



THE INDIAN LAW REPORTS,

MADRAS SERIES

CONTAINING

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

REPORTED BY

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(1ST JANUARY—31ST DECEMBER, 1914.)

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(1914) I.L.R., 37 MAD.

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ADVANCEMENT, *presumption of*:—See MARRIED WOMEN'S PROPERTY ACT (III OF 1874).

ADVERSE POSSESSION, *by mortgagee*:—See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 54 AND 118.

—, *tacking of*:—See (INDIAN) EVIDENCE ACT (I OF 1872), SS. 107 AND 108.

—, *Mortgagor and mortgagee—Validity of agreement that the mortgagee's possession should be as absolute owner after a certain date* [Where the mortgage deed provided that in default of payment of the mortgage amount within the stipulated period, the mortgagee should take possession of the mortgaged property and enjoy the same as absolute owner, and accordingly the mortgagor after the said period, and in consideration of a further payment of Rs. 250 by the mortgagee, relinquished the mortgaged property to be held by the mortgagee as absolute owner, and had the patta transferred to his name. *Held*, that the possession of the mortgagee under the circumstances for over twelve years, was adverse to the mortgagor, whose right to redeem consequently became barred by limitation. An unregistered agreement between the mortgagor and the mortgagee, that the mortgagee should hold possession as owner will not confer an immediate ownership on the mortgagee, but is valid so far as it has the effect of changing the legal character of the possession of a mortgagee into possession as owner. A mortgagee cannot, by a mere assertion of his own or by any unilateral act on his part, convert his possession as mortgagee into possession as absolute owner. *Ali Muhammad v. Lalta Baksh* (1878) I.L.R., 1 All., 655, referred to. *Kurri Veerareddi v. Kurri Bapireddi* (1906) I.L.R., 29 Mad., 336, *Sri Raja Papamma Rao v. Sri Vira Pratapa II. V. Ramachandra Razu* (1896) I.L.R., 19 Mad., 249 (P.C.) and *Dasharatha v. Nyahulchand* (1892) I.L.R., 16 Bom., 134, distinguished.

Usman Khan v. Dasanna ... (1914) I.L.R., 37 Mad., 54

—, *Possession by person claiming as trustee—Animus possidendi determines nature of right prescribed—Estoppel—Landlord and tenant*.] When a person purports to hold property as a trustee, he cannot by such possession acquire a right to the property by prescription for himself against the beneficiaries. The character in which possession is held, and the *animus possidendi* of the holder determines the right which the possession would confer. *Madhava v. Narayana* (1886) I.L.R., 9 Mad., 224, *Thakore Fatesingji v. Bamanji A. Dalal* (1903) I.L.R., 27 Bom., 515, *Secretary of State for India v. Krishnamoni Gupta* (1902) I.L.R., 29 Cal., 518 (P.C.), *Lyell v. Kennedy* (1889) 14 A.C., 437 and *Sour v. Ashwell* (1893) 2 Q.B., 390, referred to. The plaintiff's father claiming to be the trustee of a temple demised temple lands in 1866 on kanom to the first defendant, and the second defendant was the ultimate assignee of the kanom interest at the date of suit. The plaintiff's claim to the trusteeship was negatived by decree of Court in 1894 when a third party was declared to be the trustee. It was found that the plaintiff was not the trustee at the date of the present suit instituted by the plaintiff for recovery of possession of the kanom lands from the second defendant. *Held*, that the suit must fail, as the plaintiff was not the trustee. *Held further*, that the second defendant was not estopped from denying the plaintiff's right on the ground that he was no longer the trustee, though he would be estopped from denying the title of the temple.

Thuppan Nambudripad v. Ittichiri Ammu ... (1914) I.L.R., 37 Mad., 37

AGREEMENT *interfering with the course of legal proceedings—Agreement that suit should be decided in accordance with the result of another suit, whether a bar to its trial on the merits—Compromise*.] An agreement by a party that a suit may be decided in a manner different from that prescribed by law is void and does not debar him from subsequently claiming a trial of the suit on its

merits. *Rukhambhai v. Adamji* (1909) I.L.R., 33 Bom., 69 and *Moyan v. Pathukutti* (1908) I.L.R., 31 Mad., 1, referred to. Pending an original suit in the Court of a District Munsif, by the maker of a promissory note, for a declaration that it was unenforceable, the payee instituted a suit on the promissory note for recovery of the amount due in the Small Cause Court. The parties agreed that the small cause suit should be decided in accordance with the result of the original suit, and the former suit was finally dismissed without a trial, following the decision of the Munsif in the original suit. *Held*, that the agreement in question did not disentitle the plaintiff from claiming a trial of the small cause suit independently on its merits, and the suit must consequently be remanded. Subject to certain well-known exceptions, when the Court is seized of a case, it has jurisdiction to decide it in the manner prescribed by law, and that the parties have no right to interfere with its authority to do so.

Raja of Venkatagiri v. Chinta Reddi ... (1914) I.L.R., 37 Mad., 408

—, *that the mortgagee's possession should be as absolute owner after certain date, validity of*:—See ADVERSE POSSESSION.

ALIENATION *by managing member in part for necessity*:—See HINDU LAW.

AMARAM TENURE, *resumable*:—See (MADRAS) ESTATES LAND ACT (I OF 1908).

APPEAL *against preliminary order after passing of final order, maintainability of*:—See DECREE.

—, *right of, when decree does not adversely affect appellant—Res judicata*.] No appeal will lie from a decree which does not itself in some way or other adversely affect the appellant. The fact that in the judgment there is an adverse finding on a point not directly or substantially in issue between the parties will not give a party a right to contest such a finding where the decree is entirely in his favour and does not necessarily imply that finding. The finding would not act as *res judicata* as regards such point. *Quære*: Whether an appeal would lie even if the matter were *res judicata*?

Secretary of State v. Saminatha Kownden ... (1914) I.L.R., 37 Mad., 25

—, *from preliminary decree after passing of final decree*:—See EVIDENCE ACT (I OF 1872), SEC. 4.

APPELLATE COURT, *jurisdiction of, defined*:—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 106.

ASSIGNMENT *of decrees to defeat creditors*:—See DECREE.

AVYAVAHARIKA, *meaning of*:—See HINDU LAW.

BAIL, *prisoner on, committing suicide*:—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 514 (5).

BOND, *a security, power of the District Magistrate to cancel*:—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 125.

—, *given under rules, deemed to be given by order of Court, stamp of*:—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 269.

BREACH OF CONTRACT *to deliver goods at a particular time*:—See CONTRACT ACT (IX OF 1872), SEC. 39.

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"CHILD," meaning of:—See CRIMINAL PROCEDURE CODE (ACT V OF 1908), s. 488 (1).

CIVIL PROCEDURE CODE (ACT VIII OF 1859), SEC. 937:—See SPECIAL OR SECOND APPEAL.

(ACT XIV OF 1882), SEC. 230—Decree for land and mesne profits in favour of a minor—Execution after 12 years after decree for ascertaining mesne profits—Limitation—Limitation Act (IX of 1908), sec. 6—Policy of Limitation Acts.] The prohibition contained in Civil Procedure Code (Act V of 1908), section 48, viz., that certain classes of decrees cannot be executed after 12 years, applies even to the case of minors who are decree-holders. Section 6 of the Limitation Act cannot be invoked to extend the period as section 6, Act IX of 1908, is expressly limited to cases where the limitation is provided for in the Limitation Act itself: nor is there any law apart from section 6 to the effect that minority is a ground of exemption from the operation of the law of limitation. *Moro Sadashiv v. Pisaji Raghunath* (1892) I.L.R., 16 Bom., 536, not followed. *Jhandu v. Mohan Lal* 29 P.R., 483, followed. English decisions on the policy of Limitation Acts referred to. Limitation being the result of Statute Law no exemption from it can be recognised except what the Statute itself provides. Under the old Civil Procedure Code (Act XIV of 1882) even where the decree directed that mesne profits should be ascertained in execution only, and not in the ascertainment of mesne profits was one in execution only, and not in suit; so that the limitation applicable for such an application was that

applicable for execution applications. An application for the ascertainment of mesne profits directed by a decree under the old Civil Procedure Code, but made after 12 years after decree, is barred by the Civil Procedure Code (Act XIV of 1882), sec. 230. The new Civil Procedure Code which directs an enquiry as to the mesne profits, before passing a final decree is not applicable to such a case. The effect to be given to a document and to the proceedings of a court must be decided by the law in force when the document was executed or the proceedings were passed. *Muthiah Chettiar v. Ramaswami Chettiar* Second Appeal No. 117 of 1911, followed. Applicant's mother, as next friend of the applicant, obtained a decree in his favour for partition which was confirmed with certain modifications by the High Court on 3rd August 1897. The decree left the mesne profits subsequent to suit to be ascertained in execution. The decree also declared as follows:—"The plaintiff do recover, when collected, his one-third share of such debts as have been or can be collected with due diligence out of the debts due to the family." Various applications for execution of the decree were made by the applicant's mother and she entered into a compromise on 21st January 1900 with the judgment-debtors regarding all the matters mentioned in the decree and others and the Court passed on 6th February 1903 a final decree in terms of the compromise. Applicant became a major on 29th November 1909 and made the present execution application for partition and ascertainment of mesne profits and outstandings on 1st November 1910, repudiating the compromise on various grounds. *Held*, that the applications were barred by the 12 years' rule of limitation, contained in Civil Procedure Code (Act XIV of 1882), section 230, corresponding to Civil Procedure Code (Act V of 1908), section 48.

Ramana v. Babu ... (1914) I.L.R., 37 Mad., 186

SEC. 269, rule framed under—
Binding until rules made under new Civil Procedure Code (Act V of 1908)—
Bond given under rules, deemed to be given by order of Court, stamp of—
"Otherwise provided for by the Court Fees Act."—*Court Fees Act* (VII of 1870), sch. II, art. 6—*Stamp Act* (II of 1899) sch. I, art. 15.} Until rules are framed by the High Court under the new Civil Procedure Code (Act V of 1903), the rules made by Government under section 269 of the old Civil Procedure Code (Act XIV of 1882) are in force, though they may be inconsistent with Order 21, rule 43, of the first schedule to the new Civil Procedure Code. A bond given in pursuance of the rules made under power conferred by a section of the Code must be deemed to be given in pursuance of an order made by a Court under a section of the Civil Procedure Code and is consequently "otherwise provided for by the Court Fees Act" [see schedule II, article 6, Court Fees Act (VII of 1870) and Schedule I, article 15 of the Indian Stamp Act II of 1899]. The stamp is an eight-anna stamp under the Court Fees Act.

Re The District Munsif of Tiruvallur ... (1914) I.L.R., 37 Mad., 17

SEC. 424:—See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 80.

SECOND APPEAL. SEC. 584:—See SPECIAL OR

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 11, EXPLANATION IV:—"Might and ought"—*Res judicata even as regards implied decisions, if necessary for the decree—Applicability to issues also.* A, a landlord, tendered a patta to B, his tenant, who objected to the patta on the ground that the extent of his holding was overstated, some of the lands included in the patta not belonging to A but to B himself. The issue was raised whether the patta tendered was proper; the Court found that it did not contain any objectionable matter and was therefore a proper patta. Decree was accordingly given for rent in favour of A. A tendered a similar patta to B, for a subsequent year and B again raised a similar objection to the extent of the holding. In a suit brought by A for the rent, B objected to the extent of the holding and it was contended that the matter was *res judicata* by reason of the decision in the previous suit. *Held*, by the Full Bench, upholding the contention and agreeing with *MUNRO, J.* in *Bayya Naidu v. Paradesi Naidu* (1912)

I.L.R., 35 Mad., 216 (1) that the question of the extent of the defendant's holding was directly and substantially in issue in the previous suit and must be taken to have been heard and finally decided in plaintiff's favour as such a decision is necessarily involved in the decree passed in plaintiff's favour, seeing that if the decision had been the other way, it would, under the Rent Recovery Act, have been fatal to his suit which must have been dismissed on the ground that the patta was not a proper one, (2) that even if it were not expressly in question, it must be deemed to have been raised and decided within the meaning of explanation iv to section 11, Civil Procedure Code, as it was a ground of defence which might and ought to have been raised by the defendant, and (3) that it is unnecessary in such a case of failure to raise the available ground of defence that there should have been an express decision by the Court upon it in order to make it *res judicata*. *Sri Gopal v. Pirthi Singh* (1902) I.L.R., 24 All., 429 (P.C.) and *Muhammed Ibrahim Hossain Khan v. Ambika Pershad Singh* (1912) I.L.R., 39 Cal., 527 (P.C.), followed. *Per SUNDARA AYYAR, J.*—The doctrine of *res judicata* applies to suits, as well as issues and the force of *res judicata* with regard to an implied decision is applicable also to what ought to have been made ground of attack or defence with respect to an issue. The test is not whether the decision was explicit, but whether the issue was one on which the judgment of the previous suit was based quite apart from the question whether the decree itself would be affected by the matter being reopened in the later suit. If the judgment was not based upon the issue then the decision of the issue whether express or implied cannot constitute the matter *res judicata* in the later suit. *Per SADASIVA AYYAR, J.*—In order to constitute a decision on an issue of fact *res judicata* it is not necessary that the cause of action and the subject matters of the suits should be the same. Where the subject matter of the former decision and the relief claimed therein were the same as those claimed in the subsequent litigation the Courts should try their best to hold that the causes of action are the same. A decree for rent between an ordinary landlord and tenant may not necessarily involve a decision as to the terms of the lease or as to the extent of the land comprised in the lease but a decision under the Rent Recovery Act is otherwise.

Bayya Naidu v. Suryanarayana ... (1914) I.L.R., 37 Mad., 70

SS. 37, 38 AND 150—*Jurisdiction to execute decree—Execution proceedings pending—Transfer of property sought to be sold to the jurisdiction of another Court—Res judicata in execution proceedings—Ex parte order passed after notice, effect of—Objection petition, when, can be treated as application to set aside ex parte order—Order IX, rule 13, application of.* Where after attachment of property in execution of a decree for money and an order for sale made by the Court which passed the decree, the property was transferred to the local limits of the jurisdiction of another Court, newly established, *Held*, that the Court which passed the decree, ceased to have jurisdiction to continue the execution proceedings and that the new Court having territorial jurisdiction over the property attached, was the proper Court to entertain an application for execution, by the sale of the property, and pass orders thereon. In such a case no formal order of transfer of a particular case or of all pending cases is necessary. On principle unless the authority which changes the venue reserves the right to the Court which has lost the jurisdiction to continue pending proceedings affecting the property so transferred to another jurisdiction, such proceedings are also *ipso facto* transferred by the change of venue to the new Court, the records relating to that action becoming part of the records of the new Court. Section 150, Civil Procedure Code, implies that the whole business of a Court might be transferred to another Court without any order of transfer by a superior Court under section 24, or any other section of the Code, thereby adopting the Calcutta view, that by changes of venue made by the local Government, the business of a Court which loses jurisdiction over a certain area, so far as such area is concerned, will be *ipso facto* transferred to the new Court. The case law on the question considered. An *ex parte* order in execution proceedings passed after issue of notice and after the Court has held that the service of the notice was duly effected is on general principles binding as *res judicata*. *Mun gal Pershad*

Dicht v. Grijia Kant Lahiri (1882) I.L.R., 8 Calo., 51, followed. Order IX, rule 13, Civil Procedure Code, applies to *ex parte* orders in execution, and unless they are set aside by application under Order IX, rule 13, or by appeal, they cannot be questioned in the further stages of execution proceedings. An objection statement which is not stamped, which contains no prayer to set aside the order, and which does not show when the objector had notice of the order, cannot be treated as an application to set aside the *ex parte* order. *Mochai Mandal v. Meseruddin Mallah* (1911) 13 C.L.J., 28, distinguished.

Subbiah Naicker v. Ramanathan Chettiar ... (1914) I.L.R., 37 Mad., 462

AND 26—*Execution application.* Application to Court which passed the decree after transfer thereof to another Court for execution, whether according to law and to the proper Court—*Limitation Act (IX of 1908), art. 182.* [On the application of a decree-holder the Court at *Visagapatam* which passed the decree sent it for execution to the Court at *Parnatipur* which after attaching certain properties dismissed the execution application on 10th March 1905. On 18th December 1907 the decree-holder again applied to the Court at *Visagapatam* for sale of the attached properties and the application was simply recorded. The present application for execution was made to the *Visagapatam* Court on 21st April 1910 for attachment and sale of certain properties. *Held*, that the application was barred as the application of the 13th December 1907, though a step in aid of execution [see *Pachisappa Achari v. Poofai's Seenan* (1905) I.L.R., 28 Mad., 577], was not made to the proper Court, and hence could not save limitation. The Court to which a decree is sent for execution is the only Court which has the execution proceedings, and it retains its jurisdiction to execute the decree till it certifies under section 41, Civil Procedure Code, to the Court which passed the decree, the fact of execution, or if it fails to execute the decree, the circumstances attending such failure. In such a case the Court which passed the decree has no jurisdiction to entertain an execution application unless concurrent execution has been ordered or proceedings in the Court to which the decree was sent, have been stayed for the purpose of executing the decree in the former Court. *Abdur Begam v. Musaffar Hussain Khan* (1898) I.L.R., 20 All., 129, followed. *Sarada Prosad Mullick v. Luchmessput Sing Doogur* (1872) 4 M.L.A., 529 at p. 540 and *Krishnakishore Dutt v. Roopall Dass* (1882) I.L.R., 8 Cal., 687, distinguished.

Maharaja of Bobbili v. Sree Raja Narasaraju Peda Balar Simhulu Bahadur ... (1914) I.L.R., 37 Mad., 231

sec. 424].—Notice of suit against Secretary of State—Notice not restricted to suits for damages for an act done.] Under section 424 of the Civil Procedure Code (Act XIV of 1882) [corresponding to section 80, Civil Procedure Code (Act V of 1908)], notice is necessary in all suits of whatever description against the Secretary of State for India in Council.

Secretary of State v. Kalekhan ... (1914) I.L.R., 37 Mad., 113

of 1863), sec. 18—Option to proceed under either so far as reliefs common are prayed for—Collector's sanction for removal of trustee given in 1908, good for suit for removal after coming into force of Civil Procedure Code (Act V of 1908).] A suit instituted with the consent of the Collector is a good suit for all reliefs referred to in section 92 of Civil Procedure Code (Act V of 1908). Section 92, Civil Procedure Code, and section 14 of Act XX of 1863, so far as the forms of relief to which they relate are the same, offer a choice to persons interested in the trust, who may proceed under either, they are not bound to proceed under both. The consent of the Collector given in November 1908, i.e., before the Civil Procedure Code came into force, is a valid consent for the institution of a suit for the removal of a trustee though at the time the consent was given a suit for removal could not be instituted under the law then in force.

Venkataranga Charlu v. Krishnama Charlu ... (1914) I.L.R., 37 Mad., 184

ORDER XXI, RULES 46 AND 54—

Sale in execution of a hypothecation debt—Moveable property.] For the purposes of execution a debt due to a judgment-debtor under a hypothecation bond is moveable property within the meaning of Order XXI, rule 46, Civil Procedure Code, and the procedure as to moveable property is applicable; the language of rule 46, which treats as moveable property, a debt not secured by a negotiable instrument is undoubtedly wide enough to cover a debt secured by a hypothecation bond or a simple mortgage. Order XXI, rule 54, is not applicable to such cases though the General Clauses Act and Transfer of Property Act speak of such debt as an interest in immoveable property. The security must follow the debt and if the debt is once attached, the benefit of the security would accrue to the attaching creditor if his remedy against the property still exists. *Tarvadi Bholanath v. Bai Kashi* (1902) I.L.R. 28 Bom., 305, *Debdendra Kumar Mandal v. Rup Lal Dass* (1886) I.L.R., 12 Cal., 546, *Kashinath Das v. Sadasiu Patnask* (1898) I.L.R., 20 Cal., 805, *Karim-un-Nissa v. Phul Chand* (1898) I.L.R., 15 All., 134, *Baij Nath Lecha v. Binoyendra Nath Palit* (1901) 6 C.W.N., 5, *Baldev Dhannrup v. Ramchandra Balvant* (1895) I.L.R., 19 Bom., 121 and *Mumidhannrup v. Lalchandra Ayyar* (1895) I.L.R., 18 Mad., 437, followed. *yappa Nask v. Sutrahmania Ayyar* (1887) I.L.R., 10 Mad., 169 and the view of the majority in *Annasami v. Scott* (1886) I.L.R., 9 Mad., 5, not followed.

Nataraja Aiyar v. South Indian Bank of Tinnevely . (1914) I.L.R., 37 Mad., 51

COMPOUNDING a charge of grievous hurt, promissory-note executed for, if valid:
—See CONTRACT.

COMPROMISE :—See AGREEMENT.

CONDUCT of parties, important evidence :—See ZAMINDARI SALE.

CONSIDERATION, meaning of:—See INDIAN PENAL CODE (ACT XLV OF 1860).

_____, Void deed, NO CONSIDERATION for fresh contract on attaining majority:—See GUARDIANS AND WARDS ACT (VIII OF 1890).

CONSTRUCTION OF DOCUMENTS—Sale or agreement to sell—Intention is the test—Want of registration—Indian Registration Act (III of 1877), sec. 17—Admissibility—Evidence.] Whether a document operates by way of a present conveyance of property or only as an agreement to create a future right depends upon the intention of the parties as expressed in the instrument. Even if a present right is created the instrument, though unregistered, is admissible in evidence in a suit for specific performance. *Nagappa v. Devu* (1891) I.L.R., 14 Mad., 55 and *Upendra Nath Banerjee v. Umash Chandra Banerjee* (1910) 15 C.W.N., 375, followed. The instrument in this case was construed as an agreement to sell notwithstanding that it contains certain words showing a present transfer.

Mangamma v. Ramamma (1914) I.L.R., 37 Mad., 480

CONTRACT ACT (IX OF 1872), SEC. 23—Contract between third parties for the payment of money on the failure of a marriage void as opposed to public policy.] An arrangement between A and B, that B's daughter shall marry A's son and that, if she fails to do so, B shall pay a sum of money to A, is opposed to public policy and void under section 23, Indian Contract Act (IX of 1872). *Venkata Kristnayya v. Lakshmi Narayana* (1903) I.L.R., 32 Mad., 18½ (F.B.), applied. *Hermann v. Charlesworth* (1905) 2 K.B., 123, referred to. *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas* (1897) I.L.R., 21 Bom., 23, explained.

Devarayan v. Mutturaman (1914) I.L.R., 37 Mad., 393

Devarayan v. Mutturaman ss. 39, 55, 68 AND 78 : — Breach of contract to deliver goods at a particular time—Damages, measure of—Time at which damages should be computed.] A contract to deliver goods within a certain period is broken by non-delivery before its expiry, in the absence of an agreement between the parties to extend the time for performance. The measure of damages in such a case is the difference between the contract rate and the market rate at the expiry of the period agreed upon as the time for delivery in the contract. *Per WHITE, C.J.*—Section 68 of the

Contract Act does not entitle a promisee for his own purposes and without the consent of the promisor to extend the time for performance which had been agreed to by the parties to the contract. Nor does section 55 enable him to keep alive a broken contract in the hope of being able to recover heavier damages for its breach. *Oyle v. Earl Fane* (1867) L.R., 2 Q.B., 275 at p. 284 and *Ashmore & Co. v. Cox & Co.* (1899) 1 Q.B., 43, explained; *Nickoll & Knight v. Ashton, Edridge & Co.* (1900) 2 Q.B., 228 and *Roth v. Taysen* (1896) 1 Com. Cas., 306; s.c., 73 L.T., 628, referred to.—*Per* AYLING, J.—Section 63 deals only with concessions on the part of the promisee advantageous to the promisor, and cannot be invoked to support an extension of time by the promisee for his own benefit. Section 55 read with section 2 (i) means nothing more than this: on the promisor's failure to perform within the contract time, the promisor loses the power to enforce the contract, that is, to claim any advantage due to himself thereunder. The promisee has the option of enforcing it or not as it may suit him, and if he elects to enforce the contract he can, under section 73, obtain only such damages as naturally arose in the usual course of things from the breach or the parties knew, when they made the contract, to be likely to result, which cannot include any aggravation of damages caused by the promisee's action or inaction subsequent to the breach.

Muthaya Maniagarani v. Lekku Reddiar ... (1914) I.L.R., 37 Mad., 41

—SEC. 251:—See LIMITATION ACT (IX OF 1908).

—SS. 2 AND 47:—See DECREE.

CONTRACT, breach of, to deliver goods at a particular time:—See (INDIAN) CONTRACT ACT (IX OF 1872), ss. 39, 55, 63 AND 73 ... 41

—a, failure to perform, whether 'an act' within article 3, sch. II of Provincial Small Cause Courts Act (IX of 1887);—See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART. 3.

—by one co-owner to sell property belonging to him in common with another:—See SPECIFIC RELIEF ACT (I OF 1877).

—Illegality—Promissory note executed for compounding a charge of grievous hurt, if valid.—Practice—Revision—Grounds of interference—Moral as opposed to legal justice—Mere errors of procedure, or technical defects.] Where a promissory note was executed as consideration for compounding a charge of grievous hurt against a person who had died previous to the complaint, *Held*, that, as the offence could not be compounded except with the consent of the person to whom the grievous hurt was caused, the agreement to pay money, evidenced by the promissory note, was illegal, and the promissory note was consequently unenforceable. The fact that the complainant may have a right to claim damages for the injury caused to the deceased would make no difference, unless such right had been set up and proved. The High Court as a Court of Revision has no power to consider justice apart from such justice as the law recognises. *Sheikh Nubbee Buksh v. Mussawut Beebe Hingon* (1867) 8 W.R., 412, referred to.

Mottai v. Thanappa ... (1914) I.L.R., 37 Mad., 381

—by managing member of joint Hindu family under circumstances not binding on the other members:—See SPECIFIC RELIEF ACT (I OF 1877).

—WITH GOVERNMENT, suit to recover money under, whether of a small cause nature:—See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART. 3.

COURT FEES ACT (VII OF 1870), SCH. II, ART. 6:—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 269 ... 17

COURT OF WARDS ACT (MADRAS ACT I OF 1902), SEC. 49 (1)—Notice of suit—Suit for money is a suit relating to property of a ward.] A suit for money is a suit relating to the property of a ward within the meaning of sub-section (1) of section 49 of Madras Act I of 1902 (Madras Court of Wards Act) and requires a notice of suit under that section. A mere demand for payment is not a notice of suit.

Venkatachelapathi v. Sri Rajah B. S. V. Siva Rao Naidu Bahadur. (1914) I.L.R., 37 Mad., 28;

COURTS BELOW point not before:—See DECREE, ASSIGNMENT OF.

CREDITORS, assignment to defeat:—See DECREE, ASSIGNMENT OF.

—Minor—Minor's rights over property purchased for his benefit by maternal uncle—Sale of such property by father, invalid.] Where certain immoveable property was purchased for the benefit of a minor by his maternal uncle, and was subsequently sold by the minor's father, as if it belonged to the joint family of which himself and the minor were members, *Held*, in a suit by the minor after attaining majority to recover the property from the alienee, that the purchase for the benefit of the minor was valid, and he was entitled to recover. *Kul'a Pandithan v. Ramayi* Second Appeal No. 881 of 1909, followed. *Kamta Prasad v. Sheo Gopal* (1904) I.L.R., 26 All., 342, *Ulfat Rai v. Gauri Shankar* (1911) 8 A.I.J., 670 and *Meghan Dube v. Fran Singh* (1908) I.L.R., 30 All., 63, referred to. The essential fact which renders void a transaction by a minor is that some agreement by the minor is necessarily an essential part of the transaction. But when a contract by the minor is not a necessary condition for upholding his right in property, his right should be maintained. *Mohori Bibee v. Dharmodas Ghose* (1893) I.L.R., 30 Calc., 539 (P.C.), *Navakotti Narayana Chetty v. Logalinga Chetty* (1910) I.L.R., 33 Mad., 312, referred to.

Munia v. Perumal ... (1914) I.L.R., 37 Mad., 390

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 94—Summons may be issued under, to accused to produce document or thing.] Under section 94, Criminal Procedure Code, a Magistrate has power to issue a summons to an accused person to produce a document or other thing even when its production might tend to incriminate him. *Mahomed Isackiah & Co. v. Ahmed Mahomed* (1888) I.L.R., 15 Calc., 109, followed. *Ishwar Chandra Ghoshai v. The Emperor* (1908) 12 C.W.N., 1016, dissented from.

Re Kondareddi ... (1914) I.L.R., 37 Mad., 112

—SEC. 106—Appellate Court, jurisdiction of, defined.] The jurisdiction of an appellate court to order a person who has been convicted of one of the offences mentioned in sub-section (1), of section 106, Criminal Procedure Code, is not restricted to cases where the conviction was by one of the courts specified in the sub-section. The words "an appellate court" are quite general and the word "also" indicates that the powers given by that section may be exercised by the courts mentioned in sub-section (1) and by an appellate court. The words "under this section" in sub-section (3), have reference to the powers given by that section and not to the courts by which those powers are in the first instance exercisable. *Muthiah Chetty v. Emperor* (1909) I.L.R., 29 Mad., 190, over-ruled.

Re Solai Gounden ... (1914) I.L.R., 37 Mad., 153

—SEC. 125—Security to keep the peace—and power of the District Magistrate to cancel a security bond.] The District Magistrate has jurisdiction under section 125, Criminal Procedure Code, to cancel a bond to keep the peace on the ground that on the facts its execution should not have been ordered. *Nabu Sardar v. Emperor* (1907) I.L.R., 34 Calc., 1 (F.B.), followed.

Re Mare Gowd ... (1914) I.L.R., 37 Mad., 125

—SEC. 195 (1) (c)—Sanction to prosecute—Insolvency Proceedings.] Where alleged forged documents were filed in the Insolvency Court, *Held*, that the sanction of the Insolvency Court to prosecute for offences relating to the making and using of the said documents is necessary although the offence of forgery was complete before the commencement of the Insolvency Proceedings. Where the documents were produced before the Official Assignee, *Held*, that the sanction of the Court and not of the Official Assignee is necessary. The Official Assignee does not become a civil court merely because he has a wide discretion in deciding on claims of persons alleging themselves to be creditors of the

insolvent, or because persons aggrieved by decisions of his can appeal to the Court from those decisions.

Beardsell & Co. v. Abdul Gunni Sahib ... (1914) I.L.R., 37 Mad., 107

SEC. 195—Sanction for perjury. [In granting sanction to prosecute for perjury, Courts should not merely see whether there is a good prospect of conviction but should also consider whether the circumstances are such as to render prosecution desirable in the public interests. Where the petitioner, a girl of fifteen, in a statement before a Magistrate under section 164, Criminal Procedure Code, said that her mother and one Bashayya used to talk and fight with each other and as a witness before another Magistrate stated that they never quarrelled with each other, *Held*, that a prosecution for perjury was not desirable.]

Re Nattava Parankusam ... (1914) I.L.R., 37 Mad., 564

SEC. 202—See MALICIOUS PROSECUTION.

SEC. 307—Jurisdiction of High Court to convict of offence under section 326, Indian Penal Code (Act XLV of 1860).] The High Court is empowered on a reference under section 307, Criminal Procedure Code, to convict the accused of an offence under section 326, Indian Penal Code. *Sir V. BASHYAM AYYANGAR, J.*, in *Pattikadan Ummaru v. Emperor* (1906) I.L.R., 26 Mad. 243, followed. *BENSON, J.*, in *Pattikadan Ummaru v. Emperor* (1906) I.L.R., 26 Mad., 243, dissented from.

Re Mutyalu ... (1914) I.L.R., 37 Mad., 286

SEC. 423 AND 439—High Court, power of, to alter finding of acquittal into conviction and enhance sentences in Revision—Indian Penal Code (Act XLV of 1860), sec. 300, explained.] Section 423, clause (b), Criminal Procedure Code, 1898, gives power to the High Court when hearing an appeal against a conviction to alter the finding and section 439 gives power to enhance the sentence so as to make it appropriate to the altered finding. Section 439, sub-section (4), which enacts that "nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction" must be construed as referring to cases where the trial has ended in a complete acquittal; any other construction would be inconsistent with the power to "alter the finding" given to the Court as a Court of Revision by virtue of its power to exercise the power conferred on a Court of Appeal by section 423, clause (b). In this view the High Court, having in revision altered a finding of rioting into one of murder, enhanced the sentences from five years' rigorous imprisonment to transportation for life. In the course of a riot the accused attacked and killed a man with dangerous weapons. *Held*, that the acts of the accused having caused the death of the man and there being nothing to suggest that they were not sufficient to cause death as their ordinary and natural result in the absence of proof of circumstances sufficient to give the accused the benefit of any of the exceptions to section 300, Indian Penal Code, they must be taken to have intended to kill the man and are guilty of murder.

Re Bali Reddi ... (1914) I.L.R., 37 Mad., 119

SEC. 476—Sanction to prosecute—Section 537 (b)—Illegality or Irregularity.] Where a sanction to prosecute given under section 476, Criminal Procedure Code (Act V of 1898), did not order the accused to be sent before the nearest First-class Magistrate but merely ordered his prosecution, *Held*, that though the sanction was irregular it was not illegal and that the irregularity was cured by section 537 (b), Criminal Procedure Code. In the matter of the petition of *Bhup Kumar* (1904) I.L.R., 26 All., 249 at p. 256, dissented from.

Re Suppayya Tharagan ... (1914) I.L.R., 37 Mad., 317

SEC. 488 (1)—Maintenance—[Child,] meaning of.—Prostitution not a profession which the law will recognise.] The word 'child' in section 488 (1), Criminal Procedure Code (Act V

of 1898), means a person who has not attained the age of majority. The attainment of puberty cannot be taken as the age when childhood ceases. The law will not treat prostitution as a profession by which a girl might earn her livelihood and maintain herself under section 488, Criminal Procedure Code. It is against public policy to do so.

Krishnaswami Ayyar v. Chandravadana ... (1914) I.L.R., 37 Mad., 565

SEC. 514 (5)—Bail bond—[Bail, prisoner on, committing suicide—Discharge of sureties.] When a person who has been let out on bail commits suicide, the sureties are discharged from their obligation to produce him.

Re Vijayaraghavan Naidu ... (1914) I.L.R., 37 Mad., 156

CUSTOM OR CONTRACT enabling tenant to build on ryot's land, validity of:—See ESTATES LAND ACT (MADRAS ACT I OF 1908).

DAMAGE, ACTUAL, when necessary, to support action:—See EASEMENT.

remoteness of:—See SECRETARY OF STATE.

See HINDU LAW.

DAMAGES, measure of:—See (INDIAN) CONTRACT ACT (IX OF 1872) ... 412

time at which, should be computed:—See (INDIAN) CONTRACT ACT (IX OF 1872) ... 412

DEBT, a hypothecation sale in execution of:—See CIVIL PROCEDURE CODE (ACT V OF 1908), OR. XXI, R. 46 AND 546.

DECREE, ASSIGNMENT OF—Assignment to defeat creditors—Transfer made for valuable consideration, but not bona fide—Transfer of Property Act (IV of 1882), sec. 53—Statute 13 Eliz., c. 5—Validity of transfer of moveable property—Practice of Privy Council—Point not before Courts below.] In this case the Judicial Committee upheld the decision of the High Court as to the invalidity of certain assignments which though for good consideration were made to defeat creditors; and held that the question whether any of the parties could establish rights based not on the assignments but on other grounds such as the actual payment of debts, was a point not before the Courts below, and therefore their Lordships would not decide it.

Chidimbaram Chettiar v. Srinivasa Sastrial ... (1914) I.L.R., 37 Mad. (P.C.), 227

DECREE, construction of, whether executable or merely declaratory—Appeal against preliminary order after passing of final order, maintainability of—What orders in execution are appealable—Civil Procedure Code (Act V of 1908), ss. 2 and 47.] A decree which does not direct possession of any of the suit lands to be given to plaintiff who sued for possession of all the lands in suit but merely declared the right of the defendant to remain in possession of a portion of the lands of the whole of which she was in possession is one that is not capable of execution by the plaintiff, by way of possession of the rest being given to him, especially when there was not even a declaration of plaintiff's right to the rest of the lands. A question whether a decree is executable or not is certainly one that comes within sections 2 and 47 of the Civil Procedure Code (Act V of 1908) the former of which enacts that the determination of any questions within section 47 is a decree; an appeal lies from such determination under section 2. The determination of a mere issue by the executing Court, made prior to the passing of the final order would not be regarded as an adjudication between the parties against which an appeal would lie. *Venkatagiri Iyer v. Sadagopachariar* (1904) 14 M.L.J., 359, referred to. Orders in execution which declare (1) that execution shall issue and that a Commissioner be appointed for carrying out execution, (2) that interest is payable and (3) that a party is entitled to mesne profits are appealable though the final orders determining the extent or amount will have to be passed only thereafter. *Narayana Pattar v. Gopalakrishna Pattar* (1905) I.L.R., 28 Mad., 355, *Ram Kirpal v. Rup Kuari* (1884) I.L.R., 6 All., 269 (P.C.), *Bhup Indar Bahadur Singh v. Bijai Bahadur Singh* (1901) I.L.R., 23 All., 152 (P.C.), *Maharajah of Burdwan v. Tara Sundari Debi* (1883) I.L.R., 9 Calc., 619 and *Deoki Nandan Singh v. Binsi Singh* (1911) 14 O.L.J., 35, referred to. *Held*, an appeal against a preliminary order in execution can be filed even after the date of the final order, which merely carries out and is consequential to the preliminary order, though no appeal has been filed against the final order. *Uman*

Kunwari v. Jarbhandan (1908) I.L.R., 30 All., 479 (F.B.), followed. *Mackenzie v. Narsingh Sahai* (1909) I.L.R., 36 Cal., 782, *Kuriya Mal v. Bishambhar Das* (1910) I.L.R., 32 All., 225, *Madhu Sudan Sen v. Kamini Kanta Sen* (1905) I.L.R., 32 Cal., 1023, *Baikuntha Nath Dey v. Nawab Salimulla Bahadur* (1907) 12 C.W.N., 590 and *Narain Das v. Balgobind* (1911) 8 A.L.J., 604, not followed. Similarly an appeal against an order of remand can be filed even after the date of the final decree consequential on remand. *Subba Sastri v. Balachandra Sastri* (1895) I.L.R., 18 Mad., 421 and *Mullikarjuna v. Pathaneni* (1896) I.L.R., 19 Mad., 479, followed. Where a right and jurisdiction are conferred expressly by statute they cannot be taken away or cut down except by express words or by necessary implication. When the law gives a person two remedies he is entitled to avail himself of either of them unless they are inconsistent. There is no question of election in such cases. *Mussammatt Gulab Koor v. Badshah Bahadur* (1909) 13 C.W.N., 1197, followed. With the reversal of the earlier order, the later order which depends for its validity upon the earlier one, *ipso facto* ceases to have any force.

Lakshmi v. Maru Devi ... (1914) I.L.R., 37 Mad., 29,

form of:—See HINDU LAW.

DEFAMATION:—See INDIAN PENAL CODE (ACT XLV OF 1860), SEC. 498.

DELAY, effect of:—See SPECIFIC RELIEF ACT (I OF 1877).

DEPOSIT OF MONEY REPAYABLE at a fixed date:—See LIMITATION ACT (IX OF 1908).

DEVASTANAM COMMITTEE MEMBER, decree debt incurred by father as:—See HINDU LAW.

DOCUMENT, ANCIENT:—See (INDIAN) EVIDENCE ACT (I OF 1872).

presumed to be genuine by the first Court, whether, can be rejected in appeal:—See INDIAN EVIDENCE ACT (I OF 1872).

EASEMENT—Right of support—Disturbance—Actual damage when necessary, to support action—Temporary structure, whether an easement of support acquirable in respect of.] No actual damage is necessary to support an action for the disturbance of an easement of support for a building: *Contra*, where the disturbance is of a natural right of support. *Backhouse v. Bonomi* (1861) 9 H.L.C., 503, referred to. The rule requiring actual damage is applicable only to an action for damages, but actual damage is not necessary to entitle a person having a right of support, to relief by way of injunction. *Corporation of Birmingham v. Allen* (1877) 6 Ch.D., 284, followed. *Quære*: Whether a right of support can be claimed for a temporary structure, which has been in existence for the statutory period? *Maheklav v. Dawson* 5 L.J. (Common Law) K.B., 261, referred to.

Ramakrishna v. Seetharama ... (1914) I.L.R., 37 Mad., 527

EASEMENTS—Water rights:—Distinction between surface water, and water flowing in a definite channel.] No claim can be made either as a natural right or as an easement by prescription, to water which does not flow in a definite course, but which should be regarded as surface water or surface drainage. The right to the water of a stream does not cease, when it ceases to flow in a confined water-course, unless it exhausts itself as a stream, and merely soaks into the ground. The chief characteristic of surface water is its inability to maintain its identity and existence as a water body. When the flow of water on one person's land can be identified with that on another, a right to such flow can arise, although the water may flow along an intervening piece of land. Water flowing into a field from a known channel and passing along the field onwards into another field though not over a confined tract in the former field, but along its whole area is not surface water. Well-defined existence arising from an ascertained course is the real test in coming to a conclusion against any body of water being regarded as surface water. The question whether or not particular water is surface water is one of fact to be determined by the circumstances attending its origin and continued existence. The right to the water of a stream is sustainable notwithstanding the fact that the water in the stream is not always sufficient for the purpose for which the right is claimed, or that it reaches the plaintiff's land not directly, but indirectly by flowing into another channel. A

river channel supplied the means of irrigation for the lands of the parties to the suit, and the other ryots of the village. A branch leading from the main channel passed through the lands of defendants Nos. 1, 2 and 3 in a definite water-course, up to the fourth defendant's lands when it entered the fourth defendant's field, and after irrigating it, flowed over its bunds and joined another channel which irrigated the plaintiff's lands. Defendants Nos. 1, 2 and 3 blocked up the channel at a point higher than the fourth defendant's land. In a suit by plaintiff for declaration of his right to the customary supply of water through the channel, and for an injunction restraining the defendants from obstructing the water-course, *Held*, that the water of the channel when it entered the fourth defendant's field could not be regarded as surface water, but continued in a definite water-course, and plaintiff was entitled to the usual supply of water unobstructed.

Adinarayana v. Ramudu ... (1914) I.L.R., 37 Mad., 304

EJECTMENT, conversion of suit in, into one for partition:—See HINDU LAW.

Landlord and tenant—Right of lessee after expiry of lease, to eject a trespasser.] Where a lessee whose lease had expired prior to suit, sued for possession of the land leased to him, from a trespasser: *Held*, that the expiration of the lease did not necessarily imply the expiration of the lessee's right of possession, and the lessee was entitled to a decree for possession as against trespassers *a fortiori* where the landlord acquiesced in plaintiff getting a decree. *Gibbins v. Buckland* (1863) L.J., 32 Exch., 156 and *Knight v. Clarke* (1885) 15 Q.B.D., 294, referred to.

Venkayya v. Sateyya ... (1914) I.L.R., 37 Mad., 281

ENCUMBRANCE, discharge of:—See REVENUE RECOVERY ACT (MADRAS ACT II OF 1864).

of minor's property by natural guardian while Court guardian in existence:—See GUARDIANS AND WARDS ACT (VIII OF 1890).

EQUITY, JUSTICE AND GOOD CONSCIENCE, rule of:—See HINDU LAW ... 397

ESTATES LAND ACT (MADRAS ACT I OF 1908)—Tender of patta not necessary to recover rent though accrued due prior to the Act—Limitation, when begins to run in respect of claim for rent.] In a suit for recovery of rent time runs from the time the rent became due according to the terms of the tenancy and not from the end of the fasli. *Arunachalam Chettiar v. Kadiri Rowthen* (1906) I.L.R., 29 Mad., 556, applied. *Rangayya Appa Rao v. Bobba Srinamulu* (1904) I.L.R., 27 Mad., 143 (P.O.), distinguished. Tender of patta is not a condition precedent to the maintainability of a suit for the recovery of arrears of rent, instituted after the Madras Estates Land Act came into force, though such rent may have accrued due before that. *Veerabhadra Raju v. Kumari Naidu* (1912) 22 M.L.J., 451, followed. Even under the Rent Recovery Act (VIII of 1865) the tender of patta was not necessary to complete the landholder's right to rent, but was only a condition to be fulfilled if legal proceedings had to be instituted for the enforcement of the landholder's rights. *Appa Rao v. Ratnam* (1890) I.L.R., 13 Mad., 249, followed. *Venkat Narasimha Naidu v. Seethayya* (1910) 9 M.L.T., 231 and *Javanmal Jital v. Muktabai* (1890) I.L.R., 14 Bom., 516, distinguished. *Gopalaswamy Mudali v. Mukkee Gopalier* (1874) 7 M.H.C.B., 312, referred to.

Kanthimathinatha v. Muthusamia ... (1914) I.L.R., 37 Mad., 540

SEC. 77—Madras Local Boards Act (V of 1884), ss. 73 and 74—Right of land-holder to distrain property of intermediate tenure-holder for cess paid.] Neither section 77 of the Madras Estates Land Act, nor sections 73 and 74 of the Madras Local Boards Act authorizes a land-holder to levy distraint against an intermediate tenure-holder for recovering any portion of cess collected from the land-holder.

Lakshminarasimham Pantulu v. Sree Sree Ramachandra Mardaraja Deo ... (1914) I.L.R., 37 Mad., 319

ss. 8 (7) AND 8—Suit for resumption by a landholder against ryots—First Court's decree before the Act, in favour of the landholder—Act coming into force during appeal, effect of—Whether Estates Land Act, section 8, retrospective—Final decree in section 8

(7), meaning of—*Amaram tenure, resumable—Right of resumption when exercisable—Notice to quit—Prescription—No estoppel by receipt of rent—Improvements, when tenant entitled to value of—Transfer of Property Act (IV of 1882), ss. 51 and 108 (h).]* Appeal No. 174 of 1905. If a tenant knowing that he has not a permanent occupancy right in the land in his possession makes improvements without any hope or expectation in himself created or encouraged by the landlord, he cannot claim compensation for the value of such improvements. Even if the landlord knew that the tenant was making the improvements under mistaken belief that he had occupancy rights in the land, and merely kept quiet without interfering there will be no estoppel against the landlord. *Ramsden v. Dyson* (1861) L.R., 1 H.L., 129 and *Beni Ram v. Kundan Lal* (1899) I.L.R., 21 All., 496, followed. *Mahalakshmi Ammal v. Palani Chetti* (1871) 6 M.H.C.R., 245, doubted. Section 51 of the Transfer of Property Act will not apply to the case of a tenant as it cannot be said that he is a person believing in good faith that he is "absolutely entitled" to the land. Neither section 108, clause (h) of Transfer of Property Act, nor the Hindu, Muhammadan, nor Common law of India is applicable to a case where the tenant without removing the fixtures in the one case or the building erected by him in the other case, wants to recover compensation for the improvements effected by him. Where there has been a periodical raising of the rent due by the tenants, and periodical resumptions of the tenants' lands by the landlords both of which were submitted to by the tenants without any contest, it may be concluded that the tenants have no occupancy rights. Lands held under *Amaram tenure* have generally been held to be resumable. So far as this Presidency is concerned it would seem to be well settled that a person who has lawfully come into possession as a tenant from year to year or for a term of years cannot by setting up however notoriously during the continuance of such relation, any title adverse to that of the landlord, inconsistent with the legal relation between them acquire by limitation, title as owner or any other title inconsistent with that under which he was let into possession; *Seshamma Shettati v. Chikaya Hegade* (1902) I.L.R., 25 Mad., 507, followed. This doctrine is of doubtful applicability in a case where the landlord has shown by an unequivocal act that he intends to exercise his option and determine the tenancy even though he may not have succeeded in doing so. *Srinivasa Ayyar v. Muthusami Pillai* (1901) I.L.R., 21 Mad., 246, referred to. It is also well established in this Presidency that if after the determination of the tenancy the tenant remains in possession as a trespasser for the statutory period, he will by prescription acquire a right as owner of such limited estate as he might prescribe for. A receipt of rent, subsequent to a notice to determine the tenancy, is consistent with the case of either party on the question as to the existence of occupancy rights as in any event there would be a liability to pay rent and it is therefore doubtful if such a receipt could be relied on as a waiver of the plaintiff's right to resume. *Held*, on the facts of the present case that there was a determination of the tenancy by a reasonable notice and that there was no assertion of an adverse title for twelve years before the suit so as to entitle the defendants to claim a prescriptive right. Where, during the pendency of an appeal filed by the defendants in a suit brought by a zamindar to eject his tenants, the Madras Estates Land Act (I of 1908) came into force the tenants, who were ordered by the decree of the First Court to be ejected, cannot take advantage of section 6 of the Act even if that section be assumed to be retrospective, as the ryoti lands in respect of which they claimed permanent occupancy rights, would be "old waste" as defined by section 3, clause (7) of that Act, in respect of which, before the passing of the Act the zamindar had obtained a final decree of a competent Civil Court negating the occupancy right. The words "Final Decree" occurring in section 3, clause (7), mean "final" with reference to the Court which passes the decree; a decree is none the less final for the purposes of the section because an appeal was pending when the Act came into operation. *Quære*: Whether an appeal is a rehearing of the suit within the meaning of the Civil Procedure Code as under the Rules under the English Judicature Act so as to give retrospective effect to a statute passed after the decree of the First Court and during the pendency of the appeal? *Quære*: Whether section 6 of the Madras Estates Land Act, 1908, is in terms retrospective? (The views enclosed in rectangular brackets were also stated but are no longer law as a Full Bench composed of the CHIEF JUSTICE, KRISHNASWAMI AYYAR and AYLING, JJ., decided the contrary in *Kanakayya v. Janardhana Padhi* (1913) I.L.R., 36 Mad., 439, on

14th November 1910. This case is now reported for the other points decided in the case which are noted above.)

Narasayya v. Raja of Venkatagiri ... (1914) I.L.R., 37 Mad., 1

ss. 9, 11, 151, 157 AND 187

(g)—*Custom or contract enabling tenant to build on ryoti land, validity of.* A custom or contract entitling a ryot of agricultural land to erect buildings thereon, is not opposed to the provisions of the Madras Estates Land Act, and can be enforced against the landlord, though such erections may impair the value of the holding for agricultural purposes. The effect of such a custom is simply to make it an implied term of the contract of tenancy.

Meera Kasim Rowther v. Foulkes ... (1914) I.L.R., 37 Mad., 432

ESTOPPEL:—See HINDU LAW.

—by judgment—*Equitable estoppel—Res judicata—Indemnity, contract of—Breach—Decree against promisee is binding on promisor.* The second defendant undertook to pay interest on certain debts of the plaintiff, and in default, agreed to indemnify the plaintiff against all losses caused thereby. The second defendant having defaulted, the creditor recovered judgment both for principal and interest on the debts, in a suit to which the plaintiff and second defendant were parties, the court finding that second defendant's plea of payment of interest was false. In a suit by the plaintiff for recovery of damages against the second defendant, on account of the latter's default in payment of the stipulated interest, the second defendant again pleaded payment. *Held*, that whether the technical rule of *res judicata* was applicable or not, the second defendant was equitably estopped, by reason of the finding in the previous suit from raising the contention that he had really paid the interest due to the creditor. Where there is a contract to indemnify, a decree passed against the promisee cannot be impeached by the promisor and if both the promisee and the promisor were parties to the suit by the third party, or if the promisor had notice of the suit, the judgment would be conclusive against the promisor. The contract on the part of the promisor is substantially broken when the court finds in a suit honestly defended by the promisee, that there has been a violation of duty by the promisor, which has entitled a third party to the damage for which the indemnity has been given. *Parker v. Lewis* (1873) L.R., 8 Ch. A., 1035 at p. 1058, *Mercantile Investment and General Trust Company v. River Plate Trust, Loan, and Agency Company* (1894) 1 Ch., 578 and *Krishnan Nambiar v. Kannan* (1898) I.L.R., 21 Mad., 8, referred to.

Nallappa v. Vridhachala ... (1914) I.L.R., 37 Mad., 270

—equitable:—*See ESTOPPEL by JUDGMENT.*

—*See ADVERSE POSSESSION.*

EVIDENCE:—See CONSTRUCTION OF DOCUMENT.

(INDIAN) EVIDENCE ACT (1 OF 1872), ss. 4 AND 90—Ancient document—Practice as to mode of proof—Whether document presumed to be genuine by the First Court can be rejected in appeal—Practice—Appeal from preliminary decree after passing of final decree.] According to the practice prevailing in this Presidency, when *prima facie* evidence of custody and of the date of a document purporting to be 30 years old is given, the Court generally marks the document on the footing that there is sufficient evidence to justify its being marked as an exhibit at that stage. It is only subsequently that the opponent exercises his right of adducing evidence of circumstances which entitle him to say that the presumption under section 90 of the Evidence Act should not be drawn with respect to the document. The Court generally arrives at its conclusion on the matter after the evidence on both sides has been given. An Appellate Court is entitled to reject a document presumed to be genuine by the Original Court under section 90 of the Evidence Act, without calling for further proof. *Shafiq-un-nissa v. Shaban Ali Khan* (1904) I.L.R., 26 All., 581 and *Srinath Patra v. Kuloda*

Prosad Bunerjee (1905) 2 C.L.J., 592, referred to. It is competent to a party to prefer an appeal against the preliminary decree in a redemption suit, though before the appeal is presented the final decree has been passed. *Lakshmi v. Mani Devi* (1911) 21 M.L.J., 1063, followed, *Janaki Nath Ray Chowdhury v. Promotha Nath Ray Chowdhury* (1911) 15 C.W.N., 830, referred to.

Ramuvien v. Veerappudayan ... (1914) I.L.R., 37 Mad., 455

Act (IV of 1882), ss. 54, 118. SEC. 92:—See TRANSFER OF PROPERTY

SEC. 107 AND 108—*Nature of presumption—Adverse possession, tacking of.* There is no presumption in law that a person was alive for seven years from the time when he was last heard of. Sections 107 and 108 of the Evidence Act deal with the procedure to be followed when a question is raised before a Court, as to whether a person is alive or dead, but do not lay down any presumption as to how long a man was alive or at what time he died. *Narki v. Lal Sahu* (1910) I.L.R., 37 Cal., 103 and *Muhammad Sharif v. Bande Ali* (1912) I.L.R., 34 All., 86, followed. Assuming that the Court could make a presumption that a person was alive for seven years after he was last heard of, it depends on the circumstances of each case, whether the Court would draw such a presumption or not. A person in possession without title cannot tack his possession to that of another, if he did not enter on possession as the heir of that other.

Veeramma v. Chenna Reddi ... (1914) I.L.R., 37 Mad., 440

EXECUTION APPLICATION.—See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 38, 39, 41 AND 50, O.R. XXI, R. 16 AND 26.

EXECUTION PROCEEDINGS, pending.—See CIVIL PROCEDURE CODE (ACT V OF 1908) ss. 37, 38 AND 150.

Res Judicata in:—See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 37, 38 AND 150.

See "RES JUDICATA".

EXECUTOR, title of, to sue without probate.—See LIMITATION ACT (IX OF 1908).

FINDING, CONCURRENT, OF FACT.—See SPECIAL OR SECOND APPEAL.

High Court ignoring, and deciding contrary to it on Second Appeal:—See SPECIAL OR SECOND APPEAL.

FOREIGN COURT, jurisdiction of.—See FOREIGN JUDGMENT.

FOREIGN JUDGMENT, suit on.—*Jurisdiction of Foreign Court—Submission to, by defendants, when defendant carrying on business in foreign territory through agent—No residence thereby—Service of notice of suit on agent, insufficient as against principals outside jurisdiction—Service on principals out of jurisdiction.* Submission to the jurisdiction of a foreign forum is largely a question of fact in each case or a mixed question of law and fact. Where defendants submitted to the jurisdiction of foreign Courts by giving a power of attorney to an agent and a decision is passed against them after service of summons of the suit on them while they were out of jurisdiction, by order of Court, the defendants are *prima facie* bound by the judgment; and where no other defence is raised but that of non-submission and non-service of notice both of which were found against, a decree against the defendants in accordance with the foreign judgment must necessarily follow. Persons who carry on business in a foreign country through an agent submit to the jurisdiction of the Courts of that country by giving that agent a power of attorney containing very wide powers including right to institute or defend any suits that might be brought against them touching any matters connected with their business or otherwise. A power of attorney of this character which presumably is brought to the notice of persons dealing with the firm is evidence that the principals adopted the Court of the place wherein the business is carried on, as the forum before which their claims were to be brought. *Bank of Australasia v. Harding* (1850) 19 L.J.C.P., 845 and *In re Hainault Forest Act* (1858) 9 C.B., Rep., 648 at p. 661 and *Bank of Australasia v. Nias* (1851) 20 L.J.Q.B., 284,

followed. *Obiter*.—A decree obtained in a foreign country against a firm after serving the agent of the firm with notice of the suit while the principals of the firm who were defendants in the cause were out of its jurisdiction cannot be enforced as a personal decree against them in other Courts. *Sahib Thambi v. Hamid* (1913) I.L.R., 36 Mad., 414; s.c. (1912) 22 M.L.J., 109, followed. Service of suit on an agent of a partnership whose members reside out of jurisdiction, does not create jurisdiction on the ground of residence. *Nalla Karuppa Settiar v. Mahomed Iburaam Sahab* (1897) I.L.R., 20 Mad., 112, distinguished. *Fasal Shaw Khan v. Gafer Khan* (1892) I.L.R., 15 Mad., 82, *Girdhar Damodhar v. Keesigar Hiragar* (1893) I.L.R., 17 Bom., 662, *Annamalai Chetti v. Murugasa Chetti* (1903) I.L.R., 28 Mad., 544 (P.C.), *Copin v. Adamson* (1874) 9 Ex. Cases, 845, *Russell v. Gambefort* (1889) 28 Q.B.D., 528, *Roussillon v. Roussillon* (1840) 14 Ch. D., 351, *Schibsky v. Westenhols* (1870) 6 Q.B., 155, and *Emanuel v. Symon* (1908), 1 K.B., 302, referred to.

Ramanathan Chettiar v. Kalimuthu Pillai ... (1914) I.L.R., 37 Mad., 163

FOREST ACT (MADRAS ACT V OF 1882), ss. 26, 53 AND 55—*Compounding offence.* The words "no further proceedings shall be taken" in section 53 of the Forest Act (Madras Act V of 1882), mean that proceedings then in progress must lapse.

Re Narayana Padayachi ... (1914) I.L.R., 37 Mad., 28

FRAUD.—See MINOR.

GUARDIAN ad litem, appointment of, procured by suppression of near relation.—See MINOR.

de facto, powers of:—See MUHAMMADAN LAW.

GUARDIANS AND WARDS ACT (VIII OF 1890), ss. 7 (2), 25 AND 30—*Guardian appointed by Court—Encumbrance of minor's property by natural guardian while court guardian in existence—Encumbrance void—Consideration, void deed, no, for fresh contract on attaining majority.* The appointment of a guardian under the Guardians and Wards Act (VIII of 1890) has the effect of extinguishing the rights of the minor's natural guardian to deal with the minor's property. Where the natural guardian with rights thus extinguished but purporting to act as a *de facto* guardian encumbered the minor's property with his consent, *Held*, that the encumbrances were null and void. An encumbrance thus created without authority cannot be ratified by the minor on attaining majority. There can be no ratification of a transaction which is void owing to the promisor possessing no contractual capacity at the time. Nor can a void deed form a good consideration for a fresh contract made by the minor on attaining majority.

Arumugam Chetti v. Duraisinga Tevar ... (1914) I.L.R., 37 Mad., 38

HEREDITARY OFFICES, emoluments of.—See (MADRAS) HEREDITARY VILLAGE OFFICES ACT.

(MADRAS) HEREDITARY VILLAGE OFFICES ACT (III OF 1895), SEC. 5, *applicability of—Emolument of hereditary offices in section 3, clause 4—Statute, construction of—* Section 5 of Madras Act III of 1895 is applicable to emoluments of hereditary offices in proprietary estates of the classes mentioned in section 3, clause 4. *Mutyala Bapayya v. Kosuri Muramullu* (1912) M.W.N., 7, approved. *Veerabadram Achari v. Suppiah Achari* (1911) I.L.R., 33 Mad., 488, overruled. *Per SADASIVA AYYAR, J.*—In cases of ambiguity as to the construction of a statute, considerations based on the scheme of the Act, and the previous history of the legislation relating to the matters dealt with in the Act might properly be referred to for deciding which of the two views ought to be taken.

Kandappa Achary v. Vengama Naidu ... (1914) I.L.R., 37 Mad., 548

HIGH COURT, power of, to alter finding of acquittal into conviction and enhance sentence in Revision.—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 428 AND 439.

—See ABATEMENT OF SUIT.

HINDU LAW—Adoption—Adoption of an orphan—Estoppel—Presumption in favour of adoption, when arises—Practice—Conversion of suit in ejectment into one for partition. Only the parents of a child can give him in adoption and therefore an orphan cannot be validly given in adoption either by

himself or by any one else. *Subbaluvammal v. Annakutti Ammal* (1864) 2 M.H.C.R., 129, *Balvantrav Bhaskar v. Bayabai et al* (1869) 6 B.H.C.R., (O.C.J.) 83, and *Bashettiappa v. Shivelingappa* (1873) 10 Bom. H.C.R. 268, applied. An invalid adoption does not *per se* destroy the adoptee's rights in his natural family. *Bhavanani Sankara Pandit v. Ambabay Ammal* (1863) 1 M.H.C.R., 303 and *Lakshmappa v. Rāndrā* (1875) 12 Bom. H.C.R., 364 at p. 397, followed. No estoppel arises in such a case unless in consequence of the adoption the position of the party setting up the estoppel is changed to his disadvantage, so as to render it inequitable that the adopter should be restored to his place in his natural family. *Gopalayyan v. Raghupatiayyan* (1873) 7 M.H.C.R., 250, and *Parvatiyayamma v. Ramakrishna Row* (1895) 1 L.R. 18 Mad., 145, followed. No presumption in favour of an adoption arises in the absence of evidence of the giving or acceptance or of circumstances by which such a presumption can be supported, though the adoption may have taken place long before, and been acquiesced in by all concerned. *Anandrá Shivaji et al v. Ganesh E. Kokil* (1870) 7 B.H.C.R., —Appx. xxxiii, at p. xxxiv distinguished. A suit in ejectment cannot be converted into a suit for partition.

Vaithilingam v. Natesa ... (1914) 1 L.R., 37 Mad., 529

Debt—Pious obligation—Decree debt incurred by father as devastanam committee member— *Ayavaharika* [meaning of.] The liability of a Hindu father, who as a member of a devastanam committee unauthorisedly spends the devastanam funds for expenses of a litigation, and is afterwards directed by the Court to pay the costs out of his own private funds, constitutes a debt which his sons and grandsons are under a pious obligation to discharge. The expression '*Ayavaharika*' debt means a debt which is not supportable as valid by legal arguments, and on which no right could be established by the creditor in a Court of Justice. *Durbar Khachar v. Khachar Harsur* (1908) 1 L.R., 32 Bom., 348, dissented from. *Chakouri Mahton v. Ganga Pershad* (1912) 15 C.L.J., 228, followed. *Natusayyan v. Ponnusami* (1893) 1 L.R., 16 Mad., 99 and *Khalilul Rahman v. Gobind Pershad* (1893) 1 L.R., 20 Cal., 328, referred to. *Ramasengar v. Secretary of State* (1910) 20 M.L.J., 89, distinguished.

Venugopala Naidu v. Ramanadhan Chetty ... (1914) 1 L.R., 37 Mad., 458

Impartible Estate—Question whether an estate alleged to be a raj was partible or impartible—Question of fact whether estate was a raj—Concurrent decisions of Courts in India—Privy Council, practice of—Adoption—joint power to two widows to adopt—Power exercised by surviving widow—Construction of will—No provision for the death of one of two joint donees—No power in Court construing will to make by its interpretation any addition to testamentary dispositions.] In the absence of a sanad under Madras Regulation XXV of 1802, the regulations of that year do not affect the title to any land. *Collector of Trichinopoly v. Lekkamani* (1874) L.R., 1 I.A., 282 at p. 306, followed. The acceptance of a sanad in common form under Madras Regulation XXV of 1802 does not of itself, and apart from other circumstances, avail to alter the succession to an hereditary estate. *The Udayarpalayam Case* (1905) 1 L.R., 28 Mad., 508 at p. 515: s.c., L.R. 32 I.A., 261 at p. 268, followed. Unless there be an existing estate with other incidents which a sanad in common form under Madras Regulation XXV of 1802 can operate to confirm, such sanad will confer on or confirm in the grantee an estate descendible according to the ordinary rules of inheritance of the Hindu law. *Raja Venkata Rao v. Court of Wards* (1879) 1 L.R., 2 Mad., 128 (P.C.); s.c., L.R., 7 I.A., 38, followed. In order to establish that any estate is descendible otherwise than in accordance with the ordinary rules of inheritance of the Hindu law, it must be proved either that it is from its nature impartible and descendible to a single heir, or that it is so impartible and descendible by virtue of a special family custom. *Baboo Gunesh Dutt Singh v. Maharajah Moheshur Singh* (1855) 6 M.I.A., 164 at p. 187, followed. The nature of the estate, and the existence or otherwise of a special family custom are questions of fact to be determined on the evidence in each case. *Mallikarajuna v. Durga* (1890) 1 L.R., 18 Mad., 406 (P.C.); s.c., L.R., 17 I.A., 134, followed. In a case in which the question was whether the estate of Nidadavole in the Kistna district of the Madras Presidency, which was the subject of a sanad in common form under Madras Regulation XXV of 1802,

was partible or impartible, the appellant contended that the grantee had, at and prior to the date of the sanad, an estate of the nature of a raj or principality, and therefore impartible, but he did not rely on any special family custom. *Held* (on the above principles), that the question whether the prior estate was of the nature of a raj or not was a question of fact to be determined on the evidence, and that where both Courts in India had concurrently found it was not a raj but was partible, those findings ought not, according to the practice of the Board, to be disturbed unless they were shown to be not justified by the evidence. *Allen v. Quebec Warehouse Company* (1886) L.R., 12 A.C., 101 at p. 104, followed. Their Lordships, after considering the evidence, so far from being so satisfied, were not prepared to say that they should not have come to the same conclusion on that point. The appeal was therefore dismissed. A Hindu of the Sudra caste by his will made the day before his death in 1864, after bequeathing his estates to his two widows gave them the following power of adoption; "You should adopt a boy who is our sannihita (one closely related) whenever it should strike you that our samastanam (family) should continue." This power was not exercised whilst both widows were alive, but by the survivor of the two widows in 1890. *Held*, without deciding the question of the validity or otherwise, under the Hindu law, of a joint power of adoption (for the proper determination of which their Lordships were of opinion that the materials in this case were insufficient) that the will gave to the widows jointly the power to adopt a son should occasion arise which in their opinion made it desirable to do so: but only one of the widows could receive the boy in adoption so as to step into the position of being his adoptive mother. On a consideration of the surrounding circumstances there was nothing which required or justified their Lordships in interpreting the provisions of the will with regard to the adoption in any special way arising from the fact that the testator was a Hindu; and they must adhere to the plain meaning of the language used. The exercise of the power was vested in the discretion of the joint donees, and it was clearly the law that in such a case the death of one of the donees put an end to the joint power; not by virtue of any peculiar doctrine of English law, or series of English decisions, but flowing from the nature of a joint power. The case was different when the power vested not in specific persons, but in the occupants for the time being of a specified office, such as executors. The words of the will when properly construed related to choice and adoption by the two widows acting jointly. Hence the words referred only to the period of time when both widows were living. To hold that one of the widows could adopt a son after the death of the other widow would be providing for a period of time which the testator left unprovided for, and would be making an addition to his testamentary dispositions which no Court construing a will was entitled to do.

Narasimha v. Parthasarathy ... (1914) 1 L.R., 37 Mad. (P.C.), 199

Joint family—Alienation by managing member in part for necessity—Co-parcener's suit to set it aside—Form of decree—Practice.] Where the managing member of a joint Hindu family consisting of himself and his nephew sold family property for a consideration of which part was found to be binding on the family, and the nephew sued to recover his share of the property from the alienee: *Held*, that according to equitable principles, in the absence of anything appearing to the contrary, the whole of the consideration for the sale, the valid as well as the invalid portion thereof, must be distributed over the whole of the property sold in proportion to the value of each part. *Marappa Gaundon v. Rangasami Gaundon* (1900) 1 L.R., 23 Mad., 89 dissented from. The proper decree in such a case is to decree to the plaintiff his share of the property sold after division by metes and bounds, on condition that he pays to the defendant a proportionate share of the consideration found binding, together with mesne profits from the day that he deposits the amount into Court, and gives notice thereof to the defendant.

Vadivelam v. Natesam ... (1914) 1 L.R., 37 Mad., 435

Joint family—Twice-born caste—Debt—Marriage expenses of male member, binding on the family.] Marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahmachari or of a Sanyasi and debts reasonably incurred for the marriage of a twice-born

Hindu male are binding on the joint family properties. *Govindaravulu Narasimham v. Devaraholla Venkatanarasayya* (1904) I.L.R., 27 Mad., 206, overruled; *Kameswara Sastri Veerachariu* (1911) I.L.R., 34 Mad., 422, approved.

Gopalakrishnam v. Venkatanarasa ... (1914) I.L.R., 37 Mad., 273

Maintenance—Daughter-in-law, whether entitled to be maintained, in the absence of ancestral property—Rules of Hindu law, when binding on Courts—Rule of equity, justice and good conscience. A Hindu is under no legal obligation to maintain his widowed daughter-in-law, when he has no ancestral assets in his hands. The rules of Hindu Law are binding on the Court only where it is necessary to decide any question regarding succession, inheritance, marriage, or caste or any religious usage or institution. Where maintenance is claimed against a person not on the ground that the property coming by inheritance to him is burdened with the maintenance of the person claiming it, but on the ground that the Hindu Law-givers have placed such a duty on him, the Hindu Law, as such, has no obligatory force, and the Court would have to decide the question in accordance with equity, justice and good conscience. Though the rules and precepts of Hindu Law-givers might often be entitled to great respect in deciding the rule of justice in such cases, the weight due to them would depend upon the circumstances of each case including the conditions of modern society, and the conceptions of equity and justice which the Court considers it right to give effect to. *Semble*: There may be special circumstances which may make it equitable and just in a particular case to uphold the claim for maintenance, in the absence of ancestral property. *Khetramani Dasi v. Kashinath Das* (1889) 2 B.L.R. (A.C.J.), 15, applied. *Rangammal v. Echammal* (1889) I.L.R., 22 Mad., 305, explained.

Meenakshi Ammal v. Rama Ayyar ... (1914) I.L.R., 37 Mad., 896

... rules of, when binding on Courts.—See HINDU LAW ... 897

See SPECIFIC RELIEF ACT (I OF 1877).

Stridhanam—Order of succession according to Mitakshara—Brother's widow not an heir—Burden of proof in suit for possession. The stridhanam property of a Hindu female devolves on her death, on her husband, and failing the husband, on his sapindas in the order laid down in the Mitakshara with reference to the succession to the property of a male. *Marya Pillai v. Sivabagyathachi* (1911) 2 M.W.N., 168, followed. A brother's widow is a gotraja sapinda, but is not entitled to succeed as an heir under the Madras system of inheritance. *Balamma v. Pullaya* (1895) I.L.R., 18 Mad., 168, followed. *Mari v. Chinnammal* (1885) I.L.R., 8 Mad., 107 and *Venkatasubramaniam Chetti v. Thayarammah* (1898) I.L.R., 21 Mad., 263, referred to. On failure of the husband's sapindas, the blood relations of the *propositus* are entitled to succeed to the exclusion of the Crown. A Plaintiff seeking to recover possession from a defendant in possession though as a trespasser, must prove his own title.

Kanakammal v. Ananthamathi Ammal ... (1914) I.L.R., 37 Mad., 293

Succession—Step-mother cannot inherit under Mitakshara law but may inherit according to a special caste custom. A step-mother is not to be allowed to inherit to her step-son as a gotraja sapinda. *Mari v. Chinnammal* (1885) I.L.R., 8 Mad., 107 (F.B.), explained. The Mitakshara law (apart from usage) does not recognise a step-mother as in the line of heirs at all. Property should go to the Crown in preference to her. This case was remanded on the following additional issue (*inter alia*), "whether according to the usage of the caste to which she and the first defendant belong, the step-mother is entitled to inherit to her step-son?"

Seethai v. Nachiar ... (1914) I.L.R., 37 Mad., 286

Widow—Alienation in part for necessity—Reversioner suing for declaration as to invalidity of sale, on payment of binding portion of the consideration—Absence of offer to pay, if fatal to suit—Conditional declaration—Form of decree. When a reversioner, during the life-time of the widow, sues for a declaration that an alienation in part for necessity, is invalid beyond the life-time of the widow, on payment of the binding portion of the consideration, *Held*, that the suit should not fail on the mere ground of

the absence of an offer in the plaint to pay the amount that was binding on the reversioner. *Singam Setti Sanjivi Kondayya v. Draupadi Bayamma* (1908) I.L.R., 31 Mad., 158, not followed. *Bhagwat Dayal Singh v. Debi Dayal Sahu* (1908) I.L.R., 35 Calc., 420 (P.C.), applied. *Held* also, that a conditional decree may be passed. *Mahomed Shumsool v. Shewukram* (1874) 2 I.A., 7, referred to. *Per SUNDARA AYYAR, J.*—The uncertainty regarding the person who would be entitled to succeed the widow is no ground for refusing a declaration regarding the character of the alienation, and a declaration may be made that the alienation is invalid as a whole, but that on equitable grounds the alienee should have a charge declared in his favour for the binding portion of the consideration. *Isri Dut Koer v. Mussumat Hansutti Koerain* (1883) 10 I.A., 150, applied. *Semble*: The proper form of the decree in such suits is merely to make a declaration that the alienee has a charge for a certain sum of money.

Paparayudu v. Rattamma ... (1914) I.L.R., 37 Mad., 276

IMPARTIBLE ESTATE.—See HINDU LAW.

IMPROVEMENTS, when tenant entitled to value of.—See ESTATES LAND ACT (MADRAS ACT I OF 1908).

INDEMNITY, contract of.—See ESTOPPEL BY JUDGMENT.

(INDIAN) INSOLVENCY ACT (III OF 1909), SEC. 9 (d) (iii).—*Adjudication, petition for, what to contain—Leave to amend, when to be given.* A petition for adjudication in bankruptcy alleged that the debtors "did depart from their place of business and residence and are secreting themselves so as to deprive their creditors of the means of communicating with them whereby your petitioners are advised and believe that the said insolvents are liable to be adjudged to have committed an act of insolvency." An affidavit in support of this petition alleged the indebtedness of the debtors and that they had left Madras leaving no one in charge of their respective business and "are secreting themselves for the purpose of evading their creditors." *Held*, that these allegations were a sufficient compliance with section 9 (d) (iii) of the Insolvency Act. The statement of intent to defeat or delay the creditors must appear either in the petition or in the affidavit; otherwise the petition is liable to be dismissed as the omission to state the fact that the defect incurable by amendment. An omission to state the fact that the petitioning creditor is a secured creditor and the value of his security, as required by section 12 (2) and rule 21, is one that could be cured by amendment. *WHITE, C.J.*—Leave to amend a petition by inserting new causes of action should not be given at a time when by doing so the court would be depriving the defendant of the plea of limitation. *WALLIS, J.*: be depriving the defendant of the plea of limitation leave could not be (dubitate), whether under peculiar circumstances leave could not be granted in such cases. *Per WALLIS, J.*—"The passage (in the petition) conveyed with sufficient certainty that the debtors committed an act of insolvency by leaving their place of business and residence with intent to defeat and delay their creditors. But if that act of insolvency is not expressed with sufficient certainty we are at liberty to look at the affidavit and after reading the petition with the affidavit to find that the act of insolvency is charged with sufficient certainty." *Ex parte Coates, In re Skelton* (1877) 5 Ch. D., 979, distinguished.

Gunnis & Co. v. Muhammad Ayyub Sahib ... (1914) I.L.R., 37 Mad., 555

INSOLVENCY PROCEEDINGS.—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 195 (1) (c).

INSURANCE.—See MARRIED WOMEN'S PROPERTY ACT (III OF 1874).

IRRIGATION CESS ACT (MADRAS ACT VII OF 1865).—"River belonging to Government," meaning of.—*Zamindars and Rajas, rights of, to waters of rivers passing through their lands—Water, proprietary rights in, discussed—Madras Land Encroachment Act (III of 1905), effect of, upon such rights.* *Per MILLER, J.*—In a suit for the recovery from Government of water-cess illegally levied the cause of action arises on each occasion on which the cess is demanded and article 131 of schedule II of the Limitation Act does not apply. The High Court having held in *Kandukuri Mahalakshamma*

Garu, Proprietrix of Urlam v. Secretary of State for India (1911) I.L.R., 34 Mad., 295, on facts similar to those relied upon in the present case, that the Vamsadhara river is a river belonging to Government such finding was a matter of law which should be followed until overruled by a Full Bench or a Higher Court. Followed accordingly. *Per SANKARAN NAIR, J.*—Under the customary law of the country water belonged to the owner of the estate through which it passes, so long as the water remained on the land, subject to the claims of the proprietors below. The members of the village community and the zamindars or poligars were entitled to the water which flowed through their lands. If Government are the proprietors of the land they are the owners of the water thereon and these rivers and streams of which they own the bed and the banks belong to Government. It was the policy of the East India Company in granting the permanent sanads to recognise private proprietary rights and to divest themselves of such rights which may have been vested in them. It is against the policy and the spirit of the permanent settlement regulation to hold that the Government reserved to themselves any power to increase the revenue on the zamindari or to levy any assessment for the use of water. The permanent sanads granted to Rajas and chieftains did not interfere with their use of the waters of natural streams for the cultivation of all lands within the ayacut (i.e., the area of land that can be irrigated according to the customary methods) subject to the claims of the ryots. The new zamindaris created by the East India Company were placed on the same footing as the old. "Speaking generally, whenever the Government contend that these zamindars are not entitled to exercise any of the rights which are capable of private ownership, and that such rights are vested in the Crown, it lies on the Government to prove that such zamindars were deprived of them either expressly or by necessary implication under the sanads granted under that Regulation (Regulation XXV of 1802); the new zamindaris were placed on the same footing. The sanads referred to are those which were granted by Lord Olive, a copy of which will be found in the earlier editions of the Standing Orders of the Board of Revenue." Under the Regulation of 1802, the Government did not enter into any engagements with the landholders to supply water. The circumstances under which the permanent sanads were granted preclude any such engagement. In the case of new zamindaris created, there may be cases in which the Government reserved to themselves the control of water-courses. Act VII of 1865 was intended by the legislature to refer to all rivers and streams in those ryotwari districts where no mirasi or any corresponding right prevailed, and the words "rivers belonging to Government" do not apply to rivers running through or by zamindaris. The Act was not intended to effect any change in the substantive law but to enable Government to levy a cess on account of the large expenditure incurred by Government in the construction and improvement of irrigation works. The ryotwari lands were assumed to be Government property; and all rivers running through ryotwari lands were accordingly treated as belonging to Government. But it does not enable the Government to levy a water-cess where the land-owners use the waters of rivers in accordance with the rights they had before. The exemption clause in section 1 of the Act—"Where a zamindar or inamdar by virtue of engagements with the Government is entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of such right and no more"—does not apply to those zamindaris and proprietors who themselves take and are entitled to take the water for irrigation from the rivers and streams in their zamindaris without its being supplied to them by Government. Even if the section with the exemption clause applied, the "engagement" to be implied is one to allow the proprietors to irrigate all their lands within the ayacut which could be irrigated without any fee and without any charge. As Act III of 1905 does not interfere with vested rights, it cannot be used to interpret Act VII of 1865 to take away such rights. Therefore under Act VII of 1865 (standing uneffected by subsequent legislation) it was not competent to the Government to levy any cess for any water taken from the Vamsadhara river without the aid of Government works. (See the end of the judgment for a summary of the conclusions.)

Secretary of State v. Janakiramayya ... (1914) I.L.R., 37 Mad., 322

JURISDICTION :—See MORTGAGE.

— of High Court to convict of offence under section 326, Indian Penal Code (Act XLV of 1860):—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 307.

— to execute decree :—See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 37, 38 AND 150.

— Transfer of venue from one Court to another after Decree—Appellate forum.] The District Munsif of Madanapalle having jurisdiction over Kadiri, passed a decree on 30th March 1911 in respect of a cause of action which arose in Kadiri. On 1st April 1911 Kadiri was transferred to the territorial jurisdiction of the District Munsif's Court at Penukonda, from which appeals lay to the District Court at Bellary, whereas appeals from the District Munsif's Court at Madanapalle lay to the District Court at Omdapah. Held, on the question as to the proper appellate forum in the case, that the appeal from the decree lay to the District Court at Bellary, as the transfer of territorial jurisdiction *ipso facto* effected a transfer of venue.

Subbayya v. Rachayya ... (1914) I.L.R., 37 Mad., 477

JUSTICE, legal, moral as opposed to :—See CONTRACT ... 385

KHAZIS ACT (XII OF 1880), ss. 2 AND 4—*Khazi not entitled to any exclusive right to officiate as such.* The appointment of a person as Khazi under the Khazis Act (XII of 1880) does not confer on the appointee any exclusive franchise or any exclusive right to perform the functions of his office. Where, therefore, the plaintiff, a Khazi appointed under the Act, sued the defendant to restrain him from officiating at marriages, and for the recovery of sums of money received by the latter as fees for *nikkas* performed by him, Held, that the suit must fail, as the plaintiff had no right to restrain any person from discharging any of the functions of a Khazi. *Muhammad Yussuf v. Sayad Ahmed* (1881), 1 Bom. H.C.B. Appx. 18, distinguished. *Sayad Hashim Sahib v. Huseinshu* (1889) I.L.R., 13 Bom., 429, *Mira Mohidin v. Asun Mohidin* (1907) 17 M.L.J., 421, *Bhoolwa v. Syud Unwur Ulee* (1859) N.W.P. S.D.A., 127, and *Zeenutoollah Caze v. Nujeeboollah* (1835) 6 Ben. S.D.A., 31, referred to.

Sheik Ummar v. Budan Khan ... (1914) I.L.R., 37 Mad., 228

KIDNAPPING from lawful guardianship :—See INDIAN PENAL CODE (ACT XIV OF 1860).

LAND ENCROACHMENT ACT (MADRAS ACT III OF 1905) :—See MADRAS IRRIGATION CESS ACT (VII OF 1865).

LAND-HOLDER, right of, to distrain property of intermediate tenure-holder for cess paid :—See (MADRAS) ESTATES LAND ACT (I OF 1908).

LANDLORD AND TENANT :—See ADVERSE POSSESSION.

— See EJECTMENT.

LEGAL PRACTITIONERS' ACT (XVII OF 1879), SEC. 13—*Gross misconduct—Wilful neglect of pleader to appear after receipt of full fees—"Actionable claim" purchase of, by a pleader—Transfer of Property Act (IV of 1882), ss. 8 and 136—Pleader engaging in trade without intimating to the High Court—Rule 27 of the Rules under Legal Practitioners' Act.]* Held by the Full Bench: The judgment and evidence given in a civil suit, filed by a party, against his pleader, for refund of fees on account of non-appearance of the pleader are admissible, as evidence in an enquiry instituted for the purpose against the pleader, under the Legal Practitioners Act; but, they are not conclusive proof in the enquiry. Wilful neglect by a pleader to appear without any justification whatever, and conduct a case after receipt of full fees, is unprofessional conduct for which the pleader could be punished under section 13 of the Legal Practitioners' Act. *Per BENSON (OFFG. C.J.)* and *SUNDARA AYYAR, J.*—A false defence of non-receipt of fees is an aggravation of the misconduct in failing to appear. *Per SUNDARA AYYAR, J.*—The vation of the misconduct in failing to appear. *Per SUNDARA AYYAR, J.*—The judgment and the evidence in the Civil Suit, are relevant under section 11 of the Evidence Act. Wilful neglect to appear after receipt of full fees is worse than gross negligence, for which also a pleader might be punished

and it amounts to fraudulent conduct on the part of the pleader. *Obiter*. SANKARAN NAIR, J.—A *vakil* is bound to appear and conduct his case even if the fee or any portion thereof remains unpaid, in the absence of any agreement to the contrary or at least notice to the client in sufficient time to enable him to make other arrangements. *Obiter*. SUNDARA AYYAR, J.—In the absence of an agreement that the fee promised should be previously paid, it is, to say the least, very doubtful, whether a plea of non-payment of part of the fee, would be of any avail. *Held* by the Full Bench: A claim is none the less an "actionable claim" within the meaning of section 3 of the Transfer of Property Act, because a suit had been instituted thereon. Purchase of an "actionable claim" by a pleader, is prohibited by section 136 of the Transfer of Property Act, and a pleader is guilty of unprofessional conduct in such a purchase within the meaning of section 13 of the Legal Practitioners' Act. It is gross misconduct on the part of the pleader, if the purchase be speculative, especially if it is made, just when the claim is ripe for judgment and when the seller is his own client unable to judge of the result of suit. *Held* also by the Full Bench: Whether the purchase of an "actionable claim" by a pleader, will amount to gross misconduct on the part of the pleader, is a question to be determined on the particular facts of each case. *Per* SUNDARA AYYAR, J.—The onus is on the pleader who purchases an "actionable claim," to show that in the circumstances of the particular case, it does not amount to gross misconduct. *Held* by the Full Bench: A pleader who engages himself in trade but does not intimate the same to the High Court as required by Rule 27 of the Rules framed by the High Court under the Legal Practitioners' Act, is guilty of misconduct, within the meaning of the section 13 of the Act. Their Lordships of the Full Bench, considered it unnecessary to inflict any punishment for such violation of the rules, in the absence of a specific charge to that effect. *Obiter*: SUNDARA AYYAR, J.—A pleader who merely supervises a trade even if only during his leisure hours and holidays must be said to be personally carrying on the trade even if the ordinary routine work of the trade is carried on by means of servant and agent. If all the members of a family of whom the pleader is one, enter into a partnership and carry on a family trade as partners, then all of them must be regarded as carrying on the trade. It is otherwise, if some members alone of the joint family carry on the family trade, in which the pleader has no direct concern so far as the outside world is concerned, though, as between the members *inter se* all of them might be responsible for the result of the trade. *Obiter*: SANKARAN NAIR, J.—In the circumstances of this country and under the present conditions of the legal profession, it may be inexpedient and unnecessary for the High Court to declare that a pleader should not follow any trade or business and that it is unprofessional for him to do so.

Muni Reddi v. Venkata Rao ... (1914) I.L.R., 37 Mad., 238

LEGAL PROCEEDINGS, agreement interfering with the course of the:—See AGREEMENT.

LESSEE, right of, after expiry of the lease, to eject a trespasser:—See EJECTMENT.

LIMITATION ACT (IX OF 1908), SEC. 6:—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 230.

SEC. 17:—See LIMITATION ACT (IX OF 1908)... 175

SS. 19 AND 20—Payment or acknowledgment by one partner only—Invalid as against other partners in absence of proof of authority to make it—No presumption of such authority—Contract Act (IX of 1872), sec. 251—Necessary or usually done in carrying on partnership—Proof under, insufficient—Judicial notice—Practice.] *Held*, that according to the rulings in this Presidency an acknowledgement or payment made by one partner does not bind the other partners, in the absence of proof that they authorised such acknowledgement or payment, though it may be an act necessary or one usually done in carrying on the business of partnership; and such authority cannot be presumed. The decisions in *Valasubramania Pillai v. Ramanathan Chettiar* (1909) I.L.R., 32 Mad., 421 and *Shaik Mohideen Sahib v. Official Assignee of Madras* (1912) I.L.R., 35 Mad., 142, require to be reconsidered in the light of the rulings of the English and other Indian

High Courts. Such acknowledgements are made as a matter of course by trade-debtors, whether carrying on business singly or in partnership and are forthcoming in almost every suit for the price of goods sold and delivered. This is a matter within the daily experience of Courts of First Instance so that they are entitled to take judicial notice of it without requiring proof of the same.

K. R. V. Firm v. Seetharamaswami ... (1914) I.L.R., 34 Mad., 146

ARTS. 49, 60, 61, 62, 81, 89, 120 AND 145—'Specific moveable property,' meaning of, in article 49—Whether includes money—Residuary article, when to be applied—Money had and received to the plaintiff's use.] Where the karnavan of a Malabar tarwad sued a junior for recovery of a sum of tarwad money received by the latter, but withheld by him in denial of the plaintiff's right to the same. *Held*, that the case was governed by article 62 of the Limitation Act (IX of 1908) as the defendant had received monies belonging to the plaintiff which *ex aquo et bono* he ought to refund, and the cause of action was for money had and received to the plaintiff's use, and arose on the date of the receipt, and not on the date of the denial of the plaintiff's right to the money. *Mahomed Wahib v. Mahomed Ameer* (1905) I.L.R., 32 Cal., 527, referred to. 'Specific moveable property' in article 49 does not include money, though money is 'moveable property' within article 89. Specific property is property which is recovered *in specie*, i.e., the very property itself, not any equivalent or reparation. The residuary article 120 should be applied only as a last resort, if no other article is applicable. *Sharoop Doss Mondal v. Joggesaur Roy Chowdhry* (1899) I.L.R., 26 Cal., 564, referred to.

Sankunni v. Govinda ... (1914) I.L.R., 37 Mad., 381

ART. 182:—See CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 38, 39, 41 AND 50, ETC.

Deposit of money repayable at a fixed date—Articles 66 and 115, applicable, article 145 not applicable—"Deposit" in article 145, meaning of—Probate and Administration Act (V of 1881)—Title of executor to sue even without probate—Limitation Act (IX of 1908), sec. 17—Same word re-enacted in a repealing Act—Construction, same meaning as in the repealed Act.] Article 145 of the Limitation Act (IX of 1908) is not applicable to deposits of money. "Deposit" in article 145 means only deposit of goods to be returned in specific when wanted; it is the sort of bailment known to lawyers under that name in the Roman Law of Bailments which was accepted by BRACON and afterwards by Lord Holt in *Coggs v. Barnard* (1703) 1 Sm. L.C., 173; s.c., 2 Raym., 909, as fit to be enforced in England. *Ishur Chunder Bhaduri v. Jibun Kumari Bibi* (1889) I.L.R., 16 Cal., 25 and *Perundevitayar Ammal v. Nammahwar Chetty* (1895) I.L.R., 18 Mad., 390, followed. *Administrator-General, Bengal v. Kristo Kamini Dassas* (1904) I.L.R., 31 Cal., 519 and *Lala Gobind Prasad v. Chairman of Patna Municipality* (1907) 6 C.L.J., 535, not followed. A loan repayable at a fixed date is governed probably by article 66 and if not by article 115. Unlike cases governed by the Indian Succession Act and the Hindu Wills Act, in a case governed by the Probate and Administration Act (V of 1881), the obtaining of probate is not necessary to clothe the executor with the right to sue for debts due to the testator, and the estate is represented by the executor even in the absence of probate, within the meaning of section 17 of the Limitation Act, and time begins to run from the date of the testator's death, as the obtaining of a succession certificate is not a condition precedent to the filing of a suit but is only necessary before getting a decree. Where a word which is used in one sense in one Act is re-enacted in a subsequent Act which repeals the former, then unless there is some strong reason to the contrary it must be read in the same sense in the subsequent Act in which it is re-enacted. *Mayor of Portsmouth v. Smith* (1885) L.R., 10 A.C., 364 at p. 371, referred to. Testatrix lent money to the defendant on 15th August 1900, and died on 16th January 1904. The will was governed by the Probate and Administration Act. *Held*, that a suit by the executor in 1910 was barred by limitation either under article 66 or 115 of the Limitation Act.

Balakrishnudu v. Narayanaswamy Chetty ... (1914) I.L.R., 37 Mad., 176

LIMITATION :—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 280.

—when begins to run in respect of claim for rent :—See (MADRAS) ESTATES LAND ACT (I OF 1908).

LIMITATION ACTS, policy of :—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 280.

LOCAL BOARDS ACT (MADRAS ACT V OF 1884), SS. 73 AND 74 :—See (MADRAS) ESTATES LAND ACT (I OF 1908).

LOCAL GOVERNMENT, the alleged ratification by :—See SECRETARY OF STATE.

MAINTENANCE :—See HINDU LAW.

(INDIAN) MAJORITY ACT (IX OF 1875), SEC. 3 :—See INDIAN PENAL CODE (ACT XLV OF 1860).

MALE MEMBER, marriage expenses of, binding on the family :—See HINDU LAW.

MALABAR LAW :—See MORTGAGE.

MAINTENANCE :—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 488 (1).

MALICIOUS PROSECUTION :—'Prosecution,' what amounts to :—Magistrate sending only notice but not summons or warrant and dismissing complaint, no prosecution—Criminal Procedure Code (Act V of 1898), sec. 202.] Where on receiving a complaint of an offence of defamation a magistrate issued only a notice but not a summons or a warrant to the accused, which notice simply informed him that a preliminary enquiry would be held at a certain time in the matter of the complaint preferred by the complainant, and the complaint was dismissed under section 202, Criminal Procedure Code, after hearing counsel for both parties. Held, that there was no prosecution of any offence by the complainant so as to give room for any suit for malicious prosecution. *DeRosario v. Gulab Chand Anundjee* (1910) I.L.R., 37 Cal., 358, *Golap Jan v. Bholanath Khettry* (1911) I.L.R., 38 Cal., 880, followed. The sending of such notice and the hearing thereon are not authorized by the Criminal Procedure Code. Prosecution commences with the issue of process (summons or warrant) after the complaint has been entertained by the magistrate and the prior proceedings constitute at most an attempt by the complainant to prosecute the accused.

Sheik Meeran Sahab v. Ratnavelu Mudali .. (1914) I.L.R., 37 Mad., 181

MARRIED WOMEN'S PROPERTY ACT (III OF 1874), SEC. 6—Applicability to Hindus—Insurance—Policy for the benefit of wife and children, if creates a trust—Policy amount payable to the executors, administrators and assigns of the assured—Right of beneficiary to enforce Presumption of advancement.] Where a Hindu male effected a policy of insurance on his own life, expressed on the face of it to be for the benefit of his wife, or his wife and children or any of them, but payable to his executors, administrators and assigns, and died leaving a daughter, Held, by the Full Bench, that section 6 of the Married Women's Property Act (III of 1874) applied to the case, and by virtue thereof a trust was created in favour of the daughter, in regard to the policy amount, against which the creditors of the assured have no right to proceed. *Oriental Government Security Life Assurance, Limited v. Vanteddu Ammiraju* (1912) I.L.R., 35 Mad., 162, overruled. Per WHITE, C.J. (SANKARAN NAIR, J. concurring)—Sections 4, 5, 6, 7, 8 and 9 of Act III of 1874 do not apply where either of the spouses, at the time of the marriage, professed the Hindu religion. The primary object of section 6 is to enable a man (though a Hindu male) to make provision for his wife and children by insuring his life for their benefit without executing a separate deed of trust, though the result may be that a Hindu woman derives a benefit thereby. Per WHITE, C.J.—Section 6 does not affect the law of contract or the law of trust as regards the persons entitled to enforce the contract under the policy. The person entitled to enforce the rights of the beneficiary is the trustee, if a trustee has been appointed, and if no special trustee has been appointed, the Official Trustee, to whom the money is payable, and not the daughter, the beneficiary. Held, also that the daughter was not entitled to enforce her claim against the insurance company or as against a creditor

ne (i) the company was under a contractual obligation to pay the amount to the executor or administrator of the assured and (ii) the presumption of advancement of a daughter was rebutted by the words "for the benefit of his wife and children" the policy not being one for the benefit of such of the children as were daughters. Per TRAVIS, J.—The daughter's right under the insurance policies are affected by section 6 of Act III of 1874, and the operation of section 6 is not prevented by section 2. For the daughter is not a married woman within the meaning of sections 2 and 6, though she may be married, as the expression 'married woman' cannot refer to any woman other than one who is married to the assured.

Bolamba v. Krishnappa ... (1914) I.L.R., 37 Mad. (F.B.), 483

MINOR :—See CONTRACT ... 390

—See MUHAMMADAN LAW.

—Guardian ad litem, appointment of, procured by suppression of the existence of near relation—Whether decree liable to be set aside—Fraud.] In a suit for the recovery of money against a father and his minor son, the father refused to act as guardian ad litem of his minor, whereupon the Court appointed its Head Clerk as guardian, on the affidavit of the plaintiff that there was no fit and proper person alive to act as the guardian of the minor, while as a matter of fact the plaintiff knew that the minor was living under the protection of his maternal grandfather. The decree passed in the suit was sought to be set aside by the minor on the ground of fraud above mentioned. Held, that the statement in the affidavit could not be held to be deliberately false so as to constitute fraud, in the absence of any allegation of collusion between the plaintiff and the Head Clerk, and the decree could not be set aside unless there was no appointment of a guardian ad litem or the appointment was induced by fraud or what the Court would regard as tantamount to fraud. *Hanuman Prasad v. Muhammad Ishaq* (1906) I.L.R., 28 All., 137, *Ramachandra Das v. Joti Prasad* (1907) I.L.R., 29 All., 676 and *Babaji bin Kusaji v. Maruti* (1874) 11 Bom. H.C.R., 182, distinguished.

Maruthamalai v. Palani ... (1914) I.L.R., 37 Mad., 535

—, a decree for land and mesne profits in favour of :—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 230.

MINORITY of Muhammadan, when to cease :—See (INDIAN) PENAL CODE (ACT XLV OF 1860), SEC. 363.

MONEY, suit to recover under a contract with Government, whether of a Small Cause nature :—See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART. 3.

MORTGAGE—Suit for redemption—Valuation—Jurisdiction—Malabar Law—

Mortgage by karnavan, whether a junior member is bound to sue to set aside.] The proper valuation of a suit to redeem a mortgage is the amount of the mortgage admitted by the plaintiff to be binding on him, and not that of the mortgages set up by the defendant. In such a suit the question of jurisdiction has to be decided on the averments in the plaint, and not with reference to the pleas of the defendant. *Chandu v. Kombi* (1886) I.L.R., 9 Mad., 208, followed. *Unni v. Kunchi Amma* (1891) I.L.R., 14 Mad., 26 at p. 28, referred to. When a karnavan of a Malabar tarwad makes an alienation which is not binding on the other members, the latter need not sue to set it aside, but can recover possession on the strength of their title, in the absence of proof of the validity of the alienation. Secus: where the plaintiff has himself executed the instrument under which the defendant claims. The trustee of a Malabar devasom first executed an otti for Rs. 50, and subsequently renewed the same in a consolidated otti for Rs. 1,650 and further created a purankadam for Rs. 1,500, on the same property. His successor sued to redeem the otti for Rs. 50 treating the other mortgages as invalid. Held, that the suit as framed was maintainable, and the plaintiff was not bound to sue to set aside the later mortgages created by his predecessor.

Chappan v. Raru ... (1914) I.L.R., 37 Mad., 429

MORTGAGE BY KARNAVAN, whether a junior member is bound to sue to set aside:—See MORTGAGE.

MORTGAGE SUIT:—See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 85 AND 91

_____, usufructuary:—See TRANSFER OF PROPERTY ACT (IV OF 1882) ss. 54 AND 118.

MORTGAGOR AND MORTGAGEE:—See ADVERSE POSSESSION.

MUHAMMADAN LAW—Minor—De facto guardian's powers over minor's properties—Sale by mother for expenses of minor's sister's marriage, or for the discharge of proper family debt, not binding. Under the Muhammadan law the general rule is that the dealings of a de facto guardian of a minor with the minor's properties, do not ipso facto bind the minor. The rule is however subject to exceptions. In cases of urgent and imperative necessity, or where the transaction from its nature must necessarily be beneficial to the minor, a de facto guardian can alienate the property of the minor, whether moveable or immovable. According to Muhammadan law, sale of a minor's property by an unauthorized guardian even if it was not made for a valid cause, is neither void nor voidable in the ordinary sense of the terms, but is regarded as *mangul* or dependent, that is, in a state of suspense, its validity or invalidity being determined by the minor adopting or not adopting it after he has attained majority, though the effect of his decision will relate back to the date of inception of the transaction. A person who chooses to buy a minor's property from a person who has no power to deal with it, however bona fide his action may have been, cannot invoke any principles of justice and good conscience to support the transaction itself, though such considerations may be a good ground for the Court refusing to give relief to the minor except on condition of his restituting whatever benefit he has derived from the transaction. A sale by a mother of the minor's property for finding money for the marriage expenses of the minor's sister or for the discharge of family debts and for other family purposes is not binding on the minor.

Ayderman Kutti v. Syed Ali ... (1914) I.L.R., 37 Mad., 514

MUHAMMADAN, minority of, when to cease:—See (INDIAN) PENAL CODE (ACT XLV OF 1860).

OFFENCE, compounding:—See FORESTS ACT (MADRAS ACT V OF 1882), ss. 28, 58 AND 55.

ORAL ARRANGEMENT that mortgagee should give up possession of the mortgaged property in part and receive the equity of redemption in part:—See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 54 AND 118.

ORPHAN ADOPTION:—See HINDU LAW.

PARTITION, conversion of suit in ejectment into one for:—See HINDU LAW ... 526

PARTNER payment or acknowledgment by one only:—See LIMITATION ACT (IX OF 1908), ss. 19 AND 20.

PATTA, tender of, etc.:—See (MADRAS) ESTATES LAND ACT (I OF 1908).

PEACE security to keep the:—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 125.

PENAL ASSESSMENT—Right of Government to levy—Interference with possession—Possession short of the statutory period is sufficient basis for a suit for a declaration of title—Specific Relief Act (I of 1877), sec. 42.] Per curiam. The Government has no right to collect penal assessment from a person in possession of land simply on the ground that he is not the legal owner of the land, but such right is conditional on the land being communal. Per ABDUS RAHIM, J. (AYLING, J. dubitante).—A person in possession of land even though for less than 12 years, would, under section 42 of the Specific Relief Act, be entitled to a declaration that he is in lawful possession as against a wrong doer who interferes with his possession. *Ismail Arif v. Mahomed Ghous* (1893) I.L.R., 20 Cal., 834 (P.O.), applied. *Hanmantarav v. Secretary*

of State for India (1901) I.L.R., 25 Bom., 287, distinguished. *Rassonada Rayar v. Sitharoma Pillai* (1864) 2 M.H.C.R., 171, referred. The levying of penal assessment on land if not justified amounts to unlawful interference with possession.

Ayyapparaju v. The Secretary of State ... (1914) I.L.R., 37 Mad., 298

(INDIAN) PENAL CODE (ACT XLV OF 1860), SEC. 828—Jurisdiction of High Court to convict of an offence under:—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 307.

_____, SEC. 360:—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 423 AND 489.

_____, SEC. 423—"Consideration," meaning of.] The word "consideration" in section 423, Indian Penal Code, cannot mean the property transferred. Therefore an untrue assertion in a transfer deed that the whole of a plot of land belonged to the transferor is not a statement relating to the consideration for the transfer and is not an offence under the section.

Re Mania Goundan ... (1914) I.L.R., 37 Mad., 47

_____, SEC. 488—Defamation—absolute privilege or statement in complaint to magistrate.] A defamatory statement in a complaint to a magistrate is absolutely privileged.

Re Muthusami Naidu ... (1914) I.L.R., 47 Mad., 110

_____, SEC. 363—Kidnapping from lawful guardianship—Minority of Muhammadan, when to cease for the purpose of section 363—(Indian) Majority Act (IX of 1875), sec. 8.] According to Muhammadan Law the occurrence of puberty determines minority and the mother's right to custody, but for the purpose of section 363, Indian Penal Code, regard must be had only to the definition of minority in section 3. Indian Majority Act (IX of 1875). In the matter of *Khatija Bibi* (1870) 5 Beng. L.R., 557, distinguished.

Re Muthu Ibrahi ... (1914) I.L.R., 37 Mad., 567

PERJURY, sanction for, not desirable in public interests:—See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 195.

PLEADER ENGAGING IN TRADE without intimating to the High Court:—See LEGAL PRACTITIONERS' ACT (XVIII OF 1879), SEC. 18.

POLICY, for the benefit of wife and children, if, creates a trust:—See MARRIED WOMEN'S PROPERTY ACT (III OF 1874).

POSSESSION by person claiming as trustee:—See ADVERSE POSSESSION.

PRACTICE:—See HINDU LAW.

_____, as to mode of proof:—See (INDIAN) EVIDENCE ACT (I OF 1872).

PRESCRIPTION:—See ESTATES LAND ACT (MADRAS ACT I OF 1908).

PRESUMPTION IN FAVOUR OF ADOPTION, when arises:—See HINDU LAW.

PRESUMPTION, nature of:—See (INDIAN) EVIDENCE ACT (I OF 1872).

PRICE, meaning of:—See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 54 AND 118.

PRIVATE INTERNATIONAL LAW:—See FOREIGN JUDGMENT.

PRIVILEGE, absolute, for statement in complaint to Magistrate:—See INDIAN PENAL CODE (ACT XLV OF 1860), SEC. 498.

PRIVY COUNCIL, practice of:—See DECREE, ASSIGNMENT OF, See HINDU LAW.

PROBATE AND ADMINISTRATION ACT (V OF 1881):—See LIMITATION ACT (IX OF 1908).

- PROBATE**, title of executor to sue even without:—See LIMITATION ACT (IX OF 1908).
- PROMISSORY NOTE** executed for compounding a charge of grievous hurt:—See CONTRACT ... 385
- PROPERTY, ANCESTRAL**, whether daughter-in-law entitled to be maintained in the absence of:—See HINDU LAW ... 397
- PROPERTY** of intermediate tenure-holder, right of land-holder to distrain, for corn paid:—See (MADRAS) ESTATES LAND ACT (I OF 1908).
- PROPERTY, MOVEABLE**, transfer of, validity of:—See DECREE, ASSIGNMENT OF.
- PROPERTY**, transfer of, to the jurisdiction of another court:—See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 37, 38 AND 150.
- "PROSECUTION,"** what amounts to:—See MALICIOUS PROSECUTION.
- PROSECUTE**, sanction to:—See CRIMINAL PROCEDURE CODE (ACT V OF 1908), SEC. 195 (1), (c).
- PROSTITUTION**, not a profession which the law will recognise:—See CRIMINAL PROCEDURE CODE (ACT V OF 1908), SEC. 488 (1).
- PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887)**, SCH. II, ART. 3—Failure to perform a contract whether 'an act' within article 3—Suit to recover money under a contract with Government, whether of a small cause nature—Second appeal.] Failure by Government to carry out a contract under which the plaintiff was entitled to a sum of money on account of certain constructions made by him, is not 'an act' purporting to be done by an officer of Government in his official capacity within the meaning of article 3, schedule II of the Provincial Small Cause Courts Act (IX of 1887). The article applies only to a suit relating to some distinct act done by an officer of Government. *Rajmal Manikchand v. Hannant Anyaba* (1896) I.L.R., 20 Bom., 697, and *Chhaganlal Kishoredas v. The Collector of Kaira* (1911) I.L.R., 35 Bom., 42, applied. *Bunwari Lal Mookerjee v. The Secretary of State for India* (1890) I.L.R., 17 Cal., 290 and *Mothi Rangayya Chetti v. The Secretary State for India* (1905) I.L.R., 28 Mad., 213, referred to. A suit to recover a sum of money being less than Rs. 500 under such a contract is a suit of a small cause court nature, and no second appeal lies.
- The Secretary of State for India v. Ramabrahmam* ... (1914) I.L.R., 37 Mad., 538
- ART. 28—Suit of a small cause nature—Second Appeal.] Plaintiff sued for the recovery of certain jewels which she had presented to her son-in-law at the time of his marriage with her daughter, basing her claim on a caste custom by which she was entitled, after the death of the pair, to a return of the jewels presented by her: Held, that the right claimed was a right based as upon a conditional gift and not a right to inherit the jewels as the property of the bridegroom or the bride, and article 28 of schedule II of Act IX of 1887 did not apply to such a case. No Second Appeal lay as the suit (being for the recovery of less than Rs. 500) was within the cognizance of the Small Cause Court.
- Chinnayya v. Achammah* ... (1914) I.L.R., 37 Mad., 538
- REGISTRATION**, want of:—See CONSTRUCTION OF DOCUMENT.
- RELIGIOUS ENDOWMENTS ACT (XX OF 1863)**, SEC. 18:—See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 92.
- RENT**, no estoppel by receipt of:—See ESTATES LAND ACT (MADRAS ACT I OF 1908).
- RENT RECOVERY ACT (MADRAS ACT VIII OF 1865)**, SEC. 69:—See SPECIAL OR SECOND APPEAL.
- RENT, TO RECOVER, ETC., TENDER OF PATTAS NOT NECESSARY:**—See MADRAS ESTATES LAND ACT (I OF 1908).

- RES JUDICATA**—Execution proceedings—Order, returning execution application for correction of the amount claimed, without notice to judgment-debtor, whether binding on the decree-holder.] Where the Court without issuing notice to the judgment-debtor returned an execution application, directing the decree-holder to amend the same by reducing the amount claimed, and the decree-holder failed to appeal against the order, Held, that the order was a judicial adjudication in a proceeding between the parties, that the decree-holder was not entitled to the larger amount, and that the decree-holder was consequently debarred from claiming the larger amount in a fresh execution application. The fact that the judgment-debtor had no notice is immaterial, except when the order is passed against him, in which case it is an *ex parte* order and cannot bind a party who had no opportunity to make his defence. *Hiralal Bose v. Dwija Charan Bose* (1906) 3 C.L.J., 240, *Bholanath Das v. Prafulla Nath Kundu Chowdhry* (1901) I.L.R., 28 Cal., 122 and *Deihi and London Bank, Limited v. Orchard* (1877) I.L.R., 3 Cal., 47 (P.C.), distinguished.
- Vyapuri Goundan v. Chidambara Mudaliar* ... (1914) I.L.R., 37 Mad., 814
- REVENUE RECOVERY ACT (MADRAS ACT II OF 1864)**, ss. 1 AND 42:—Sale for arrears of water-cess due under Madras Act VII of 1865—Discharge of encumbrances.] Under section 42 of Madras Act II of 1864 (Revenue Recovery Act), a sale for arrears of water-cess due under Madras Act VII of 1865 conveys a title to the purchaser free of encumbrances, water-cess being included in the term "public revenue" as per section 1 of Madras Act II of 1864. Cases relating to sales for arrears of income-tax and abkari revenue have no bearing on this question.
- Vellappayal Ambalam v. Karuppiiah Pillai* ... (1914) I.L.R., 37 Mad., 49
- REVERSIONER'S SUIT** to set aside an alienation by widow, whether survives to his legal representatives:—See ABATEMENT OF SUIT.
- "RIVER BELONGING TO GOVERNMENT,"** meaning of:—See (MADRAS) IRRIGATION CESS ACT (VII OF 1865).
- RYOTI LAND**, custom or contract enabling tenant to build on, validity of:—See (MADRAS) ESTATES LAND ACT (I OF 1908).
- SALE BY MOTHER** for expenses of minor's sister's marriage or for the discharge of proper family debts, not binding:—See MUHAMMADAN LAW.
- SALE OR AGREEMENT TO SELL:**—See CONSTRUCTION OF DOCUMENT.
- SALE OR EXCHANGE:**—See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 54 AND 188.
- SALE**, validity of:—See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 85 AND 94.
- SANCTION** to prosecute:—See CRIMINAL PROCEDURE CODE (ACT V OF 1908), SEC. 195 (1), (c).
- See CRIMINAL PROCEDURE CODE (ACT V OF 1908), SEC. 476.
- SECOND APPEAL:**—See PROVINCIAL SMALL COURTS ACT (IX OF 1887), SCH. II, ARTS. 3 AND 28.
- See SPECIAL OR SECOND APPEAL.
- SECRETARY OF STATE**, notice of suit against:—See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 80.
- SECRETARY OF STATE IN COUNCIL**, suit against, in respect of illegal order of District Magistrate under Assam Labour Emigration Act (VI of 1901), sec. 91, and also for alleged defamation in a Government order,—Damage, remoteness of—Liability of defendant under the Government of India Act, 1858—Not liable here on the ground that the order was made in the course of employment, nor for acts done by Government servants in exercise of statutory powers—Alleged ratification by the Local Government—Government order—Absolute

privilege.] Suit by the plaintiff, who represented the Assam Labour Supply Association in Ganjam and other districts, against the Secretary of State for India in Council for damages in respect of two orders of the District Magistrate of Ganjam suspending and dismissing one T.S., the local agent of the Association in Ganjam and closing his depot to recruiting under the Assam Labour and Emigration Act (VI of 1901) whereby the plaintiff was prevented from earning from the members of the Association his commission of seven rupees for each labourer sent to Assam; and for an alleged libel on the plaintiff in an order passed by the Governor in Council on appeals by the plaintiff and others against the aforesaid orders, in which it was stated that the plaintiff's own conduct was not altogether above suspicion. *Held*: under the notification issued pursuant to section 91 of the aforesaid Act as amended relaxing the provisions of the Act in favour of the Association, the District Magistrate had power to dismiss the local agent but not to suspend him or to close his depot to recruiting under the Act independently of the Notification. *Seem*: that the damage to the plaintiff by reason of the loss of his commission was too remote. The defendant's liability to suit is the same as that of the East India Company before the passing of the Government of India Act, 1858; it can only be altered by Act of Parliament, and is not affected by section 79, Civil Procedure Code. Extent of such liability in respect of acts done in the exercise of sovereign powers not being acts of State, discussed. It was not sufficient to render the Company liable that an act of this nature had been done by its servant in the course of employment but without previous order or subsequent ratification. Ratification must have been by the Company and must now be by the Secretary of State. Essentials of ratification discussed. In the present case the defendant was not liable for the act of the District Magistrate on the further ground that it was done by him in the exercise of statutory authority and not as an agent of Government. Further, as to the alleged defamation, the order of the Government of Madras having been published in the execution of its duty and without exceeding it, was absolutely privileged, and in any case there was no evidence of malice. *Dhakjee Dadjee v. East India Company* (1813) 2 Mor. Dig., 807, *Peninsular and Oriental Steam Navigation Company v. The Secretary of State* (1861) 5 Bom. H.C.R., Appx. I, *Hari Shivabhadra v. The Secretary of State for India* (1882) I.L.R., 1 Mad., 844 and referred to. *Vijaya Raghava v. The Secretary of State for India* (1884) I.L.R., 7 Mad., 466, questioned.

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SERVICE OF NOTICE OF SUIT ON AGENT, insufficient as against principals outside jurisdiction:—See FOREIGN JUDGMENT.

SERVICE ON PRINCIPALS OUTSIDE JURISDICTION:—See FOREIGN JUDGMENT.

SPECIAL OR SECOND APPEAL—*Second Appeal in cases under Madras Rent Recovery Act (VIII of 1865), sec. 69—Civil Procedure Code (Act VIII of 1859), sec. 879—Civil Procedure Code (Act XIV of 1882), sec. 584—Concurrent findings of fact—High Court ignoring concurrent findings and deciding contrary to it on Second Appeal.* Although section 59 of the Madras Rent Recovery Act (VIII of 1865) only provides for a regular appeal (on law and fact), and there is no further appeal to the High Court from the decision of the District Judge on appeal from the Collector given by the terms of the Act itself, yet under section 372 of Act VIII of 1859 which was the Civil Procedure Code in force when Madras Act VIII of 1865 was passed, and which regulated the procedure of the Civil Courts in India outside the Presidency towns, a special appeal lay "to the Sudder Court from all decisions passed in regular appeal by the courts subordinate to the Sudder Court"; and when the District Court was substituted for the Zillah Court and the High Court for the Sudder Court a special appeal lay from the District Court to the High Court. The terms of the later Civil Procedure Code (Act XIV of 1882) which was the Code in force when the suits out of which the present appeals arose were instituted are clear on the point that an appeal lies from the order of the District Judge to the High Court unless

that right is taken away by express legislation or some express provision of law. And a second or special appeal to the High Court in cases arising under Madras Act VIII of 1865 has been held to lie in *Veeraswamy v. Manager, Pittapur Estate* (1903) I.L.R., 26 Mad. 518. The practice has been ever since the passing of the Act for such appeals to be preferred to the High Court, and their Lordships would not be disposed to interfere with such a long standing practice even if they thought there was an implied rule against second appeals lying from the decisions of the District Judge with respect to adjudications under the Act by the Collector. Section 584 of the Code of Civil Procedure, 1882, distinctly prohibits second appeals on questions of fact, and confines the competency of the High Court to deal with law and procedure. Where, therefore, in a suit by a landlord under section 9 of the Madras Act VIII of 1865, to enforce acceptance of a patta by his tenants, the sole question was whether on the evidence an arrangement which had been previously come to between the parties was permanent, and the Collector and the District Judge concurrently found in the defendant's favour that it was permanent, but the High Court on second appeal ignored that finding and held that the landlord was entitled to revert to a system of rates which had existed prior to such arrangement, *Held* that the High Court had acted in inadherence of section 584 of the Code, and had thereby assumed a jurisdiction which it did not possess, and its decision was set aside and the case remitted to India. *Durga Chowdhry v. Jewahir Singh Chowdhry* (1890) I.L.R., 18 Cal., 23 (P.O.); s.c., I.L.R., 17 I.A., 123, followed.

Ravi Veeraraghavulu v. Venkata Narasimha Naidu Bahadur. (1914) I.L.R., 87 Mad. (P.O.), 443

SPECIFIC RELIEF ACT (I OF 1887), sec. 42:—See PENAL ASSESSMENT.

sec. 15—*Contract by managing member of joint Hindu family under circumstances not binding on the other members—Right to specific performance—Hindu Law.* Where the managing member of a joint Hindu family consisting of himself and his sons, some of whom were majors, entered into a contract to sell family lands to the plaintiff, under such circumstances that the contract was held not binding on the sons, *Held*, in a suit for specific performance against both the father and the sons composing the joint family, that under section 15 of the Specific Relief Act, the plaintiff was not entitled to a decree even as against the father. Section 15 applies to a case where a member of an undivided family agrees to sell part of the joint property in which he has only a share; and the circumstance that an undivided father has an interest in every portion of the undivided property does not take the case out of the operation of the section. *Kosuri Ramaraju v. Isalury Ramalingam* (1908) I.L.R., 26 Mad., 74, and *Srinivasa Reddi v. Sivarama Reddi* (1909) I.L.R., 32 Mad., 320, not followed. *Poraka Subbarami Reddi v. Vadlamudi Seshachalam Chetty* (1910) I.L.R., 33 Mad., 359, *Govinda Naicken v. Apathsahaya Iyer* (1914) I.L.R., 37 Mad., 403; s.c. (1912) M.W.N., 87 and *Barrett v. Ring* (1864) 2 Sm. & Giff., 43; s.c., 65 E.R., 294, referred to.

Nagiah v. Venkatarama Sastrulu ... (1914) I.L.R., 37 Mad., 387

ss. 15 AND 17—*Contract by one co-owner to sell property belonging to him in common with another—not enforceable—Delay, effect of.* Where one of two divided brothers of a Hindu family agreed to sell immovable property held by them in common, and a suit was brought for specific performance of the contract by compelling the vendor to execute a deed of sale in respect of the whole of the property agreed to be sold, *Held*, that no specific performance could be granted, as the execution of a sale deed by the defendant would be ineffectual in respect of the moiety not belonging to him; the Court would not lend its sanction to a transaction devoid of legal effect and improper in itself as calculated to throw a cloud on the title of a third person which would give him a cause of action for a declaratory suit. *Poraka Subbarami Reddy v. Vadlamudi Seshachalam Chetty* (1910) I.L.R., 33 Mad., 359, referred to. *Kosuri Ramaraju v. Isalury Ramalingam* (1908) I.L.R., 26 Mad., 74, *Srinivasa Reddi v. Sivarama Reddi* (1909) I.L.R., 32 Mad., 320 and *Barrett v. Ring* (1864) 2 Sm. & G., 43; s.c., 65 E.R., 294, distinguished. Section 17 of the Specific Relief Act

prohibits the Court from directing specific performance of a part of a contract except in accordance with the preceding sections. Even in a case falling within section 15, the relief by way of a decree for part performance is discretionary and will not be granted where there has been great delay and a consequent change of circumstances.

Govinda Naicken v. Apathachaya Iyer ... (1914) I.L.R., 37 Mad., 408

STAMP ACT (VI OF 1899) :— See CIVIL PROCEDURE CODE (ACT XIV OF 1882), sec. 269.

STATUTE, construction of :— See (MADRAS) HEREDITARY VILLAGE OFFICERS ACT (III OF 1895).

STEP-MOTHER, cannot inherit under *Mitakshara* but may inherit according to a special caste custom :— See HINDU LAW.

STRUCTURE, temporary, whether an easement of support acquirable in respect of :— See EASEMENT.

SUCCESSION, order of, according to *Mitakshara* :— See HINDU LAW.

SUMMONS to accused to produce document or thing :— See CRIMINAL PROCEDURE CODE (ACT V OF 1898), sec. 94.

SUPPORT, right of :— See EASEMENT.

TENDER OF PATTI not necessary to recover rent, etc. :— See (MADRAS) ESTATES LAND ACT (I OF 1908).

TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 3 AND 136 :— See LEGAL PRACTITIONER'S ACT (XVIII OF 1879), sec. 18.

— SEC. 58 :— See DECREE, ASSIGNMENT OF.

—, to the jurisdiction of another Court :— See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 37, 38 AND 150.

— ss. 54 AND 118—*Mortgage, usufructuary*—Oral arrangement that mortgagee should give up possession of the mortgaged property in part, and receive the equity of redemption in part—*Sale or exchange*—Price, meaning of—*Evidence Act (I of 1872)*, sec. 92—*Adverse possession by mortgagee*.] A usufructuary mortgagee of items A and B sued to redeem item A, alleging that item B had been previously redeemed by him. The defendant pleaded that more than 12 years prior to suit the mortgage had been extinguished by an oral arrangement by which the mortgagor orally sold item A to the mortgagee in consideration for the latter surrendering item B to the mortgagor freed from the mortgage lien. The defendant also contended that the possession of the mortgagee became adverse from the date of the arrangement, and that the suit was barred by limitation. *Per curiam*.—*Held*, that the transaction pleaded was not merely a compromise in acknowledgment of existing right, but amounted to an exchange of property within section 118 of the Transfer of Property Act if it was not a sale, and was invalid for want of a registered instrument. *Per MILLER, J.*—The transaction could not be proved for showing the change of the mortgagee's possession into adverse possession, since the intention to discharge the mortgage involved the intention to make certain transfers, and it could not be said that if those transfers failed, both the parties nevertheless intended to discharge the mortgage. *Per SADASIVA AYYAR, J.*—All transfers by conveyance, if they are not settlements or declarations of trust were intended by the legislature to come within one of the headings 'sale', 'exchange' or 'gift' in the Transfer of Property Act. *Thiruvengada Chariar v. Ranganatha Ayyangar* (1903) 13 M.L.J., 500, dissented from. Price means not only money in current coin, but includes money due on a prior debt, and the words 'price paid' will cover cases where the vendor's claim to the receipt of the price is satisfied by giving him what he accepts as tantamount to such payment. A mortgagee in possession, as such, cannot by merely asserting possession as owner under an invalid sale convert his possession into adverse possession so as to pre-empt for a title under the Limitation Act. *Byari v. Puttanna* (1891) I.L.R., 14 Mad., 38, *Bhagavant Govind v. Kondi valad Mahadu* (1890) I.L.R., 14

Bom., 279. *Ramunni v. Kerala Varma Vahia Raja* (1892) I.L.R. 15 Mad., 166 and *Kairajmal v. Daim* (1905) I.L.R., 32 Calo., 296 (P.C.), applied. A mortgage created by a registered instrument may be proved to have been discharged by admissible evidence (including oral evidence) of payment of the mortgage amount, or by admissible evidence of any other transaction which operates as mode of payment. *Ramavata v. Tulsi Prasad Singh* (1911) 14 C.L.J., 517, *Kattika Bapanamma v. Kattika Kristnamma* (1907) I.L.R., 30 Mad., 231, *Karampalli Unni Kurup v. Thekku Vittel Muthorakutti* (1903) I.L.R., 26 Mad., 195 and *Goseti Subba Row v. Varigopa Narasimham* (1904) I.L.R., 27 Mad., 368, referred to. But oral evidence of an invalid oral conveyance (of which evidence is legally inadmissible) of the equity of redemption in a portion of the mortgaged property in discharge of the mortgage debt is inadmissible.

Ariyaputhira v. Muthukomaraswami ... (1914) I.L.R., 37 Mad., 428

— ss. 85 AND 91—*Mortgage suit—Parties—Non-joinder of attaching money decree-holder—Sale, validity of*.] Where after attachment by a money decree-holder of certain property previously mortgaged by the judgment-debtor, the mortgagee brought a suit on the mortgage, without impleading the attaching decree-holder as a party, obtained a decree for sale, and himself bought the property in execution of his decree. *Held*, that the order for sale and the sale held thereunder were not binding on the attachment decree-holder, and that the latter was entitled to bring the properties to sale under his attachment. An attaching decree-holder has under section 91, Transfer of Property Act, an interest in the mortgaged property entitling him to redeem the mortgage, and is a necessary party in a suit on the mortgage. *Ghulam Hussain v. Dina Nath* (1901) I.L.R., 23 All., 467, referred to.

Venkata Seetharamayya v. Venkataramayya ... (1914) I.L.R., 37 Mad., 418

TRESPASSER, a, to eject, right of lessee after expiry of lease :— See EJECTMENT.

TRUSTEE, Collector's sanction for removal of, given in 1908, good for suit for removal after coming into force of Civil Procedure Code (Act V of 1908) :— See CIVIL PROCEDURE CODE (ACT V OF 1908), sec. 92.

—, possession by person claiming as :— See ADVERSE POSSESSION.

VALUATION :— See MORTGAGE.

VENUE, transfer of, from one court to another after decree :— See JURISDICTION.

WATER, proprietary rights in, discussed :— See (MADRAS) IRRIGATION CESS ACT (VII OF 1865).

WATER RIGHTS :— See EASEMENTS.

—, SURFACE, AND WATER FLOWING IN A DEFINITE CHANNEL, distinction between :— See EASEMENTS.

WIDOW, brother's, not an heir :— See HINDU LAW.

—, surviving, powers exercised by :— See HINDU LAW.

WILL, construction of :— See HINDU LAW.

ZAMINDARS AND RAJAHS, rights of, to waters of rivers passing through their lands :— See (MADRAS) IRRIGATION CESS ACT (VII OF 1865).

ZAMINDARI SALE IN EXECUTION :— Whether entire zamindari or only zamindar's life estates sold—Mixed question of law and fact depending on entire evidence in the case—State of then law as to zamindar's interest therein, not conclusive—Conduct of parties, important evidence.] A question as to whether the entire estate in a zamindari and not only the life interest of the zamindar was sold in execution and bought by the purchaser is a question of mixed law and fact to be determined by the evidence in each case. All that *Abdul Aziz Khan v. Appayasami Naicker* (1904) I.L.R., 27 Mad., 131 at p. 132 (P.C.), decided in reference to the above question was that the state of the law as understood at the time of sale, as to the rights of the zamindar in

regard to the zamindari, was evidence to be considered along with other evidence in the case; it is not alone conclusive on the question. In determining the question of what the Court intended to sell and the purchaser understood he bought, evidence as to how the parties affected by the transaction themselves viewed it at the time is of much greater value than evidence which may be procurable some twenty years after the transaction took place. On the evidence in the case their Lordships held that the sale which took place in 1880 was of the whole zamindari and that the purchaser bought the whole zamindari in execution. *Veerabhadra Aiyar v. Marudaga Nachiar* (1911) I.L.R., 34 Mad., 188, referred to. *Veera Soorappa Nayani v. Errappa Naidu* (1906) I.L.R., 29 Mad., 484 at p. 490, explained.

Alagaraya Gounder v. Ramanuja Naidu ... (1914) I.L.R., 34 Mad., 22

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APPELLATE CIVIL.

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

M. NARASAYYA AND EIGHTY-FIVE OTHERS (DEFENDANTS NOS. 1 TO 8,
10, 12 TO 18, 20 TO 23, 32 TO 48, 52 TO 56, 58 TO 84, 86 TO
88, 92 TO 97, 105 TO 108, 110 AND 114), APPELLANTS IN
APPEAL NO. 197 AND RESPONDENTS IN APPEAL NO. 174),

1910.
March 18,
21 & 24
and April
20 & 26.

v.

UNDE RAJAH RAJA SIR RAJA VELUGOTI SREE RAJA
GOPALA KRISHNA YACHENDRULAVARU BAHADUR,
K.C.I.E., PANCHAHABAR, MANSUBDAR, RAJA OF VENKATAGIRI
(PLAINTIFF), RESPONDENT, IN APPEAL NO. 197 AND
APPELLANT IN APPEAL NO. 174.*

Appeal No. 197 of 1905.

Estates Land Act: (Madras Act I of 1908), ss. 3 (7) and 6—Suit for resumption by a land-holder against ryots—First Court's decree before the Act, in favour of the land-holder—Act coming into force during appeal, effect of—Whether Estates Land Act, sec. 6, retrospective—Final decrees in section 3 (7), meaning of—Amaram tenure, resumable—Right of resumption when Exercisable—Notice to quit—Prescription—No estoppel by receipt of rent—Improvements, when tenant entitled to value of—Transfer of property Act (IV of 1882), ss. 51 and 108 (h).

Appeal No. 174 of 1905.

If a tenant knowing that he has not a permanent occupancy right in the land in his possession makes improvements without any hope or expectation in himself created or encouraged by the landlord, he cannot claim compensation for the value of such improvements. Even if the landlord knew that the tenant was making the improvements under a mistaken belief that he had occupancy rights

* Appeals Nos. 197 and 174 of 1905.

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VENKATAGIRI. in the land and merely kept quiet without interfering there will be no estoppel against the landlord.

Ramsden v. Dyson (1864) L.R. 1 H.L., 129 and *Beni Ram v. Kundan Lal* (1899) I.L.R., 21 All., 408, followed.

Mahdatchmi Ammal v. Palani Chetti (1871) 6 M.H.C.R., 245, doubted.

Section 51 of the Transfer of Property Act will not apply to the case of a tenant as it cannot be said that he is a person believing in good faith that he is "absolutely entitled" to the land. Neither section 108, clause (h) of the Transfer of Property Act, nor the Hindu, Muhammadan, nor Common law of India is applicable to a case where the tenant without removing the fixtures in the one case or the building erected by him in the other case, wants to recover compensation for the improvements effected by him.

Where there has been a periodical raising of the rent due by the tenants, and periodical resumptions of the tenants' lands by the landlords both of which were submitted to by the tenants without any contest, it may be concluded that the tenants have no occupancy rights. Lands held under *Amaram* tenure have generally been held to be resumable.

So far as this Presidency is concerned it would seem to be well settled that a person who has lawfully come into possession as a tenant from year to year or for a term of years cannot by setting up however notoriously during the continuance of such relation, any title adverse to that of the landlord, inconsistent with the legal relation between them, acquire by limitation, title as owner or any other title inconsistent with that under which he was let into possession; *Seshamma Shettati v. Chickaya Hegade* (1902) I.L.R., 25 Mad., 507, followed.

This doctrine is of doubtful applicability in a case where the landlord has shown by an unequivocal act that he intends to exercise his option and determine the tenancy, even though he may not have succeeded in doing so.

Srinivasa Ayyar v. Muthusami Pillai (1901) I.L.R., 24 Mad., 246, referred to.

It is also well established in this Presidency that if after the determination of the tenancy the tenant remains in possession as a trespasser for the statutory period, he will by prescription acquire a right as owner or such limited estate as he might prescribe for.

A receipt of rent, subsequent to a notice to determine the tenancy, is consistent with the case of either party on the question as to the existence of occupancy rights as in any event there would be a liability to pay rent and it is therefore doubtful if such a receipt could be relied on as a waiver of the plaintiff's right to resume.

Held, on the facts of the present case, that there was a determination of the tenancy by a reasonable notice and that there was no assertion of an adverse title for twelve years before the suit so as to entitle the defendants to claim a prescriptive right.

[Where, during the pendency of an appeal filed by the defendants in a suit brought by a zamindar to eject his tenants, the Madras Estates Land Act of

(The views enclosed in rectangular brackets, were also stated but are no longer law as a Full Bench composed of the CHIEF JUSTICE, KRISHNASWAMI AYYAR and AYLING, JJ., decided the contrary in *Kanakayya v. Janaradhana Padhy* (1913) I.L.R., 36 Mad., 439, on 14th November 1910. This case is now reported for the other points decided in the case which are noted above.)

1908 came into force, the tenants, who were ordered by the decree of the First Court to be ejected, cannot take advantage of section 6 of the Act even if that section be assumed to be retrospective, as the ryoti lands in respect of which they claimed permanent occupancy rights, would be "old waste" as defined by section 3, clause (7) of that Act, in respect of which, before the passing of the Act the zamindar had obtained a final decree of a competent Civil Court negating the occupancy right.

The words "Final Decree" occurring in section 8, clause (7) mean "final" with reference to the Court which passes the decree; a decree is none the less final for the purposes of the section because an appeal was pending when the Act came into operation.

Quære: Whether an appeal is a rehearing of the suit within the meaning of the Civil Procedure Code as under the Rules under the English Judicature Act so as to give retrospective effect to a statute passed after the decree of the First Court and during the pendency of the appeal?

Quære: Whether section 6 of the Madras Estates Land Act 1908 is in terms retrospective?

APPEAL against the decree of T. M. SWAMINATHA AYYAR, the District Judge of Nellore, in Original Suit No. 11, of 1901.

The facts of these cases are to be found in the judgment in Appeal No. 197.

The Honourable Mr. P. S. Sivaswami Ayyar the Advocate-General and S. Subrahmanya Ayyar, for the appellant in Appeal No. 174 and respondent in Appeal No. 197.

The Honourable Mr. T. V. Seshagiri Ayyar and T. V. Muthukrishna Ayyar for the appellants in Appeal No. 197 and respondents in Appeal No. 174.

These appeals coming on for hearing and having stood over for consideration the Court delivered the following judgments:—

Appeal No. 197.

This is an appeal by the defendants against a decree obtained by the Raja of Venkatagiri for recovery of possession of a certain village. Mr. Seshagiri Ayyar, on behalf of the appellants, has taken the point that, having regard to the fact that the Madras Estates Land Act, 1908, came into force during the pendency of this appeal, the appeal must be decided with reference to the law as laid down in that enactment. The Advocate-General on behalf of the respondent took the objection that this question could not be raised as it was not made a ground of appeal in the memorandum of appeal. We are of opinion that it is open to Mr. Seshagiri Ayyar to take the point notwithstanding that the question is not raised in his grounds of appeal.

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Mr. Seshagiri Ayyar contended that an appeal being by way of rehearing we should apply the law as it stands at the date of the hearing of the appeal. If we applied that law, he contended, inasmuch as he was, when the Act came into operation, in possession of ryoti land he was entitled to the benefit of the enactment contained in section 6 (1) of the Act, as amended by the Act of 1909. He argued that the land in question was not "old waste" as defined by section 3 of the Act of 1908 since it did not come within the purview of the last paragraph of that section for the reason that as an appeal was pending when the Act came into force there had been at that time no "final decree of a competent Civil Court."

Although we should have expected to find the qualification of the right created by section 6 in the section itself and not in the section which defines "old waste," the intention of the legislature is clear, viz., to prevent a man being deprived of the benefit of a judgment which he had obtained before the Act came into force.

It is to be observed that there is not to be found in the sections of the Code which relate to the powers of an Appellate Court, or in the Rules, any provision which corresponds to Order LVIII, rule 1 of the English rules of the Supreme Court that all appeals shall be by way of rehearing.

In *Kristnama Chariar v. Mangammal*(1) there is an observation by Sir BHASHYAM AYYANGAR, J., that when an appeal is preferred from a decree of a Court of First Instance the suit is continued in the Court of Appeal and reheard either in whole or in part. This observation was with reference to the question of limitation then before the Court. We doubt if it can be relied on as supporting what we understood to be Mr. Seshagiri Ayyar's proposition. His proposition comes to this that under the Code and Rules an appeal is a rehearing of the suit so as to have the effect of rendering a statute retrospective in its effect even though no such effect is to be gathered from the terms of the statute itself.

In *Quilter v. Mapleson*(2), the observation of JESSEL, M. R., that on a rehearing such a judgment may be given as ought to be given if the case came at that time before a Court of First

Instance, was made with reference to the English rule under the Judicature Act that appeals should be by way of rehearing, and the same remark applies to the observation of BOWEN, L. J., in the same case, that if the law had been altered pending an appeal, it would be pressing rules of procedure too far to say that the Court of Appeal could not decide according to the existing state of the law. In *Quilter v. Mapleson*(1) the Court was of opinion that the section in question was in terms retrospective.

We express no opinion as to whether section 6 of the Madras Estates Land Act, 1908, is in terms retrospective. Assuming it is, the retrospective rights created are cut down in a case to which the last paragraph of section 3 (7) applies.

As regards the words "final decree" occurring in this paragraph, we are of opinion that they mean final with reference to the Court which passes the decree and that they are none the less final, for the purpose of the section, because an appeal was pending when the Act came into operation. Section 13 of the Code of 1882, as it seems to us, does not help Mr. Seshagiri Ayyar. For the purpose of the law of *res judicata* explanation 4 says that a decision liable to appeal may be final within the meaning of the section until an appeal is made. The explanation was only for the purposes of the section. Moreover it does not find a place in the Code of 1908.

In *Govinda Parama Guruvu v. Dandasi Pradhanu*(2) the Lower Appellate Court, reversing the decree of the Munsif, dismissed a suit in ejectment on the ground that the defendants had occupancy rights. The Madras Estates Land Act came into operation after the decree of the Lower Appellate Court and before the hearing of the Second Appeal. This Court, whilst doubting whether the Judge was right in holding that the tenants had occupancy rights, was of opinion that section 6, clause (1) of the Madras Estates Land Act I of 1908, as amended by Act IV of 1909, conferred on the defendants a permanent right of occupancy and they dismissed the appeal. The same view would seem to have been taken in *Venkata Gopalarayanam Garu v. Venkatasubbayya*(3). No doubt in *Govinda Parama Guruvu v. Dandasi Pradhanu*(2), it was said that it was

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(1) (1903) I.L.B., 26 Mad., 91 at p. 95 (F. B). (2) (1882) 9 Q.B.D., 672.

(1) (1882) 9 Q.B.D., 672. (2) Second Appeal No. 1158 of 1906.
(3) Second Appeal No. 1592 of 1907.

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immaterial that a decree for possession had been already passed. But the decree there referred to would seem to have been the decree of the Munsif which had been reversed by the Lower Appellate Court. The present case therefore, where there was an existing decree for possession at the time the Second Appeal was heard, is clearly distinguishable.

Assuming section 6 of the Act of 1908 to be retrospective, it does not help the defendants if the land was "old waste" within the meaning of the section. We are of opinion that the land is old waste as defined by section 3 (7) since it is ryoti land in respect of which before the passing of the Act the landholder had obtained a final decree of a competent Civil Court establishing that the ryot has no occupancy right.

The result therefore is, assuming section 6 to be retrospective, the right conferred upon the tenants by the section is cut down by the definition of "old waste" in section 3 (7), and the defendants, in this case, cannot rely upon the section.

The question whether the defendants have a right of permanent occupancy in the lands from which the plaintiff now seeks to eject them came before this Court in the year 1899 on appeal from the Subordinate Judge of Nellore in Original Suit No. 45 of 1897 [*Narasayya v. Venkatagiri Rajah*(1)]. This Court affirming the decree of the Subordinate Judge held against the alleged right of permanent occupancy but dismissed the plaintiff's suit on the ground that the notices to quit which he had given to the defendants were insufficient. The sufficiency of the notices which have been given in the present suit is not contested.

The question of the defendants' alleged right of permanent occupancy has been investigated once again in the present suit by the District Judge of Nellore, the matter not being *res judicata* by reason of the judgment of this Court, and in a very careful and exhaustive judgment he arrives at the same conclusion as that come to by the Subordinate Judge in the suit of 1894 and by this Court in appeal from the decree of that suit. We think this conclusion is right. There is no documentary evidence to show the origin of the defendants' title or to show the terms on which their predecessors in title obtained possession in the first instance or continued in possession after 1802, the date

(1) (1890) I.L.R., 23 Mad., 262.

of Lord Clive's letter when the defendants' ancestors were relieved from the obligation of rendering military service. It is not disputed that the village in question forms part of the Venkatagiri Zamindari, of which the plaintiff is the proprietor. On the other hand, the defendants and their ancestors have been in possession, with intervals during which the lands were resumed by the plaintiff's predecessors, for some 200 years. The defendants made some attempt to prove that their ancestors got into possession under grants from the plaintiff's predecessors, but we think the District Judge was perfectly right in disbelieving the evidence tendered by the defendants in support of these alleged grants. The case made by the plaintiff in his plaint is that the defendants were "allowed to continue" in possession after 1802. There is a good deal of evidence to show that the defendants and their ancestors were described as *amaramilars* and although the precise nature of an *amaram* tenure is by no means clear, it seems to have been generally assumed that lands held on *amaram* tenure are resumable—see Wilson's Glossary, page 21 and *Unide Rajaha Raje Bommarauze Bahadur v. Pemmasamy Venkatadry Naidoo*(1). We think it is clear, in fact it was not seriously contested, that the lands were resumable in 1802. See *Sitaramarazu v. Ramachandrarazu*(2), *Sanniyasi v. Salur Zamindar*(3), *Mahadevi v. Vikrama*(4) and *Radha Pershad Singh v. Budhu Dashad*(5).

The fact would seem to have been that after 1802, the defendants' ancestors were allowed to continue in possession on payment of rent, and the defendants' ancestors and the defendants, with some intervals during which the plaintiff and his predecessors resumed possession, have been in possession until now.

Two points tell against the right of permanent occupancy claimed by the defendants. The plaintiff's ancestors have from time to time raised the *jodi*, or rent, and there is no evidence to show the defendants disputed their right to do so. This is not conclusive (see *Rajah of Parlakimidy v. Gandahattikota Gajendra Ramachendra Bisaye*(6), but it is some evidence against the

(1) (1858) 7 M.I.A., 128 at pp. 135 and 140.

(2) (1881) I.L.R., 8 Mad., 367.

(3) (1884) I.L.R., 7 Mad., 266.

(4) (1891) I.L.R., 14 Mad., 365.

(5) (1895) I.L.R., 22 Cal., 988.

(6) Appeal No. 43 of 1908.

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right of permanent occupancy claimed by the defendants. The other fact is that the plaintiff's ancestors resumed possession of the lands from 1835 to 1849 and again from 1876 to 1882. As regards the period 1835 to 1849, there is no evidence that the defendants contested the plaintiff's right to resume. As regards the period 1876 to 1882, there is some evidence though of a very unsatisfactory character that the defendants denied the right.

We think the present case is governed by the decision of the Privy Council in *Unide Rajaha Raje Bommarauze Bahadur v. Pemmasamy Venkatadry Naidoo*(1), where the lands in question formed part of the Zamindary of Karvetnagar in Madras and were held on *amaram* tenure and where the letter of Lord Clive of 1802, to which reference was made, relieving the Zamindar from military services, had been sent to the Zamindar. In that case, their Lordships observe "It is a possible case, looking at the extensive powers with which the Zamindar is invested, that the grant being originally "*amaram*," and resumable, might, when the military service was dispensed with, and circumstances had changed, been converted into a perpetual grant upon a fixed payment. Had this been the case, it ought to have been distinctly pleaded, and the grants themselves, if produced, would have shown whether such defence could be supported."

In the present case the defendants do not plead a grant in 1802 though they allege that the Zamindar (paragraph No. 8 of the written statement) "entered into arrangements with the defendants' ancestors by which the *jodi* payable by them was slightly increased and permanently fixed and the defendants' ancestors were, thereafter, to be in possession of their village as their absolute property with all powers of alienation." There is no evidence to support this allegation of an "arrangement" having been come to in 1802. We think *Forbes v. Meer Mahomed Tuquee*(2), where the defendants were able to prove a grant *pro servitiis impensis et impendendis*, services which though obsolete might again be required to be performed, is clearly distinguishable from the present case.

We are of opinion that the plaintiff has, apart from the question of limitation, established his right to resume the lands in question on giving reasonable notice to the defendants.

(1) (1859) 7 M.I.A., 128 at pp. 135 and 140. (2) (1870) 13 M.I.A., 438.

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The question of limitation is, in our opinion, one of greater difficulty. Though the rent has been raised from time to time, it has been uniform since 1876 and has been paid up to a short time before the institution of the suit.

The defendants were out of possession from 1876 to 1882, during which period the plaintiff had resumed possession and himself collected the rent direct from the ryots. In 1882, the defendants got back into possession. The defendants' case is that by twelve years possession they have acquired a prescriptive title to a permanent right of occupancy subject to the payment of the rent fixed in 1876 and regularly paid by them since they got back into possession in 1882.

So far as this Presidency is concerned, it would seem to be well settled that a person who has lawfully come into possession as tenant from year to year or a term of years cannot by setting up, however notoriously, during the continuance of such relation, any title adverse to that of the landlord inconsistent with the legal relation between them, acquire, by limitation, title as owner or any other title inconsistent with that under which he was let into possession;—*Seshamma Shettati v. Chickaya Hegade*(1). But "if after the determination of the tenancy, the tenant remains in possession as trespasser for the statutory period, he will, by prescription, acquire a right as owner or such limited estate as he might prescribe for;"—see *Seshamma Shettati v. Chickaya Hegade*(1). In *Parameswaram Mumbannoo v. Krishnan Tengel*(2), the adverse possession was held to have commenced after the former tenancy had been determined and the plea of limitation was upheld.

The doctrine enunciated in these two cases, as we have said, would seem to be well established in this Presidency and to be consistent with the law of England. In *Archbold v. Scully*(3), the House of Lords held it was not within the power of a tenant by any act of his own to alter the relation in which he stands to his landlord. Lord WENSLEYDALE cites the observations of Lord REDESDALE in an earlier case [*Saunders v. Annesley*(4)]. "I take it to be that whenever a person comes to the possession either by judgment of law or his own agreement, and holds that

(1) (1902) I.L.R., 25 Mad., 507.

(2) (1903) I.L.R., 26 Mad., 535.

(3) (1861) 11 E.R., 769 at p. 776.

(4) 2 Sch. and Lef., 98.

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possession, he and all who claim under him must hold it according to his right to the possession, and cannot qualify it by any other right." A disclaimer of the lessor's title by the lessee may be a ground of forfeiture, but it does not in itself make the statute of limitations run against the lessor. See Lightwood's Time Limit on Actions, page 107, citing *Archbold v. Scully*(1). We do not find that the doctrine has been formulated in the other High Courts in India. In fact in Calcutta and Bombay, the view would seem to be that the assertion of the adverse right coupled with possession for the statutory period is enough. In *Vithalbowa v. Nārāyan Dāji Thite*(2), the view taken was that the assertion of a permanent right of occupancy during the subsistence of a *tenancy at will* would bring the law of limitation into operation and in *Thakore Fatesingji v. Bamanji A. Dalal*(3), it was held by BATTY, J., that a tenant in India is not precluded by an admission of tenancy from showing that the nature of the tenancy asserted by him to the knowledge of the landlord has been for the prescribed period *pro tanto* adverse to the right of the landlord to evict. *Gopalrao v. Mahadevrao*(4), and *Budesab v. Hanmanta*(5), would appear to have been decided on the ground that the assertion of the adverse right coupled with the possession for the statutory period was sufficient independently of the question whether when the right was asserted, the relation of landlord and tenant subsisted or not. In *Drobomoyi Gupta v. C. T. Davis*(6), the plea of limitation was upheld on the ground that the landlord was aware that the tenants were claiming to hold with rights of permanent occupancy, and in *Icharan Sing v. Nilmoney Balidar*(7), it was held that a person could plead tenancy, and, in the alternative, a prescriptive title by adverse possession of a limited interest.

The decision of the Privy Council in *Beni Pershad Koeri v. Dudnath Roy*(8), where it was held that a notice by a tenant for life that he claimed perpetual right of occupancy did not make his possession adverse, would seem to have proceeded on

(1) (1861) 11 E.R., 769 at p. 776.

(3) (1908) I.L.R., 27 Bom., 515.

(5) (1897) I.L.R., 21 Bom. 509.

(7) (1908) I.L.R., 35 Calc., 470.

(2) (1894) I.L.R., 18 Bom., 507.

(4) (1897) I.L.R., 21 Bom., 394.

(6) (1887) I.L.R., 14 Calc., 323.

(8) (1900) I.L.R., 27 Calc., 156 (P.C.).

the ground that when the adverse right was set up, the landlord could not sue for possession.

We feel some doubt as to whether we ought to apply the doctrine enunciated in *Seshamma Shettiati v. Chickaya Hegade*(1), in a case where the landlord has shown by an unequivocal act that he intends to exercise his option and determine the tenancy [see *Srinivasa Ayyar v. Muthusami Pillai*(2)], even though he may not have succeeded in doing so. In such a case it seems to us that it might well be held that the landlord could not be heard to say that there is a subsisting tenancy which prevents the acquisition of a limited title under the law of limitation. The landlord is not bound to exercise his option and repudiate the tenancy, but if he does, even though he does not succeed in evicting the parties in possession, we doubt whether he should be allowed to set up a subsisting tenancy as a ground for preventing the acquisition by prescription of a limited interest.

In the present case a notice to quit was given in 1884, and the Judge was of opinion that this notice was not reasonable, but it would seem to have been a six months' notice (see Exhibit VI) and that efforts were made to serve it (see Exhibits VI-A and VI-B).

There is no evidence as to what was done under this notice but the Judge seems to have been of opinion it was not a reasonable notice. We doubt if the subsequent receipt of rent by the landlord could be relied on as waiver of the notice since it was equally consistent with the defendants' claim that they had permanent rights of occupancy (they have never denied their liability to pay rent) as with the plaintiff's claim that the lands were resumable. In this state of things we should be inclined to hold that the plea of limitation was made out if there was satisfactory evidence of the assertion of an adverse title by the defendants when they got back into possession in 1882. The evidence of the fifty-second defendant that the Tahsildar had been told in 1876 that the Raja had no power to resume possession of the village since it had been granted permanently cannot be relied on, since this witness denied the fact of resumption in 1876, which is now admitted. Further this evidence, even if true, would not help the defendants since they would appear to

(1) (1902) I.L.R., 25 Mad., 507.

(2) (1901) I.L.R., 24 Mad., 248.

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have done nothing to resist the resumption in 1876, though there is some evidence that the Zamindar had executed *pattas* to the defendants from 1876 to 1882 and that they refused to receive the *pattas* and execute *muchilikas*—see the evidence of the plaintiff's fourth witness, the *karnam* of the village in cross examination. The defendants got back in 1882. Assuming they got back without the permission of the plaintiff and he accepted the situation and continued to receive the rent at the rate fixed in 1876, there is nothing to show that they got back under the assertion of the adverse right which they set up in the suit of 1894. The rent was paid and received as before and there is nothing to show that the landlord accepted the rent as payable by them as tenants from year to year or that they paid the rent as an incident of their permanent tenure. In the absence of evidence to show an assertion of an adverse title twelve years before the suit, we must hold that the plea of limitation is not made out.

We think the District Judge was right and that this appeal should be dismissed with costs.

Appeal No. 174.

WHITE, C.J. THE CHIEF JUSTICE.—This is an appeal by the plaintiff against so much of the decree in ejectment obtained by him as directs the payment of compensation to certain of the defendants. In cases to which the Transfer of Property Act applies the rights of the tenant are defined by section 108 (h) of that enactment and the extent of the right is the same in cases not governed by the Act. See *Ismail Khan Mahomed v. Jaigun Bibi*(1). I do not think section 51 of the Act applies in terms as between landlord and tenant. The observations in *Ismail Kani Rowthan v. Nazarali Sahib*(2), may be said to indicate a contrary view but these observations are very guarded, and they are moreover *obiter*. Even if the section applied, I do not see how, in this case, it could be said the defendants believed in good faith they were "absolutely entitled" to the property in question. There have been at least two resumptions of the property by the Zamindar. There is no trustworthy evidence that these resumptions were resisted by the defendants. There

(1) (1900) I.L.R., 27 Cal., 570. (2) (1904) I.L.R., 27 Mad., 211 at p. 221.

have been enhancements of rent and there is nothing to show those enhancements were not accepted without protest. Both under the Hindu and the Mahomedan law as well as under the common law of India, a tenant who erects a building on land let to him can only remove the building and cannot claim compensation on eviction; *Ismail Kani Rowthan v. Nazarali Sahib*(1).

The further question is, do the facts of this case bring it within any principle of equity which entitles the defendants to say, 'if we are evicted, we must be paid compensation'? At the highest the evidence shows the plaintiff knew the improvements were being effected and did not interfere. This is clearly not enough to estop the plaintiff in a suit for possession [see *Beni Ram v. Kundan Lal*(2)], and in my opinion it is not enough to give the defendants a right to compensation. In fact, I should be disposed to hold, if there is no express contract, unless the lessor is estopped from suing for possession the lessee cannot claim compensation. If the lessor is estopped from recovering possession the Court can say—you are estopped but we will not enforce this equity against you if you pay the tenant such compensation as we think fair.

There are however no doubt cases in which courts in this country have granted compensation on what I may call general equitable grounds, without considering the question whether the facts gave rise to an estoppel against the lessor which would disentitle him from suing to recover possession. Assuming a right to compensation may arise in a case in which the lessor is not estopped from recovering possession, I am of opinion, on the facts, there is no such right in this case.

The learned Judge in the Court below relied on *Dattatraya Rayaji v. Shridhar Narayan*(3). In that case compensation was awarded to the tenant, the Court being of opinion that the facts brought the case within the principle of the decision in *Ramsden v. Dyson*(4), but there were special circumstances in that case from which the Court was able to draw the inference that the plaintiff by his conduct afforded hope and encouragement to the defendant that he would be allowed to remain in peaceable possession or at least would not be ejected without a reasonable return for the expenditure incurred by him.

(1) (1904) I.L.R., 27 Mad., 211 at p. 221. (2) (1899) I.L.R., 21 All., 496 (P.C.).
(3) (1892) I.L.R., 17 Bom., 786. (4) (1864) L.R., 1 H.L., 129 at p. 171.

NARASAYYA *Mahálatchmi Ammal v. Palani Chetti*(1), is no doubt an authority in the defendants' favour but with all respect, I doubt if this decision is good law. See the observations in *Ismail White, C.J. Kani Rowthan v. Nasarali Sahib*(2).

Even accepting the principle laid down in *Nundo Kumar Naskar v. Banomali Gayan*(3), in my opinion the facts of this case do not come within the principle there stated.

In *Municipal Corporation of Bombay v. Secretary of State*(4), the Court held, on the facts, that the defendants acted on a belief which was referable to an expectation created by Government that their enjoyment of the land would be in accordance with that belief and that the Government knew that the defendants were acting in this belief so created. In this view of the facts the Court held the defendants were entitled to the benefit of the dictum formulated by Lord KINGSDOWN in *Ramsden v. Dyson*(5).

In *Ramsden v. Dyson*(5), the House of Lords held against the alleged equitable rights set up by the defendant, Lord KINGSDOWN dissenting from Lord CRANWORTH, Lord WENSLEYDALE and Lord WESTBURY. There is nothing, however, so far as I can see, in the judgments of these learned Lords which is inconsistent with Lord KINGSDOWN's proposition. The proposition is this: "If a man, under a verbal agreement with a landlord for a certain interest in land, or, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation." I do not think the facts of the present case bring the case within Lord KINGSDOWN's dictum. In my opinion the evidence does not show that there has been a hope or expectation in the tenant which was created or encouraged by the landlord.

I think this appeal should be allowed with costs.

ABDUR RAHIM, J.

ABDUR RAHIM, J.—I agree that this appeal should be allowed as I have no doubt that in the circumstances referred to by the

(1) (1871) 6 M.H.C.R., 245.

(2) (1904) I.L.R., 27 Mad., 211 at p. 221.

(3) (1902) I.L.R., 29 Calc., 871 at p. 884. (4) (1905) I.L.R., 29 Bom., 580.

(5) (1864) L.R., 1 H.L., 129 at pp. 141 and 170.

learned Chief Justice the tenants could not have believed in good faith when they dug the wells in the land that they had a permanent right to the land or that the landlord would grant them such a right. If they had acted under such belief they would have been entitled to insist that they should not be ejected at all or that if ejected compensation should be paid to them for the improvements which they had effected under such belief provided they proved that they made the improvements in circumstances which would induce a Court of Equity to imply a contract between them and the landlord that the landlord would not eject them or in case he ejected them that he would pay them the value of the improvements. The court would infer such a contract if the landlord by his conduct encouraged or raised an expectation in the tenant spending money in making improvements that the latter would not be evicted at all or at least not without being compensated for the value of such improvements and the improvements were in fact made under such expectations. Such a contract is inferred in order to relieve the tenant from the fraud of the landlord. This I take it is the extent to which the doctrine of equitable estoppel is well established; *Ramsden v. Dyson*(1), *Beni Ram v. Kundan Lal*(2) and *Municipal Corporation of Bombay v. Secretary of State*(3). We are not called upon to decide in this case having regard to its undoubted facts the question whether if the tenants believed that they had a permanent right to the land and in such belief, but without that belief being created or actively encouraged by the landlord, made the improvements to the knowledge of the landlord and without any warning or interference by him, they could be ejected at all or whether in any case the landlord should not pay them the value of improvements. The opinions delivered by the learned Lords in *Ramsden v. Dyson*(1) especially that of the Lord Chancellor, Lord CRANWORTH, make it clear that in cases of this nature the Court of Equity would raise an equitable estoppel against the owner of the land less readily in a case where the tenant makes permanent improvements on the land than where a stranger makes similar improvements. And the grounds for such a distinction are obvious. The tenant making permanent

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(1) (1864) L.R., 1 H.L., 129 at pp. 141 and 170.

(2) (1899) I.L.R., 21 All., 496 (P.C.). (3) (1905) I.L.R., 29 Bom., 580.

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improvements might well have relied on the honour of the landlord not to evict him so long as the rent was regularly paid. While ordinarily a similar interpretation could hardly be placed on the conduct of a stranger in spending his money upon another's land. And I do not think the doctrine of equitable estoppel has been or should be extended as between a landlord and his tenant to a case where all that can be alleged against the former is that he did not interfere and merely remained passive with the knowledge that the tenant was making improvements under a mistaken belief that he had a more stable interest in the land than that of a tenant at will or of a tenant from year to year. This is what I gather from what is laid down in *Beni Ram v. Kundan Lal*(1), *Ismail Khan Mahomed v. Jaigun Bibi*(2), *Ismail Kani Routhan v. Nazarali Sahib*(3), *Dattatraya Rayaji v. Shridhar Narayan*(4) and *Municipal Corporation of Bombay v. Secretary of State*(5). The contrary view which is supported by *Mahálatchmi Ammal v. Palani Chetti*(6) and a dictum of the learned Judges in *Nundo Kumar Naskar v. Banomali Gayan*(7), seems to be against the weight of authority. The tenant should know under what terms he has been let into possession and the law lays no duty upon the landlord to remind his tenant of his title under which he holds the land. So far as the present case is concerned, *Beni Ram v. Kundan Lal* (1) and *Ramsden v. Dyson* (8) clearly lay down the principle from which it follows that if a tenant knowing the extent of his interest in the land in his possession, as is the case here, chooses to expend money upon a title which he must know would soon come to an end that is his own folly and he cannot ask the owner of the land to recoup him for such expenditure. It has been suggested that unless the lessor is estopped from suing for possession the tenant would not be entitled to claim compensation. I am not prepared without the question being argued at the bar to give my adherence to it. Such a proposition was not advanced during argument and it seems to me that there may be cases where the landlord would not be estopped from recovering possession but only estopped

(1) (1899) I.L.R., 21 All., 496 at p. 502 (P.C.).

(2) (1900) I.L.R., 27 Calc., 570 at p. 583. (3) (1900) I.L.R., 27 Mad., 211.

(4) (1898) I.L.R., 17 Bom., 736 at p. 741. (5) (1905) I.L.R., 29 Bom., 580.

(6) (1871) 6 M.H.C.R., 245. (7) (1902) I.L.R., 29 Calc., 871 at p. 884.

(8) (1864) L.R., 1 H.L., 129.

from recovering possession without paying for the improvements effected by the tenant. I may mention that there is a class of cases in which the court has refused to grant a mandatory injunction for the removal of permanent buildings erected on his holding by a ryot having a right of occupancy, if the landlord has been guilty of laches or delay in bringing his action. But those cases stand on a different principle. As regards section 108 of the Transfer of Property Act—that only deals with the right of the tenant to remove the fixtures he has planted in the land and section 51 of the same Act apparently applies only to the case of a transferee of an absolute right in land. Nor are we concerned in this case with the right under the Hindu or Muhammadan law of a tenant or a trespasser to remove buildings or the structures erected by such a person.

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APPELLATE CIVIL—FULL BENCH.

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

Re THE DISTRICT MUNSIF OF TIRUVALLUR (REFERRING
OFFICER). *

1911.
January 6
and 9.
March 20.

*Civil Procedure Code (Act XIV of 1882), sec. 269, rule framed under—
Binding until rules made under new Civil Procedure Code—Bond given
under rules, deemed to be given by Order of Court, stamp of—"Otherwise
provided for by the Court Fees Act"—Court Fees Act (VII of 1870), sch. II,
art. 6—Stamp Act (II of 1899), sch. I, art. 15.*

Until rules are framed by the High Court under the new Civil Procedure Code (Act V of 1908), the rules made by Government under section 269 of the old Civil Procedure Code (Act XIV of 1882) are in force, though they may be inconsistent with Order XXI, rule 43, of the first schedule to the new Civil Procedure Code.

A bond given in pursuance of the rules made under power conferred by a section of the Code must be deemed to be given in pursuance of an order made by a Court under a section of Civil Procedure Code and is consequently "otherwise provided for by the Court Fees Act" (see schedule II, article 6, Court Fees Act VII of 1870, and schedule I, article 15, of the Indian Stamp Act II of 1899. The stamp is an eight-anna stamp under the Court Fees Act.

* Referred Case No. 14 of 1910.

Re CASE stated under section 60 of the Indian Stamp Act (II of 1899) by S. RANGANADHA MUDALIYAR, the District Munsif of Tiruvallur, in his letter, dated 27th October 1910.

"The document was executed by the second defendant in Original Suit No. 38 of 1901 on the file of the District Court, Chingleput, and two sureties in favour of that Court under rule 7, page 31 of the Civil Courts' Guide, for the production, when called for, of the attached movables left in their custody by an *Amin* of this Court. The warrant was sent to this Court for execution and was entrusted by my Deputy Nazir to the *Amin*. After attachment he obtained this bond as usual in this Court on a one-rupee stamp paper (general), being the *ad valorem* stamp on the value of the attached cattle. When the same was forwarded to the District Court it was returned to this Court with an order that a fresh bond should be taken on a paper with eight-anna court-fee label attached to it as required by article 6, schedule II, of the Court Fees Act. I submitted that the bond was correctly stamped under article 57, schedule I of Act II of 1899, and that the Court Fees Act was not applicable. Thereupon a further proceeding was received with the bond requiring a fresh bond and a direction that the practice of this Court should be corrected. . . . As I held judicially elsewhere when such bond was sought to be enforced that bonds of this character should bear *ad valorem* general stamp and not eight-anna court-fee label and as the different opinion of the District Judge has thrown doubt on the correctness of my view, I beg to refer the question for the decision of the High Court.

Rule 7 of the Civil Courts' Guide was framed under section 269 of the old Civil Procedure Code. It will be treated as framed under the present sections 122 and 128 (b). It will therefore be enforceable by execution process under section 145, but it has to be determined whether the document is one excluded from the purview of Act II of 1899. Article 15 of that Act provides for 'Bond [as defined by section 2 (5)] not being a debenture (No. 27) and not being otherwise provided for by this Act or by the Court Fees Act (VII of 1870).' Among the bonds for which special provision is made are 'Indemnity bonds' (34) and Security bonds (57). The Court Fees Act provides for 'Bail bond or other instrument of obligation in pursuance of an order made by a Court or Magistrate

Re under any section of the Code of Criminal Procedure, 1882, or the Code of Civil Procedure.' An order to attach implied an order to obtain security bond as per rules framed under proper authority but it may be a question whether such an instrument should be described as executed 'under any section of the Civil Procedure Code.' Assuming however that it was so I am of opinion that the bond in question does not wholly fall under this article and requires to be stamped under the Stamp Act. Under rule 7 of the Civil Courts' Guide (p. 31) cattle may be left in the charge of a judgment-debtor if he 'enters into a bond in the form given in schedule A appended to these rules with one or more sufficient sureties for its production when called for.' The second defendant was therefore the principal and his two co-executants were his sureties. Section 19, clause XV of the Court Fees Act exempts from Court Fees 'Bail bonds in criminal cases, recognizances to prosecute or give evidence and recognizances for personal appearance or otherwise.' Even if an undertaking to produce the person of another be exempt, an undertaking to produce material objects, documents and so forth would perhaps not be exempt.

Article 57 of the Stamp Act provides for duty on security bonds or mortgage deeds 'executed by way of security for the due execution of an office or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract.' The executants of the bond may in certain cases be deemed officers in custody of the attached properties (compare Order XXI, rule 43) but if not there was certainly a contract and the sureties who joined in the execution of the bond were expressly required as such to join in it and in so far as their obligation is concerned they fall under that article. It will be observed that there is no proviso in this article that payments under the Court Fees Act exempted them from liability under this article. The principle in *Kulwanta v. Mahabir Prasad*(1) and *Soonjharee Koonwar v. Ramessur Pandey*(2), would therefore be applicable. In this connection the case of the obligation being charged on immovable property may also be referred to. Such instruments are treated as mortgages even though executed under the Civil

(1) (1889) I.L.R., 11 All., 16 (F.B.).

(2) (1866) 5 W.R., Mss., 47.

Re Procedure Code. The Board of Revenue has also ruled to the same effect (*vide* Resolution No. 227, dated 9th September 1899; Registration Circular No. 11, dated 23rd September 1899). And instruments of that nature are not registered by the registering officers unless they are stamped as mortgages. The Legislature did not amend article 57 or 34 even when they thought fit to do so in regard to article 15, Stamp Act and article 16, schedule II, of the Court Fees Act. I am therefore of opinion that security bonds by sureties to see to the production by the decree-holder, judgment-debtor or claimant, as the case may be, of attached movables entrusted to the former are chargeable under article 57 and that they are not liable under the Court Fees Act. In this connection I may also refer to certain other cases under the Civil Procedure Code where the taking of security may be ordered, *e.g.*, where there is an attachment of arrest before judgment (Order XXXVIII, rules 1 and 5) or for costs (Order XXV, rule 1 and Order XLV, rule 7), where execution or stay thereof is ordered (Order XLI, rules 5 and 6 and Order XXI, rule 26), where money is paid out to a guardian of a minor entitled to it (Order XXXII, rule 6) and where an arrested judgment-debtor desires to file an insolvent application (section 55). In most of these cases security on the movable property is demanded and registered bonds are filed bearing *ad valorem* general stamp."

The Government Pleader for the referring officer.

WHITE, C.J. THE CHIEF JUSTICE.—In this matter a point was raised by the Government Pleader as to whether the rules, in connection with which this reference arises, have now any legal effect.

The power given to the Local Government by section 269 of the old Code to make rules for the maintenance of attached livestock is now given to the High Court by section 128 (2) (b). Order XXI, rule 43, reproduces the old section 269, but it does not reproduce the provision requiring the officer attaching the property to act in accordance with the rules notwithstanding they may be inconsistent with the provisions of the section. Section 157 of the Code of 1908 keeps alive the rules, etc., made under the old Code so far as they are consistent with the Code of 1908. There is nothing in the Code of 1908, as distinguished from the orders in the first schedule to the Code, which is

inconsistent with the rules issued under section 269, though there is an inconsistency between the rules and Order XXI, rule 43. But the High Court has power to alter the rules in the first schedule. This being so, I do not think it follows that, because the rules made under the old section are inconsistent with the rules in the schedule, they are not consistent with this Code within the meaning of section 157.

The point is not free from doubt, but until rules are made by the High Court, I think the rules made by Government under section 269 of the old Code are in force.

Section 157 is an enabling, not a repealing, section. The rules have never been expressly repealed and I do not think we are bound to hold they are implicitly repealed by virtue of the words "so far as they are consistent with this Code," which occur in section 157.

As regards the question raised in the letter of reference, as the bond is given in pursuance of a rule made under power conferred by a section of the Code, I think the bond may be said to be given in pursuance of an order made by a Court under a section of the Code of Civil Procedure, that consequently the bond is "otherwise provided for by the Court Fees Act" (see schedule II, article 6, Court Fees Act, 1870 and schedule I, article 15 of the Indian Stamp Act, 1899), and that the stamp is an eight-anna stamp under the Court Fees Act.

MUNRO, J.—I agree.

SANKARAN NAIR, J.—I agree.

Re THE DISTRICT
MUNICIPALITY OF
TIRUVALLUR.
WHITE, C.J.

MUNRO, J.
SANKARAN
NAIR, J.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Chief Justice, and
Mr. Justice Phillips.

1911.
August 17
and 21.

VIRUTHUROYAR MECHE VEERAPATTAM UGNIPARIYA-
DAYA VELLAVATTU TIRUMALA RAGURAMA IMMUDI.
KANAHARA RAMAYA ALAGARAYA GOUNDER
(PLAINTIFF), APPELLANT,

v.

RAMANUJA NAIDU AND SEVEN OTHERS (DEFENDANTS NOS. 1, 3,
4, 6 AND 7 AND LEGAL REPRESENTATIVES OF DEFENDANTS
NOS. 1 AND 3), RESPONDENTS.*

Zamindari sale in execution—Whether entire zamindari or only zamindar's life-estate sold—Mixed question of law and fact depending on entire evidence in the case—State of then law as to zamindar's interest therein, not conclusive—Conduct of parties, important evidence.

A question as to whether the entire estate in a zamindari and not only the life interest of the zamindar was sold in execution and bought by the purchaser is a question of mixed law and fact to be determined by the evidence in each case.

All that *Abdul Aziz Khan v. Appayasami Naicker* [(1904) I.L.R., 27 Mad., 131 at p. 142 (P.C.)], decided in reference to the above question was that the state of the law as understood at the time of sale, as to the rights of the zamindar in regard to the zamindari, was to be considered along with other evidence in the case; it is not alone conclusive on the question.

In determining the question of what the Court intended to sell and the purchaser understood he bought, evidence as to how the parties affected by the transaction themselves viewed it at the time is of much greater value than evidence which may be procurable some twenty years after the transaction took place. On the evidence in the case their Lordships held that the sale which took place in 1880 was of the whole zamindari and that the purchaser bought the whole zamindari in execution.

Veerabadra Aiyar v. Marudaga Nachiar [(1911) I.L.R., 34 Mad., 183], referred to.

Veera Soorappa Nayani v. Errappa Naidu [(1906) I.L.R., 29 Mad., 484 at p. 490], explained.

APPEAL against the decree of V. SWAMINADHA AYYAR, the Subordinate Judge of Madura (West), in Original Suit No. 40 of 1904.

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

S. Srinivasa Ayyangar for the appellant.

* Appeal No. 120 of 1905.

T. Rangachariar and C. S. Venkatachariar for the respondents
Nos. 6 and 7.

JUDGMENT.—Two points were raised on appeal: (1) That the Subordinate Judge was wrong in holding that the claim in the present suit was not *res judicata*; (2) that he was wrong in holding that the entire estate in the zamindari and not only the life interest of the zamindar was sold in execution and purchased by the first defendant.

We think the Subordinate Judge was right in holding that the whole estate was sold. This being so, it is not necessary for us to discuss the question of *res judicata*.

As regards the second point the question is what did the Court intend to sell and what did the purchaser understand that he bought. This is a question of mixed law and fact and must be determined by the evidence in the particular case.

It is true that when the sale in execution took place it was the accepted law in Madras that the holder of an impartible zamindari could not encumber the *corpus* of the estate so as to bind his co-parceners.—see *Abdul Aziz Khan v. Appayasami Naicker* (1). Mr. Srinivasa Ayyangar relied strongly on the statement in the judgment of the Privy Council in this case that the parties must be taken to be bound by the law as it was understood when the sale took place. If by this statement is meant that the state of the law as it was understood at the time is conclusive on the question, the observation is inconsistent with other decisions of the Privy Council to which reference is made in the judgment and with earlier passages in the judgment. The cases are alluded to in the judgment in *Veerabadra Aiyar v. Marudaga Nachiar* (2). We think all that their Lordships meant by this passage was that the state of the law as understood at the time was evidence to be considered with the other evidence in the particular case in determining what the Court intended to sell and what the purchaser understood that he bought.

We do not think that the Judges in stating in their judgment in *Veera Soorappa Nayani v. Errappa Naidu* (3), where it was held that the full proprietary interest passed by the sale, that

(1) (1904) I.L.R., 27 Mad., 131 at p. 142 (P.C.). (2) (1911) I.L.R., 34 Mad., 183
(3) (1906) I.L.R., 29 Mad., 484 at p. 490.

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the sale in that case took place after the decision of the Privy Council in *Muttyan v. Zamindar of Sivagiri* (1), intended to imply that, if the sale under consideration had taken place before the decision of the Privy Council in that case, they would necessarily have held that something less than the full proprietary interest passed by the sale.

We think the Subordinate Judge applied the right test in determining whether the whole estate, or only a life-estate, was sold, and we certainly not prepared to say he was wrong in holding that the whole estate passed.

In determining the question of what the Court intended to sell and the purchaser understood he bought, evidence as to how the parties affected by the transaction themselves viewed it at the time is of much greater value than evidence which may be procurable some twenty years after the transaction took place.

In an application made in November 1883 (Exhibit IX) the plaintiff's elder brother asked that his interest in the estate should not be sold on the ground amongst others that the debt sued for was incurred for immoral purposes. It was not suggested that the whole of the zamindari was not liable to be sold. In fact the application was made upon the footing that the whole estate was liable to be sold. The other evidence is fully dealt with by the learned Judge and we need not discuss it.

Then we have the judgment of the Privy Council in the suit brought by the plaintiff's elder brother in 1882. Their Lordships observe that on the document before them "they must come to the conclusion that the thing professed and intended to be sold and actually sold was not the father's share but the whole interest in the zamindari itself." Except certain oral evidence which the Subordinate Judge did not believe the materials for determining this question are the same as were before the Privy Council in 1888. We express no opinion as to whether this judgment of the Privy Council operated as *res judicata*; but the fact that, on this mixed question of law and fact the Privy Council came to the conclusion at which they arrived at necessarily carries great weight. Mr. Srinivasa

(1) (1888) I.L.R., 6 Mad., 1 (P.C.).

Ayyangar has urged that the Privy Council had no occasion to consider and did not consider how the law was then understood with regard to the power of the holder of an impartible zamindari to encumber the *corpus* of the estate. We are not called upon to assume that the Privy Council did not take this into consideration. Assuming they did not, we are certainly not prepared to say that, if they had, their decision would have been that only a life-estate was sold.

We think the Subordinate Judge was right and we dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Spencer.

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

1911.
August
15, 16 and 22

v.

SAMINATHA KOWNDEN AND ANOTHER (PLAINTIFF AND FIRST
DEFENDANT), RESPONDENTS.*

Appeal, right of, when decree does not adversely affect appellant—Res judicata.

No appeal will lie from a decree which does not itself in some way or other adversely affect the appellant.

The fact that in the judgment there is an adverse finding on a point not directly or substantially in issue between the parties will not give a party a right to contest such a finding where the decree is entirely in his favour and does not necessarily imply that finding.

The finding would not act as *res judicata* as regards such point.

Quære: Whether an appeal would lie even if the matter were *res judicata*?

SECOND APPEAL against the decree of T. V. ANANTHAN NAYAR, the Subordinate Judge of Kumbakonam, in Appeal No. 1052 of 1905, presented against the decree of G. KOTHANDA RAMANJULU NAYUDU, the District Munsif of Kumbakonam, in Original Suit No. 313 of 1903.

The facts of this case are stated in the judgment.

The Honourable Mr. P. S. Sivasami Ayyar the Advocate-General for the appellant.

* Second Appeal No. 705 of 1907.

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S. Srinivasa Ayyangar and T. V. Gopalaswami Mudaliyar for the second respondent.

JUDGMENT.—This appeal arises out of a dispute as to fishery rights in two channels in the Tanjore district, claimed by the first defendant, the head of the Teruppanandal Mutt. The plaintiff was a man who had taken a lease of the fishery rights in these and other channels from Government; and being obstructed in the exercise of his rights in respect of these channels by the first defendant, he filed this suit, impleading not only the first defendant but also the Secretary of State as the second defendant. In his plaint he prayed for an injunction restraining the first defendant from interfering with the fishery in the plaint channels and for damages caused to him (the plaintiff) by such interference and he added an alternative prayer that in case it was found that the first defendant was not liable for the aforesaid damages, the second defendant should be directed to pay them.

The Munsif dismissed his suit *in toto* and ordered him to pay the costs of both the defendants. He appealed to the Subordinate Judge who after calling for finding on three issues left undecided by the District Munsif dismissed the appeal with costs of both the respondents.

The present second appeal is preferred by the Secretary of State (the second defendant in the Munsif's Court and the second respondent in the Subordinate Judge's Court): and the first defendant who now figures as the second respondent raises the preliminary objection that as the decrees of both the Lower Courts are entirely in the present appellant's favour, he is not entitled to appeal against them.

The case is a somewhat curious one and the point is by no means free from doubt; but on the whole we think the objection must be allowed. Undoubtedly, as it stands, the decree of the Subordinate Judge as also that of the District Munsif is entirely in the appellant's (second defendant's) favour. Not only is the suit for relief against him dismissed but he is given his costs in both Courts.

The learned Advocate-General has argued at considerable length that any party to a suit aggrieved by a decree is entitled to appeal against it although the decree, on the face of it, may be entirely in his favour. He relies mainly on the ruling of

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WOODROFFE, J. in *Krishna Chandra Goldar v. Mobesh Chandra Saha*(1) which is quoted with approval in *Yusuf Sahib v. Durgi*(2) and followed in *Nagalla Kotayya v. Nagalla Mallayya*(3).

A perusal of WOODROFFE, J.'s judgment shows that he considered it an essential condition of the right of appeal that the appellant should be adversely affected in some way or other by the decree itself. This point is emphasised by ABDUR RAHIM and KRISHNASWAMI AYYAR, JJ., in the latest of the three cases: wherein they say that the appeal "lies only against the decree, and not against a mere finding." Certainly both in *Krishna Chandra Goldar v. Mobesh Chandra Saha*(1) and *Nagalla Kotayya v. Nagalla Mallayya*(3) the learned Judges are at pains to explain most clearly in what way the mere existence of the decree apart from any finding in the judgment prejudiced the appellant. It may be admitted that this point is not so clear in *Yusuf Sahib v. Durgi*(2) but on the other hand the opinion there expressed is a mere *obiter dictum* and the decision of the case proceeded on other grounds altogether. The only case which has been quoted to us in which the right to appeal can be said to have been based on the findings behind the decree rather than on the decree itself is *Jamma Das v. Uday Ram*(4) and it is to be noted that the decision proceeded on the basis that the finding was necessarily implied in the decree.

Now, in the present case, the only way in which it is suggested that the second defendant is adversely affected by the decree is that if the finding on the second issue operates as *res judicata* against him it prevents him from setting up in future any proprietary rights to the fishery in the suit channels. The said issue runs: "Whether the second defendant has the right of fishery in the two plaint *vaikals*."

It may be pointed out at once that the decree certainly does not necessarily imply this finding—to quote the wording of the Allahabad case. The Munsif recorded no finding on issues 2, 6 and 7; but based his dismissal of the suit on other grounds. The Subordinate Judge called for findings in all the three issues above named. The Munsif returned findings adverse to the plaintiff on all three: and the Subordinate Judge accepted them as well as the findings originally recorded on the other issues.

(1) (1905) 9 C.W.N., 584.

(2) (1907) I.L.R., 30 Mad., 447.

(3) (1910) M.W.N., 719.

(4) (1899) I.L.R., 21 All., 117.

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The plaintiff's claim for damages had already been decided against him under issue No. 4 and the Subordinate Judge finds in addition (paragraph No. 8 of his judgment) that "the loss sustained by reason of his non-enjoyment of the fishery is not separately ascertained and must be very slight." Under issues Nos. 6 and 7 the Subordinate Judge agreeing with the Munsif found (a) that plaintiff was out of possession and had no right to sue for an injunction, (b) that as a lessee of one year he had no right to ask for a permanent injunction. The decision of these issues affords a perfectly independent basis for the dismissal of the suit apart from the question involved in issue No. 2. This circumstance at once distinguishes the case from *Yusef Sahib v. Durgi*(1) above quoted. Again the prejudice to the second defendant is solely dependent on the assumption that the decision of issue No. 2 will operate as *res judicata* against him in future litigations. The respondent's vakil has quoted more than one case to show that no appeal would lie even if the matter were *res judicata*—a view which seems to obtain a certain amount of support even from *Yusef Sahib v. Durgi*(1); but as a matter of fact we do not think that the decision in this case would operate as *res judicata*; and we may note for what it is worth, that the learned vakil for the respondents himself argues that it would not and even expressed himself as willing to undertake to raise no such contention in future litigations.

We have already given reasons for holding that the determination of issue No. 2 was not necessary to the decision of the suit: and the examination of the pleadings and of the judgments of the Lower Courts shows that it cannot be said that the question raised therein was directly and substantially at issue between the first defendant and the second defendant. Paragraph No. 8 of the plaint in putting forward the alternative claim against the second defendant (that he should be liable to pay the said damages Rs 530) says: "For *this reason* the second defendant is made party." The second defendant while admitting the allegations in the plaint to the effect that the ownership of the fishery lies with him puts the plaintiff to proof of damages, and simply prays that the relief claimed against him be dismissed with costs. So far as can be

(1) (1907) I.L.R., 30 Mad., 447.

ascertained the second defendant adduced no evidence in the case. And as the Munsif remarks in paragraph 11 of his judgment: "The suit is not one by or on behalf of Government, and it is in fact one against Government."

We must therefore hold that the second defendant is not adversely affected in any way by the decree in this suit or by any finding necessarily implied therein, and that he has no right of appeal.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Phillips.

LAKSHMI (FIRST DEFENDANT—FIRST RESPONDENT),
APPELLANT,

v.

MARU DEVI AND FOUR OTHERS (PLAINTIFFS NOS. 1 TO 4—PETITIONERS NOS. 1 TO 4 AND SECOND DEFENDANT—SECOND RESPONDENT),
RESPONDENTS.*

Decree—Construction of, whether executable or merely declaratory—Appeal against preliminary order after passing of final order, maintainability of—What orders in execution are appealable—Civil Procedure Code (Act V of 1908), ss. 2 and 47.

A decree which does not direct possession of any of the suit lands to be given to plaintiff who sued for possession of all the lands in suit but merely declared the right of the defendant to remain in possession of a portion of the lands of the whole of which she was in possession is one that is not capable of execution by the plaintiff, by way of possession of the rest being given to him, especially when there was not even a declaration of plaintiff's right to the rest of the lands.

A question whether a decree is executable or not is certainly one that comes within sections 2 and 47 of the Civil Procedure Code (Act V of 1908) the former of which enacts that the determination of any questions within section 47 is a decree; an appeal lies from such determination under section 2.

The determination of a mere issue by the executing court, made prior to the passing of the final order would not be regarded as an adjudication between the parties against which an appeal would lie.

Venkatagiri Iyer v. Sadagopachariar [(1904) 14 M.L.J., 359], referred to.

Orders in execution which declare (1) that execution shall issue and that a Commissioner be appointed for carrying out execution, (2) that interest

* Appeal Against Order No. 113 of 1910.

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is payable and (3) that a party is entitled to *mesne* profits are appealable though the final orders determining the extent or amount will have to be passed only thereafter.

Narayana Pattar v. Gopalakrishna Pattar, [(1905) I.L.R., 28 Mad., 355], *Ram Kirpal v. Rup Kuari* [(1884) I.L.R., 6 All., 269 (P.C.)], *Bhup Indar Bahadur Singh v. Bijai Bahadur Singh* [(1901) I.L.R., 23 All., 152 (P.C.)], *Maharajah of Burdwan v. Tarasundari Debi* [(1883) I.L.R., 9 Cal., 619] and *Deoki Nandan Singh v. Banshi Singh* [(1911) 14 C.L.J., 35], referred to.

Held, an appeal against a preliminary order in execution can be filed even after the date of the final order, which merely carries out and is consequential to the preliminary order, though no appeal has been filed against the final order.

Uman Kunwari v. Jarbandhan [(1908) I.L.R., 30 All., 479 (F.B.)], followed.

Mackenzie v. Narsingh Sahai [(1909) I.L.R., 36 Cal., 762], *Kuriya Mal v. Bishambhar Das* [(1910) I.L.R., 32 All., 225], *Mathu Sulan Sen v. Kamini Kanta Sen* [(1905) I.L.R., 32 Cal., 1023], *Baikuntha Nath Dey v. Nawab Salimulla Bahadur* [(1907) 12 C.W.N., 590] and *Narain Das v. Balgobind* [(1911) 8 A.L.J., 604], not followed.

Similarly an appeal against an order of remand can be filed even after the date of the final decree consequential on remand.

Subba Sastri v. Balachandra Sastri [(1895) I.L.R., 18 Mad., 421] and *Mallikarjuna v. Pathamani* [(1896) I.L.R., 19 Mad., 479], followed.

Where a right and jurisdiction are conferred expressly by statute they cannot be taken away or cut down except by express words or by necessary implication.

When the law gives a person two remedies he is entitled to avail himself of either of them unless they are inconsistent. There is no question of election in such cases.

Mussammatt Gulab Koer v. Badshah Bahadur [(1909) 13 C.W.N., 1197], followed.

With the reversal of the earlier order, the later order which depends for its validity upon the earlier one, *ipso facto* ceases to have any force.

APPEAL against the order of H. O. D. HARDING, the District Judge of South Canara, dated 29th January 1910, in Execution Petition No. 54 of 1909.

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

K. P. Madhava Rao and K. P. Lakshman Rao for the appellant.

K. Naraina Rao and G. Annaji Rao for the respondents.

JUDGMENT.—This is an appeal against the order of the District Judge of South Canara, dated the 29th January 1910, in an application for execution of the decree in Original Suit No. 43 of 1906. The decree was the result of a compromise between the parties. The material portion of it was in these terms: the Court doth order and decree “that plaintiffs do pay

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the assessment on the entire property as per plaint *karar*, dated 16th November 1905, that first defendant shall enjoy land, yielding 126 *muras* of rice, and house, out of the land referred to in the *karar*, that first defendant shall not alienate the said land of 126 *muras* of rice, that if alienated, the alienation shall be null and void, that after the death of the first defendant the said land and house shall be enjoyed by the second defendant paying thereabout 63 *muras* of rice to plaintiff annually by the end of June of each year through Court, etc.” In 1909 the plaintiff applied for execution and asked for an order “directing that from out of the lands mentioned in the decree, land yielding 126 *muras* of rice which is already in the possession of the first defendant and which is to be retained with her as per compromise decree, be caused to be separated towards the said first defendant and that the remaining properties be given in possession to the plaintiffs by a Commissioner.”

The first defendant objected on the ground that the decree was declaratory in its terms and that therefore no execution could issue. The District Judge held that “the decree can be executed by setting aside lands that yield 126 *muras* of rice income,” and directed that this should be done, and ordered the appointment of a Commissioner to prepare lists of the lands. The first defendant has presented the appeal to this Court on the ground that the Judge was wrong in construing the decree as one that was not purely declaratory.

On the merits there can be no doubt that the order of the Judge cannot be upheld. The decree did not direct possession of any lands to be given to the plaintiffs but merely declared the right of the first defendant to remain in possession of land yielding 126 *muras* of rice of which she already had possession.

It does not even declare the plaintiff's title to any lands but merely decrees that plaintiffs do pay the assessment on the entire property of the family. We are unable to see how on the terms of the decree an order directing that the plaintiffs be put in possession of all the lands except that yielding 126 *muras* of rice, could be justified.

Mr. Naraina Rao, the learned vakil for the respondent, has however raised a preliminary objection which we are bound to deal with. The objection is that before the appeal was presented on the 18th July 1910, the Judge had passed another

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order on the 18th March 1910, directing delivery to the plaintiffs in accordance with his former order after hearing the objections to the lists prepared by the Commissioner, that the defendant did not appeal against the final order of the 18th March which has in consequence become final, and that he was not entitled, after the passing of the second or final order, to appeal against the first order of the 29th January.

To this objection Mr Naraina Rao in the course of his argument added another, that no appeal could be preferred at all against the order of the 29th January, as it really did not decide any question of right between the parties.

We may dispose of the second objection at once in a few words. According to section 2 of the Civil Procedure Code, "the determination of any questions within section 47" is a decree. The question whether a decree is executable or not is certainly one that comes within this definition. No doubt the determination of a mere issue by the execution Court made prior to the passing of the final order would not be regarded as an adjudication between the parties against which an appeal would lie. See *Venkatagiri Iyer v. Sadagopachariar*(1). But in this case the Judge did not merely record a finding on an issue. He held that execution should issue in favour of the plaintiffs, and ordered the appointment of a Commissioner as required by the decree. In *Narayana Pattar v. Gopalakrishna Pattar*(2), the learned CHIEF JUSTICE and SUBRAMANIA AYYAR, J., held that when the executing Court finally decided that the decree-holder was entitled to interest an appeal lay against such an order. The learned Judges there point out the distinction between that case and one where the Court merely records a finding on an issue, as in *Venkatagiri Iyer v. Sadagopachariar*(1). It has also been decided that, where the executing Court decides that the plaintiff is entitled to mesne profits, an appeal will lie against that order, though the amount of the profits may not have been ascertained by it. See *Ram Kirpal v. Rup Kuari*(3), *Bhup Indar Bahadur Singh v. Bijai Bahadur Singh*(4) and *Maharajah of Bardwan v. Tarasundari Debi*(5). Our judgment is also in accordance with *Deoki Nandan Singh v. Bansi Singh*(6), which lays

(1) (1904) 14 M.L.J., 359.

(3) (1884) I.L.R., 6 All., 269, (P.C.)

(5) (1883) I.L.R., 9 Calc., 619 at p. 622.

(2) (1905) I.L.R., 28 Mad., 355.

(4) (1901) I.L.R., 23 All., 152 (P.C.)

(6) (1911) 14 C.L.J., 35.

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down the test for deciding whether an appeal would lie against any particular order in execution or not. We overrule this contention. The first contention is certainly better supported by authority, but we are of opinion that it is not entitled to prevail. The defendant being entitled to appeal against the order of the 29th January, we are unable to hold that he was not entitled to do so within the period allowed to him by law. The second order merely carried out the first order in this case; it did not, in any way, supersede that order, as indeed it could not do. We cannot see how that order could affect the defendant's right of appeal. He might have had no objection to it provided the first order was right.

This indeed is the position taken up by the appellant before us. To use the language of the decision of a Full Bench of this Court in another case "where a right and jurisdiction are conferred expressly by statute" they cannot be taken away or cut down except by express words or necessary implication. It is argued that the later order, not having been appealed against, would remain in force, even if we reverse the earlier one, and that therefore it is not open to us to take the futile step of setting aside the first order. We cannot agree that the reversal of the earlier order will leave the later one intact. The second order depends for its validity upon the first one allowing execution in favour of the plaintiffs, and with the quashing of the first the second must cease to have any force. The appellant has not been able to draw our attention to any decision of this Court in support of his position. But he relies on the decision of the Calcutta High Court in *Mackenzie v. Narasingh Sahai*(1), and upon *Madhu Sudan Sen v. Kamini Kanta Sen*(2), which was followed in that case. It is perhaps desirable to examine briefly the decisions of the Calcutta High Court bearing on this question. *Madhu Sudan Sen v. Kamini Kanta Sen*(2) was a case of an appeal against an order of remand. It was presented after the Munsif had passed his final judgment subsequent to the remand. MACLEAN, C.J., and MITRA, J., held that the appeal was incompetent. The reason given is that section 588 of the old Civil Procedure Code provides for appeals against various interlocutory orders, several of which do not

(1) (1909) I.L.R., 36 Calc., 762.

(2) (1905) I.L.R., 32 Calc., 1028.

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affect the decision of a suit on the merits, though some do; that a party failing to appeal against any of the orders could object to it on an appeal against the final decree, and that, therefore, if he desire to avail himself of the privilege conferred by section 588 in relation to an order of remand, he ought to do so before the final disposal of the suit. With all respect for the learned Judges we must say the argument does not commend itself to us. When the law gives a person two remedies he is entitled to avail himself of either of them unless they are inconsistent. See *Mussammatt Gulab Koer v. Badshah Bahadur*(1). The learned Judges distinguished an earlier case, *Jatinga Valley Tea Company v. Chera Tea Company*(2), on the ground that the appeal there had been presented before the final judgment was passed. But the *ratio* of that decision is equally applicable whether the appeal against the remand is presented before or after the second judgment in the case. FIELD, J., observes "The Code does not say that there shall be an appeal only if the case has not been finally determined in the Court of first instance, before that appeal is preferred or comes on for hearing. We cannot, therefore, import into the Code a provision which does not there exist. The Munsif's jurisdiction to hear the case upon remand depended upon the remand order. If the remand order were badly made, the decree, and, indeed all the proceedings taken under that remand order, are null and void." In *Mackenzie v. Narsingh Sahai*(3), there was a preliminary decree in a suit for partition and a subsequent final decree. The appeal was against the former only and was presented after the final decree had been passed. The learned Judges who decided the case, MUKERJEE and CARNDUFF, JJ., followed *Madhu Sudan Sen v. Kamini Kanta Sen*(4); they say that the final decree would still stand even if the preliminary decree were reversed. No reason is given for this proposition. The learned Judges dissent from the judgment of the Allahabad High Court in *Uman Kunwari v. Jarbandhan*(5) and point out that the view taken in that case, that an appeal might be preferred against an order of remand even after the Court of first instance had passed its final judgment after remand, was

(1) (1909) 13 C.W.N., 1197.

(2) (1886) I.L.R., 12 Cal., 45, at p. 47.

(3) (1909) I.L.R., 35 Cal., 762.

(4) (1905) I.L.R., 32 Cal., 1023.

(5) (1906) I.L.R., 30 All., 479 (F.B.).

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based on the opinion of the Allahabad Court that the party aggrieved by an order of remand could not object to it on an appeal presented against the final decree, and that the Calcutta High Court had adopted a contrary view on the point. Now, the Legislature has laid down in the present Code of Civil Procedure, section 105 (2), that an order of remand cannot be impeached except by an appeal against that order. It is similarly provided in section 97 that "where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree." The result of the opinion of the Calcutta High Court in the case cited by the appellant would be that, if a party, without any fault of his own, is unable to appeal against a preliminary decree or an order of remand before the final decree on remand is passed, he would lose all opportunity of objecting to that order or decree and be deprived of the right of appeal expressly conferred on him by the Legislature. The incorrectness of the position would be manifest from another inconvenience which may be pointed out here. Suppose a District Court passes an order of remand and before it is appealed against the Munsif's Court passes a decision on the merits in pursuance of the remand order. Suppose the Munsif's decision on the merits is unimpeachable. If the defendant's appeal could be only against the final judgment he would be bound to appeal to the District Court though necessarily he would not be entitled in that appeal to attach that Court's order of remand. And yet, according to the view of the Calcutta Court, he would be bound to get the order of the Munsif confirmed in order to get a right of appealing to the High Court against the order of remand. MOOKERJI, J., has attempted in a later case to support *Mackenzie v. Narsingh Shahi*(1) on another ground. In *Baikuntha Nath Dey v. Nawab Salimulla Bahadur*(2) the learned Judge says: "When an order of remand has been made, its validity may be challenged directly and immediately by an appeal under sec. 588, cl. (28), or indirectly under sec. 591, when an appeal is preferred against the final decree in the suit. . . . The party affected by the order of remand, however, must make his election. He may, if he chooses, prefer an appeal against the order of remand,

(1) (1909) I.L.R., 36 Cal., 762. (2) (1907) 13 C.W.N., 520 at p. 597.

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obtain a stay of proceedings during the pendency of the appeal; he may, on the other hand, carry out the order of remand, take the chance of a successful termination of the suit in his favour and in the event of defeat, prefer an appeal against the final decree in which the validity of the order of remand may be questioned. He cannot, however, if he has carried out the order of remand and taken the full benefit of it, turn round and prefer an appeal against the order of remand." But surely, a party appealing against an order of remand is not entitled, as of right, to a stay of proceedings in the Court of first instance, nor does it lie in the power of a defendant objecting to a remand to decide whether he should appear at the further proceedings before the Court of first instance or not. He is bound to do so at the risk of those proceedings being completed in his absence in case of default. This theory of alternative reliefs is pointed out by MOOKERJI, J., himself to be wrong in *Mussammat Gulab Koer v. Badshah Bahadur*(1), where the learned Judge observes: "That a litigant is entitled to take advantage of each and every one of the remedies open to him, except when they are inconsistent with each other." The Allahabad High Court in *Kuriya Mal v. Bishambhar Das*(2) followed *Mackenzie v. Narsingh Sahai*(3) distinguishing its own earlier case, *Uman Kunwari v. Jarbandhar*(4) [which had been dissented from *Mackenzie v. Narsingh Sahai*(3) on the ground that "a right of appeal from an order of remand . . . was expressly given by section 588 of the old Code, and this Court proceeded upon the ground that such right of appeal could not be taken away in the absence of some direct provision to the contrary." We may point out that a right of appeal against a preliminary decree or against an order in execution is also expressly granted by the statute. The learned Judges of the Allahabad High Court go on to observe: "Moreover, in considering what the effect of the reversal of an order of remand, under section 562 aforesaid, would be, this Court was careful to point out that anything done in pursuance of such an order would become *ipso facto* of no effect on the reversal of the said order, because the Court concerned would have no jurisdiction to pass any further order in the case (except by way of review), unless empowered to do so by the order under section 562 itself. No such

(1) (1909) 18 C.W.N., 1197.

(3) I.L.R., 36 Cal., 762.

(2) (1910) I.L.R., 32 All., 225.

(4) (1908) I.L.R., 30 All., 479 (F.B.).

consideration arises in the case now before us, as it is clear that the learned Munsif after passing his preliminary decree had jurisdiction, and indeed was bound to proceed in due course to pass a final decree in the case. It seems to us that a serious anomaly would be created by the modification of the preliminary decree of June 25, 1908, while the final decree of June 30, 1908, remained in force and had not been appealed against." The whole argument, it will be noted, is based on the assumption that the final decree which is the result of proceedings dependent for their validity on the preliminary decree would survive the reversal of the latter decree. This assumption, we have already pointed out, is unsupportable. *Kuriya Mal v. Bishambhar Das*(1), has been re-affirmed by the Allahabad Court in *Narain Das v. Balgobind*(2). The Madras High Court has held that an order of remand is appealable even after the passing of the final decree subsequent to the remand. See *Subba Sastri v. Balachandra Sastri*(3), and *Mulikarjuna v. Pathaneni*(4).

For the reasons above mentioned we overrule the first preliminary objection also.

In the result, the order of the lower Court must be reversed, and the application for execution dismissed, with costs both here and in the lower court.

(1) (1910) I.L.R., 32 All., 225.

(3) (1895) I.L.R., 18 Mad., 421.

(2) (1911) 8 A.L.J., 604.

(4) (1896) I.L.R., 19 Mad., 479.

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APPELLATE CIVIL.

*Before Sir Charles Arnold White, Chief Justice, and
Mr. Justice Spencer.*

1911.
September
1, 4, 5, 6, 19
and 21.

ARUMUGAM CHETTI AND ANOTHER (LEGAL REPRESENTATIVES
OF KRISHNAN CHETTI THE DECEASED PLAINTIFF),
APPELLANTS

v.

DURASINGA TEVAR AND THIRTEEN OTHERS (DEFENDANT, LEGAL
REPRESENTATIVE OF THE FIRST RESPONDENT AND TRANSFERREES OF
THIRD RESPONDENT), RESPONDENTS.*

*Guardians and Wards Act (VIII of 1890), ss. 7 (2), 29 and 30—Guardian
appointed by Court—Encumbrance of minor's property by natural guardian
while court guardian in existence—Encumbrance void—Consideration, void
deed, no, for fresh contract on attaining majority.*

The appointment of a guardian under the Guardians and Wards Act (VII
of 1890) has the effect of extinguishing the rights of the minor's natural
guardian to deal with the minor's property.

Where the natural guardian with rights thus extinguished but purporting
to act as a *de facto* guardian encumbered the minor's property with his consent.
Held, that the encumbrances were null and void.

An encumbrance thus created without authority cannot be ratified by the
minor on attaining majority. There can be no ratification of a transaction which
is void owing to the promisor possessing no contractual capacity at the time. Nor
can a void deed form a good consideration for a fresh contract made by the
minor on attaining majority.

APPEAL against the decree of W. GOPALACHARIAR, the Sub-
ordinate Judge of Madura (East), dated 21st day of August
1905, in Original Suit No. 41 of 1904.

This was a suit to recover Rs. 8,866-0-10 due under two regis-
tered hypothecation bonds, of which one was executed by first
defendant's late mother for Rs. 1,000 on 27th July 1898 to
Muhamad Ibrahim Ravuttan and assigned by him to plaintiff on
25th January 1904, and the other was executed by first defend-
ant and his mother to plaintiff for Rs. 3,000 on 23th June 1899.

Defendants 2, 3 and 4 were subsequent mortgagees of
items 2, 3 and 4 of the hypotheca. Fifth defendant was said to
have purchased the hypotheca in the name of sixth defendant in

* Appeal No. 227 of 1905.

1901 while the same were under attachment in Original Suit
No. 439 of 1901, Sivaganga Munsif's file. Seventh defendant
was a prior mortgagee. Certain partpayments on account of
interest were also alleged to have been made on the two bonds.

In the written statement filed on 6th September 1904,
first defendant contended that he was a minor on the dates the
plaint bonds bear, that on Krishnaswami Ayyar having been
appointed guardian of his property, his mother, from whom the
document of 27th July 1898 was taken, had no power to hypo-
thecate his property or to incur debts and that this document
which was executed without consideration was not valid and
binding upon him. The validity of the other hypothecation
bond of 28th January 1899 was also denied on the ground that
he (first defendant) was then a minor and that the mother was
not competent to hypothecate his property. First defendant
denied the partpayments alleged. It was added that the assign-
ment of 3,000 rupees bond was fraudulently obtained without
consideration.

In a further written statement which appears to have
been filed on 28th February 1905, without permission of the
Court, first defendant admitted that both the debts were bor-
rowed for his necessity and that he was not able to say whether
he was a major on the dates of bonds, but that he has no objec-
tion to a decree being passed as desired by plaintiff. He added
that his previous statement was put in upon the persuasion of the
fifth defendant.

Third defendant, a simple mortgagee from first defendant
for Rs. 6,000 and Rs. 1,500 on 25th April 1901 and 12th
March 1902 respectively, and fourth, fifth and sixth defend-
ants disputed the validity of the plaint bond on the ground
that first defendant was a minor on the date of the bond and
that his late mother was not competent to incur debts or deal
with his property, another person having been appointed guardian
by Court for his property. The partpayments alleged were denied
and plaintiff's right to recover any amount on the first bond,
dated 27th July 1898, was denied on the ground that he (plaintiff)
admitted discharge of that debt and the assignment was said to
have been fraudulent and without consideration. It was added
that seventh defendant was only a name lender in respect of the
mortgage for Rs. 7,000 and that first defendant was the real

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mortgagee, that he having not sued in respect of it also, the suit was not sustainable.

Seventh defendant without admitting the truth and validity of the plaint bond put plaintiff to the proof of his case and claimed priority to his mortgage of items 2, 3 and 4 for Rs. 7,000.

Eighth and ninth defendants admitted assignment of the bond, dated 27th July 1898, to plaintiff.

The issues raised were:—

(1) Whether the first defendant was more than 18 years old when the guardian was appointed by the District Court? (2) Whether the appointment by the District Court was not valid and binding against plaintiff? (3) Whether the first defendant was more than 21 years old on 28th June 1899, the date of the bond for Rs. 3,000? (4) Were the plaint documents true and supported by consideration and valid? (5) Was the plaintiff estopped from denying that 1,000 rupees bond was discharged? Was it discharged? (6) Was first defendant estopped from disputing liability under 1,000 rupees bond?

The Subordinate Judge found issue (2) in the affirmative and issues (1), (3), (5) and (6) in the negative. On the fourth issue he held that the plaint bonds were invalid on the ground that first defendant was not competent to contract and that Rakku Nachiar was not a guardian competent to deal with first defendant's properties. Plaintiff appealed to the High Court.

S. Srinivasa Ayyangar for the second and third appellants.

T. Rangaramanujachariar and *S. Sundararaja Ayyangar* for the third respondent.

M. Narayanaswami Ayyar for the fourth and twelfth respondents.

C. S. Govindaraja Mudaliyar and *C. S. Venkatachariar* for the fifth respondent.

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JUDGMENT.—The plaintiff in the lower Court, a money-lender by profession, based his claim upon two hypothecation bonds, Exhibit L for Rs. 1,000 executed on July 27, 1898, and Exhibit A for Rs. 3,000 executed on June 28, 1899 and as his suit was dismissed, he now appeals. On account of the 1st defendant's minority a guardian named Krishnaswami Iyer was appointed on January 18, 1897, under the order of the District Court of Madura marked Exhibit CC. On November 20, 1899,

by force of orders marked Exhibits EE and FF, the first defendant's mother, who had by Exhibit CC been made guardian of the persons of the first defendant and his minor sister jointly with the guardian of their property, was appointed guardian of their property also, and Krishnaswami Iyer was discharged from his office. On October 31, 1900, the first defendant was declared by the Court to have attained majority and the guardian's powers ceased.

Exhibit L was executed by the first defendant's mother Rakku Nachiar alone purporting to act as guardian of the first defendant and his sister. Exhibit A was executed both by the first defendant and his mother, but she does not describe herself therein as his guardian. A comparison of dates easily shows that both documents were executed during the continuance of the guardianship of the guardian of property appointed by Court. The Subordinate Judge has found that the first defendant was below 18 years when the guardian was appointed. Mr. Srinivasa Ayyangar has asked us to come to a different conclusion on the evidence, but on this point we may briefly remark that no evidence sufficient to rebut the legal presumption that the first defendant was a minor when guardians of his person and property were appointed by the Court having jurisdiction under Act VIII of 1890, has been laid before us.

As regards Exhibit L, it has been contended that it is valid on the ground that it was executed by the first defendant's mother who was guardian of his person and *de facto* guardian of his property, if the debt was incurred for necessary purposes. But in the first place there is no proof that she was *de facto* guardian beyond the vague statement of the plaintiff's eighth and ninth witnesses that her men managed the first defendant's villages, and there was no suggestion of the kind in Exhibit DD when a motion was made to the Court to remove Krishnaswami Iyer and appoint Rakku Nachiar. In the second place the authorities cited on the appellant's behalf fall far short of establishing the proposition that when a guardian of a minor's property is appointed under the Guardians and Wards Act, persons other than such guardians can legally bind the minor's estate. It would be exceedingly inconvenient for the minor's interests if there were such conflict of authority between guardians. The legislature has in fact provided for such an eventuality so far as guardians appointed

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by Court are concerned. Section 7 (2) of the Guardians and Wards Act takes away the power of any guardian not so appointed by declaring that the Court's order appointing a guardian under the Act will have the effect of removing any other guardian. Sections 29 and 30 provide against the lawfully appointed guardian encumbering or alienating portions of the minor's estate without the Court's permission. In *Nathu v. Balwantrao*(1) it was held that an adverse act of mother while acting as *de facto* guardian of her son, in disposing of the minor's property as if it was her own and purporting to pay her own debts although the purchase-money was in fact applied in payment of debts for which the minor was liable would not bind the minor for whom a guardian had been appointed by Court. The effect of appointments under the Act of extinguishing the powers of a natural guardian is discussed in *Ram Chunder v. Chauda Lal*(2). No doubt these cases are not on all fours with the present, but they show how other Courts have treated the powers of certificated guardians as exclusive and the language of the Act is clear enough. In *Abdul Khader v. Chidambaram Chettiar*(3) where the parties were Muhammadans, this Court held that persons purporting to act as *de facto* guardians and to incur debts in good faith for the benefit of a minor could not bind the minor's property by their acts, if in fact they had no legal status as guardians. The position of a mother after the appointment of a guardian by Court appears to be no better, even though she may be guardian of the minor's person, as in this case. The want of authority of a *de facto* guardian is a good defence to a suit brought by a mortgagee to enforce his mortgage against a minor, though if the positions were reversed and the minor were suing to set aside the mortgage, as was held in *Nizam-ud-din Shah v. Anandi Prasad*(4), a Court might equitably decline to grant relief until the plaintiff compensated the mortgagee to the extent to which he had benefited by the money advanced on the mortgage.

Turning to the decisions cited on the other side, they do not help us much. *Honápa v. Mhálpái*(5) and *Manishankar Pranjivan v. Bai Muli*(6) deal with the powers of natural guardians when no certificated guardian has been appointed. So also

(1) (1903) I.L.R., 27 Bom., 390.

(3) (1909) I.L.R., 32 Mad., 276.

(5) (1891) I.L.R., 15 Bom., 259.

(2) 2 A.L.J., 460.

(4) (1896) I.L.R., 18 All., 873.

(6) (1888) I.L.R., 12 Bom., 686.

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Arunachala Reddy v. Chidambara Reddy(1). There was a testamentary guardian in that case and he acquiesced in the alienation made by the natural guardian for necessity. In *Ananthaya Kamthi v. Laxminarayanappayya*(2) there was a caretaker in possession of a minor's estate as a guardian but no conflict of authority arose between guardians certificated or natural. In *Madan Mohan v. Rangi Lal*(3) the certificated guardian joined with the minor in executing the mortgage in dispute but failed to obtain the Court's permission, and the Court treated the transaction as voidable, and good if not followed by notice of an intention to avoid it, whereas in *Mohori Bibee v. Dharmodas Ghose*(4) the Privy Council has treated mortgages entered into by minors as void for want of contractual capacity. In *Gharib-ullah v. Khalak Singh*(5) certain mortgages were contracted by the manager of an undivided Hindu family and the mother who obtained a certificate of guardianship did not get the Court's sanction under section 29. It is thus not a case in point. Next it is contended that apart from Rakku Nachiar's Act being valid, the first defendant and those who claim under him are precluded from disputing the validity of Exhibit L, because in 1903 after attaining majority the first defendant undertook in a letter filed as Exhibit L (1), to see that this debt and that secured by Exhibit A were paid at an early date if the plaintiff arranged to take an assignment of Exhibit L from the original mortgagee Mahomed Ibrahim.

It is sought to make Exhibit L (1) do duty as an estoppel, as a ratification of the suit bonds (Exhibits A and L), or as a foundation for a new contract between the first defendant and the plaintiff after the attainment of majority. The plaintiff's position is said to have been made worse by his acting on the first defendant's offer to pay promptly on condition of his taking the assignment (Exhibit M), but the plaintiff's statements at page 167 of the printed documents that the first defendant's mother represented her son to be 17 or 18 in 1896 or 1897 (the year when a guardian was appointed), that he got no record to show his age, and that he was aware of the guardianship petition being presented show that he was not wilfully kept in ignorance of the

(1) (1903) 13 M.L.J., 223.

(3) (1901) I.L.R., 23 All., 288.

(2) (1905) 15 M.L.J., 233.

(4) (1903) I.L.R., 30 Calc., 539 (P.C.).

(5) (1908) I.L.R., 25 All., 407 (P.C.).

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first defendant's minority, and there can be no estoppel if the person concerned knows the truth about the facts asserted. Moreover estoppel cannot be invoked to defeat a plain provision of law; *vide Madras Hindu Mutual Benefit Permanent Fund v. Ragava Chetti*(1). A mortgage can only be effected by a registered document and there is no registered document validly executed by the first defendant in existence. There is only an alienation made by his mother without authority. *Sarat Chunder Dey v. Gopal Chunder Laha*(2) can be distinguished by the circumstance that the District Judge found that Ahmed, whose acquiescence in his mother's conduct was held to amount to estoppel, had reached majority at the date of mortgage. *Purmessur Ojha v. Mussamut Goolbee*(3) relied on by Mr. Srinivasa Ayyangar was another case of a major permitting his mother to represent him as a minor and to mortgage ancestral property. If in that case he had been in fact a minor his permission would have gone for nothing. Then too there can be no ratification of a void transaction, void owing to the promisor possessing no contractual capacity at the time [*vide Ramaswami Pandia Thalavar v. Anthappa Chettiar*(4) and Pollock and Mulla's Contract Act, page 56].

Nor can a void deed form a good consideration for a fresh contract made on attaining majority. In this case we are told that the first defendant was benefited by not being put into Court at once and by a change of creditors, and the promisee was benefited by the promise of the first defendant to pay the debt of Rs. 3,000. These advantages may serve as consideration for the assignment, but this suit was brought on the mortgage; the cause of action is described in the plaint as starting from them, and no case of a new contract appears to have been put forward till now. Even in the prayer for additional issues at page 185 of the printed documents, this case is not clearly set out. A cause of action cannot be founded on an estoppel, nor does an estoppel arise from a representation of a mere intention such as the first defendant's intention to pay promptly—*vide Halsbury's Laws of England*, volume XIII, page 377, section 534.

As regards Exhibit A it was executed both by the first defendant and his mother. Decisions have been cited to show

(1) (1896) I.L.R., 19 Mad., 200.

(3) (1869) 11 W.R. (C.R.) 446.

(2) (1892) L.R., 19 I.A., 208.

(4) (1906) 16 M.L.J., 422 at p. 423.

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that it is not necessary for a guardian, to describe himself as a guardian, if he actually is one, but when a minor purports to act and execute for himself as in this case it would be a violent presumption to treat his mother as acting for him.

Assuming however that her act was the act of a guardian, it is bad for the same reason as her execution of Exhibit L *viz.*, because there was a guardian appointed by the Court at the time. The first defendant's execution of Exhibit A was bad as being the act of a minor. Again it is argued that the plaintiff is entitled to be reimbursed for necessities supplied to the minor and to get a charge on his estate independently of the suit bonds. Section 68 of the Indian Contract Act and the decision of *Bhawal Sahu v. Baijanath Pertab Narain Singh*(1) are quoted in support of this position and some of the items and oral evidence have been referred to in order to show what the cost of the minor's maintenance was and how the money borrowed from the plaintiff was expended. On this point it will be sufficient to note that the Subordinate Judge in paragraph 19 of his judgment found no evidence that the debts which Exhibit A discharged and those which the account (Exhibit N), evidenced were all borrowed for the real necessity of the first defendant or Rakku Nachiar. In our opinion also the plaintiff failed to establish satisfactorily that the debts were incurred for the first defendant's benefit, several of the debts mentioned in Exhibit A being incurred by his mother. The plaintiff evidently knew that he was dealing with a limited owner as he states at page 170 of the printed documents in his evidence that he knew when Exhibit B was taken, that Krishnaswami was appointed guardian, and that the first defendant and his mother told him that he (the guardian appointed by the Court) was giving Rs. 20 for their maintenance every month. Exhibit B in date is after Exhibit L and before Exhibit A. From Exhibit DD it appears that Rakku Nachiar was given monthly Rs. 30 and 4½ *kalam*s of paddy, and although the cash payments were delayed for a time, there is no such allegation as to the grain. Thus the first defendant and his mother were not without necessities for their support, and we are not satisfied that they could not have lived within their income if they had tried. Even if some of

(1) (1908) I.L.R., 35 Cal., 320.

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the articles purchased with the money advanced by the money-lender were necessities, the responsibility would rest on him when a bond is taken for the debt to take care that the bond is so drawn as to render the estate of the minor in law liable for the debt. This was the opinion of the learned Judge who decided the case in *Bhawal Sahu v. Baijanath Pertab Narain Singh*(1) and we agree with them. If the present suit had been based on accounts and the plaint framed for the recovery of necessities supplied to a minor, questions of limitation would have arisen.

Lastly, a question has been raised whether the lower Court should have given the plaintiff a decree on the admission of liability under both Exhibits A and L contained in the first defendant's statement presented on February 27th 1905 and printed at pages 8 and 9 of the printed pleadings. The plaint contains a prayer for a personal decree against the first defendant. The first defendant is now dead, and the 12th respondent is his legal representative. In the first defendant's first written statement, dated September 6th 1904, upon which issues were framed on November 30th 1904, he completely denied his liability. In his deposition on July 18th 1905, he stated that his first written statement was put in at the instance of the 5th defendant and his second written statement at the instance of the plaintiff. He added that the facts mentioned in the written statement put in through Mr. Naganatha Ayyar (i.e., the first) were true. Exhibit IV is a notice given by the first defendant to the plaintiff in August 1904 in which he alleged that the plaintiff had held out false hopes to him before suit and had practised fraud in respect of the documents for one thousand and three thousand by which Exhibits L and A are evidently intended, and that they were unsupported by consideration and invalid. Section 152 of the Code of Civil Procedure in force when the suit was tried declares that if at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment. Section 153 contains a similar provision for suits in which there are, as here, several defendants. No doubt admissions may be made by parties at any time, but seeing that the Court of First

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Instance did not treat the first defendant's second statement as a confession of judgment and pass a decree against him on the strength of it, we are of opinion that it can only be treated as a piece of evidence, and that not conclusive looking to the circumstances under which it was made. These are that its maker contradicted it before and retracted it afterwards, alleging that he had been induced to make it; that it was put into Court on a day when there was no hearing of the suit and after the framing of issues; and that at the time it was made the first defendant appears to have parted with most, if not all, of his rights over his property.

We think that the appellant is not entitled to any relief in this suit and we would dismiss his appeal with costs of fifth and sixth (one set) and the fourth and twelfth respondents (one separate set).

APPELLATE CRIMINAL.

Before Mr. Justice Spencer.

Re MANIA GOUNDAN (ACCUSED), PETITIONER.*

Indian Penal Code (Act XLV of 1860), sec. 423—"Consideration," meaning of.

The word "consideration" in section 423, Indian Penal Code, cannot mean the property transferred. Therefore an untrue assertion in a transfer deed that the whole of a plot of land belonged to the transferor is not a statement relating to the consideration for the transfer and is not an offence under the section.

PETITION under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898), praying the High Court to revise the judgment of W. H. H. CHATTERTON, the Sub-Divisional Magistrate of Salem in Criminal Appeal No. 51 of 1911, dated the 3rd day of May 1911.

The accused and the second prosecution witness owned a certain piece of land of which each cultivated about half. In April 1910 the second prosecution witness sold his portion to first prosecution witness for Rs. 75. In February 1911 accused knowing that the second prosecution witness had already sold

* Criminal Revision Case No. 317 of 1911.
(Criminal Revision Petition No. 237 of 1911.)

1911.
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9 and 10.

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his portion of the land executed a sale-deed conveying the whole survey field to another. The lower Courts held that the facts disclosed an offence under section 423, Indian Penal Code.

W. Barton for the petitioner.

P. R. Grant for the Public Prosecutor *contra*.

SPENCER, J.

ORDER.—The petitioner has been convicted of an offence under section 423, Indian Penal Code. This little used section of the Penal Code makes punishable the act of a person who dishonestly or fraudulently executes an instrument which purports to transfer any property and which contains any false statement relating to the consideration for such transfer, or relating to the person or persons for whose use or benefit it is really intended to operate. What the accused did in the present case is stated in the Sub-Magistrate's judgment. Knowing that the prosecution second witness was in undisturbed enjoyment of half the portion of the land in question, that the prosecution second witness had sold that portion to the prosecution first witness for Rs. 75, and that the prosecution first witness was in the enjoyment of that portion, the accused in order to cause loss to the prosecution first witness and gain to himself sold the whole land for Rs. 120 only, while the half of it was sold for Rs. 75. The Magistrate also finds the statement in the document that the whole land at the time of the execution of it was in the accused's enjoyment and possession to be false. It is clear that the law does not make punishable every false statement contained in an instrument of transfer. It must be a statement relating to the consideration or to the person to be benefited thereby. In this case it is the first prosecution witness, not the purchaser who complained. The first-class Magistrate who heard the appeal found three false statements contained in Exhibit C, viz., (1) an assertion that the whole plot belonged to the appellant, (2) the mention of the sale price as Rs. 120 whereas a moiety had been sold for Rs. 75 and (3) a statement that the vendee purchased the whole land whereas the vendor was only legally entitled to sell a moiety. The last of these is obviously not a statement of the character made punishable under the section. It is not, as the Magistrate suggests, a false statement as to the person for whose benefit the sale is to operate, for the identity of the vendor or vendee is not disguised. The Public Prosecutor is unable to support the

conviction on the second head and the attempt has been rightly abandoned, for the fallacy lies in confusing consideration with value. It is hardly necessary to point out that the different portions of the same field may differ in value. The first statement does not relate to the consideration for the transfer. The Public Prosecutor argues that the property itself is the consideration from one point of view, but this is not the ordinary meaning of the term, nor is it the meaning of the term where it is employed in *Emperor v. Mahabir Singh* (1) which is the only reported case on this section of the Code so far as I am aware. The property is the subject of the sale, the price is the consideration. I consider that no offence has been made out under section 423 by the facts of this case as found. The conviction is therefore set aside and the fine, if paid, must be refunded. It may be pointed out that the alteration sentence ordered by the first-class Magistrate was illegal as it amounted to an enhancement under the ruling in *Queen Empress v. Ishri* (2).

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SPENCER, J.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

VELLAPPAYAL AMBALAM AND TWO OTHERS (DEFENDANTS
Nos. 1 to 3), APPELLANTS,

1911.
November 8.

v.

KARUPPIAH PILLAI (PLAINTIFF), RESPONDENT.*

Revenue Recovery Act (Madras Act II of 1864) ss. 1 and 42—Sale for arrears of water-cess due under Madras Act VII of 1865—Discharge of encumbrances.

Under section 42 of Madras Act II of 1864 (Revenue Recovery Act), a sale for arrears of water-cess due under Madras Act VII of 1865 conveys a title to the purchaser free of encumbrances, water-cess being included in the term 'public revenue' as per section 1 of Madras Act II of 1864.

Cases relating to sales for arrears of income-tax and abkari revenue have no bearing on this question.

SECOND APPEAL against the decree of F. H. HAMNETT, the District Judge of Madura, in Appeal No. 701 of 1907, presented against

(1) (1908) I.L.R., 25 All., 81. (2) (1897) I.L.R., 16 All., 67.
* Second Appeal No. 252 of 1910.

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the decree of the District Munsif of Madura in Original Suit No. 162 of 1906.

The plaintiff came into possession of the plaint land on 3rd February 1906 by virtue of a purchase at a revenue sale held in consequence of non-payment of water-cess. This sale took place on 24th August 1905. Exhibit A, the sale certificate issued to him by the Revenue Department stated that the land had been registered in the name of the plaintiff as owner of the land. It was found by the lower Courts that Veeranam the original owner of the land (which was not ryot-wari) had a heritable and alienable occupancy right the *melwaram* being vested in a *Devastanam*. It did not appear how in these circumstances plaintiff came to be registered as owner but as the *inamdar* was not a party the point was not in issue, and was not decided.

Prior to the above revenue sale Veeranam had executed a mortgage of the land to the first defendant and in execution of a mortgage-decree thereon it was sold to third defendant on 23rd October 1905, who claimed to have obtained possession from the Court on 6th February 1906. The plaintiff had also obtained a precept for possession from the Court on 3rd February 1906.

The defendants Nos. 1 to 3 contended that the sale to plaintiff could not give to plaintiff a title prior to that of 3rd defendant and further that the sale to the plaintiff could be only subject to the mortgage upon which the suit was filed, decree obtained and execution sale made. It was further contended that the revenue sale was brought about by collusion. The Munsif held that the revenue sale to the plaintiff could operate only subject to subsisting encumbrances and that the plaintiff's purchase was affected by the doctrine of *lis pendens* and dismissed the plaintiff's suit. This decision was reversed on appeal by the Temporary Subordinate Judge and the case remanded by him for deciding the question of collusion and consequential issues. On Second Appeal the High Court reversed this order of remand and remitted the case to the District Court to decide these issues. The District Court held that there was no collusion, assessed mesne profits and allowed the appeal throughout.

Defendants appealed to the High Court.

C. S. Venkatachariar for appellants Nos. 2 and 3 argued that the water-cess leviable under Madras Act VII of 1865 was not

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"Public revenue" within the meaning of Madras Act II of 1864, section 1, that the mortgage, having become merged in the decree, section 42 of Madras Act II of 1864 did not apply and that the doctrine of *lis pendens* applied.

K. N. Aiyar, contra.

JUDGMENT.—We are of opinion that a sale for arrears of water-cess would convey a title to the purchaser free of encumbrances. "Public revenue" is defined in section 1 of Act II of 1864 to include cesses payable to Government on account of water supplied for irrigation and therefore includes the cess payable under Act VII of 1865. Section 42 of Act II of 1864 declares that all lands brought to sale on account of arrears of revenue shall be sold free of all encumbrances. The plaintiff in this suit therefore obtained a title free of the appellant's mortgage. The cases relating to sales for arrears of income-tax and abkari revenue have no bearing on the question before us. It is further urged that the sale for arrears of water-cess was invalid, as no notice was given to the *inamdar*. But this point was not raised in either of the lower Courts even if it was open to the appellant to raise it.

The Second Appeal is dismissed with costs.

BENSON
AND
SUNDARA
Ayyar, JJ.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Spencer.

NATARAJA IYER (PETITIONER—SECOND DEFENDANT), APPELLANT

v.

1911.
November 15
and 16.

THE SOUTH INDIAN BANK OF TINNEVELLY, THROUGH
THEIR AGENT SUBBIAH AYYAR AND ANOTHER (PLAINTIFF AND
AUCTION PURCHASER—RESPONDENTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Order XXI, rules 46 and 54—Sale in
execution, of a hypothecation debt—Moveable property.

For the purposes of execution a debt due to judgment-debtor under a
hypothecation bond is moveable property within the meaning of Order XXI.

* Civil Miscellaneous Appeal No. 154 of 1910.

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rule 46, Civil Procedure Code, and the procedure as to moveable property is applicable; the language of rule 46, which treats as moveable property a debt not secured by a negotiable instrument, is undoubtedly wide enough to cover a debt secured by a hypothecation bond or a simple mortgage.

Order XXI, rule 54, is not applicable to such cases though the General Clauses Act and Transfer of Property Act speak of such debt as an interest in immovable property.

The security must follow the debt and if the debt is once attached, the benefit of the security would accrue to the attaching creditor if his remedy against the property still exists.

Tarvadi Bholanath v. Bai Kashi [(1902) I.L.R., 26 Bom., 305], *Debendra Kumar Mandel v. Rud Lall Dass* [(1886) I.L.R., 12 Cal., 546], *Kasinath Das v. Sadashiv Patnaik* [(1893) I.L.R., 20 Cal., 805], *Karim-un-Nissa v. Phul Chand* [(1893) I.L.R., 15 All., 134], *Baij Nath Lohia v. Binoyendra Nath Palit* [(1901) 6 C.W.N., 5], *Baldev Dhanrup v. Ramchandra Balvant* [(1895) I.L.R., 19 Bom., 121] and *Muniyappa Naik v. Subrahmaniya Ayyar* [(1895) I.L.R., 18 Mad., 437], followed.

Sami Ayyar v. Krishnaswami [(1887) I.L.R., 10 Mad., 169] and the view of the majority in *Appaswami v. Scott* [(1886) I.L.R., 9 Mad., 5] not followed.

APPEAL against the order of V. K. DESIKACHARIYAR, the Subordinate Judge of Negapatam, in Execution Application No. 271 of 1910 in Original Suit No. 30 of 1908 on the file of the Subordinate Judge of Tinnevely.

The facts of this case appear in the judgment.

T. R. Ramachanda Ayyar and M. Subrahmaniya Ayyar for the appellant.

T. Rangachariar and V. Narasimha Ayyangar for the respondent.

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AND
SPENCER, JJ.

JUDGMENT.—The question in this appeal is whether the sale in execution of a decree of a debt due to the judgment-debtor under a hypothecation bond is liable to be set aside on the ground of irregularity. It cannot be so set aside, if it is to be regarded as held by the lower Court as moveable property within the meaning of Order XXI, rule 46, corresponding to section 268 of the old Code. The language of rule 46, which treats as moveable property, a debt not secured by a negotiable instrument, is undoubtedly wide enough to cover a debt secured by a hypothecation bond or a simple mortgage.

But it is contended that such a debt is immovable property within the definition of such property as given in the General Clauses Act as including a benefit arising out of land. It may be that a security of this character is a benefit arising out of land; but, supposing that this definition would show that a simple

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mortgage debt would, generally speaking, be regarded as immovable property, still we have got to see whether the meaning is really what is contemplated by the provisions of the Civil Procedure Code relating to the execution of decrees.

It seems to us that the provisions of rule 54, Order XXI, corresponding to section 274 of the Code of 1882, are not meant to apply to property of the nature of a debt secured by a hypothecation bond. For instance, as pointed out in *Karim-un-nissa v. Phul Chand*(1), if the property to be attached is a mortgage debt where the mortgagee is not in possession nor is entitled to possession of the mortgaged property, the requirements as to the proclamation of the order at some place in or adjacent to the property and the affixing at a conspicuous part of the property could not be applied. These provisions seem to contemplate that the immovable property should be in the nature of tangible property. Further, the mortgagee not being entitled to possession, his decree-holder would not be entitled to go upon the land for the purpose of proclaiming or affixing the order. Then there is another difficulty in the way of holding that mortgage debt is to be treated as immovable property for the purposes of attachment. Rule 54 does not provide for any order prohibiting the mortgagor, that is, the person owing the debt, from paying the debt to the mortgagee whose right is sought to be attached and without such an order the object of attachment might be frustrated. Rule 46, on the other hand, provides for such prohibitory order being passed. The fact is, as pointed out in *Tarvadi Bholanath v. Bai Kashi*(2) and other cases, the security must follow the debt, and if the debt is once attached, the benefit of the security would accrue to the attaching creditor, if his remedy against the property still exists.

Much reliance, we may also mention, has been placed on behalf of the appellant on the definition of mortgage as an interest in immovable property as given in the Transfer of Property Act. But the real question, as we have said, is whether it is immovable property within the meaning of rule 54, Civil Procedure Code, and for the reasons we have stated it is difficult to regard it as such.

(1) (1893) I.L.R., 15 All., 134.

(2) (1902) I.L.R., 26 Bom., 305.

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There is some diversity of judicial opinion on the question under discussion, but we are satisfied that the weight of opinion is, undoubtedly, in favour of the view we have taken. (See *Debendra Kumar Mandel v. Rup Lall Dass*(1), *Kasinath Das v. Sadasiv Patnaik*(2), *Tarvadi Bholanath v. Bai Kashi*(3), *Karim-un-Nissa v. Phul Chand*(4), *Baij Nath Lohia v. Binoyendra Nath Palit*(5) and *Baldev Dhanurup v. Ramchandra Balvant*(6). As regards this Court, opinion seems to have fluctuated. While TURNER, C.J., in *Appasami v. Scott*(7), was inclined to adopt the view which has the support of the majority of the High Courts, the other two learned Judges favoured a different view. In *Sami v. Krishnasami*(8), the inclination was to support the view taken by the majority of the Judges in *Appasami v. Scott*(7). In *Muniappa Naik v. Subramania Ayyan*(9), the view adopted in *Debendra Kumar Mandel v. Rup Lall Dass*(1), and *Kasinath Das v. Sadasiv Patnaik*(2), is expressly approved, though the learned Judges seem to imply that a sale under section 268 of the Code of 1882 might be irregular. *Achamma v. Basappa*(10) simply follows *Muniyappa Naik v. Subramania Ayyan*(9). There is thus some uncertainty as to the exact view held by this Court on the point under discussion. But as the conclusion at which we have unhesitatingly arrived is undoubtedly supported by preponderance of authority of the other High Courts, we do not think it necessary to refer the matter to a Full Bench. The appeal will therefore be dismissed with costs.

(1) (1886) I.L.R., 12 Calc., 546.

(8) (1902) I.L.R., 28 Bom., 305.

(5) (1901) 6 C.W.N., 5.

(7) (1886) I.L.R., 9 Mad., 5.

(9) (1895) I.L.R., 18 Mad., 437.

(2) (1893) I.L.R., 20 Calc., 805.

(4) (1893) I.L.R., 15 All., 134.

(6) (1895) I.L.R., 19 Bom., 121.

(8) (1887) I.L.R., 10 Mad., 169.

(10) (1898) 8 M.L.J., 1.

ORIGINAL CIVIL.

Before Mr. Justice Wallis.

A. M. ROSS, (PLAINTIFF),

v.

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

6th
February
1913.

Secretary of State in Council, suit against, in respect of illegal order of District Magistrate under Assam Labour and Emigration Act (VI of 1901), sec. 91, and also for alleged defamation in a Government order—Damage, remoteness of—Liability of defendant under the Government of India Act, 1858—not liable here on the ground that the order was made in the course of employment, nor for acts done by Government servants in the exercise of statutory powers—alleged ratification by the Local Government—Government order—Absolute privilege.

Suit by the plaintiff, who represented the Assam Labour Supply Association in Ganjam and other districts, against the Secretary of State for India in Council for damages in respect of two orders of the District Magistrate of Ganjam suspending and dismissing one T.S., the local agent of the Association in Ganjam and closing his depôt to recruiting under the Assam Labour and Emigration Act (VI of 1901), whereby the plaintiff was prevented from earning from the members of the association his commission of seven rupees for each labourer sent to Assam; and for an alleged libel on the plaintiff in an order passed by the Governor-in-Council on appeals by the plaintiff and others against the aforesaid orders, in which it was stated that the plaintiff's own conduct was not altogether above suspicion. Held: under the notification issued pursuant to section 91 of the aforesaid Act as amended relaxing the provisions of the Act in favour of the Association, the District Magistrate had power to dismiss the local agent but not to suspend him or to close his depôt to recruiting under the Act independently of the Notification.

Seems: that the damage to the plaintiff by reason of the loss of his commission was too remote.

The defendant's liability to suit is the same as that of the East India Company before the passing of the Government of India Act, 1858; it can only be altered by Act of Parliament, and is not affected by section 79, Civil Procedure Code.

Extent of such liability in respect of acts done in the exercise of sovereign powers not being acts of state, discussed.

It was not sufficient to render the company liable that an act of this nature had been done by its servant in the course of employment but without previous order or subsequent ratification. Ratification must have been by the Company and must now be by the Secretary of State. Essentials of ratification discussed.

In the present case the defendant was not liable for the act of the District

* Civil Suit No. 51 of 1911.

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Magistrate on the further ground that it was done by him in the exercise of statutory authority and not as an agent of Government.

Further, as to the alleged defamation, the order of the Government of Madras having been published in the execution of its duty and without exceeding it, was absolutely privileged, and in any case there was no evidence of malice.

Dhakjee Dadajee v. East India Company, [(1843) 2 Mor. Dig. 307], *Peninsular and Oriental Steam Navigation Company v. The Secretary of State*, [(1861) 5 Bom., H.C.R. Appx. 1], *Hári Bhánji v. The Secretary of State for India* [(1882) 1 L.R., 4 Mad., 344], *Shivabhajan v. The Secretary of State for India* [1904] 1 L.R., 28 Bom., 314, referred to.

Vijaya Rágava v. The Secretary of State for India, [(1884) 1 L.R., 7 Mad., 466], questioned.

C. P. Ramaswami Ayyar, A. Krishnaswami Ayyar and M. Subbaraya Ayyar, for the plaintiff

The Hon'ble The Advocate-General and *C. E. Odgers*, for the defendant.

WALLIS, J. JUDGMENT.—This is a suit brought by the plaintiff, Mr. A. M. ROSS, to recover damages from the Secretary of State for India in Council in respect of two orders made by the Collector of Ganjam, by one of which a local agent working under the Assam Labour and Emigration Act, 1901, was suspended and the depôt maintained by him closed to recruiting, while by the other the local agent was dismissed; and also for alleged defamation of the plaintiff by the Governor of Madras in Council in a Government Order passed on the appeal of the plaintiff and other interested parties against the Collector's orders above referred to.

Under part IV of the aforesaid Act of 1901, as amended in 1908, recruiters known as garden sirdars are sent by employers in Assam to recruit labourers in Ganjam and other places under a license issued by the authorities in Assam and counter-signed by the authorities of the district in which the recruiting is to be carried on. They are under a statutory duty to provide a proper place of accommodation, or depôt, for the recruited coolies, and to get each cooly's labour contract executed before an appointed officer. Employers may also appoint local agents to supervise them.

In the exercise of powers conferred by section 91 of the Act, as amended, the Government of Madras issued the Notification of 6th October 1909, relaxing or dispensing with the requirements of certain sections of the Act in the case of garden sirdars working under the control of the Assam Labour Supply Association and

other bodies on certain specified conditions. One of these conditions required the Association to employ a local agent in each district where recruiting was carried on, for the purpose of representing the Association in all matters connected with the supervision of the sirdars. Under condition 8 the local agent was to provide suitable accommodation (a depôt) for the labourers engaged. Under condition 9 he was responsible for preventing to the best of his ability all acts of misconduct on the part of the sirdars; and under condition 10 the license of any local agent, who might be found not to have exercised due care in preventing misconduct on the part of the sirdars, was liable to be cancelled by the District Magistrate.

On the 19th February 1910, the District Magistrate of Ganjam issued notice to T. S. Rama Sastri, local agent of the Association in the district, calling on him to show cause why his license should not be suspended for habitually allowing illegal recruitment in the Agency tracts where recruitment was prohibited; and on the 21st February he passed the first of the orders complained of suspending this agent's license pending the passing of orders as to its cancellation. A copy was sent to the Sub-Collector and Police Inspector, Berhampore, who were requested to see that the depôt was closed to recruiting until further orders issued. By a subsequent order of the 25th July 1910, made upon the report of the Special Assistant Agent as the result of an enquiry held by him, the District Magistrate cancelled the local agent's license.

It was admitted before me that, if condition 10 giving the District Magistrate power to cancel the local agent's license for failure to exercise due supervision was valid, the legality of the dismissal could not be questioned in the present case; but it was contended that the condition was *ultra vires* as section 67 specified the cases in which the District Magistrate could dismiss local agents, and was exhaustive. I had no hesitation in overruling this contention, as it seemed to me that the condition was a necessary and proper one to be made under section 91 of the Act as amended. So much is left to the local agent under the Notification, that it would not in my opinion be safe to make these relaxations without reserving to the District Magistrate power to dismiss a local agent who proves untrustworthy. I hold the order of dismissal was not open to objection.

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It is otherwise with the order of the 21st February closing the depôt to recruiting. That depôt was available not only to the local agent as the place he was bound to provide under condition 8, but also to garden sirdars as the place they were bound to provide under section 62 of the Act when recruiting under the provisions of the Act without the benefit of the concessions. As correctly pointed out in the Government Order containing the alleged defamation of the plaintiff, the concessions had not the effect of limiting the right of working under the Act, or preventing employers from so doing, if they preferred to conform to the more arduous and exacting requirements of the regular procedure. It is I think clear that the District Magistrate's order of the 21st February closing the Berhampore depôt to recruiting by garden sirdars working under the Act was *ultra vires*.

The legality of the other part of the order suspending the local agent pending enquiry was questioned at a late stage of the case, on the ground that the power to dismiss under condition 10 did not include a power to suspend. The decision in *Barton v. Taylor*(1) that a Colonial Legislative Assembly has no power to suspend members as well as to expel, proceeded on the ground that suspension would deprive the constituency of its representation and does not appear to cover the present case. The plaintiff has also referred to an American decision—*Gregory v. New York*(2) *Seshadri Ayyangar v. Nataraja Ayyar*(3) in support of his contention. I am inclined to think that a statutory power of dismissal does not include a power of suspension; but the plaintiff has failed to show that he incurred any additional damages by reason of the suspension, and in the view I take of the case it is unnecessary to decide the point.

Assuming the Collector's orders closing the depôt to recruiting and suspending the local agent to be *ultra vires*, the next question is, has the present plaintiff any cause of action against any one? The local agent and the garden sirdars were in the service of the Assam employers constituting the Assam Labour Supply Association, and it was their business which was interrupted by the closing of the depôt. The plaintiff who is the agent of the

(1) (1886) 11, A.C., 197.

(2) (1889) 3, Lawyer's Rep., 854.

(3) (1898) I.L.R., 21 Mad., 179.

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Association in the districts of Ganjam, Godaveri and Vizagapatam held agreements and powers of attorney from several persons and companies working in the Association; and, though not filling any statutory capacity under the Act, represented the Association in these Districts, exercised a general supervision over their local agents and garden sirdars, and corresponded on behalf of the Association with the local authorities in all matters relating to recruiting. For his services he was entitled under his agreements to be paid Rs. 7 a head for each labourer recruited, and the plaintiff alleges that the closing of the depôt which put a stop to all work of emigration interfered seriously with the plaintiff's business, prevented him from earning his commission during the period of the closure of the depôt, and caused heavy loss to him personally.

The question then at once arises whether the plaintiff's claim for damages is not too remote. The general rule is stated in *Mayne on Damages*: "If *A* breaks his contract with *B* or inflicts some harm on *B*, the result may be most hurtful to *C*. But *C* cannot in general sue *A*," citing as to that the judgment of Lord PENZANCE in *Simpson v. Thomson*(1), and the same rule is laid down in *Dicey's Parties to an Action*, rule 83, page 383. For the plaintiff reliance has been placed on *National Phonograph Company v. Edison-Bell Consolidated Phonograph Company*(2), in which it was held that, if *A* by fraud induces *B* to break his contract with *C* and *C* sustains damage thereby, he may sue *A*. In the present case it is not alleged that there has been any breach of contract with the plaintiff, and it does not appear to me that the present point arose or was considered in that case. That case therefore is no authority for the plaintiff but it is unnecessary to consider the point further as in my opinion the suit fails on another ground.

Assuming that the action of the Collector was tortious, the next question is, is the plaintiff entitled to recover unliquidated damages for such tort from the Secretary of State in Council under the provisions of the Government of India Act, 1858? For the plaintiff reliance was placed on *The Secretary of State for India v. Hári Bhánjî*(3), *Vijaya Râgava v. The Secretary*

(1) (1877) 3 A.C., 279, at p. 289.

(2) (1908) 1 Ch., 335.

(3) (1882) I.L.R., 5 Mad., 273.

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of State for India(1) and *Jehangir M. Cursetji v. Secretary of State*(2) [and on appeal *Jehangir v. Secretary of State*(3)] was also referred to. The Advocate-General for the defendant relied mainly on the decision in *Shirabhai v. The Secretary of State for India*(4), following *Rogers v. Rajendra Dutt*(5), *Tobin v. The Queen*(6), *McInerney v. The Secretary of State for India*(7) and *The Secretary of State for India in Council v. Kasturi Reddi*(8). The important decision of the Privy Council in *Secretary of State for India v. Moment*(9), which has only just been reported, was also referred to by the plaintiff at the close of the argument.

The fundamental position, as stated by their Lordships in that case following the judgment of Sir BARNES PEACOCK in *Peninsular and Oriental Steam Navigation Company v. The Secretary of State*(10), is that, as regards liability to be sued, the Secretary of State is to be in no position different from that of the old East India Company before the passing of the Government of India Act, 1858. The plaintiff has therefore to prove that he would have had a cause of action against the East India Company if the case had arisen before 1858. In *Peninsular and Oriental Steam Navigation Company v. The Secretary of State*(10), the plaintiff had been injured by the negligence in the course of their employment of workmen employed by Government at the Government dockyard at Kiddorpoore. Stress was laid on the fact that Government in India was obliged to engage in transactions partaking more of the character of private business than of affairs of State, such as this dockyard, the Bengal Marine Bullock Train, river steamers, etc. "There is a great and clear distinction," it was said, "between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on without having such powers delegated to them;" and at the close of the judgment, it was held, that the workmen having been employed by Government, and the act complained of being of a private nature and not done in the exercise of

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powers usually called sovereign powers, or in the performance of an act of State, Government was liable for their negligence in the course of their employment in the same way as any private employer in a similar case.

That was all that was decided, but certain dicta in the judgment were subsequently interpreted by the Calcutta High Court in *Nobin Chunder Dey v. The Secretary of State for India*(1) as asserting the immunity of the Company from suit in respect of all acts done in the exercise of sovereign powers whether the suit was based on contract or on tort, thus conferring on the Company a larger immunity than is enjoyed by the Crown in England. In *Hári Bhánji v. The Secretary of State for India*(2), a suit to recover money alleged to have been illegally levied, INNES J. refused to follow the Calcutta case but dismissed the suit on the merits, leaving each party to bear his own costs. Even so an appeal was preferred by the successful defendant on the ground that the Court ought to have declined jurisdiction as the act complained of was done in the exercise of sovereign powers. This contention was over-ruled in a learned judgment distinguishing between acts of State over which the Court has no jurisdiction—as regards which the agent is protected as well as the principal—and acts, such as those in that case and in this, done under colour of Municipal law as to which the agent at any rate is always responsible—*The Secretary of State for India v. Hári Bhánji*(3). The only question before the Appellate Court was one of jurisdiction, and they decided nothing as to the grounds on which liability could be brought home to the Company with success for acts done by public servants in India in cases within the jurisdiction of the Courts. This question was however discussed by INNES, J., at the trial. *Hári Bhánji v. The Secretary of State for India*(2). In the first place the learned Judge drew the inference from the preamble to Bengal Regulation III of 1793 (which he set out) that the Company had submitted questions such as arose in that case (the alleged illegal levy of salt duty) to the arbitrament of the Courts. In the second place, he came to the conclusion that a Petition of Right would lie against the Crown in England in a

(1) (1884) I.L.R., 7 Mad., 466.

(2) (1903) I.L.R., 27 Bom., 189.

(3) (1904) 6 Bom., L.R., 131.

(4) (1904) I.L.R., 28 Bom., 314.

(5) (1860) 8 M.L.A., 103.

(6) (1864) 16 C.B. (N.S.) 310.

(7) (1911) I.L.R., 38 Cal., 797.

(8) (1903) I.L.R., 26 Mad., 268, at p. 279.

(9) (1912) 40 I.A., 48.

(10) (1861) 5 Bom., H.C.R., App. 1 at pp. 13 and 16.

(1) (1876) I.L.R., 1 Cal., 11. (2) (1882) I.L.R., 4 Mad., 244 at pp. 355 and 356.

(3) (1882) I.L.R., 5 Mad., 278.

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similar case, and decided that the liability of the Company for an act of this kind done in the alleged exercise of sovereign powers could not be less. The judgment therefore did not cover the present case, in which no money of the plaintiff has come into the hands of Government and in which the plaintiff would have no remedy against the Crown on a Petition of Right. Indeed, referring to the case of *Rogers v. Rajendro Dutt*(1), the learned Judge remarked that it might be authority for the position that the East India Company or the Secretary of State would not be liable to be sued for the recovery of unliquidated damages for a wrong, which is the present case.

It certainly seems a reasonable position that (as held by the learned Judge) the liabilities of the East India Company cannot have been any less than those of the Crown in England on a Petition of Right, which extend, not only to detention of the land, chattels or money of the subject, but also as now settled, to breach of contract—*Thomas v. Reg.*(2). Whether the Company enjoyed the same immunity as the Crown with regard to torts is of course a very different matter. *Peninsular and Oriental Steam Navigation Company v. The Secretary of State*(3) is authority for the proposition that it did not do so with regard to transactions which might have been carried on by a private individual. Whether it did so with regard to acts done in the exercise of sovereign powers but under colour of municipal law cannot perhaps be considered settled conclusively until their Lordships have had an opportunity of considering the case of *Rogers v. Rajendro Dutt*(1), in which “the irresponsibility of the supreme power” for a certain tortious act committed under the orders of the Government of India by an officer in its service was assumed, and justified on the ground that the officer who does the act is himself liable; and it is unnecessary to recognise an immunity so extensive for the purposes of the present case. Two decisions of the Irish Courts as to the Lord Lieutenant of Ireland may be cited on one side, and numerous English decisions as to Colonial Governors on the other.

While the immunity of the Crown in respect of tortious acts committed by its servants has always been based on the legal

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maxim, the King can do no wrong, yet the Courts, in particular cases where the act had neither been ordered nor ratified by the Crown, have been careful to point out that there were less technical grounds on which such immunity could be justified, grounds which appear to be equally applicable to the East India Company. Thus in *Canterbury v. Reg.*(1), where an ex-speaker of the House of Commons sought to recover damages for the loss of his furniture in the fire which destroyed the Houses of Parliament and was occasioned by the negligence of the servants of the Commissioners of Woods and Forests who were in charge of the building, Lord LYNDHURST, L.C., pointed out that the Commissioners were public officers appointed to perform certain duties entrusted to them by the Legislature, and that though they were appointed by the Crown that would not make the Crown responsible for their neglect or misconduct any more than high officers of State such as the Lord Chancellor or Postmaster-General were responsible for the neglect or misconduct of subordinate officials appointed by them; and that, if the Crown would not be responsible for the neglect or misconduct of the Commissioners themselves, it must be equally irresponsible in the case of their subordinates. And in *Tobin v. The Queen*(2), in which it was sought to recover damages from the Crown for the action of the Captain of a ship of war in destroying a vessel supposed to be engaged in the slave trade, the second ground on which the immunity of the Crown was based was that the rule which makes masters or principals responsible for torts committed by their servants or agents in the course of their employment was inapplicable between the Crown and the Captain of a ship of war. Story on Agency has quite recently been treated as of the highest authority and followed by the House of Lords in settling the vexed question whether the principal is responsible for wrongs committed by the agent in the course of his employment for his own benefit as well as for wrongs committed by him for the benefit of his principal, *Lloyd v. Grace, Smith, and Co.*(3); and in Story it is broadly laid down that Governments do not come within the rule. “Section 319.—It is plain, that Government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or

(1) (1860) 8 M.L.A., 103.

(2) (1874) L.R., 10 Q.B., 31.

(3) (1861) 5 Bom., H.C.R., Appx. I.

(1) (1843) 4 St.Tr.N.S., 767.

(2) (1864) 16 C.B.N.S., 310.

(3) (1912) 107 L.T., 531 S. C. (1912) A.C., 716.

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agents engaged in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents, whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests." This passage is cited with approval in *The Secretary of State for India in Council v. Kasturi Reddi*(1). Similarly in a very recent case *McKenzie v. Corporation of Chilliwack*(2), their Lordships of the Judicial Committee appear to have been of opinion that a local authority could be made responsible for the misconduct of a constable appointed by it, if at all, only on the ground that the appointment was not fitly or properly made.

In *Dhakjee Dadajee v. East-India Company*(3), the Supreme Court of Bombay held that an action of trespass for alleged trespass in breaking and entering the plaintiff's house and taking away books under a warrant from the Governor of Bombay in Council would not lie against the East India Company, unless it was shown to have ordered or ratified the act complained of—thus negating the position that the Company could be made responsible like an ordinary principal merely on the ground that the act was done by the agent in the course of employment. The decision in *Peninsular and Oriental Steam Navigation Company v. The Secretary of State*(4), which has been already examined, only makes an exception in the case of undertakings of a private nature carried on by the Company, and in no way affects the application of the principle to acts done by the servants of the Company in the exercise of the sovereign powers delegated to it.

The plaintiff however relies on the decision of KERNAN, MUTHUSWAMI AYYAR and HUTCHINS, JJ. in *Vijaya Ragava v. The Secretary of State for India*(5), that the Secretary of State in Council was liable in damages for the illegal action of the Governor of Madras in removing the plaintiff from the Office of Municipal Councillor under the Towns Improvement Act (III of 1876). That decision does not proceed expressly on the ground that the Company would have been liable like an ordinary

(1) (1903) 26 Mad., 268.

(2) (1912) 107 L.T., 570.

(3) (1843) 2 Mor. Dig., 307.

(4) (1861) 5 Bom., H.C.R., Appx. 1.

(5) (1884) I.L.R., 7 Mad. at pp. 478, 486 and 487, 486.

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employer for acts done by its servants in the course of its employments; and indeed this part of the case appears to have received very little consideration. KERNAN, J. merely refers to *Forester v. Secretary of State for India in Council*(1), in which the defendant was held liable to pay the plaintiff the value of certain arms illegally seized by Government in India with interest at the rate of 12 per cent. The point argued in that case was whether a seizure was an act of State; if not, it was a seizure in respect of which a Petition of Right would lie against the Crown in England, and the liability of the Secretary of State in Council does not seem to have been disputed. That case does not seem to be any authority for holding the defendant liable in damages for the act of the Government of Madras in wrongly dismissing a Municipal Councillor from his office. The other learned Judges forming the majority appear from their statements to have proceeded on an admission made by the Advocate-General who appeared for the defendant that "if the Government would have been answerable otherwise, Section 416 (now section 79) of the Code of Civil Procedure would make the Secretary of State liable." Section 416 is as follows, "Suits by or against the Government shall be instituted by or against [as the case may be] the Secretary of State for India in Council." It has since been decided in *Raleigh v. Goschen*(2), that if a body such as the Governor-in-Council committed a tort, assuming of course that they were amenable to the jurisdiction of the Court, a suit would not lie against them in their official capacity but only as individuals. Such a suit could not be said to be a suit against Government. Further it could scarcely have been intended in an enactment as to procedure to effect a change in the substantive law and make the Secretary of State in Council liable where he was not liable before. However, if the Legislature had such an intention, it is now settled by the decision of their Lordships of the Judicial Committee in *Secretary of State v. Moment*(3), that an enactment adding to or taking away from the liability of the Secretary of State in Council to be sued as settled by the Government of India Act, 1858, is *ultra vires* of

(1) (1871) L.R., I.A., Supp. 10.

(2) (1893) 1 Ch., 73.

(3) (1912) L.R., 10 I.A., 48.

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the India Legislature, as opposed to the provisions of the Indian Council's Act, 1861. It appears to me therefore that the decision in *Vijaya Raghava v. The Secretary of State for India*(1) is no longer of authority, and in any case does not preclude me from holding on the authorities already cited that the Company could not have been made liable for the tortious acts done by their servants in India, in the exercise of sovereign powers, which it had not ordered or ratified, merely on the ground that they were done in the course of employment.

If the Company could not have been held liable for acts such as these on the ground that they were done by its servants in the course of their employment, the only other ground of liability I can think of as applicable to the present case is that the acts were ordered or ratified by it. In the present case the plaintiff relies on an alleged ratification of the orders complained of by the Governor in Council of Madras in G.O. No. 48 of 12th October 1910. Only part of the order was communicated to the plaintiff, but the whole must be looked at to ascertain whether Government ratified the orders or not, as this question in no way turns on whether the ratification was communicated or not; *Baron v. Denman*(2). It may, I think, be surmised that Government had been advised that the closing of the depot to recruiting under the Act as distinct from recruiting under the notification was illegal, and they point out this mistake, though in an earlier part of the order they "consider the present necessities of the case have been met by the District Magistrate's action."

On the whole I think the order is not expressed in sufficiently clear and unambiguous terms to amount to a ratification; but the point is immaterial, as it seems to me the Government of Madras had no authority from the Company, and have no authority from the Secretary of State now, either to commit tortious acts themselves or to ratify them when committed by others. The authority of the Government of Madras is derived from the East-India Company Act, 1793, and the Government of India Act, 1833, under which the whole Civil Government of the Presidency was vested and continues vested in the Governor and Councillors. In *Dhakjee Dadajee*

(1) (1884) I.L.R., 7 Mad., 486.

(2) (1848) 6 St. Tr. N.S., 525.

v. East-India Company(1), Sir ERSKINE PERRY held that the only ratification which would bind the Company in such a matter was a ratification by the Court of Proprietors itself.

For the foregoing reasons it seems to me that, as this is not a case in which a Petition of Right would lie against the Crown at the instance of the plaintiff, and as the Company would not have been liable for the acts of its servants merely on the ground that they were done in the course of employment, and, as the acts complained of in this case have not been shown to have been ratified by the Secretary of State, who has succeeded under section 3 of the Government of India Act, 1858, to the powers of the Directors and the Court of Proprietors, this part of the plaintiff's case must fail.

The decision may, however, be rested on narrower grounds. The orders of the District Magistrate suspending the local agent and closing the depot to recruiting would appear to have been passed by him as incidental to the statutory power, conferred upon him by the Act of 1901 as amended and the notification made thereunder, to dismiss the local agent; and, if this be so, it is well settled that in exercising such authority or in exceeding it he cannot be considered to have been the agent of the authority appointing him so as to render the latter liable. This was the first ground of decision in *Tobin v. The Queen*(2), already referred to, in which it was held that, independently of the doctrine that the King can do no wrong, the Crown could not be made liable for the action of a Naval Captain purporting to act under the Slave Trade Acts in seizing and destroying the plaintiff's vessel, as he was not acting in obedience to the command of Her Majesty but in the supposed performance of a duty imposed upon him by Act of Parliament. In that case ERLE, C.J., observes:—"Then as Captain Douglas would not have been an agent of the Crown if he had lawfully seized and kept the vessel under the statute, still less ought he to be held such agent in seizing and destroying it illegally." Applying this principle it has been held in *Shivabhan v. The Secretary of State for India*(3), that the Secretary of State in Council could not be made liable for the negligence of a chief constable

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(1) (1843) 2 Mor. Dig. 307. (2) (1864) 16 C.B.N.S., 310 at p. 349.
(3) (1904) I.L.R., 28 Bom., 314.

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in regard to the custody of hay seized by him under statutory authority conferred by the Code of Criminal Procedure. In such cases even ratification would make no difference, because there can be no ratification unless the act is done on behalf of the principal in the first instance. *Buron v. Danman*(1), and notes to *Armory v. Delamirie*(2). In 4 Inst., 217, Lord Coke says:—"By the common law he that receiveth a trespass and agreeth to a trespass after it is done, is no trespasser, unless the trespass was done for his use or for his benefit, and then his agreement subsequent amounteth to a commandment, for in that case *Omnis ratihabitio retrotrahitur et mandato acquiritur*."

The plaintiff also seeks to recover damages in this suit for an alleged libel in the opening sentence of G.O. No. 948, Public dated 12th October 1910, which was passed by Government on complaints made by the plaintiff himself and by two of the firms from whom he held powers of attorney, namely Messrs. Williamson Magor & Co., Calcutta, and Messrs. Balme Laurie & Co., British India Tea Company, Calcutta, of the orders of the District Magistrate which are the subject of this suit. The alleged libel is contained in the first sentence of the order:—"Government see no reason to doubt that there has been illegal recruitment in the agency tracts of the Ganjam District by sirdars working under the Assam Labour Supply Association, and are of opinion that the conduct of Mr. Ross (the plaintiff) in that matter has not been wholly above suspicion." The order directs copies to be sent to the District Magistrate of Ganjam and the District Magistrates of Vizagapatnam and Godavari in whose districts Mr. Ross was working on the same lines, to Mr. Ross himself, and to the two firms already mentioned. This is the only publication relied on. The defendant has not thought proper to plead justification, but has elected to rely on his other defences.

As to this, I am in the first place of opinion for reasons already stated that no suit lies against the defendant for a libel published by the Madras Government, at all events unless it be shown that publication was made under the orders of the Secretary of State, or on his behalf and afterwards ratified by him. A similar conclusion was arrived at by CHANDAVARKAR, J.

(1) (1848) 6 St. T. N.S. 525.

(2) (1903) 1 Sm. L.C. 356.

in *Jehangir v. Secretary of State*(1), to whom the case was referred on a difference of opinion between BATTY and JACOB, JJ. sitting on appeal from the Judgment of TYABJI, in *Jehangir M. Cursetji v. Secretary of State*(2).

Even if the suit had been brought against the members of the Madras Government at the date of the order, and this Court had jurisdiction to entertain such a suit, it must still in my opinion have failed on the ground that the publication having been made by such Government in the execution of its duty, and without exceeding it, is absolutely privileged. In *Oliver v. Lord Bentinck*(3), the plaintiff sued the defendant in the Court of Common Pleas at Westminster for publishing in the Gazette at Madras, whilst Governor and Commander-in-Chief in the Presidency, a notification that the Court of Directors had resolved to dismiss the plaintiff who was a military officer for gross violation of the trust reposed in him as Commander-in-Chief of the Molucca Islands; and on demurrer all the Court were of opinion that it would be a good defence to the suit that the publication was made by the defendant in the execution of his duty, and considering that this had not been sufficiently pleaded, they gave the defendant leave to amend.

In *Grant v. Secretary of State for India*(4), GROVE, J. held that the defendant was not liable for the publication of a similar notification in the Gazette (apparently the *Fort St. George Gazette*) at all events when the libel was not alleged to have been published maliciously and without reasonable and probable cause. This qualification was inserted with reference to the dissenting judgment of COCKBURN, L.C.J., in *Dawkins v. Lord Paulet*(5), but is not in accordance with the decision of the majority of the Court in that case, or with the subsequent decision of the Court of Appeal in *Chatterton v. The Secretary of State for India in Council*(6). As explained in the case last mentioned, the defence of absolute privilege in this, as in other cases, is allowed in the public interest, because it would be contrary to such interest to allow public officers to be sued for libel in respect of publications made in the course of their

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(1) (1904) 6 Bom. L.R., 131. (2) (1903) I.L.R., 27 Bom., 189.
(3) (1811) 3 Taun., 346 S.C., 128 E.R., 181.
(4) (1877) 2 C.P.D., 445 at p. 453. (5) (1869) L.R., 5 Q.B., 94.
(6) (1895) 1 Q.B., 189.

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official duty on the mere allegation that the publication was malicious. Otherwise, they would be obliged to defend all such actions for the purpose of rebutting the allegations of malice, however unfounded, and would be hampered and embarrassed in the due discharge of their duties.

Even if the occasion was not one of absolute privilege it was certainly one of qualified privilege; and that being so, and there being no evidence of malice of any kind on the part of Government in passing the order, a suit against them would fail on this ground also, and must also fail against the present defendant. In the result the suit is dismissed with costs.

1912 August
21 & 22,
and
September.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Wallis, Mr. Justice Sundara Ayyar
and Mr. Justice Sadasiva Ayyar.

B. BAYYAN NAIDU—(PLAINTIFF), APPELLANT

v.

B. SURYANARAYANA (MINOR BY GUARDIAN B. AMMANNA)—
(SECOND DEFENDANT), RESPONDENT.*

*Civil Procedure Code (Act V of 1908), sec 11, explanation IV.—‘Might and ought’,
—Res judicata even as regards implied decisions, if necessary for the
decree—Applicability to issues also.*

A, a landlord, tendered a patta to B, his tenant, who objected to the patta on the ground that the extent of his holding was overstated, some of the lands included in the patta not belonging to A but to B himself. The issue was raised whether the patta tendered was proper; the Court found that it did not contain any objectionable matter and was therefore a proper patta. Decree was accordingly given for rent in favour of A.

A tendered a similar patta to B, for a subsequent year and B again raised a similar objection to the extent of the holding. In a suit brought by A for the rent, B objected to the extent of the holding and it was contended that the matter was *res judicata* by reason of the decision in the previous suit.

Held, by the Full Bench, upholding the contention and agreeing with MUNRO, J. in *Bayya Naidu v. Paradesi Naidu* (1912) I.L.R., 35 Mad., 218.

(1) That the question of the extent of the defendant's holding was directly and substantially in issue in the previous suit and must be taken to have been heard and finally decided in plaintiff's favour, as such a decision was necessarily involved in the decree passed in plaintiff's favour, seeing that if the decision had

* Letters Patent appeal No. 32 of 1911.

been the other way, it would under the Rent Recovery Act have been fatal to his suit which must have been dismissed on the ground that the patta was not a proper one.

(2) that even if it was not expressly in question, it must be deemed to have been raised and decided within the meaning of explanation IV to section 11, Civil Procedure Code, as it was a ground of defence which might and ought to have been raised by the defendant, and

(8) that it is unnecessary in such a case of failure to raise the available ground of defence, that there should have been an express decision by the Court upon it in order to make it *res judicata*.

Sri Gopal v. Purthi Singh [(1902) I.L.R., 24 All. 429 (P.C.)] and *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh* [(1912) I.L.R., 39 Cal. 527 (P.C.)] followed.

Per SUNDARA AYYAR, J.—The doctrine of *res judicata* applies to suit, as well as issues and the force of *res judicata* with regard to an implied decision is applicable also to what ought to have been made ground of attack or defence with respect to an issue. The test is not whether the decision was explicit, but whether the issue was one on which the judgment of the previous suit was based quite apart from the question whether the decree itself would be affected by the matter being reopened in the later suit. If the judgment was not based upon the issue then the decision of the issue whether express or implied cannot constitute the matter *res judicata* in the later suit.

Per SADASIVA AYYAR, J.—In order to constitute a decision on an issue of fact *res judicata* it is not necessary that the cause of action and the subject matters of the suits should be the same. Where the subject matter of the former decision and the relief claimed therein were the same as those claimed in the subsequent litigation the Courts should try their best to hold that the causes of action are the same.

A decree for rent between an ordinary landlord and tenant may not necessarily involve a decision as to the terms of the lease or as to the extent of the land comprised in the lease but a decision under the Rent Recovery Act is otherwise.

APPEAL under section 15 of the Letters Patent Act (24 and 25 Vict. Cap. 104) against the decree of MUNRO and SANKARAN NAIR, JJ. in *Bayya Naidu v. Paradesi Naidu* (1) presented against the decree of E. L. VAUGHAN, the District Judge of Ganjam, in appeal No. 170 of 1908, preferred against the decree of GANGADHARA SOMAYAJULU, the District Munsif of Sompeta.

The facts of this case are set out in the judgments of the three learned Judges.

The Hon'ble Mr. T. V. Seshagiri Ayyar for the appellant.

Dr. S. Swaminadhan for the respondent.

WALLIS, J.—I agree with MUNRO, J., that the extent of the WALLIS, J. defendant's holding under the plaintiff is *res judicata* by reason

(1) (1912) I.L.R., 35 Mad., 218.

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of the decision in Original Suit No. 430 of 1906. In that case the present plaintiff, who held a five years' lease of the village from the registered landholder, sued the present defendant to recover rent for faslis 1314 and 1315 in the shape of rajabagam, or landholder's share of the produce, of certain jeroyati lands in the village in the occupation of the defendant. To enable the plaintiff to succeed it was necessary for him to show under section 7 of the Rent Recovery Act 1865, that he had tendered a proper patta to the defendant for each fasli, or that it had been agreed to dispense with the tender. Under section 4 the patta had to contain the local description and extent of the land. The plaintiff pleaded that he had tendered a proper patta for each fasli. The defendant denied the tenders, and pleaded further that the pattas alleged to have been tendered were not proper instancing certain payments claimed. He pleaded further that "the extent of the defendant's jeroyati land (that is, of the land in respect of which the plaintiff claimed rent) has been very much overrated." I think that must be taken as referring to the extent in the patta as well as to the extent in the plaint, which would merely reproduce it; and I think the District Munsif who tried the case so understood it, as in his careful summary of the written statement he makes no express mention of the plea as to the extent of the land and evidently treats it as part of the plea that the pattas tendered were improper; and I think it was also covered by the issue "whether the pattas so tendered are proper" and by the terms of the judgement on that issue, which is as follows: "The terms of the pattas, Exhibit F, do not contain any objectionable matter." If this view of the pleadings is correct, there is an end of the case, because the question of the extent of the defendant's jeroyati holding was directly and substantially in issue in the previous suit and must be taken to have been heard and finally decided in the plaintiff's favour, as such a decision is necessarily involved in the decree passed in the plaintiff's favour, seeing that, if the decision had been the other way, it would under the Rent Recovery Act have been fatal to his suit which must have been dismissed on the ground that the patta was not a proper one.

In his judgment SANKARAN NAIR, J., observes that a decree for rent does not necessarily involve the decision that a proper patta has been tendered, as the parties may dispense with

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them; but where as here tender of a proper patta is alleged on the one side and denied on the other and there is no suggestion that tender has been dispensed with, it seems to me that the decree for rent does involve the decision that a proper patta has been tendered.

Apart from any question as to the terms of the patta, it seems to me that the extent of the defendant's holding of jeroyati land in the village was a matter directly and substantially in issue in the suit, as it was in respect of this extent that the plaintiff was claiming rajabagam, or landholder's share of the produce, from the defendant; and that it was necessary for him to prove this extent to enable a decree to be given in his favour, even if there had been no plea in the written statement, as there was, that the extent had been over-estimated. In these circumstances I think the decision on the sixth issue that the plaintiff was entitled to the rajabagam claimed in the plaint necessarily involved a decision that the extent of the defendant's jeroyati land in the village was as alleged in the plaint, because what he claimed was the rajabagam of this extent, and that this point must be taken to have been decided in the plaintiff's favour.

In either view the question of the extent of the defendant's holding of jeroyati land in the village having been directly and substantially in issue and having been, as we must take it, heard and determined because essential to the decision of the suit, cannot be raised again in the present suit for the rent of fasli 1316 by the defendant's setting up that he was all along in occupation of only 5 acres of jeroyati land in the village and not of the extent all along claimed by the plaintiff.

But even assuming that the propriety of the patta was not questioned in the former suit on the ground that the extent of the lands was wrongly shown and that the extent was not otherwise questioned by the defendant, I think that these being good grounds of defence to the suit might and ought to have been raised, and must be deemed to have been matters expressly and substantially in issue in the former suit by virtue of explanation IV to section 11 of the Civil Procedure Code. It seems to me that any ground of attack or defence which by virtue of the explanation is deemed to have been directly and substantially in issue in a suit must also be deemed to have

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been heard and finally decided adversely to the party who failed to raise it. The proposition that failure to raise grounds of attack or defence which might and ought to have been raised does not make such grounds *res judicata* unless there is an express decision by the Court upon them appears to me to be wholly untenable. Courts of justice are not in the habit of deciding points not raised before them; and to say that the explanation only takes effect when they happen to do so appears to me to defeat the policy of the section and to render the explanation senseless as, held by the Allahabad High Court in *Sri Gopal v. Pirthi Singh*(1), a decision confirmed on appeal in *Sri Gopal v. Pirthi Singh*(2), by their Lordships of the Judicial Committee who thought it sufficient to say that the judgment of the High Court was clearly right and that the appeal on this point was unarguable. I do not therefore consider it necessary to refer to the earlier decisions of the Calcutta High Court on which SANKARAN NAIR, J. relied, and it is the more unnecessary to do so as they are very fully examined in the judgment of SUNDARA AYYAR, J. The appeal must be allowed, the decrees of this Court and the lower appellate Court reversed, and the case remanded to the District Judge for disposal according to law. Costs will abide the event.

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SUNDARA AYYAR, J.—This is an appeal under section 15 of the Letters Patent arising out of *Bayya Naidu v. Paradesi Naidu*(3). The original suit which led to the Second Appeal was instituted by a landlord for the recovery of rent from the defendants, his ryots, for the fasli year 1316. According to the plaintiff's case the defendants were in possession of about 14 acres of jeroyati lands under him liable to pay waram or rent in kind. The first defendant, the undivided father of the second defendant, contended that he held only 5 acres of jeroyati lands and that he held in addition 10 acres of inam and 3 acres of cash rent paying lands and denied that any patta was tendered to him for the fasli in question as alleged by the plaintiff. The correctness of the patta alleged to have been tendered was also denied. The seventh issue framed by the Munsif raised the

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question "whether the alleged tendered patta was valid and binding on the defendant." The eighth issue was "whether the whole of the 14 acres of land mentioned in the plaint is defendants' jeroyati as alleged by the plaintiff, or only 5 acres jeroyati and the rest inam and cash rent paying land as alleged by the defendants." At the hearing a further question was raised whether the question of the propriety of the patta tendered was *res judicata* in consequence of the decision of the Court in Original Suit No. 430 of 1906 which related to a suit for rent instituted by the plaintiff against the defendants for fasli 1314. The District Munsif held that the matter was not *res judicata* because the points in dispute were not raised in the previous suit, these points being the inclusion of inams and of money rent paying lands as waram paying lands, and the erroneous description of the lands for which the plaintiff is entitled to claim rent. On the merits he held that the patta tendered was not a proper one. He was of opinion that part of the lands included in the patta was inam and was wrongly claimed by the plaintiff as jeroyati. He did not decide the question whether cash rent and not rent in kind was payable for part of the land. He apparently thought that the patta must be held to be incorrect in stating that waram was payable while cash rent was received till the end of fasli 1313. The mistake complained of with regard to the description of the land was that the eastern boundary was described as the service inam of the defendant, while in the patta for faslis 1313 and 1314, it was described merely as defendants' inam. This was held by the Munsif to be improper although he did not decide the question whether the description of the boundary of the defendants' land as service inam was in fact correct or not. He dismissed the plaintiff's suit. His judgment was confirmed on appeal by the District Judge who upheld the Munsif's view on the question of *res judicata*. The Judge observed on the question of the correctness of the patta as follows:—"Appellant does not seriously argue that the patta was a proper one." The plaintiff preferred a Second Appeal to this Court. The question argued in Second Appeal was that the propriety of the patta was *res judicata* by the judgment in Original Suit No. 430 of 1906. The appeal came on for hearing before MUNRO and SANKARAN NAIR, JJ. The learned Judges differed in their views, MUNRO, J., being of opinion that the plea of *res judicata* must be upheld,

(1) (1898) I.L.R., 20 All., 110.

(2) (1902) I.L.R., 24 All., 429 (P.C.).

(3) (1912) I. L. R., 35 Mad., 216.

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while SANKARAN NAIR, J., agreed with the opinion of the lower Courts that it should not be maintained. In the result, the Second Appeal was dismissed in accordance with the provisions of section 98 (2) of the Civil Procedure Code. The present appeal is therefore substantially against the judgment of SANKARAN NAIR, J. In the previous suit, Original Suit No. 480 of 1906, the first issue was "whether the plaintiff tendered pattas to the first defendant for faslis 1814 and 1815 and whether the pattas tendered are proper." The tender of patta was held to be proved. The finding on the question of its propriety was in these terms:—"The terms of the pattas, Exhibits E and F, do not contain any objectionable matter. I accordingly find the first issue in the affirmative." In the written statement in that suit marked as Exhibit C, in the present suit, paragraphs 8 and 9 took objections to the correctness of the patta. Paragraph 8 stated:—"The pattas filed alleging having been tendered are not proper. The terms in paragraph 3 of the plaint are not mamool terms." The terms referred to related apparently to the giving of firewood, the payment of interest and the amount of road cess payable by the ryot. Paragraph 9 stated: "The extent of defendants' jeroyati land has been very much over-estimated by the plaintiff." So far as the written statement was concerned the details of the overstatement of the extent of the jeroyati land were not stated and no specific objection was taken to the statement that some portion of the lands was wrongly mentioned as liable to pay waram instead of cash rent. The objection in the present suit with regard to the description of the eastern boundary may be left out of account as it cannot be held to affect the plaintiff's right to the land in question. It is immaterial whether the defendants' land which forms the eastern boundary was his service inam or an inam of a different character so far as the relations between the plaintiff and the defendants with regard to the plaint land are concerned. The District Munsif did not find that the description of it as service inam was incorrect. It does not appear to what points the evidence let in by the parties in the previous suit related with respect to the correctness of the patta, and the Munsif's finding throws no further light as it is expressed in general words "The terms do not contain any objectionable matter." The appellant's contention is that the defendants who set up that a proper patta had

not been tendered were bound to raise all objections that they could to the propriety of the patta and that the judgment in the previous suit must be taken to be an adjudication that the terms of the patta were correct in every respect and that therefore they cannot raise any objection to the propriety of the patta in this suit which they might have failed to urge in the previous suit. Except in the matter of the difference in the description of the eastern boundary which, in my opinion, may be neglected it is not stated that the terms of the patta tendered for fasli 1816 were not similar to the patta for fasli 1814 which was held to be a proper one in the previous suit. The District Munsif observes that the patta in question was virtually the same as that which was tendered for fasli 1814. The correctness of this statement is not seriously disputed. MUNRO, J., observes:—"Had the issue in the previous suit relating to the correctness of the patta been found in the negative, the plaintiff's suit must have been dismissed. . . . The finding in the previous suit that the pattas were proper, i.e., that they were such as the defendants were bound to accept, was a finding that the relationship of landlord and tenant subsisted between the plaintiff and the defendants in respect of the land entered in the pattas and I do not think that the defendants can again be allowed to put the plaintiff to proof of his title." SANKARAN NAIR, J., held having regard to the general language of the District Munsif's finding in the previous suit that there was no explicit adjudication there of the questions now raised, viz., whether a portion of the lands was inam or jeroyati and whether another portion was liable to pay cash rent or waram. The learned Judge was further of opinion that as the suit related only to the rent for a particular year [F. 1816], it did not necessarily require a decision as to the terms of the patta or the extent of the land for which rent was payable, and that these questions are therefore not *res judicata*.

The decision of the question depends on the interpretation to be placed on section 11 of the Civil Procedure Code which embodies the rule of *res judicata*. According to the section, the Court is forbidden to try "any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties." The rule applies subject to the other provisions of the section not

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only to a suit tried before, but to an issue decided in a previous suit provided the matter directly and substantially in issue in the later suit was raised in the previous suit or in a substantial and direct issue in the previous suit. Explanation III lays down—“The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.” An implied denial is as effective as an express one. Explanation IV says, “Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

The appellant contends that with respect to any issue in the former suit the parties were bound to put forward all grounds of attack or defence material for the decision of the issue and will be deemed to have done so even if they failed to do so in fact; that the propriety of the patta was directly and substantially in issue in the previous suit, and that both the plaintiff and the defendants were bound to put forward every matter involved in the question of the correctness of the patta and that the decision that the patta was a proper one must be taken to be a decision that there was no valid objection of any sort to it; and that the defendants cannot now be permitted to raise any matter relating to the propriety of the patta which he might have failed to raise before. I am of opinion that these contentions must be upheld. The learned counsel for the respondent rested himself on the arguments contained in the judgment of SANKARAN NAIR, J., and did not elucidate the points any further. It becomes therefore necessary to examine the arguments contained in the judgment of that learned Judge. He lays down the following propositions as I understand his judgment:—

(1) The scope of the rule of *res judicata* as limited by the words ‘directly and substantially in issue’ is not confined to the relief granted by the former suit or to the property which was the subject matter therein.

(2) The decision on a matter not essential for the relief finally granted in the former case, or which did not form one of the grounds for the decision itself, cannot be said to have been directly and substantially in issue; but, where the decision on a question was essential to the relief granted or the decree passed, or where it formed the groundwork of the decision, then the

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matter must be deemed to have been directly and substantially in issue in the suit.

The difference between issues ‘collateral’ and ‘direct’ depends upon whether it was possible to pass the decree without any finding upon the particular issue.

(3) With regard to the relief granted in a suit, the decree may render it necessary to imply a decision on a question not expressly decided, but with regard to issues no implication is necessary but we ought to have a clear decision to create a bar. [The application of the latter part of the rule would of course be to cases where the subject matter of the two suits is different.]

(4) Explanation (4) does not dispense with the necessity of a finding upon a matter which might and ought to have been made a ground of defence or attack in the former suit unless that matter must be taken to have been involved in the actual decree passed in the case.

(5) It is not enough to make the matter of an issue *res judicata* that the decision of it in a different manner would be inconsistent with the decree in the previous case as such determination would not affect the actual decree passed in that case for the rent for fasli 1314.

(6) A decree for rent does not necessarily involve the decision that a proper patta has been tendered.

If therefore as a fact that question was not decided in the previous suit, we are not bound to imply that it was so decided.

Now section 11 of the Civil Procedure Code requires that the matter or issue should have been heard and finally decided by such Court. It does not say that it should have been decided in explicit terms. It cannot be doubted that if an adjudication on a matter is necessarily involved in the decision in a prior suit, the section must be understood to lay down that it must be taken to have been heard and finally decided. SANKARAN NAIR, J., admits that the principle of an implied decision must be adopted so far as whatever is required by decree in the previous suit is concerned. But he lays down that it is not applicable with regard to issues. He does not say how then the judgment in a suit is to be understood. No such distinction is warranted by the language of the section. The suit and an issue put forward for trial in the second suit are treated on exactly the same footing in the section, and the test of *res judicata* with regard to each is

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whether the matter directly and substantially in issue in the later suit was the matter directly and substantially in issue in the suit or in an issue in the earlier suit. The word "issue" in the expression "suit or issue" must be distinguished from the use of the words 'in issue' in the expression "the matter directly and substantially in issue." The latter expression as already stated is made applicable to both the later suit and an issue raised in it. "Directly and substantially in issue" obviously means "directly and substantially in question, which would include everything necessarily involved" whether that expression is applied to the suit itself or an issue in it. This has to be borne in mind in interpreting explanation IV also. It speaks of "any matter which might and ought to have been made ground of defence or attack in the former suit." The phrase "matter directly and substantially in issue" in the principal clause of the section is spoken of with reference to both the suit and issue. Clearly therefore what ought to have been made ground of defence or attack with respect to any issue in the earlier suit must be taken to have been a matter directly and substantially in issue therein when the question is whether an issue in the earlier suit can be tried again in the later suit. Again in deciding whether any matter is *res judicata*, the question is, what is necessarily involved in the actual judgment of the Court in the earlier suit, not what relief was granted by the decree, because it is the matter decided (expressly or by necessary implication) that becomes *res judicata*. It is desirable to illustrate by a concrete example. Suppose a suit is instituted for one of the instalments payable according to the terms of a bond. The defendant denies its genuineness and pleads also absence of consideration, and issues are framed on both points. The Court passes a decree for the instalment but records no explicit finding on either of the issues. A suit is subsequently instituted in the same Court for a second instalment and the defendant raises the same pleas as in the earlier suit. The subject matter of the two suits is not the same and the dismissal of the second suit would not affect the actual decree passed in the earlier suit. Can it be contended that the issues may be tried again in the second suit? According to the learned Judge apparently they should be tried again. The executant of the bond, according to him, though he cannot seek to recover back the amount decreed against him in the earlier suit, may

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resist the second suit for the later instalment. The difference between issues 'collateral' and 'direct,' according to the learned Judge, depends upon "whether it was possible to pass the decree without any finding upon the particular issue." I am unable to accept his position that though a finding might be necessary to pass the judgment in the previous suit, the issue should not be taken to have been decided (unless explicitly decided) if the result of the second suit would not be to reopen the actual decree in the previous suit. The result of such a position would be that the same issues may be reopened again and again in the same Court though such reopening would be inconsistent with the decree and judgment in every one of the previous suits. According to the learned Judge such inconsistency is immaterial. The decision of the Privy Council in *Amanat Bibi v. Imdad Husain*(1) is referred to in support of this position. There were two earlier proceedings, one, a suit to establish a sub-proprietary right as against a talukdar, the other, a proceeding to recover the same property from the talukdar under the terms of a certain revenue circular on repaying to the talukdar the arrears of revenue which he had paid to the Government. The third proceeding in which the plea, of *res judicata* was raised was a suit to redeem a mortgage granted by the person who was plaintiff in the earlier proceeding. The Privy Council held that the third suit was not barred as *res judicata* because the cause of action was different. Their Lordships held that the cause of action to establish a sub-proprietary right was obviously different from that in a suit for redemption though the property sought to be recovered was the same. The question in issue, said their Lordships, was quite different in the two suits; and they interpreted the provisions in section 7 of Act VIII of 1859 which enacted that "every suit shall include the whole of the claim arising out of the cause of action" as not requiring that "every suit shall include every cause of action, or every claim which the party has, but only that every suit should include the whole of the claim arising out of the action, on which the suit is brought." It is now a well-established proposition that though the subject-matter of the litigation and the relief claimed may be the same, different suits may be maintained by a plaintiff if the cause of action in each suit be different. There

(1) (1888) L.R., 15 I.A., 106 at p. 111.

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were two stages in the second of the earlier proceedings. The first originated in an application by the plaintiff under a Revenue circular to recover the property. The Settlement Officer who made the inquiry found that the plaintiff had conveyed the property to the talukdar by a conditional sale which had become absolute in 1853 and that the plaintiff was further not entitled to recover the property as he had not repaid to the talukdar certain arrears of revenue paid by the latter which he was bound to repay before claiming to recover the property. Their Lordships held that this order under the special circular could not be treated as judicial proceedings at all. The plaintiff then had recourse to fresh proceedings on the ground that the payment of arrears by the talukdar must be treated as having been made on his account. The Settlement Officer then again decided that the property had been transferred to the talukdar by a conditional sale of the year 1853 which had become absolute. Their Lordships held that the question in those fresh proceedings must be taken to have been merely "whether the plaintiff was entitled to recover the property which had been transferred by the Government to the talukdar on repaying to the talukdar the arrears of revenue which he had paid to Government," that being according to their Lordships the cause of action on which the plaintiff then claimed to recover. The matter in issue in the suit before their Lordships, they said, was "the respondent's right to redemption under the mortgage-deed of 1854." Their Lordships then observed, "It may be difficult to reconcile the position of the talukdar as mortgagee in 1854 with his position as absolute owner in 1853 under purchase from the mortgagor. But if it be established that the respondent was a mortgagor in 1854 with the right of redemption, why should he be barred merely because at an earlier date he may have had no right to the property at all?" This is the passage relied on by the learned Judge for the proposition that the decision of an issue in the earlier suit inconsistent with an issue in the later suit will not make the suit or issue in the later suit *res judicata*. I can find no such proposition laid down by the Privy Council. They did not regard the later suit as inconsistent with the decision in the former suit that there was a conditional mortgage of 1853 which, if it was in operation, had become absolute in 1853. Proceeding on the basis that the conditional mortgage

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had been established to be true, if the talukdar chose to take a mortgage in 1854 from the plaintiff and his subsequent holding was under that mortgage, their Lordships held that the mortgage of 1854 would furnish the plaintiff with a fresh cause of action, and a plaintiff need not combine in the same suit all his cause of action, though both suits might be for the recovery of the same property. They did not say that in the later suit the execution of the conditional sale of 1853 or its having become absolute could be denied. The observation that it may be difficult to reconcile the position of the talukdar as mortgagee in 1854 with his position as absolute owner in 1853 under a purchase from the mortgagor meant no more than that it might appear to be improbable that a person who was absolute owner in 1853 would take a mortgage in 1854; but a mortgagee cannot deny the title of his mortgagor, and if the talukdar chose to take a mortgage from the plaintiff in 1854 he could not say that the plaintiff did not obtain a fresh cause of action for redemption of that mortgage. On the other hand, in *Pahalwan Singh v. Maharaja Muheshur Buksh Singh Bahadoor*(1), the Privy Council applied the rule of an implied decision of an issue by a former adjudication although the property in the two suits was different. The learned Judge seems to have been under the impression that in that case the decree in the later suit would re-open the decree in the earlier suit, but that was not the case, as the property in dispute in the two suits was different. It is of course necessary that in order that an issue may be *res judicata* the decision in the former suit must necessarily involve an adjudication in a particular way on the issue raised in the later suit and its adjudication in a contrary way in the later suit must be inconsistent with the adjudication which must be implied in the earlier suit. In one part of his judgment the learned Judge observes that where the decision on a question was essential to the relief granted, or where it formed the groundwork of the decision, then the matter must be deemed to have been directly and substantially in issue in the suit, but he afterwards restricts the scope of the second test to cases where the question was explicitly decided. For this restriction I can find no warrant either in principle or in the language of the section.

(1) (1872) 12 Ben. L.R., 391 (P.C.).

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The statement that a decision on a matter not essential for the relief finally granted cannot be said to have been directly and substantially in issue is unworkable in practice, where a suit is dismissed without any relief being granted. The test should really be whether the matter was essential for the decision in the earlier suit, not for the relief granted. The decision of a Court proceeds on the matters put in contest by the parties and its adjudication cannot be understood without regard to the actual contest. It is impossible to understand it merely with regard to the decree. Suppose a suit for an instalment on a bond is dismissed, the defendant's plea being that the bond is not genuine and that it is not supported by any consideration. The Court does not record any explicit findings on these points, either of which would lead to the dismissal of the suit. Suppose the plaintiff afterwards institutes a suit for another instalment and the defendant raises the same pleas. Can the plaintiff be permitted to say that the points should be tried again and he should be given a decree if both points are found in his favour. SANKARAN NAIR, J., concedes that the granting of the relief may be taken to involve the decision of whatever point is necessary to support the decree. But what points are to be taken as involved in the decree in the instance just put? How is it possible to decide a question of *res judicata* by a consideration of the relief alone which is granted and without a consideration of the judgment in the case, and how is it possible to understand what the Court decides in the judgment without seeing what the contest between the parties was. The result of doing so would be to confine the doctrine of *res judicata* to the scope of the rule *transit in rem judicatum* (except where a matter directly and substantially in issue has been explicitly decided by the judgment in a former suit). Suppose in the illustration already put of a defendant denying both the genuineness and consideration of an instalment bond, the defendant in the second case admits the genuineness of the bond but denies only the passing of consideration for it. If it is open to the Court in the later suit to proceed on the footing of the genuineness of the bond, the question would arise whether the matter as to consideration is *res judicata* by the former judgment. As no explicit findings on the points in contest were recorded in the judgment, the

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decision might have proceeded either on the ground that the bond was not genuine or that it was not supported by consideration; or on both grounds. It might be proper in such a case to hold that the previous judgment did not necessarily imply a decision on the question of consideration. Certainty is essential for the application of the rule of *res judicata* and the Court would not prevent the reargitation of a matter where it is not certain that the previous decision proceeded on a particular ground. See *Vythilinga Mudaliar v. Ramachendra Naicker*(1). If a suit for an instalment is dismissed for default no matter would be *res judicata* in a claim for another instalment. If it is decreed *ex parte*, the genuineness of the bond and all questions as to its enforceability, so far as to justify a decree for the instalment would be *res judicata* in a suit for another instalment. The learned Judge apparently proceeds on the view that for some reason the scope of the rule of *res judicata* with regard to issues should be restricted as far as possible, and refers to the opinion of STUART, C.J. in *Babu Lal v. Ishri Prasad Narain Singh*(2), and *Muhammad Ismail v. Chatter Singh*(3), who regretted the application in this country of the principle of *res judicata* to the trial of issues, and not merely to the subject-matter in previous suits. It is unnecessary to consider whether there are good grounds for such regret. The rule was well established by the decisions of the Privy Council. See *Krishna Behari Roy v. Brojeswari Chowdranee*(4), *Pahalwan Singh v. Maharaja Muheshur Buksh Singh Bahadoor*(5), *Soorjomonee Dayee v. Suddanund Mohapatra*(6), and *Pittapur Raja v. Buchi Sitayya*(7). Section 13 of Act X of 1877 and section 11 of the present Code made the expression "matter directly and substantially in issue" applicable both to 'suit' and 'an issue in a suit.' "

The learned Judge holds that the proper terms of the patta to be tendered by the land-holder to the ryot could not be regarded as having necessarily been directly and substantially in issue in a suit for rent. Two decisions of the Privy Council are referred to in support of this position. The first of them is *Misir Ragho*

- (1) (1904) 14, M.L.J., 379. (2) (1873) I.L.R., 2 All., 582 (F.B.).
(3) (1881) I.L.R., 4, All., 69 (F.B.). (4) (1875) 2 I.A., 283.
(5) (1878) 12 Ben. L.R., 804 (P.C.). (6) (1872) 12 Ben. L.R., 391 (P.C.).
(7) (1885) I.L.R., 8 Mad., 219 (P.C.).

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Bardial v. Sheo Baksh Singh(1). In that case the plaintiff had previously instituted a suit for Rs. 1,665, the balance of interest due on a bond for Rs. 12,000 in a Court not competent to try suits exceeding Rs. 5,000 in value. The defendant had pleaded that the bond was supported by consideration only to the extent of Rs. 4,790, and that the amount already paid by him for interest exceeded the interest due on the actual consideration that had passed. The defendant's plea was upheld. The plaintiff subsequently instituted a suit for the principal and interest due on the bond in a court competent to try a suit of that value. The question was whether the decision in the previous suit as to the amount of consideration that had passed for the bond was *res judicata* in the subsequent suit. Their Lordships held that it was not. The point was decided on the ground that the Court that decided the previous suit was incompetent to try the later suit for principal and interest. The rule as to the necessity for the Court trying the previous suit having concurrent jurisdiction to try the later suit had also been laid down by the decisions of the Privy Council under Act VIII of 1859, although the language of section 2 of that Act did not in terms refer to that requisite. Sir RICHARD COUCH in pointing out that the rule already applied by the Privy Council while Act VIII of 1859 was in force was embodied in explicit terms in Act X of 1877 went on to observe that the issue as to consideration "was a 'collateral' rather than a 'direct' issue in the suit." He said, "the plaintiff might have succeeded without having a finding upon it, if he had proved an admission by the defendant that the sum claimed was due for interest, or had shown that the Rs. 2,475 (the sum alleged to have been paid for interest) had been expressly paid on account of the larger sum which he said the defendant owed for interest." This is immediately followed by the sentence "If the decision of the Assistant Commissioner is conclusive he will, although he could not have tried the question in a suit on the bond, have bound the plaintiff as effectually as if he had jurisdiction to try that suit. Their Lordships think that this was not intended and that by Court of competent jurisdiction Act X of 1877 means a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive, or in other words, a Court of concurrent

(1) (1888) I.L.R., 9 Cal., 489 at p. 445.

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jurisdiction." It is clear to my mind that his Lordship in making the observation contained in the previous sentence was only dealing with the question of the necessity of concurrent jurisdiction in the court which tried the earlier suit, and he used the expression "collateral" in the sense of "not referring to the subject-matter of the previous suit" and that he did not mean that it was not necessary for the decision of the suit on the issues raised between the parties on the pleadings in the case. The observation was made with reference to the principle that the judgment of a court not having jurisdiction to try the later suit would not be *res judicata* on any issue in the earlier suit but only with respect to the actual subject-matter of the previous suit. In *Run Bahadur Singh v. Lucho Koer*(1), the decision in *Misir Ragho Bardial v. Sheo Baksh Singh*(2) was treated as an authority only on the question that the adjudication of a court not having concurrent jurisdiction with that trying the later suit would not make the decision of an issue *res judicata*. Both *Misir Ragho Bardial v. Sheo Baksh Singh*(2) and *Run Bahadur Singh v. Lucho Koer*(1), on the other hand proceed on the assumption that if there had been concurrence of jurisdiction in the two courts the finding on an issue in the earlier suit would have given rise to a successful plea of *res judicata*. It would appear that in the *Duchess of Kingston's case*(3) which was referred to by Sir RICHARD COUCH in the judgment in *Misir Ragho Bardial v. Sheo Baksh Singh*(2) the expression "direct issue" as opposed to a "collateral" one was used in the sense of an issue directly determining the subject-matter of the previous proceedings and not in the sense in which it is obviously used in the Indian statute. There is in my opinion no foundation at all for making a distinction between an explicit decision and an implied decision of an issue in the application of the doctrine of *res judicata*, provided the matter raised in the issue was directly and substantially in issue in the earlier suit. If the decision was not sufficiently explicit that would no doubt furnish the party affected by it in the earlier suit a good ground for appeal against the decision just as any other error or imperfection would do, but the defect in the finding is not one that can be collaterally

(1) (1885) I.L.R., 11 Cal., 301 (P.O.). (2) (1893) I.L.R., 9 Cal., 439.
(3) (1776) 2 Sm. L.C., 78.

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attacked in the later suit. The same observation would apply even if an issue regarding a matter directly and substantially in issue in the former suit was not clearly raised or not raised at all provided the matter is such that it must be taken to have been decided in the earlier suit, that is, provided the judgment would not be sustainable unless the matter be taken to have been decided. SANKARAN NAIR, J., holds that explanation IV which states that "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit" does not qualify the statement in the principal clause that the matter in issue should have been "heard and finally decided by such court." It is of course true that the matter should have been decided in contemplation of law but if, as the learned Judge concedes, it is sufficient if the matter must be taken to have been decided by necessary implication so far as the subject-matter of the suit and anything involved in the decree itself are concerned, what reason is there for putting a different construction on the same words as applied to the decision of an issue? And if so far as what is involved in the decree is concerned any matter which might and ought to have been made ground of defence or attack must be taken to have been decided, there is in my opinion equally no reason for not applying the same principle with respect to a matter directly and substantially in issue in an issue in the previous suit. As I have already observed the language of explanation IV is equally applicable both to the previous suit itself and to an issue in the suit. What use is there in enacting that what ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit if the matter is not also to be taken to have been decided in the previous suit? What was not made ground of defence or attack could not have been expressly decided. The explanation would therefore be objectless if a decision also is not to be implied and made the ground of estoppel with respect to what is impliedly to be regarded as having been directly and substantially in issue. At any rate the logical result of the respondent's position must be to make an explicit decision equally necessary with respect to a ground of attack or defence not having been urged with regard to a

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matter involved in the decree itself in the previous suit. The learned Judge's position is no doubt supported by several decisions in the Calcutta High Court [*Kailash Mondal v. Baroda Sundari Dasi*(1) and *Woomesh Chandra Maitra v. Barada Das Maitra*(2)], but in my opinion these decisions are absolutely unsupportable and quite inconsistent with the decision of the Privy Council in *Pahalwan Singh v. Maharaja Muheshur Buksh Singh Bahadoor*(3) and *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh*(4), even if the decision of the same tribunal in *Sri Gopal v. Pirthi Singh*(5) could be distinguished as stated by SANKARAN NAIR, J., on the ground that the implication of a decision on an issue which ought to have been raised in the previous suit was justifiable in that case as the decree passed in the earlier suit would itself be affected otherwise. The Calcutta High Court however did not consider *Sri Gopal v. Pirthi Singh*(5) distinguishable on that ground. GURUDAS BANERJEE, J. who was a party to the decision in *Kailash Mondal v. Baroda Sundari Dasi*(1) observed in *Rajendra Nath Ghose v. Tarangini Dasi*(6) that the position adopted by him in the previous case would require to be reconsidered in consequence of the decision in *Sri Gopal v. Pirthi Singh*(5). The same view was taken by the Calcutta High Court in *Kailash Chandra Mandal v. Ram Narain Giri*(7), *Jamadar Singh v. Sherazuddin Ahamad Choudhuri*(8) and *Mohim Chandra Sarkar v. Anil Bandhu Adhikari*(9) although *Jamadar Singh v. Sherazuddin Ahamad Choudhuri*(8) might be explicable if the distinction adopted by SANKARAN NAIR, J. be correct. This court also has held that a ground of attack or defence which a party omitted to bring forward in an earlier suit must be taken to have been decided in the suit. See, *Arunachallam Chetty v. Meryappa Chetty*(10), *Masilamanian Pillai v. Thiruvengadam Pillai*(11). The point seems to me to be so obviously clear that it does not deserve further consideration.

According to the respondent's argument, although a matter not necessary to sustain the actual decree in an earlier suit will

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| (1) (1897) I.L.R., 24 Cal., 711. | (2) (1901) I.L.R., 28 Cal., 17. |
| (3) (1872) 12 Ben. L.R., 391 (P.C.). | (4) (1912) I.L.R., 39 Cal., 527 (P.C.). |
| (5) (1902) I.L.R., 24 All., 429 (P.C.). | (6) (1905) 1 C.L.J., 248. |
| (7) (1906) 4 C.L.J., 211. | (8) (1908) I.L.R., 35 Cal., 979. |
| (9) (1909) 13 C.W.N., 513. | (10) (1898) I.L.R., 21 Mad., 91 at p. 99. |
| (11) (1908) I.L.R., 31 Mad., 385. | |

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not be *res judicata* in a later suit if the decision on it is only by way of implication, yet it would be *res judicata* if it expressly decided it. That an express decision would constitute an estoppel was regarded by SANKARAN NAIR, J. as concluded by the decision of the Privy Council in *Pillapur Raja v. Bucki Sittaya*(1) to which might be added several other rulings. See *Gobind Chunder Koomloo v. Taruck Chunder Bose*(2), *Soorjomonee Dayee v. Suddan and Mohapatter*(3) and *Krishna Behari Roy v. Brojeswar Chowdrance*(4). But the test laid down in these cases was not whether the decision was explicit but whether the issue was one on which the judgment in the previous suit was based, quite apart from the question whether the decree itself would be affected by the matter being re-opened in the later suit. If the judgment was not based on the issue then the decision of the issue whether express or implied cannot constitute the matter *res judicata* in the later suit.

These are the general principles which in my opinion must guide the court in determining whether the question of the correctness of the patta is *res judicata* by the decision in the previous suit for the rent of fasli 1314. The point is, was the question of the propriety of the patta directly in issue in the previous suit and was it decided expressly or by implication. In my opinion the question whether a decree for rent involves a decision that a proper patta had been tendered is one which must be decided with reference to the facts of each case. It is perfectly true as pointed out by SANKARAN NAIR, J. that the tender of a patta is not essential to a landlord to recover rent and that the parties may dispense with it. It may be right to go farther and say that a ryot may, if he choose, not insist on the tender of a proper patta before he pays rent for any particular year and that this will not affect his right to require a proper patta in any subsequent year and resisting a suit for rent on the ground that a proper patta has not been tendered. It may be open therefore to a defendant to raise no plea at all about the correctness of a patta in a suit instituted for the rent of a particular year; this may not estop him from resisting a subsequent suit for rent for another year on the ground that the patta

(1) (1885) I.L.R., 8 Mad., 219 (P.C.). (2) (1878) I.L.R., 3 Cal., 145 (F.B.).
(3) (1873) 12 Ben. L.R., 304 (P.C.). (4) (1875) 2 I.A., 283.

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alleged to be tendered is not correct. This may possibly apply even in cases where the plaintiff alleged in the earlier suit that he tendered a patta containing proper terms. But the effect of a decision depends in large measure on the actual contest between the parties. A party may not be bound to raise a particular plea, but if he does raise a plea which would be an effective answer to the suit then the same plea cannot be raised again in a later suit between him and his opponent. It may be that the actual decree alone in the previous suit with respect to its subject-matter would not lead to an implication of the decision of a particular matter but if the matter is put in contest and the result of the contest would be that the judgment in the case must depend on the decision of the matter then it is clear to my mind that the decision would constitute it *res judicata* in a subsequent suit and it is absolutely immaterial whether the decision be express or implied. Of course it is open to the parties to show that the contest on any matter was subsequently waived or that the Court refused to decide the matter, but if neither of these events took place a decision by the Court on the matter must necessarily be implied if it was not expressly decided. In the case before us we have a decree for rent. It is said this did not necessarily require a decision as to the terms of the patta or the extent of the land for which the rent was decreed. Is this correct when the terms of the patta or the specification of the extent of the land were impugned? When these questions were raised by the defendant could the Court pass a judgment for rent in the plaintiff's favour without determining them? The learned Judge seems to proceed on the footing that the question what is necessary to be decided in a suit is to be settled without reference to the pleas raised by the defendant. With all deference this seems to be an altogether indefensible position.

In *Pahalwan Singh v. Maharaja Muheshur Buksh Singh Bahadoor*(1), a suit was instituted in the Shahabad Court for recovering certain land as an accretion to the estate of the plaintiff in that suit in the District of Shahabad. The defendant in the suit claimed the land as an accretion to his own estate in the District of Ghazipur. The Courts decided that the land was an accretion to the plaintiff's estate in Shahabad and

(1) (1872) 12 Ben. L.R. 391 (P.C.).

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not to the defendant's estate in Ghazipur. The defendant subsequently instituted a suit in the Ghazipur Court for the land to which the subject of the former suit was found to be an accretion. The Privy Council held that the holding in the earlier suit necessarily decided that the land claimed by the plaintiff in the latter suit was in the District of Shahabad and that the Court of Ghazipur had no jurisdiction. It will be noted that the property in the two suits was different. Any plea as to the district in which the property in the later suit was situated was not a necessary one, the immediate question in the earlier suit being merely whether the land was an accretion to the property of the plaintiff or of the defendant in the suit; but the parties went to trial on the question whether the land was an accretion to the plaintiff's estate in Shahabad or the defendant's estate in Ghazipur and the issue which arose on their contest was regarded as determining the question in which district the property in dispute in the later suit was situated. Their Lordships observed "Now, no doubt, it might be possible to suppose cases in which the decision as to the accretion might not necessarily be a decision that the land to which it was accreted was within the local jurisdiction of the Court which had dealt with it. But all these questions must be tried with respect to the subject-matter in the particular suit; and it seems to their Lordships impossible, in construing the section with reference to what was in issue in the former suit, to come to any other conclusion than that the decision did, by necessary implication, find that the green land was within the settled estate of the Maharaja in Shahabad. He came as plaintiff into Court; he claimed the whole of the land as an accretion to his settled estate in Shahabad. From the map and the evidence, it is obvious that, if an accretion to his land, it could be an accretion to nothing but the green land. The accretion was found to be an accretion to his land in the settled estate of Shahabad, and that proposition necessarily implied that the green land was a part of the settled estate of Shahabad.

In *Soorjomonee Dayee v. Suddanund Mohapatter*(1) the Privy Council held that if the right to certain property is contested on a ground equally applicable to that and other property, then the decision of the matter will be *res judicata* not only

(1) (1873) 12 Ben. L.R. 304 (P.C.).

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with regard to that property but with regard to all other property embraced by the ground on which the contest is based, and that the pleadings must be referred to to decide what matter was contested between the parties. Their Lordships observe "In their Lordships' opinion, the effect of the pleading is that the plaintiff sought, *inter alia*, to set aside the will on the ground that the testator had not the power to make any of the devises of reality that it contained, inasmuch as he could not devise ancestral real property, and all his real property was in point of law ancestral, consisting of such as he had inherited from his father, and such as he had bought out of the income of it . . . If both parties invoked the opinion of the court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed which, strictly construed, embraced the whole of it, therefore the judgment upon it was *ultra vires*. To so hold would appear scarcely consistent with *Mussumat Mitna v. Syud Fuzl Rub*(1), wherein it was held that in a case where there had been no issues at all, but where nevertheless it plainly appeared what the question was which was raised by the parties in their pleadings, and was actually submitted by them to the court, the judgment upon it was valid." This was a decision under Act VIII of 1859 which did not expressly lay down the rule of *res judicata* with regard to an issue in a suit. In *Tirbhuwan Bahadur Singh v. Rameshar Bakhsh Singh*(2) it was laid down by the Privy Council that the conduct of the parties must be considered in deciding whether an issue was material for the decision in the earlier suit. In *Aghore Nath Mukerjee v. Srimati Kamini Debi*(3) MOOKERJEE and TEUNON, JJ., held that if a person who has no present interest in the bequests contained in a will is made a party to a suit which asked for the construction of the will and the determination of all rights created by it and he takes an active part in the contest relating to the construction, the decision of the court on the construction would be *res judicata* against him. It is true that it is not always easy to decide what was directly and substantially in issue in a former suit. Issues are

(1) (1870) 13 M.I.A., 573.

(2) (1906) I.L.R., 28 All., 727 (P.C.).

(3) (1910) 11 C.L.J., 461.

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often framed by courts not only on points which are essential for the determination of the actual matter in controversy between the parties but also on subsidiary questions having more or less bearing on the essential points. A decision on such subsidiary questions need not necessarily make the matter raised by them *res judicata* in a subsequent suit where they became material for the decision of the matter then brought under contest. Again, a decision on one of two questions may be enough to determine a contest but both the questions might be adjudicated on and made the basis of the judgment. In such a case the matter raised in both the questions would be *res judicata* although if the judgment had been based on one of them alone the other would not be *res judicata*. Again, suppose a suit is instituted for the recovery of certain properties, the defendant might merely deny the plaintiff's title to those properties and the issues might relate only to the particular properties claimed. In such a case a pronouncement on points involving both the properties under litigation and other properties might not lead to estoppel by *res judicata*. But suppose the defendant rests his defence on a ground which admittedly covers both the properties claimed by the plaintiff in the suit and other properties as for instance by claiming them all under a will and the issue as to the will is decided against him; then in that case if the plaintiff subsequently claims other properties under the will, the question as to the will would obviously be *res judicata*. Suppose again a plaintiff claims on the basis of his right under a will some of the properties comprised in it and the defendant contests the genuineness of the will. The decision of the court that the will is or is not genuine will certainly bind both the plaintiff and the defendant in any litigation between the parties with reference to other properties in the will. In a suit for rent for a particular year it may often not be easy to determine whether any particular question raised relates only to the claim made for the year or is one which would affect the right to rent for other years also. The court has in each case to decide whether the issue covers the plaintiff's right to rent except for the year for which it is claimed. In *Vythilinga Mudaliar v. Ramachendra Naiker*(1), cited by Dr. Swaminathan for the respondent the question raised

in the earlier suit for rent was whether the defendant was in possession of all the lands for which rent was claimed. This court held that any finding on the question would not be *res judicata* in a suit for rent for a subsequent year as the land of which the defendant was in possession might not have been the same in both the years. SUBRAMANIA AYYAR, J. whose judgment was concurred in by SANKARAN NAIR, J. observed however that a decision on a point which would affect the right to rent for both the years could not be disputed in the later suit. He observed "no doubt had the decision in the previous suit been to the effect that certain specific parcels constituted part of the inam, the choultry in the present suit could not, if it admitted the possession during the period in question here of those parcels, seek to make out that the parcels were not inam." *Nil Madhub Sarkar v. Brojo Nath Singha*(1) is probably supportable on similar grounds, although some of the observations in the judgment seem to be open to exception. In a very recent case *Kali Kumar v. Bidhu Bhushan*(2), MOOKERJEE and TEUNON, JJ. held that an issue raised on the disputed point in a suit for rent and decided by a court would operate as *res judicata* in a subsequent suit for rent. MOOKERJEE, J. considers the point as settled beyond all controversy and refers to *Bhabbar Sheikh v. Hara Bewah*(3) and *Hara Chandra Bairagi v. Bepin Behari Das*(4) in support of his statement. The same view was taken by another bench of the Calcutta High Court in *Maharani Beni Pershad v. Raj Kumar*(5). Sometimes in a suit for rent by a landlord against his tenant, a third party intervenes and claims the land as his own and it becomes difficult to decide whether a decision in the suit as to the plaintiff's right to rent would be *res judicata* in a subsequent suit regarding the title between the plaintiff in the previous suit and the intervenor. The questions material for deciding a right to rent as against a particular tenant are of course very different from the considerations that will arise in a suit for title between rival landlords. If the suit was in fact expressly or impliedly allowed to be expanded in character and was regarded also as one for the declaration of the landlord's title as against the intervenor

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(1) (1894) 1 L.R., 21 Cal., 286.

(2) (1912) 16 C.L.J., 89.

(3) (1911) 13 C.L.J., 1.

(4) (1911) 13 C.L.J., 85.

(5) (1912) 16 C.L.J., 124.

(1) (1904) 14 M.L.J., 379 at p. 383.

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and a decision as to title was arrived at, the finding might be *res judicata* in any subsequent proceedings between the two rival landlords. But a mere decree for rent against a tenant need not amount to any decision in a contest about title. This was the ground on which the decision of the Privy Council in *Ran Bahadur Singh v. Lucho Koer*(1) proceeded, though estoppel by *res judicata* was avoided in that case on the ground also of the absence of concurrent jurisdiction in the court that decided the previous suit. In the present case the question raised in the previous suit, Original Suit No. 430 of 1906 was whether the patta tendered was proper. The terms in question did not relate to any incidents special for the year fasli 1314 but to the relationship between the plaintiff and the defendants generally as the owners of melwaram and the kudivaram interest in the land respectively. Section 4 of the Rent Recovery Act VIII of 1865 required that the rent payable and all other material incidents of the tenancy should be stated in the patta to be tendered to the tenant and according to section 7 of the Act no suit was maintainable unless the landlord had previously tendered to the tenant such a patta as he was bound to accept. The defendants were not bound to accept a patta which was incorrect in any particular. If the extent was wrongly stated or the rent was stated to be payable in kind while any portion of it was not, they could refuse to accept the patta. The plea raised by them in substance was that there were defects in the patta which entitled them not to accept it and that the suit should therefore be dismissed. The question therefore was whether there were any such defects in the patta. The trial would of course proceed on the defects which the defendants insisted on. With regard to the issue whether the patta was proper or not the defendants were bound to raise all objections that they could to the contents of the patta and if they failed to do so they must be taken to have raised them and all points that they could have raised must be taken to have been impliedly decided against them. Suppose the defence in this case was that the plaintiff was not the holder at all of the plaint lands. Suppose that, though the defendants raised that defence in the previous suit, the matter was not explicitly decided; or suppose they did not raise the defence at all. The question being one which related not merely to the

(1) (1885) I.L.R., 11 Cal., 801 (P.O.).

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rent for the particular year, 1317, but to the plaintiff's right to claim rent for any year the matter must be regarded as *res judicata*. It has been established by the cases in this court that a decision with regard to the proper terms of a patta to be tendered by a landholder to his right for any one year is *res judicata* with regard to subsequent years, unless the terms related specially to the particular year or there was a change in the terms of the tenancy, *Sree Venkatachalapati v. Krishna*(1) and *Sellappa Chettyar v. Velayutha Tevan*(2). In the latter case the tenant did not object in the earlier suit to some of the stipulations in the patta. It was held by BENSON and WALLIS, JJ., that estoppel by *res judicata* was nevertheless applicable to the case. SANKARAN NAIR, J. distinguishes it from the present case on the ground that on both the suits were to enforce acceptance of pattas and not for rent and that the decision that the patta is proper would necessarily involve a finding that the lands referred to in the patta belong to the plaintiff. But the question raised related to some of the terms of the patta only and not to the ownership of the land. The trial of the question as to the ownership of the land in the later suit would not affect the decree in the earlier suit—the cause of action was different. The objections taken in the later suit were not expressly decided in the earlier suit. According to the tests adopted by the learned Judge *Sellappa Chettyar v. Velayutha Tevan*(2), must be regarded as wrongly decided. I am of opinion that the principle of that decision is clearly applicable to the present case. In both, the question raised bore on the relationship of the parties, not for the particular year in question in the earlier suit but subsisting between them during future years also. The defendant raised questions relating to the permanent relationship between the parties. He was entitled to raise them and his pleas, if successful, would be an effective answer to the plaintiff's suit. These are the tests for deciding whether the rule of *res judicata* is applicable. See *Natesa Gramani v. Venkatarama Reddi*(3). Assuming therefore that the specific objections to the patta raised in this suit were not expressly decided in the previous suit, that point is immaterial. It is by no means clear however that one at least of the points was not decided. The finding was that the terms of the patta

(1) (1890) I.L.R., 13 Mad., 287.

(2) (1907) I.L.R., 30 Mad., 498.

(3) (1907) I.L.R., 30 Mad., 510.

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"did not contain any objectionable matter." The question as to the extent was certainly raised in the previous suit. There is nothing to show that the court did not decide everything that was comprised in the written statement of the defendants. The question as to whether the rent was not payable in kind for a portion of the lands was not raised in the written statement. Whether evidence was led with regard to it, it is impossible to say, but the court was entitled to try the issue as to the correctness of the patta on the pleadings in the case; and if any matter of attack with reference to the patta was not raised by the defendant he must be taken to have raised it, for any successful attack of the terms would be a complete defence to the suit for rent. I am of opinion therefore that the issue on the question of *res judicata* must be decided in the plaintiff's favour. I cannot agree with the respondent's contention that as the suit for rent related only to the year 1314, the defendant who resisted the suit on the ground that the terms of the tenancy were not properly embodied in the patta tendered by the plaintiff was entitled to keep back any objections on the ground that it would be profitable to him to do so with respect to that particular year. As the appellate court has not disposed of all the questions in the case, the case cannot be finally disposed of here. The decree of this court in *Bayya Naidu v. Paradise Naidu* (1) and the decree of the lower appellate Court must be reversed and the appeal remanded for fresh disposal according to law. All costs in this court must abide the result.

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SADASIWA ATTAR, J.:—"The question for decision in this appeal is whether the defendants who are tenants under plaintiff (a landholder) are barred by *res judicata* owing to the decision in a previous suit brought by the plaintiff against them to recover rent for two previous faslis (1314 and 1315) from setting up the contention that the patta tendered for the plaint fasli (1316) contained improper terms as to the extent of the lands in defendants' holding and as to defendants' liability to pay waram rent for a portion of their holding and that hence they (the defendants) are not liable for the rent of fasli 1316, the present suit having been brought to recover such rent.

The former suit brought for the rent of faslis 1314 and 1315 is Original Suit No. 430 of 1906. The pattas tendered for those faslis contained practically the same entries as are found in the

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disputed patta for fasli 1316. The defendants contended then (see Exhibit C), among other defences, that (a) "the pattas alleged to have been tendered are not proper" and (b) "the extent of defendants' jeroyati land has been very much overstated by plaintiff."

In the present suit also, they put forward the same defences, though they gave more details, viz., (a1) that 3 acres are "cash rent paying lands" and (b1) that the extent of lands liable to pay rent is 5 acres plus 3 acres (and not about 14 acres entered in the patta).

In that former suit, the very first issue raised the question "whether the pattas tendered are proper" and the finding of the court was as follows:—

"The terms of the pattas Exhibits E and F do not contain any objectionable matter. I accordingly find the first issue in the affirmative."* According to section 4 of the Rent Recovery Act VIII of 1865, "the patta shall contain the . . . local description and extent of the land; the amount and nature of the rent according as the same is payable in money or in kind or by a share of the produce, etc." Thus, when the court in the former suit found no objectionable matter in the pattas for faslis 1314 and 1315 and when it found the first issue in that case (*viz.* whether the pattas tendered were proper in the affirmative, it clearly found (a2) that the nature of the rent payable for the entire lands is waram share of the produce as entered in the pattas, and (b2) that the extent of the lands liable to pay rent is 14 acres as found in the pattas.

The court undoubtedly overruled defendants' contention that the extent was not 14 acres and that the pattas were also otherwise improper. It is not clear whether defendants at the trial of that suit prominently put forward the contention that 3 acres of the lands were liable to pay only cash rent and not waram produce but it cannot, in my opinion, be denied that when they attacked the pattas as containing improper terms, they were bound to put forward all the grounds on which they attacked the pattas as improper and could not be allowed to put forward some grounds of attack alone for one fasli and other grounds for other faslis. As has been decided in *Vythilinga Mudaliar v. Ramachendra Naicker* (1), *Sellappa Chettyar v. Velayutha*

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Tevan(1), and *Natesa Gramani v. Venkatarama Reddi*(2), a decision as to the standing terms of a patta between a landlord and a tenant for one fasli is *res judicata* in respect of such terms for all subsequent faslis, though of course, the tenant might prove in a subsequent fasli that by the act of God or anything which has subsequently happened (*i.e.*, by proper relinquishment of a portion of his holding, etc.) and which gives him a legal right to have the terms modified, the conditions and terms of the tenancy have been altered.

The pattas for faslis 1314 and 1315 having been expressly found to be proper pattas (that is, to contain the proper extent of land in defendants' holding and proper rates and kinds of rent) in the former suit, the defendants are, in my opinion, clearly barred by *res judicata* from contending that a similar patta tendered for plaint fasli (1316) was not a proper patta. The learned Judge whose judgment is under appeal before this Full Bench held (if I understand rightly his observations in pages 5 to 8 of his judgment) (a) that the question as to the extent of the lands to be entered in the annual patta and the kind of rent leviable on 3 acres of the holding was not "directly and substantially in issue" in the former suit because a decision on the above question was "not essential for the decree that was passed in Original Suit No. 430 of 1906" and was "not essential for the relief finally granted in the former" case as "a decree for rent does not necessarily involve" or "required a decision as to the terms of the patta or the extent of the land for which the rent has to be paid," (b) that assuming that a decision on that question was essential in the former suit, and assuming therefore that "the question must be deemed to have been directly and substantially in issue under explanation IV to section 11 of the Civil Procedure Code, even though the parties did not raise that question as they were bound to raise it," it did not follow that the question must be deemed to have been "as a matter of fact" "heard and decided," (c) that in the former suit, the question in the present suit was not "heard and decided" expressly and "we are not bound to imply" that it was so decided, (d) that the "causes of action" and the "subject-matters" of the two suits are different,

(1) (1907) I.L.R., 30 Mad., 493.

(2) (1907) I.L.R., 30 Mad., 510.

(e) that it "is not enough" that a determination in the present suit (about the extent of lands and rate of rent) would be inconsistent with the decision in the previous case that the patta then tendered was proper" to prevent such determination in the present suit by the bar of *res judicata*, and, (f) that on all the above grounds, the question in the present suit whether the patta for fasli 1316 is a proper one is not concluded by the decision in the former suit.

A decree for rent between an ordinary landlord and an ordinary tenant may not necessarily involve a decision as to the terms of the lease or as to the extent of land comprised in the lease. But a decision under the Rent Recovery Act VIII of 1865 where the landlord sued for rent on the allegation that the standing terms of the tenancy were contained in the patta tendered by him mentioning particular terms and the particular extent of the holding does, in my opinion, involve and require a decision as to whether the terms of the lease are proper and the extent of land covered by the holding is as alleged in the patta tendered by the landlord and hence the reason (a) given by the learned Judge seems to me to fail. *Nil Madhub Sarkar v. Brojo Nath Singha*(1) quoted by the learned Judge is therefore not applicable and the earlier case—*Gobind Chunder Koondoo v. Taruck Chunder Bose*(2) and *Venkatachalapathi v. Krishna*(3), *Natesa Gramani v. Venkatarama Reddi*(4), *Pittapur Raja v. Bichi Sitayya*(5), and *Sellappa Chettyar v. Velayutha Tevan*(6) also quoted by the learned Judge and referred to by him with approval, seem to me to clearly govern this case.

I shall next deal with the argument that even though the question was directly and substantially in issue because the decision involved the finding on that issue, it must also have been heard and decided before it can be deemed *res judicata*. There are no doubt observations in *Kailash Mondul v. Baroda Sundari Dasi*(7), *Woomesh Chandra Maitra v. Barada Das Maitra*(8) and *Rajendra Nath Ghose v. Tarangini Dasi*(9) to the above effect but as pointed out by SUBRAMANIA AYYAR J. in *Arunachalam Chetty v. Meyyappa Chetty*(10) if a court is bound by explanation II

(1) (1899) I.L.R., 21 Calc., 236.

(2) (1878) I.L.R., 3 Calc., 145 (F.B.).

(3) (1890) I.L.R., 13 Mad., 287.

(4) (1907) I.L.R., 30 Mad., 510.

(5) (1885) I.L.R., 8 Mad., 219 (P.C.).

(6) (1907) I.L.R., 30 Mad., 498.

(7) (1897) I.L.R., 24 Calc., 711.

(8) (1901) I.L.R., 28 Calc., 17.

(9) (1905) 1 C., L.J., 248.

(10) (1898) I.L.R., 21 Mad., 91 at p. 92.

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to section 13 of the old Civil Procedure Code (corresponding to explanation IV to section 11 of the new Code), to adopt and act upon the fiction that a matter which might and ought to have been made a ground of defence or attack in the former suit should be deemed to have been a matter directly and substantially in issue in such suit, that same explanation necessarily imposes the duty of acting upon the further fiction that that matter was also heard and decided and adjudicated upon in the former suit (Explanation II to section 13) would be meaningless as pointed out by the Allahabad High Court in *Sri Gopal v. Pirthi Singh*(1) if it were necessary in cases which were covered by it that the matter should have been, as a matter of fact, heard and finally decided in the previous suit. *Sri Gopal v. Pirthi Singh*(1) follows the Privy Council cases in *Mohabir Pershad Singh v. Macnaghten*(2) and *Kameswar Pershad v. Rajkumari Ruttan Koer*(3) and the interpretation of section 13 by the Allahabad High Court in that case was approved and adopted by the Privy Council when the case went on appeal before their Lordships in *Sri Gopal v. Pirthi Singh*(1). *Kailash Mondul v. Baroda Sundari Dasi*(4), *Woomesh Chandra Maitra v. Baroda Das Maitra*(5) and *Rajendra Nath Ghose v. Tarangini Dasi*(6) being opposed to the above decision of their Lordships of the Privy Council can, no longer, be considered good law. In fact, the Calcutta High Court itself in *Jamadar Singh v. Serazuddin Ahamad Chaudhuri*(7) has virtually dissented from *Kailash Mondul v. Baroda Sundari Dasi*(4) and *Woomesh Chandra Maitra v. Baroda Das Maitra*(5). One of the learned Judges says "It is very difficult to see how a matter, which *ex hypothesi* was not before the former Court, could possibly have been heard and finally decided by it; and it seems to me that, if this were necessary, the whole of explanation II (to section 13) would be rendered meaningless." Their Lordships also decided in that case that the decision in *Sri Gopal v. Pirthi Singh*(1) is good law and that it is not necessary that the subject-matter of the two suits must be the same before explanation II

(1) (1898) I.L.R., 20 All., 110 at p. 113. (3) (1898) I.L.R., 20 Cal., 79 (P.C.).

(2) (1899) I.L.R., 16 Cal., 682 (P.C.). (4) (1897) I.L.R., 24 Cal., 711.

(5) (1901) I.L.R., 28 Cal., 17.

(6) (1905) I.C., L.J., 248.

(7) (1908) I.L.R., 35 Cal., 979. at p. 987.

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to section 13 can be applied. I might however state that this question (b) does not really arise in this case because I am unable to agree with the learned Judge whose judgment is under appeal that the present question was not as a matter of fact heard and decided in the former suit. In the statement of facts in the beginning of this judgment, I believe I have shown that the question was really heard and decided as the defendant raised the plea as to the impropriety of the patta in the former suit and his plea was expressly overruled. See *Soorjomonee Dayes v. Suddanund Mohapatter*(1) which decides that pleadings must be looked into to understand what was in issue and what was decided in the former suit. The fact that the cause of action and the subject-matters of the two suits are different is immaterial because the only question is whether the decision in the former suit on certain issues of fact is *res judicata* in the present suit and it is not necessary under section 11 that the causes of action and the subject-matters of the two suits should be the same for a decision on issues of fact to constitute *res judicata* in a subsequent suit. Lastly, I am unable to hold that the decision as to the terms of the patta in the former suit was on a mere collateral question in the former suit. Section 11 does not use the word "collateral" but uses the words "directly and substantially in issue." The Privy Council case *Misir Ragho Bardial v. Sheo Baksh Singh*(2), was decided mainly on the ground that the court which tried the first suit was not competent to try the second suit and hence that the decision of an issue in the first suit was not *res judicata* in the second suit. There is an expression at page 445 of the judgment that the issue decided in the former suit was merely a "collateral" issue though the facts show that it was a direct and substantial issue. In the *Duchess of Kingston's case*(3), it would seem to have been held that where the court which decided the first suit was not competent to decide the second suit, the question of fact decided by the former court though material for the decision must be deemed to have been "collateral" to the subject-matter of the first suit. It was with reference to that use of the word "collateral" that the Privy Council held that the court which decided the first suit, dealt with that issue only as a collateral issue. If the Privy Council by their *obiter dictum* intended to state that the question

(1) (1878) 12 Ben. L.R., 304 (P.C.).

(2) (1888) I.L.R., 9 Cal., 489.

(3) (1776) 2 Sm. L.O., 781.

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was not directly and substantially in issue, in the former suit (a dictum irreconcilable with the Privy Council decision in *Pahalwan Singh v. Maharaja Muheshwar Bux Singh Bahadur*(1) such dictum must be held to have been overruled by their later decisions already set out including *Sri Gopal v. Pirthi Singh*(2). The latest Privy Council case *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh*(3) seems to me to be conclusive on the matter, for their Lordships decide that section 13, explanation II, would bar a defendant who omits to raise a material issue in a former suit when he was a party thereto even though that issue was not as a matter of fact heard and decided in the former suit. *Masilamania Pillai v. Thiruvengadam Pillai*(4) seems also to me to be conclusive on this question of *res judicata*. It is, no doubt, not enough to constitute *res judicata* that a determination *contra* in a later suit would be inconsistent with the determination in the former suit; for there is also a further requisite that the court which decided the former suit should have been competent to decide the later suit. In this case, this latter requisite also is complied with and I am therefore clear that the findings of fact in the former suit are *res judicata*, one of those findings being that the defendants held the extent of lands mentioned in the patta tendered to them and are bound to pay rent according to the terms of the said patta.

I may now refer shortly to one important question which was lightly touched upon during the arguments, namely, whether, where the subject-matter of the former litigation and the relief claimed therein were the same as those claimed in the subsequent litigation, the plaintiff can bring two suits on what is put forward by him as two different causes of action. The question does not really arise in this case, but I wish to state that I agree with SUBRAMANIA AYYAR, J. in *Arunachalam Chetty v. Meyyappa Chetty*(5) that courts should try their best to hold that the causes of action in such cases are substantially the same. I shall here quote WEST, J.'s observations (quoted also by SUBRAMANIA AYYAR, J.). "Under systems such as the Roman Law or the English Common Law, in which the development of legal rights

and duties has been greatly influenced by the re-action of a highly artificial mode of procedure, appropriate forms of action can be found for nearly all the ordinary cases which the legal consciousness of the community recognizes as justifying an exercise of the coercive power of the state; but, as the variety of human relations greatly exceeds that of the conceptions, upon which a system of actions can be framed, it happens that the same transaction or group of circumstances may furnish a ground for several different actions. In such cases, different causes of action arise to the party injured; but as it is felt that the same set of facts, which the mind at once grasps as jurally integral, ought not to be made the basis of repeated proceedings; the complaining party is allowed to frame his complaint in various ways, and the rule obtains that all the circumstances, which exists when the former of two actions is brought and can be brought forward in support of it, shall be brought forward then, not reserved for a second action arising out of the same events. The cause of action is regarded as identical, though the form of action differs on the second occasion, and the test applied is whether the evidence to support both actions is *substantially* the same (*Hitchin v. Campbell*(1); *Martin v. Kennedy*(2). Under a freer system of procedure, such as that of the Equity Courts in England or of the Civil Courts in India, second suits are to be admitted more sparingly than when the plaintiff has to proceed by set forms of action. As he can bring forward his whole case unfettered by artificial restraints, and seek all remedies that the Court can justly award upon the facts proved, there is no reason why he should be permitted to harass his opponent and occupy the time of the Courts by repeated investigations of a set of facts which ought all to have been submitted for adjudication at once. His cause of action, into whatever Protean forms it may be moulded by the ingenuity of pleaders, is to be regarded as the same, if it rests on facts which are integrally connected with those upon which a right and infringement of the right have already been once asserted as a ground for the Court's interference."

I am aware that BENSON and BASHYAM AYYANGAR, JJ., in *Ramaswami Ayyar v. Vythinatha Ayyar*(3) discuss some of the observations in the decision in *Arunachalam Chetty v. Meyyappa*

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(1) (1872) 12 Ben. L.R., 391 (P.C.).

(2) (1902) I.L.R., 24 All., 429 (P.C.).

(3) (1912) I.L.R., 39 Cal., 527 (P.C.).

(4) (1908) I.L.R., 31 Mad., 385.

(5) (1898) I.L.R., 21 Mad., 91 at p. 97

1) 2 W. Bl., 827.

(2) (1800) 2 Bos. and Pull., 69, s.c. 126 Ex. R. 1161.

(3) (1908) I.L.R., 26 Mad., 760.

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Chetty(1), with disapproval and SUBRAMANIA AYYAR, J., himself in *Veerana Pillai v. Muthukumara Asary*(2) said that "anything in the language used" by him in *Arunachalam Chetty v. Meyyappa Chetty*(1), "inconsistent with the view of the law as expounded" in *Ramaswami Ayyar v. Vythinatha Ayyar*(3), "can no longer be treated as an authority." I am, however, inclined to hold, with due deference to the contrary opinions, that all the observations in *Arunachalam Chetty v. Meyyappa Chetty*(1) as to the scope of the doctrine of *res judicata* are sound law and those observations in *Ramaswami Ayyar v. Vythinatha Ayyar*(3) which conflict with the views in *Arunachalam Chetty v. Meyyappa Chetty*(1) seem to me to draw rather fine distinctions and in my humble judgment would lead to unnecessary and undesirable multiplicity of litigation. However, in so far as any principle in *Arunachalam Chetty v. Meyyappa Chetty*(1) is directly inconsistent with the later Full Bench decision of the Madras High Court in *Thrikaikat Madathil Raman v. Thiruthiyil Krishnen Nair*(4) [which approves of the decision in *Ramaswami Ayyar v. Vythinatha Ayyar*(3)] but which does not refer to and does not expressly overrule *Arunachalam Chetty v. Meyyappa Chetty*(1), though it expressly overruled only *Rangasami Pillai v. Krishna Pillai*(5), I am not anxious that such directly overruled principle should be again reconsidered. As at present advised, I do not see anything in *Thrikaikat Madathil Raman v. Thiruthiyil Krishnen Nair*(4), irreconcilably inconsistent with any observation in *Arunachalam Chetty v. Meyyappa Chetty*(1), as two separate mortgages can be separately redeemed, especially if there is an express understanding to that effect between the parties and all that *Thrikaikat Madathil Raman v. Thiruthiyil Krishnen Nair*(4) decided was that the failure of a suit to redeem one mortgage is not a bar to a suit to redeem another.

I would for the reasons mentioned in paragraphs 5 and 6 of this opinion reverse the judgment of the lower Courts and remand the case to the lower appellate Courts for a fresh disposal of the appeal before it, the District Munsif not having decided the questions involved in issues 4 and 5 and the lower appellate Court also not having considered all the issues. The costs hitherto will abide the result.

(1) (1898) I.L.R., 21 Mad., 91.

(2) (1904) I.L.R., 27 Mad., 102.

(3) (1908) I.L.R., 26 Mad., 760.

(4) (1906) I.L.R., 29 Mad., 153 (F.B.).

(5) (1899) I.L.R., 22 Mad., 259.

APPELLATE CRIMINAL.

Before Mr. Justice Miller.

MESSRS. W. A. BEARDSELL & Co. (BY THEIR AGENT W. H. H. JOHNSTORE) (COMPLAINANTS), PETITIONERS,

v.

NILGIRI ABDUL GUNNI SAHIB AND ANOTHER (ACCUSED),
RESPONDENTS.*

Criminal Procedure Code (Act V of 1898), sec. 195 (1), (c)—Sanction to prosecute—Insolvency Proceedings.

Where alleged forged documents were filed in the Insolvency Court; Held:—that the sanction of the Insolvency Court to prosecute for offences relating to the making and using of the said documents is necessary although the offence of forgery was complete before the commencement of the Insolvency Proceedings.

Where the documents were produced before the Official Assignee; Held:—that the sanction of the Court and not of the Official Assignee is necessary. The Official Assignee does not become a civil court merely because he has a wide discretion in deciding on claims of persons alleging themselves to be creditors of the insolvent, or because persons aggrieved by decisions of his can appeal to the Court from those decisions.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the order of Khan Bahadur S. M. V. OOSMAN SAHIB, Presidency Magistrate, Georgetown, Madras, in Calendar Case No 27000 of 1911.

In this case a complaint was filed against the accused in the Presidency Magistrate's Court, Georgetown, Madras, charging the first accused with the offence of forgery under section 465, Indian Penal Code, and with forging documents purporting to be valuable securities under section 467, Indian Penal Code, and the second accused with abetment of the said offences as well as under section 471, Indian Penal Code, with fraudulently and dishonestly using the forged documents as genuine. It appeared from the complaint that the first accused was a partner of P. M. Inaiathulla Sahib & Co., and the complainant's firm had obtained a decree against the accused's firm for Rs. 20,364-11-2.

* Criminal Revision Case No. 752 of 1911.

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On the 21st November 1910, upon the petition of the complainant's firm the accused's firm was adjudicated insolvent. The complainant further stated that about the date of or subsequent to the adjudication petition (27th October 1910), the accused had forged a promissory-note bearing date 5th March 1908, in favour of the second accused, who was the sister's son of the first accused, for Rs. 8,000 and a letter of the same date by which the first accused purported to mortgage all the immovable properties in favour of the second accused. During the course of the insolvency proceedings, about 20th February 1911, the second accused filed an affidavit before the Official Assignee in Madras in which he asserted the genuineness of the execution of the promissory-note and the deposit of the title-deeds on the 5th March 1908. In August 1911, the promissory-note and letter were produced in the Insolvency Court before SANKARAN NAIR, J.

The preliminary objection was taken by the accused before the Magistrate that the alleged forged documents having been produced before SANKARAN NAIR, J., in the insolvency proceedings by a party to the insolvency proceedings, the sanction of the Insolvency Court to prosecute the accused was necessary under section 195 (1), (c), Criminal Procedure Code. The Magistrate, holding that the alleged forged documents were produced in the Insolvency Court and that the offences complained of were in relation to the proceedings in that Court, discharged the accused for want of the said sanction.

The complainant petitioned the High Court.

Dr. *Swaminathan* for the petitioners argued that the offences complained of were complete before the documents were produced in the Insolvency Court and the mere fact that subsequent to the completion of the offences the same documents were also produced and marked as exhibits in certain proceedings would not render necessary a sanction without which a complaint could have been instituted before they were produced in the Insolvency Court.

W. Barton for the accused.

MILLER, J.

ORDER.—I think the Magistrate was right in holding that the sanction of the Insolvency Commissioner is necessary. Taking it that all the offences charged were complete when the claim was made before the Official Assignee still at the time both first

and second accused were parties to the Insolvency Proceedings in the High Court initiated by a petition of the complainant's. The order of adjudication does not transfer the proceeding from the Court to the Official Assignee.

So that even if it is necessary under section 195 (1), (c), of the Code of Criminal Procedure that the proceeding should have commenced before the offence is complete, that requirement is fulfilled in this case. The offence of forgery is complete, it may be said, as soon as the false document is made, and in that view it cannot be right to restrict the scope of section 195 of the Code of Criminal Procedure to cases in which the commencement of the 'proceeding' precedes the completion of the offence for the section in that case would not apply to a great many cases to which it was obviously intended to apply and which are covered by its language.

As I understand the case the view suggested on behalf of the petitioners is that in order that section 195 of the Code of Criminal Procedure may apply the proceeding must have commenced before any action has been taken on, or use has been made of, the false document; but even accepting that view, which receives some support from *Noor Mahomed v. Kaikhosru* (1) the Insolvency proceedings had been commenced before any action was taken on the documents alleged to be forged.

It was suggested by Dr. *Swaminathan* that if the production of the document before the Official Assignee is taken to be their production in the 'proceeding' then the Official Assignee must be considered to be the Court and his sanction, and not that of the Insolvency Court, is what is required. I do not think so. The Official Assignee does not become a Civil Court merely because he has a wide discretion in deciding on claims of persons alleging themselves to be creditors of the Insolvent, or because persons aggrieved by decisions of his, can appeal to the Court from those decisions, and the provisions of the Insolvency Act do not suggest that he ought to be considered a Court subordinate to "the Court" which by sections 3 and 6 of the Insolvency Act is the High Court or some officer appointed under section 6 of the Insolvency Act.

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(1) (1902) 4 Bom. L.R., 268.

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The Insolvency proceeding, from the date of the petition which initiates it, is before the Court, and the Court controls and directs the actions of the Official Assignee and I think in these circumstances that it is the Court whose sanction is required and not the Official Assignee.

I do not say that the Magistrate is wrong in his view that the production of the document before the Insolvency Commissioner is sufficient to attract to the case the provisions of section 195 (1), (c), of the Code of Criminal Procedure. But in my view it is unnecessary to decide that point.

The petition is dismissed.

Messrs. Short, Bewes & Co., attorneys for the petitioners.

A. E. Rencontre, attorney for the accused.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

Re MUTHUSAMI NAIDU (ACCUSED), PETITIONER.*

1912.
April, 19.

Indian Penal Code (Act XLV of 1860), sec. 498—Defamation—absolute privilege^a
for statement in complaint to magistrate.

A defamatory statement in a complaint to a magistrate is absolutely privileged.

PETITION under sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the judgment of F. H. HAMNETT, Sessions Judge of Madura, in Criminal Appeal No. 16 of 1911 confirming the conviction and sentence of P. CASIVISWALINGAM PILLAI, the Acting First-class Sub-Divisional Magistrate of Madura Division, in Calendar Case No. 106 of 1910.

The facts of the case appear from the order.

Dr. S. Swaminathan for the petitioner.

The Acting Public Prosecutor for the Crown.

ORDER.—The question for decision in the revision petition is whether a defamatory statement made by one person regarding another in a complaint presented by the former against the latter

is absolutely privileged. In *In re Venkata Reddi*(1) a Full Bench of this Court has expressed the opinion that neither party, witness, Counsel, nor Judge can be held to be liable for defamation on account of words spoken or written in any proceeding before a court recognised by law and that such statements must be regarded as absolutely privileged. The learned Chief Justice refers in the course of his judgment to the decision in *Golap Jan Bholanath Khettry*(2), where it was held that statements made in a complaint to a magistrate were protected by absolute privilege. The same view was held by the Queen's Bench Division in *Lilley v. Roney*(3). The defamation in that case was contained in a letter of complaint addressed to the Registrar of the Incorporated Law Society against a solicitor, the society being a body having power to enquire into the conduct of solicitors. In *Bank of British North America v. Strong*(4), the Privy Council no doubt expressed the opinion that a statement in a notice of action would not be entitled to more than a qualified privilege. But this is apparently because the notice is not a part of the proceedings before the Court. We do not think that a statement in a complaint which initiates a proceeding should be held to be entitled to less privilege than other statements made by parties in the subsequent stages of the proceedings. If the complaint is false, then the defendant would be entitled to prosecute the complainant for preferring a false charge. We think the proper rule to lay down is that a statement contained in a complaint should be held to be absolutely privileged. We therefore set aside the conviction of the accused. The fine, if already paid, must be refunded.

(1) (1913) I.L.R., 36 Mad., 216 (F.B.). (2) (1911) I.L.R., 38 Cal., 880.

(3) (1892) L.J. 61 Q.B., 727.

(4) (1876) 1 A.C., 307.

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* Criminal Revision Case No. 443 of 1911 (Criminal Revision Petition No. 334 of 1911).

APPELLATE CRIMINAL.

Before Mr. Justice Benson.

1912.
April 26.Re S. KONDAREDDI AND ANOTHER (ACCUSED NOS. 1 AND 2),
PETITIONERS.**Criminal Procedure Code (Act V of 1908), sec. 94—Summons may be issued under, to accused to produce document or thing.*

Under section 94, Criminal Procedure Code, a Magistrate has power to issue a summons to an accused person to produce a document or other thing even when its production might tend to incriminate him.

Mahomed Jackariah & Co. v. Ahmed Mahomed [(1888) I.L.R., 15 Calc., 109], followed.

Ishwar Chandra Ghoshal v. The Emperor [(1908) 12 C.W.N. 1016], dissented from.

PETITION under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of C. G. RANGANADHAM MUDALIYAR, the Taluk Second Class Magistrate of Kavali, dated 5th December 1911, in Calendar Case No. 344 of 1911.

The facts of the case are stated in the order.

T. Prakasam for the petitioner.

The Acting Public Prosecutor for the Crown.

BENSON, J.

ORDER.—The question raised in this petition is whether it is competent to a Magistrate under section 94, Criminal Procedure Code, to issue a summons to an accused person to produce a document or other thing, the production of which might tend to incriminate him.

The words of the section are general. No exception is made in favour of an accused person, though several exceptions are specified in clause (3) of the section.

The question was considered at length in *Mahomed Jackariah & Co. v. Ahmed Mahomed*(1) and it was held that it was clearly the intention of the Legislature to make section 94 applicable to an accused person, notwithstanding that this involved a departure from the general principle of the English law. A similar view was apparently taken in *Nizam of Hyderabad v. Jacob*(2).

* Criminal Revision Case No. 10 of 1912.

(1) (1888) I.L.R., 15 Calc., 109. (2) (1882) I.L.R., 19 Calc., 52.

A contrary view was taken in *Ishwar Chandra Ghoshal v. The Emperor*(1), in which the learned Judges referred to sections 342 and 343, Criminal Procedure Code, which were not referred to in the two Calcutta cases noted above.

In *Ishwar Chandra Ghoshal v. The Emperor*(1), however, no one appeared to support the Magistrate's action and the learned Judges did not refer to the previous Calcutta cases.

The Magistrate always has the power to issue a search warrant to obtain the production of a document or other thing in possession of the accused.

The issue of a summons is a milder means of attaining the same and I am of opinion that the ruling in *Mahomed Jackariah & Co. v. Ahmed Mahomed*(2) should be followed.

I therefore dismiss the petition.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice
Sadasiya Ayyar.THE SECRETARY OF STATE FOR INDIA IN COUNCIL
REPRESENTED BY THE COLLECTOR OF ANANTAPUR (FIRST DEFENDANT),
APPELLANT,1912.
July 17 and
18.

v.

KALEKHAN AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 80 [Old Code (Act XIV of 1882), sec. 424]—Notice of suit against Secretary of State—Notice not restricted to suits for damages for an act done.

Under section 424 of the Civil Procedure Code (Act XIV of 1882) [corresponding to section 80, Code of Civil Procedure, (Act V of 1908)], notice is necessary in all suits of whatever description against the Secretary of State for India in Council.

SECOND APPEAL against the decree of N. LAKSHMANA RAO, the Subordinate Judge of Bellary, in Appeal No. 164 of 1907,

(1) (1908) 12 C.W.N., 1016.

(2) (1888) I.L.R., 15 Calc., 109.

* Second Appeal No. 2158 of 1910.

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presented against the decree of M. DEVA RAO, the District Munsif of Penukonda, in Original Suit No. 69 of 1906.

The facts appear in the judgment of SUNDARA AYYAR, J.

C. F. Napier, the Government Pleader, for the appellant.

A. Krishnaswami Ayyar for the respondents.

SUNDARA AYYAR, J.—This second appeal must be disposed of on the objection taken by the defendant, the Secretary of State for India in Council, that the suit is not maintainable as no notice of it was given as required by section 424 of the old Code corresponding to section 80 of Act V of 1908. The plaint states that the Board of Revenue passed an illegal order that a certain sum of money not due by the plaintiff to Government should be collected from him and that “on account of the said order the plaintiffs have lost peace of mind and are much troubled.” The plaintiffs ask for a decree granting an injunction restraining the first defendant, that is, the Secretary of State for India in Council or any of his servants, from collecting any amount from the plaintiff. The Subordinate Judge held that no notice was required under section 424, Civil Procedure Code, in such a case. The view he took was that the section applied only to suits for damages. This position is in our opinion entirely untenable. Section 424 enacted “no suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of an act purporting to be done by him in his official capacity, until the expiration of two months next after notice in writing has been given, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the District.” The contention before us is that the section applies only when the suit is in respect of an act “purporting to be done” and this, it is said, does not include a suit for an injunction but only one for damages arising from the act done. The case for the respondent has been argued with great fullness and ability by the learned vakil who has appeared for him but he has been unable to persuade us that the view adopted in the decided cases, which is against him, is wrong. Two arguments have been urged on the meaning of the language of the section. It is contended that the words “in respect of any act purporting to be done by him” justify both “the Secretary of State for India in Council and

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public officer.” In the Government edition of the statute there is a comma after the word “Council.” The object of the comma evidently was to show that the phrase “purporting to be done” did not apply to “Secretary of State for India in Council.” It is argued that punctuation cannot be taken note of in considering a statute. There is no doubt authority in English cases for this position but no Indian case has been cited to us, and it may be permissible to express a doubt whether the consideration which induced Judges in England to lay down such a rule would be equally applicable in the construction of statutes in this country. The question, however, does not depend on the punctuation alone. Now the expression “Secretary of State for India in Council” is, as urged by Mr. Krishnaswami Ayyar himself for his own purposes, merely a name under which the Government is to be sued and does not denote either an individual or a Corporation. See *Kinlock v. Secretary of State for India in Council*(1). If that be so, to speak of an act being done by the “Secretary of State for India in Council” understood in that sense seems to involve some straining of language although it is pointed out that in *Secretary of State for India in Council v. Rajluchi Debi*(2), MACLEAN, C.J., was of opinion that an act done by a public officer who is subject to the authority of the Secretary of State for India in Council could be imputed to the latter. We may also note that the Secretary of State for India in Council has no other than an official capacity, assuming that he has any capacity at all and that the expression is not a mere name. This makes it unlikely that any distinction was intended to be made between the acts of the Secretary of State for India in Council in his official capacity and other acts of his. On all these grounds we entertain no doubt that the phrase “purporting to be done” was intended to apply only to a public officer. Another argument of the respondent is that the section applies only to suits arising out of acts done by public officers, whether they be against the Secretary of State for India in Council or against a public officer, in other words, he contends that the section should be read thus: “No suit shall be instituted in respect of any act purporting to be done by a public officer in his official capacity either against the Secretary of State for India in Council or against the public

(1) (1880) 15 Ch. D., 1.

(2) (1898) I.L.R., 25 Calc., 239 at p. 243.

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officer." But if this were the meaning we think more appropriate language would be used to indicate it. The respondent's construction requires in effect the omission of the comma after the word 'Council' and the insertion of one after the word 'officer.' Besides there is reason to believe that the object of the statute was to give the Government time for reflection whenever a suit is threatened against it and this would apply whatever be the nature of the suit. No authority has been cited in support of this contention. *Secretary of State for India in Council v. Rajlucki Debi*(1), *Bachchu Singh v. The Secretary of State for India in Council*(2), *Secretary of State v. Gajanan Krishnarao*(3) and *Sakharam Bhagwan Patil v. The Secretary of State*(4) are all in favour of the construction contended for by the appellant that notice is necessary in all suits of whatever description against the Secretary of State for India in Council and we agree with the opinion expressed in those judgments.

It is then contended that the section should not be applicable to suits for injunction restraining the Secretary of State for India from doing a certain act. If the construction we have adopted of the language be correct, then there is no room for excepting any class of suits from the operation of the section and we doubt whether it would be within the province of a Court of Justice to introduce an exception where the rule enacted by the Legislature is universal in its terms. The observations of CHANDRAVARKAR, J., in *Secretary of State v. Gajanan Krishnarao*(3) and *Sakharam Bhagwan Patil v. The Secretary of State*(4) are no doubt calculated to show that the learned Judge was of opinion that, where in consequence of an immediate injury threatened by the Secretary of State for India in Council it would not be humanly possible for the plaintiff to give the prescribed two months' notice of action, the section should not be held to apply. It is not necessary to say whether even this narrow exception can be made in accordance with the language of the section. In the present case it is not alleged that any very immediate injury of a serious character was threatened. Revenue officers of Government would no doubt have power

(1) (1898) I.L.R., 25 Cal., 239.
(3) (1911) I.L.R., 35 Bom., 362.

(2) (1903) I.L.R., 25 All., 187.
(4) (1912) 14 Bom. L.R., 353.

to arrest the plaintiff for the debt alleged to be due to the Government but it is not stated that any immediate arrest was threatened. On the other hand, the suit itself was not instituted until after the expiration of more than two months from the date on which the cause of action is alleged to have arisen. There is therefore no room for any contention that it was not possible to give two months' notice before the suit was launched. The result is that the suit must be held to be not maintainable on the ground that no notice was given of it as required by section 424 of the Civil Procedure Code. The decree of the lower Appellate Court must be set aside and that of the District Munsif restored with costs both here and in the lower Appellate Court.

SADASIVA AYYAR, J.—I do not think I could usefully add any observations of my own as regards the construction of section 424 of the Civil Procedure Code and I agree with what my learned brother has just now said and also with what CHANDRAVARKAR, J., has said in *Secretary of State v. Gajanan Krishnarao*(1) and *Sakharam Bhagwan Patil v. The Secretary of State*(2) on this point. So far as the word 'him' in the old section, 424 is concerned, the matter has been made very clear by the amended Act in which section 80 has substituted the word "such public officer" for the word 'him.' I do not think the Legislature intended to make any alteration in the law but only to approve of those cases decided under the old Code which confine the grammatical relation of the 'him' to 'public officer' and do not extend it to "The Secretary of State in Council."

Then, as regards the question of hardship, if a suit against the public officer alone for an injunction could be brought without notice—a position on which I reserve my opinion—the fact that the plaintiff is prohibited from bringing a suit against the Secretary of State for India in Council without due notice cannot cause irreparable injury to plaintiff, for he could sue the public officer alone for his threatened act and obtain a temporary injunction and this will effectively prevent the threatened injury. As regards suits against the Secretary of State for India in Council large classes of such suits involve

(1) (1911) I.L.R., 35 Bom., 362.

(2) (1912) 14 Bom. L.R., 353.

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questions as to the legality of the acts done by subordinate public officers in respect of acquisitions of land under the Land Acquisition Act, recovery of arrears of all kinds of revenue, of prevention and removal of encroachments and of the performance of similar public duties and most of them do involve reliefs in the nature of an injunction. The Legislature must be deemed to have been aware of this patent consideration and if they had intended to exclude suits against the Secretary of State for India claiming the relief of injunction from the necessity of notice, they would have put in an exception under the section itself, stating that in cases of injunction or in cases where irreparable injury is likely to be caused if an injunction is not at once granted, the notice required by the first part of the section was unnecessary. I do not think that it is legitimate for the Courts to themselves graft on such exceptions to the section. As regards the English case—*Flower v. Local Board of Low Leyton*(1), in which it was held that in a suit for an injunction against a threatened injury no notice need be given under the Public Health's Act of 1875 before the suit is brought against the local authority, I respectfully dissent from that case and also from the *obiter dicta* of CHANDRAVARKAR, J., in *Secretary of State v. Gajanan Krishnarao* (2) and *Sakharam Bhagawan Patil v. The Secretary of State*(3) that a similar though more restricted exception could be grafted on to section 424 by the decisions of Courts. If I do not put it too strongly I would say that such a course would be a fraud on the part of the judiciary against the powers of the Legislature, which powers, as my learned brother remarked in the course of the arguments in this case are practically omnipotent. It will also lead to this anomaly that where a plaintiff pays up a demand due to Government loyally and out of respect to the revenue authorities (but under protest) and then sues to recover the money so paid by him he ought to give two months' notice, but if he rushes to Court for an injunction against the Secretary of State acting through the Revenue officer who is given statutory powers to recover the money, he need not give such notice at all. I do not think that that could have been the

(1) (1877) 5 Ch. D., 347.
(2) (1911) I.L.R., 35 Bom., 362. (3) (1912) 14 Bom. L.R., 353.

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intention of the Legislature. I might also add that if we give room for even a single exception of that kind, the ingenuity of litigants and of their legal advisers will be found to be quite equal to convert almost all suits against the Secretary of State into suits involving the relief for an injunction. I therefore agree that the lower Court's decree should be reversed and that the suit ought to be dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

Re K. BALI REDDI AND FOUR OTHERS (ACCUSED NOS. 1 AND 3 TO 5 IN SESSIONS CASE NO. 33 OF 1912, ON THE FILE OF THE SESSIONS COURT OF CUDDAPAH AND SECOND ACCUSED IN SESSIONS CASE NO. 33 OF 1912, ON THE FILE OF THE SESSIONS COURT AT CUDDAPAH), APPELLANTS IN CRIMINAL APPEALS NOS. 515 AND 516 OF 1912.*

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January
22 and 24,
and
February 11.

Criminal Procedure Code (Act V of 1898), ss. 423 and 439—High Court, power of, to alter finding of acquittal into conviction and enhance sentences in Revision—Indian Penal Code (Act XLV of 1860), sec. 300, explained.

Section 423, clause (b), Criminal Procedure Code, 1898, gives power to the High Court when hearing an appeal against a conviction to alter the finding and section 439 gives power to enhance the sentence so as to make it appropriate to the altered finding.

Section 439, sub-section (4), which enacts that "nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction" must be construed as referring to cases where the trial has ended in a complete acquittal; any other construction would be inconsistent with the power to "alter the finding" given to the Court as a Court of Revision by virtue of its power to exercise the power conferred on a Court of Appeal by section 423, clause (b).

In this view the High Court, having in revision altered a finding of rioting into one of murder, enhanced the sentences from five years' rigorous imprisonment to transportation for life.

In the course of a riot the accused attacked and killed a man with dangerous weapons:—*Held*, that the acts of the accused having caused the death of the man and there being nothing to suggest that they were not sufficient to cause death as their ordinary and natural result, in the absence of proof of circumstances sufficient to give the accused the benefit of any of the exceptions

* Criminal Appeals Nos. 515 and 516 of 1912 and Criminal Revision Case No. 27 of 1913 (Case taken up No. 2 of 1913).

Re
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APPEALS against the order of V. SUBRAHMANYAM PANTULU, the Sessions Judge of Cuddapah, in Calandar Case No. 33 of 1912.

The facts of the case appear in the judgment.

Dr. S. Swaminathan for Appellants in Criminal Appeal No. 515 of 1912.

The Honourable Mr. T. Richmond for the Appellant in Criminal Appeal No. 516 of 1912.

The Public Prosecutor *contra*.

Dr. S. Swaminathan and T. Balakrishna Chetti for the first and third to fifth prisoners and the Honourable Mr. T. Richmond and T. Balakrishna Chetty for the second prisoner in Criminal Revision Case No. 27 of 1913.

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JUDGMENT.—In this case the five accused were charged with rioting armed with deadly weapons and with having murdered one Chinna Gangayya on the 15th May last, offences punishable under sections 148 and 302 of the Indian Penal Code. The Sessions Judge found the accused not guilty of those offences, but guilty of simple rioting and of culpable homicide not amounting to murder (sections 147 and 304 of the Indian Penal Code). The accused appeal against their conviction and this Court, as a Court of Revision, has given them notice to show cause why they should not be convicted of murder and be sentenced for that offence.

There cannot, we think, be the slightest doubt that the accused are guilty of rioting and in the course of it killed Chinna Gangayya, as found by the Sessions Judge.

[Their Lordships here discussed the evidence and continued:] We agree with the Sessions Judge that the five accused killed Chinna Gangayya. We are, however, quite unable to accept his view that the offence was not murder. He says that "they (the accused) had no intention to cause his death or to cause such bodily injury as was likely to cause his death, but they only wanted to beat him with the knowledge that the beating was likely to cause death. He was not an important member of the opposite party, whom they might be supposed to have intended to kill. They beat him because he sided with the opposite party and threw stones against them for which I do not think the accused would have intended to kill him or

would have intended to cause such bodily injury as would have killed him. If the accused really intended to kill the man, they would not have left him with life but would have beaten him to death then and there. Moreover, the deceased also caused provocation to the accused by throwing stones at them."

We think that this is an altogether wrong view to take of the effect of the prosecution evidence. The evidence shows that the first four accused were armed with sickles and the fifth with a spear, and that the first and second accused struck the deceased on the back and neck respectively with their sickles, the deceased fell, and the other accused then fell on him and beat him, and one witness (third prosecution witness) says that the fifth accused pierced him with a spear. The medical evidence is in accordance with this. It shows that there were no less than ten incised wounds on the neck and shoulders and head of the deceased. One on the head was three inches long and cut asunder the outer table of the skull. Another was 5½ inches long and 2 inches deep, extending from the nape of the neck, round the side and to the front of the neck. Another was 5¼ inches long and 2 inches deep on the shoulder. There were three others, each an inch deep. There was another, 2½ inches long, on the right side of the neck, and another 4½ inches long on the back of the head extending to the cheek, and so forth. When five men attack another with sickles and a spear and inflict such injuries as these on him, so that he dies within 15 or 20 minutes in consequence of the wounds, it is not reasonable to hold that they did not intend to kill him. In law a man is presumed to intend the ordinary and natural results of his acts. The acts of the accused did, in fact, cause the death of the man and there is nothing to suggest that they were not sufficient to cause death as their ordinary and natural result. There is no suggestion that there was any special reason, such as a diseased spleen, which made the injuries more fatal than might naturally be expected. In these circumstances, it is immaterial to say that he was not an important member of the opposite faction, or that if they had intended to kill him they would not have left him alive but would have finished him on the spot, or that the deceased gave some provocation by throwing stones at the opposite side. If such provocation was given it was certainly not of so grave and sudden a character

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as to have deprived the accused of the power of self-control. There is no evidence that any of the accused were struck by the stones. In fact any such provocation was not pleaded nor was it relied on in the argument before us. We must therefore hold that the accused, *Kambham Bali Reddy, Kambham Inna Reddy, Gajjala Venkata Reddy, Kambhan Saviri Reddy and Kothapu Pilla Gangayya* are guilty of the murder of *Chinna Gangayya*.

It is, however, contended for the appellants that we have no power to remedy the error into which the Sessions Judge has fallen except by ordering a new trial on the charge of murder. We do not accept this contention. Section 423, clause (b), of the Criminal Procedure Code expressly empowers an Appellate Court hearing an appeal from a conviction (as in this case) to alter the finding; see *Appanna v. Pithani Mahalakshmi*(1) and *Hanumappa v. Emperor*(2). The appellants cannot rely upon section 403 of the Criminal Procedure Code and plead the acquittal by the Sessions Court on the charge of murder as a bar to the jurisdiction of this Court, because, as pointed out in *Queen-Empress v. Jahanulla*(3), the present appeal is not a second trial, but only a continuation of the trial in the Sessions Court. The decision in *Krishna Dhan Mandal v. Queen-Empress*(4), is to the same effect, where it is observed, "when an act or a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, an appeal from a conviction for any one of such offences must lay the whole case open to the interference of the Appellate Court notwithstanding any order of acquittal by the first Court in regard to any of the other offences. The interference of the Appellate Court in such a case is directed primarily, not against the acquittal, but against the conviction which is called in question by the accused, though if the interference is to be rational and complete, the Appellate Court must deal with the whole case." Nor can they rely on the last paragraph of section 439. That paragraph cannot be held to limit the powers of a Court of Appeal. It only limits the powers of the High Court when acting, not as a Court of Appeal, but as a Court of Revision. It prevents the High Court when acting as a Court of Revision from converting a finding of acquittal into

(1) (1911) I.L.R., 34 Mad., 545. (2) (1911) 21 M.L.J., 805.
(3) (1896) I.L.R., 23 Cal., 975. (4) (1895) I.L.R., 22 Cal., 377 at p. 381.

one of conviction. But section 423, clause (b), has no such restriction. The only restriction under that clause is that the Court of Appeal cannot enhance the sentence.

It may be observed that, under section 280 of the Criminal Procedure Code of 1872, it was enacted that the Appellate Court "may alter and reverse the finding and sentence or order" of the Court below, "and may, if it see reason to do so, enhance any punishment that has been awarded." This power of enhancing the sentence was taken away from the Courts of Appeal by section 423 of the Code of 1882, which so far as this matter is concerned, is the same as section 423 of the present Code. The Courts of Appeal include not only the High Court but also all Courts of Session and, in practice, all District Magistrates and first-class Sub-divisional Magistrates.

It may well be that the Legislature thought that the power to enhance sentences ought not to be entrusted to so large a number of Courts, many of which would, in practice, be comparatively inexperienced. But that reason would not apply to the High Court, and so we find that in section 439 of the Code of 1882 (which is the same as section 439 of the present Code) it was enacted that the "High Court may, in its discretion, exercise all the powers conferred on a Court of Appeal by sections 195, 423, 426, 427 and 428 or on a Court by section 338" and it is expressly added, "may enhance the sentence." The effect of the two sections read together is that the High Court when hearing an appeal against a conviction may, under section 423, clause (b), alter the finding and then as a Court of Revision may, under section 439, enhance the sentence so as to make it appropriate to the altered finding.

Sub-section (4) of section 439, which enacts that "nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction," is not, if rightly construed, inconsistent with this view. The prohibition in sub-section (4) refers to a case where the trial has ended in a complete acquittal, not to a case like the present, where the trial has ended in a conviction but where the Court has wrongly applied the law or has wrongly found some fact not proved, and has, in consequence, held that the conviction should be under some section of the Code other than the section properly applicable as any other construction would be inconsistent with

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the power to "alter the finding" given to the Court as a Court of Revision by virtue of its power to exercise the power conferred on a Court of Appeal by section 423, clause (b), and the terms of a statute should not be so construed as to involve an inconsistency between its different parts. This view is borne out by the language of section 423 clause (a), which speaks of "an order of acquittal" in the sense of an order finding the accused not guilty on any of the charges framed against him, when contrasted with the language of clause (b) which provides for the Appellate Court altering the finding where the accused has been convicted by the first Court on certain charges but not on other charges.

We are not aware of any reported decision opposed to the view we have taken. The observations of the Full Bench in *Queen-Empress v. Balwant*(1) are not applicable to the present case, since in that case there was a complete acquittal and there was no appeal before the High Court against a conviction so as to make section 423 (b) read with section 439 applicable, and the effect of that provision was not considered.

On the other hand this Court has more than once acted in accordance with the view we have taken. In *Re Govindan*(2) the second accused was charged with murder (section 302, Indian Penal Code). The Sessions Judge acquitted him of that offence but found him guilty of culpable homicide not amounting to murder (section 304, Indian Penal Code), and sentenced him to transportation for life. He appealed to this Court which also gave notice of revision, and this Court (SIR SUBRAMANIA AYYAR, Officiating C.J. and BODDAM, J.) convicted him of murder and sentenced him to death. Again in *Re Sathu Savara*(3), the accused was charged in the Sessions Court with murder (section 302, Indian Penal Code), but was acquitted of that offence and convicted only of voluntarily causing grievous hurt (section 325). The accused appealed to this Court, which also gave notice of revision and the Court (BENSON and WALLIS, JJ.) held that he was guilty at the least of culpable homicide not amounting to murder, and added "we accordingly, as a Court of Revision, convict him of that offence," and it enhanced the sentence. It is true that in neither of these cases was the legality of altering the finding

(1) (1887) I.L.R. 9 All. 134 (F.B.).

(2) Criminal Appeal No. 800 and Criminal Revision Case No. 400 of 1908.

(3) Criminal Appeal No. 143 and Criminal Revision Case No. 137 of 1907.

called in question or discussed, but for the reasons already stated we are of opinion that the procedure was legal though, no doubt, the power should in practice be exercised sparingly, as, in fact, it has been in the past.

In the result we alter the finding in the present case to one of murder punishable under section 302, Indian Penal Code. There was no premeditation and we think the ends of justice will be satisfied by the lesser penalty allowed by law.

In lieu of the sentences imposed by the Sessions Judge we sentence each of the five accused to transportation for life.

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APPELLATE CRIMINAL—FULL BENCH.

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

Re MARE GOWD (ACCUSED), PETITIONER.*

Criminal Procedure Code (Act V of 1898), sec. 125—security to keep the peace—and power of the District Magistrate to cancel a security bond.

The District Magistrate has jurisdiction under section 125, Criminal Procedure Code, to cancel a bond to keep the peace on the ground that on the facts its execution should not have been ordered.

Nabu Sardar v. Emperor [(1907) I.L.R. 34 Cal. 1 (F.B.)], followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the order of J. H. ROBERTSON, the District Magistrate of Bellary, in Proceedings dated the 2nd December 1912.

The facts of this case appear in the following order of the District Magistrate. "This is an application under section 125, Criminal Procedure Code, presented by one Mare Gowd, Village Magistrate of Kurugodu, through his counsel Mr. Ramachender, asking me to set aside the order of the Head-quarters Deputy

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* Criminal Revision Case No. 604 of 1912.

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Magistrate, Bellary, binding him over in a sum of Rs. 1,000 to keep the peace. It has not been in my experience the practice to admit such petitions and the petitioner's counsel anticipating this objection, though he does not refer to it in his petition, has himself raised the question when arguing the matter before me. He contends that under section 125, Criminal Procedure Code, a District Magistrate is empowered to revise any order passed under section 118, Criminal Procedure Code, by a Subordinate Magistrate and quotes the ruling in *Nabu Sardar v. Emperor*(1), in support of this view. He is unable, however, to point to any ruling of the Madras High Court in his favour.

In the Calcutta ruling a Full Bench held, overruling the decision of a Divisional Bench, that it was open to the District Magistrate under section 125, Criminal Procedure Code, to set aside an order under section 118 on a petition presented by the party aggrieved. With great deference to the view of the learned Judges in that case, there are, in my opinion, reasons which preclude me from following it. In the first place, the decision was an *ex parte* one, as no one appeared for the Crown, and it might well be that, if the Crown had been represented, the decision would have been different. In the next place, the decision makes no reference to section 406, Criminal Procedure Code, which gives a person, bound over to be of good behaviour, the right to appeal against the order but omits all mention of a person ordered to keep the peace. Seeing that the Code has been several times revised, this omission can hardly be accidental but must be intentional. This is clear from the decision in *In the matter of the petition of Chet Ram*(2), where it was laid down that a person ordered to give security for keeping the peace has no right of appeal and no right to be heard at all. If such person has the right to petition the District Magistrate under section 125, Criminal Procedure Code, it was to be expected that the right would have been recognized in that decision.

It is true that the petitioner admits that in this case he has no right of appeal though he does claim to petition this Court by way of revision. A reference to section 125 shows that under it the District Magistrate may cancel a bond either for keeping the peace or for good behaviour. If then the petitioner's

(1) (1907) I.L.R., 34 Cal., 1 (F.B.)

(2) (1905) I.L.R., 27 All., 623.

present claim be conceded, it follows that, in the event of his sleeping over the right of appeal conferred by section 406, or of an appeal under that section being dismissed, it is still open to him to proceed by way of revision petition, under section 125. This can hardly have been intended by the Legislature.

Nor is this all. The terms of section 125, as observed by the Calcutta High Court, are very wide and give the District Magistrate discretion *at any time* to cancel a bond. To accept therefore the petitioner's arguments would mean admitting his right to present not one but any number of applications under that section."

This case coming on for hearing, the Court (BENSON, and SUNDARA AYYAR, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH—BENSON, J.—The question before us in this case is as to the powers of a District Magistrate under section 125, Criminal Procedure Code. BENSON, J.

The facts briefly are as follows:—

The Deputy Magistrate acting under sections 107 and 118, Criminal Procedure Code, directed the petitioner to execute a bond to keep the peace. The petitioner did so and then petitioned the District Magistrate to act under section 125, Criminal Procedure Code, and to set aside the order of the Deputy Magistrate and to cancel the bond. The ground alleged by the petitioner was that the Deputy Magistrate had no sufficient reasons for requiring him to execute the bond. The District Magistrate refused to entertain the petition, stating "I hold that I have no power to entertain this petition." We are now asked to revise this order of the District Magistrate.

I am of opinion that the view taken by the District Magistrate as to his powers under section 125 is incorrect. The section runs as follows:—"The Chief Presidency or District Magistrate may at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of any Court in his district not superior to his Court."

It will be observed that the words of the section are very wide. The District Magistrate "may, at any time, for sufficient reasons," cancel such a bond, *i.e.*, for reasons which appear to the District Magistrate, in the exercise of a sound judicial discretion, to be sufficient. If the District Magistrate, in the

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exercise of a sound judicial discretion, is of opinion that the bond ought never to have been *required*, is not that a sufficient reason for cancelling the bond? I can find nothing in the section to qualify or restrict the ordinary and natural meaning of the language used, or to indicate that "sufficient reasons" means reasons in connection with something which occurred after the execution of the bond.

The words of the section "at any time" (which are not found in the corresponding section 500 of the Code of 1872, but were introduced when the sections were recast in the Code of 1882) seem to point to the same conclusion. If the District Magistrate may within a few minutes of a Subordinate Magistrate exacting the execution of a bond, cancel it, it could hardly be in consequence of anything that occurred after the execution of the bond. The view that I take was unanimously taken by a Full Bench of five Judges of the Calcutta High Court in the recent case of *Nabu Sardar v. Emperor*(1), overruling a contrary decision of a Bench of the same Court in *Barka Chandra Dey v. Janmejy Dutt*(2). It is also the view taken by KNOX, J., in two cases, *Emperor v. Abdur Rahim*(3) and *Emperor v. Someshar Das*(4).

There has been much discussion as to the nature of the jurisdiction vested in the District Magistrate under section 125, that is, whether it is an original, or an appellate or a revisional jurisdiction. I do not, however, think that the existence of the jurisdiction should be doubted or that its extent, according to the plain language of the section, should be curtailed, because of apparent difficulties in classifying the nature of the jurisdiction with reference to other sections of the Code. I say apparent difficulties, because I think that on examination they will not be found to be insuperable. It is, I think, clear from sections 404 and 406, Criminal Procedure Code, that no *appeal* is allowed in regard to an order to execute a bond to keep the peace, and consequently the jurisdiction given under section 125 cannot be regarded as an appellate jurisdiction. This is what was expressly held in *In the matter of the petition of Chet Ram*(5), and by TUDBALL, J., in *Banarsi Das v. Partab Singh*(6),

(1) (1907) I.L.R., 34 Cal., 1 (F.B.). (2) (1905) I.L.R., 32 Cal., 948.

(3) (1905) 2 Cr.L.J., 335.

(4) (1905) 2 Cr.L.J., 336.

(5) (1905) I.L.R., 27 All., 623.

(6) (1913) 11 A.L.J., 16.

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but the decisions did not go beyond that point, or state that the District Magistrate had not any revisional powers under section 125. The distinction is of importance, for if there is a right of appeal, the appeal cannot be dismissed without giving the appellant an opportunity of being heard (section 421, Criminal Procedure Code), whereas there is no similar provision in regard to petitions for revision.

Whether the jurisdiction given by section 125 is to be regarded as original or revisional, depends on the circumstances which evoke the exercise of the jurisdiction. If the petitioner alleges that in the events that have happened since the execution of the bond its continuance is no longer necessary and that it should, therefore, be cancelled, the jurisdiction invoked is clearly of an original, not a revisional character. But if the petitioner alleges that the order was made for insufficient reasons, and asks for the cancellation of the bond on this ground, the jurisdiction invoked is revisional in character. No doubt section 125 does not, in terms, provide for setting aside the order to execute the bond. It only provides for the cancellation of the bond, but I take it that if the bond is cancelled by the superior Court on the ground that it ought never to have been required, the petitioner would be content with having obtained the substance, and would not be too curious in seeking for the express cancellation of the order. The omission to provide expressly for the setting aside of the order was, perhaps, due to a desire for simplicity of language, and to the fact that the section covers both the classes of cases to which I have referred, in one of which the original order was rightly passed, though the continuance of the bond is no longer necessary, and in the other of which the cancellation of the bond may be regarded as, in effect, depriving of any further importance, the original order which was wrongly passed.

It may also be observed that under section 124 the District Magistrate may order a person imprisoned for failure to give security to be discharged, but the section says nothing about cancelling the order of the Subordinate Magistrate requiring the bond to be given. It can hardly be contended that the absence of a provision in the section for cancelling the order, limits the power of the District Magistrate to discharge the

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prisoner to cases other than those in which the order of the Subordinate Magistrate was illegal or unnecessary at the time when it was made. The interpretation which I have given to section 125 seems to me to be in accordance not only with its plain language, but with obvious convenience. The District Magistrate is the Chief Magistrate responsible for the peace of the whole district; and it seems improbable that the Legislature would restrict his power of control over the orders of his Subordinate Magistrates when those orders are, in his more experienced judgment, unnecessary for the peace of the district. It is contended, however, that he could always report the case to the High Court under section 438, but that would seem to involve a lengthy and cumbersome procedure without any corresponding advantage. It may be pointed out also that the Chief Presidency Magistrate has power to act under section 125, but it is not clear that he has any power under section 438 or otherwise to report a case to the High Court for revision. If, therefore, the restricted scope of section 125 contended for by the Public Prosecutor is correct, a wrong or illegal order made by a Subordinate Presidency Magistrate under sections 107 and 118, could not be interfered with by the Chief Presidency Magistrate himself, nor could he report the case to the High Court. This could hardly have been the intention of the Legislature.

It is also suggested that if the Legislature intended to give the District Magistrate revisional powers, they would have been given in Chapter XXXII, as in the case of wrongful discharges, but the answer is that there was no need to make any provision in that chapter as it had already been made in section 125. I do not think that any argument can be drawn from the fact that the Sessions Court is a Court of Reference for certain purposes under section 123, for section 125 is careful to exclude from its purview all such cases. In my opinion, then, the District Magistrate in the present case had power under section 125 to entertain the petition to cancel the bond, and it was open to him, in his discretion, to consider whether there were sufficient reasons for requiring the petitioner to execute the bond, and to cancel it if he found sufficient reason for so doing. The fact that there was a prayer to set aside the order in pursuance of which the bond was executed could not deprive the District Magistrate of the jurisdiction given by the section to cancel the bond.

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I would set aside his order and direct him to restore the petition to his file, and to deal with it in accordance with law as above stated.

I do not think that this Court should go into the merits in a case of this kind where the District Magistrate has jurisdiction, but has dismissed the petition on the ground that he has no jurisdiction. In *Re Yeddula Rosi Reddi*(1), I refused to entertain a petition similar to the present petition on the ground that the matter was one within the cognizance of the District Magistrate and no application had been made to him. It seems to me that he is in a better position than this Court to deal with this matter which relates to the peace of his district.

The same view was taken, and the same rule followed, in two cases by KNOX, J., already referred to [*Emperor v. Abdur Rahim*(2) and *Emperor v. Someshwar Das*(3)].

As, however, my learned brother does not agree with me as to the interpretation of section 125, and as the question of law involved is one of importance and likely often to arise in practice, I think it desirable to refer for the decision of the Full Bench the question whether, on the facts of this case as stated by me, the District Magistrate was right in holding that "he had no power to entertain the petition."

SUNDARA AYYAR, J.—In this case an order was passed by the Sub-Divisional First-class Magistrate of Bellary directing the petitioner in this Court, Mare Gowd, under section 107, Criminal Procedure Code, to execute a bond for keeping the peace. The petitioner moved the District Magistrate of Bellary under section 125, Criminal Procedure Code, to set aside the order and to cancel the bond. It is admitted that the application was based entirely on the ground that it was passed by the Sub-Divisional Magistrate on insufficient grounds. The District Magistrate held that he had no power to revise the order of the Sub-Divisional Magistrate under section 125 as he was asked to do. This Court is asked to hold in the exercise of its powers of revision that the District Magistrate was wrong in declining jurisdiction.

The question for decision is whether the District Magistrate was right in the view he took of his powers under section 125. The contention of Mr. J. C. Adam, the learned counsel for the

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(1) Criminal Revision Case No. 17 of 1907. (2) (1905) 2 Cr. L.J., 335.
(3) (1905) 2 Cr. L.J., 336.

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petitioner, is that section 125 confers plenary powers on the District Magistrate to cancel the bond executed for keeping the peace or for good behaviour on any good ground, whether because the order was wrongly passed, or because there was no further necessity for keeping the bond alive in consequence of a change in the circumstances of the case, or because, on fresh facts not presented to the Magistrate who passed the order but brought to the notice of the District Magistrate, the order directing security to be given appears to be unnecessary. It is admitted that before a bond has been actually executed the District Magistrate has no power under the section to set aside the order directing a person to execute a bond; Mr. Adam relies on a decision of the Full Bench of the Calcutta High Court, *Naba Sardar v. Emperor* (1), in support of his contention. The learned Public Prosecutor contends, on the other hand, that the jurisdiction conferred by section 125 on the District Magistrate cannot include the power to set aside the order of any inferior Magistrate as a Court of Appeal or Revision; and, therefore, also the power to cancel the bond executed, in pursuance of the order, on the ground that it was wrongly passed. This contention must, I think, be sustained. The different kinds of jurisdiction possessed by a superior Court over the proceedings of an inferior Court are described in the Criminal Procedure Code as those of a Court of "Appeal," "Confirmation," "Reference or Revision." See section 520. "Appeals" are dealt with in Chapter XXXI. Reference and Revision are dealt with in Chapter XXXII. "Confirmation" is dealt with in special sections relating to proceedings of an inferior Court requiring confirmation. Section 404 enacts that "No appeal shall lie from any judgment or order of a Criminal Court except as provided for by the Code or by any other law for the time being in force." No appeal is provided for either in Chapter XXXI or in terms anywhere else in the Code against an order either under section 106 or section 107 directing security to be given to keep the peace, while an appeal is provided by section 406 against an order, passed by a Magistrate other than a District Magistrate or a Presidency Magistrate, for security for good behaviour under section 118 of the Code. With respect to a District Magistrate's powers of revision section

(1) (1907) I.L.R., 34 Cal., 1 (F.B.).

435 entitles him to call for and examine the record of any proceeding before any inferior Criminal Court. Section 436 empowers him to pass final orders in revision in one class of cases; and section 438 authorizes him to report to the High Court the result of his examination of the record in other cases for the orders of the High Court. There can be no doubt that both the Sessions Judge and the District Magistrate are empowered to report to the High Court an order directing security for keeping the peace under section 438 after examining the record under section 435. It is unlikely that, if the District Magistrate was intended to be Court of Appeal or Revision with respect to orders or security to keep the peace, provision would not have been made for it in Chapter XXXI or Chapter XXXII. There is no apparent reason for not doing so and for providing an appeal or revision in another portion of the Code. Besides, it is unlikely that the word "Appeal or Revision" would not have been employed in section 125, if it was intended that the District Magistrate should be a Court of Appeal or Revision with respect to the order of an inferior Court for security to keep the peace. Again section 125 refers to an order for security for good behaviour as well as to one for security to keep the peace. It is not likely that section 125 also was intended to confer the powers of an Appellate Court in the former class of cases when section 406 expressly provides an appeal in such cases. An examination of some other sections in Chapter VII (C) dealing with "proceedings in all cases subsequent to order to furnish security" leads to the same conclusion. Section 123, clause (2), makes the Sessions Judge a Court of Reference with respect to all orders for security passed by Magistrates for a period exceeding one year, and the High Court a Court of Reference for similar orders passed by a Presidency Magistrate. Is it likely that the District Magistrate would be made a Court of Appeal or Revision in a case where the Sessions Judge is made a Court of Reference? Section 124 gives the District Magistrate the power to release a person imprisoned for failing to give security ordered by any Magistrate of the district, including his own predecessor, where he is of opinion that the release may be made without hazard to the community or to any other person. He may, on the same ground, reduce the amount of security or curtail the time for which security has been required. This is a power of the nature of

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original jurisdiction not questioning the legality or validity of an order passed for giving security. Where the order for security has been passed by the Court of Session or the High Court, the District Magistrate or the Chief Presidency Magistrate, as the case may be, may make a reference to the Sessions Court and the High Court, respectively, if he thinks that a person imprisoned for failing to give security may be discharged without any hazard. Such a reference also does not question the validity of the original order for security. It is unlikely that section 125 immediately following the above sections and not expressly providing that the District Magistrate is to be a Court of Appeal or Revision intended to confer on him powers of an appellate or revisional character. Moreover, if this were the intention, there is no reason for not enabling the District Magistrate to set aside the order for security and for providing only that he may cancel the bond after it has been executed. It does not seem to be permissible to interpret the power to cancel the bond as including the power to set aside the order for security. A stronger reason for holding that the District Magistrate has no appellate powers under section 125 is that he is empowered to exercise the power conferred by the section at any time. It is extremely improbable that Appellate Jurisdiction would be given to a Court without limiting the time within which such power might be exercised. The Calcutta High Court in *Barka Chandra Dey v. Janmejyoy Dutt*(1), held that "the jurisdiction conferred by section 125 is not an appellate or revisional, but an original jurisdiction." This appears to be the only view consistent with the provisions of the Code already referred to. It is true that no bond had been actually executed in that case and the District Magistrate's order was therefore entirely wrong, and the opinion expressed by the learned Judges who decided the case may be regarded as only an *obiter dictum*. In *Nabu Sardar v. Emperor*(2), a bond for keeping the peace had been executed by the person ordered to do so. He applied to the District Magistrate for the cancellation of the bond. It does not appear on what ground he requested him to do so. MACLEAN, C.J., held that the District Magistrate may, under section 125, cancel a bond for any reason which he thinks

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sufficient. He observed, "If he thinks that the bond ought never to have been required, is not that a sufficient reason? I should say so. There is nothing in the section to qualify or restrict the natural meaning of the language used, or to indicate that sufficient reasons means reasons in connection with something which has occurred after the execution of the bond." GHOSH, J., concurred in the observation. The questions referred to the Full Bench were:—(i) Has a District Magistrate power under section 125 of the Code of Criminal Procedure to direct the cancellation of a bond to keep the peace executed on an order by a Subordinate Magistrate on any other ground except that the bond is no longer necessary? (ii) Has the case of *Barka Chandra Dey v. Janmejyoy Dutt*(1), been correctly decided? It must be observed that in *Barka Chandra Dey v. Janmejyoy Dutt*(1) it was observed that a bond could be cancelled under section 125 only "if after a bond has been executed it is made to appear that by reason of the circumstances as they existed at the date of the application, that is circumstances subsequent to the date of the execution of the bond, the continuance of the latter is no longer necessary the District Magistrate may cancel it." The other learned Judges who took part in *Nabu Sardar v. Emperor*(2), agreed in answering the first question in the affirmative and the second in the negative. That is, they held that the District Magistrate's power to cancel a bond was not confined to the case where the bond was no longer necessary and that *Barka Chandra Dey v. Janmejyoy Dutt*(1) which held the contrary view was not correctly decided. It is not quite clear whether they intended to concur in the Chief Justice's observation that the cancellation might be based merely on the ground that the order for security was wrongly passed. Section 125 merely states that the District Magistrate may cancel the bond "for sufficient reason." What would constitute a "sufficient reason" is not explained. Section 124 confines the power to discharge a person imprisoned for failing to give security to cases where there would be no hazard in releasing the accused. It is reasonable to infer that the "sufficient reason" referred to in section 125 was intended to be wider than the reason mentioned in section 124. At the same

(1) (1905) I.L.R., 32 Cal., 948 at p. 952. (2) (1907) I.L.R., 34 Cal., 1 (F.B.)

(1) (1905) I.L.R., 32 Cal., 948.

(2) (1907) I.L.R., 34 Cal., 1 (F.B.).

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time it would not be right to hold, for the reasons already mentioned, that the bond could be cancelled merely on the ground that the Magistrate who passed the order did so wrongly; for, that would be to make the District Magistrate a Court of Appeal or Revision. The conclusion which this reasoning leads to is that the District Magistrate must have power to cancel the bond, not merely on the ground of something occurring after the execution of the bond which makes it right that it should be cancelled, but on other grounds also which would not impeach the correctness of the order passed by the inferior Magistrate. For instance, it may appear, from facts not known at the time when the order was passed, or not put before the Magistrate who passed it, that it would not be desirable or expedient to keep the bond alive. The jurisdiction conferred by the section must be held to be of an original character and not one intended to enable the District Magistrate to exercise the powers of a Court of Appeal or Revision. Having regard to the object of the section, namely, to confer on the District Magistrate large powers in the matter of preserving the peace of the district, the section confers on him the power to hold a fresh investigation after a bond has been executed and to cancel it if he considers it proper to do so. The District Magistrate's power of interference is therefore wider than it was held to be in *Barka Chandra Dey v. Janmejoy Dutt*(1). AIKMAN, J., in *In the matter of the petition of Chet Ram*(2) and TUDBALL, J., in *Barka Chandra Dey v. Janmejoy Dutt*(1) took the same view as the Calcutta High Court did in *Barka Chandra Dey v. Janmejoy Dutt*(1). KNOX, J., on the other hand, held the view adopted in *Nabu Sardar v. Emperor*(3) in *Emperor v. Abdur Rahim*(4) and *Emperor v. Someshar Das*(5). The only case in this Court that has been cited is the judgment of BENSON, J., in *Re Yeddula Rosi Reddi*(6), but it does not appear that the learned Judge intended to lay down any rule as to the scope of the District Magistrate's powers under section 125. He merely held that the High Court would not ordinarily exercise its power of revision to cancel a bond for keeping the peace when no application had been made to the District Magistrate under section 125. Though the District Magistrate has a wide

(1) (1905) I.L.R., 32 Cal., 948.

(2) (1905) I.L.R., 27 All., 623.

(3) (1907) I.L.R., 34 Cal., 1 (F.B.).

(4) (1905) 2 Cr.L.J., 335.

(5) (1905) 2 Cr. L.J., 336.

(6) Criminal Revision Case No. 17 of 1907.

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power under section 125, an order for security to keep the peace being the result of a conviction for an offence in cases where it is passed under section 106, and of a comparatively simple and at the same time urgent character in cases where it is passed under section 107, it was not considered necessary to provide an appeal against it. It was deemed to be sufficient, if either the District Magistrate or the Sessions Judge should consider it necessary to do so, to report such cases for the orders of the High Court in revision. In the present case, the District Magistrate was asked to cancel the bond merely on the ground that the Sub-Divisional Magistrate's order was wrongly passed. This, he had no power to do as he could do so only by exercising the powers of a Court of Appeal or Revision. The prayer that the order of the Sub-Divisional Magistrate should also be set aside was inadmissible. There is, therefore, in my opinion, no ground for interfering with the order of the District Magistrate in revision.

As my learned brother is of a different opinion, I agree to the order that the question whether the District Magistrate was right in holding that he had no jurisdiction to entertain the petition be referred to a Full Bench.

This case coming on for hearing before the Full Bench on 12th March, arguments were heard.

J. C. Adam for the petitioner.

Section 125, Criminal Procedure Code, confers plenary powers on the District Magistrate to cancel the bond at any time for sufficient reason. The wording of the section does not limit his powers in any way. There is no warrant for holding that the fact that the bond should never have been ordered is not a sufficient reason. To read into the section any limitation precluding the District Magistrate from cancelling the bond on the ground that on the facts it was improperly passed would destroy the petitioner's right of regular appeal which the section itself gives. *Nabu Sardar v. Emperor*(1) is clear authority in favour of the view that the section must be taken to mean what it says. No doubt a bond had to be executed before the District Magistrate could interfere, but this did not affect the principle. It was because the order to be upset was an order to execute a bond and not an order to keep the peace that the consequential power of the

(1) 1907 I.L.R., 34 Cal., 1 (F.B.).

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District Magistrate was a power to cancel the bond and not a power to upset an order to keep the peace. This was a mere matter of wording. There was nothing in the Code limiting appeals to the chapter specially dealing with appeals (Chapter XXXI) and indeed section 404 admitted the possibility of appellate jurisdiction being provided elsewhere in the Code for it said, "No appeal shall lie . . . except as provided for by this Code." Further the words in section 125 "at any time" precluded the idea that the bond could only be cancelled because fresh facts had arisen since it was ordered. Suppose the order was passed by the Subordinate Magistrate and the bond immediately entered into and that thereupon the person bound over, at once, say within 30 minutes of the passing of the order, asked the District Magistrate to cancel the bond, the latter might have to say that although desirous of cancelling the bond and although he had power to cancel it at any time, he could not exercise that power as there had been insufficient time for anything fresh to happen. The effect would be to make the words "at any time" meaningless and to read into the section limitations which would completely destroy its sense.

The Public Prosecutor (*C. F. Napier*) *contra*.

The arrangement of the sections in and the scheme of Chapter VIII showed that the appellate jurisdiction in the strict sense of the word was not contemplated. [He then reviewed the sections of Chapter VIII in detail.] The jurisdiction conferred by section 125 was neither appellate nor revisional but an original jurisdiction and an original jurisdiction must be exercised upon original matter and not treated as an appellate jurisdiction.

The language to "cancel the bond" instead of "set aside the order" shows that there is no power to deal with the order. Therefore it cannot be appellate or revisional.

The power is equally exercisable in cases of bonds for good behaviour where there is an appeal under section 406 which indicates it is not appealable.

It is analogous to the power to "order to be released" given to the District Magistrate by the preceding section 124.

The words "at any time" may have been inserted to enable the District Magistrate to cancel the bond, *however late*, that is, the appellant was not to be prejudiced by delay in applying for its cancellation.

Cur. ad vult.

The opinion of the Full Bench was delivered on 20th March.

CHIEF JUSTICE.—I have had the advantage of reading the judgment which has been written by SANKARAN NAIR, J., and I agree with the conclusion at which he has arrived.

I think the view taken by the Full Bench of the Calcutta High Court in *Nabu Sardar v. Emperor*(1), was right.

I am of opinion that the Magistrate was wrong in holding that "he had no power to entertain the petition," and I would answer the question which has been referred to us in the negative.

SANKARAN NAIR, J.—The question for consideration is whether a bond to keep the peace executed by a person in pursuance of an order of a First-class Magistrate under sections 107 and 118, Criminal Procedure Code, can be cancelled by the District Magistrate under section 125, Criminal Procedure Code, on the sole ground that the evidence before the Magistrate did not justify him in passing such an order.

An order under sections 107 and 118 is passed to prevent any person from committing a breach of the peace or from disturbing public tranquillity. It is based upon evidence recorded as in summons-cases. The amount of the bond must be fixed with due regard to the circumstances of the case and should not be excessive. The period for which security is required is to commence on the date of such order unless the Magistrate fixes a later date. Sureties also may be required by the Magistrate if he thinks it necessary; and in default of such security, the person against whom the order is passed may be committed to prison until he gives it or till the period of one year expires. Under section 124, the District Magistrate may release any person who has not given such security, if he is of opinion that it may be done "without hazard to the community or to any other person." Then comes the important section—section 125—which runs in these words: "The Chief Presidency or District Magistrate may at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of any Court in his district not superior to his Court." BENSON, J., held that, if the District Magistrate is of opinion that the order is not supported by the evidence on the record, it is open to him

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to cancel the bond. SUNDARA AYYAR, J., on the other hand, held that such bond can be cancelled only on the ground of something occurring after the execution of the bond which makes it right that it should be cancelled or on some other grounds which would not impeach the correctness of the order passed by the inferior Magistrate, but that a District Magistrate has no power to cancel the bond on the ground that the order for its execution was made on insufficient grounds.

If we give the words "for sufficient reasons" in the above section their natural meaning, then it would seem that the District Magistrate may set aside the order if he thinks that the evidence did not support the conclusion arrived at by the Subordinate Magistrate. That the evidence adduced does not warrant the conclusion is surely a sufficient reason for interference. If anything had happened after the date of the passing of the order which made the continuance of the bond unnecessary, that also would be a sufficient reason. If again, the District Magistrate considered from any other information which was not placed before the Deputy Magistrate that any bond was unnecessary, then also the section gives him the power to cancel the bond. Is there any reason, then, to restrict or qualify the ordinary meaning of the words used? It was argued that section 125 refers to orders for security to keep the peace as well as to orders for security for good behaviour; that section 406 gives a right of appeal against the latter class of orders; no such right of appeal is given in the former class of cases by any section of the Code, nor is any right of the District Magistrate to revise in terms recognised; it is therefore unlikely that section 125 was intended to confer such powers. Now the power of interference with orders for security for good behaviour was given by the Criminal Procedure Code, section 125, only recently. No inference can therefore be drawn from that provision and the right of appeal given by section 406. The fact that no right of appeal is given does not show that the District Magistrate may not exercise the powers usually vested in an Appellate Court. In Revision for instance such powers are often exercised, though the party has no right to be heard. Sections 435 to 438 which refer to the revisional powers of the District Magistrate do not refer to the security cases, as they have been already dealt with under section 125. Moreover it has to be noticed that section

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125 admittedly enables the District Magistrate to interfere on grounds other than those disclosed by the evidence before the Magistrate who passed the order. A Court in the exercise of its appellate or revisional powers is confined to the evidence recorded. The section therefore conferred far larger powers than those of an appellate or revisional Court. The object of section 107 indicates probably why it was considered inexpedient to give a right of appeal to the party, while, as the Chief Magistrate responsible for the peace of the district, it may have been considered advisable to give him ample powers of interference. The order under sections 107 and 118 may result in simple imprisonment for one year. It is hardly likely that such an order would be intended to be final. The High Court's power of Revision when the evidence is recorded only as in summons cases will seldom be invoked with success, and as no right of appeal is given, it is probable that section 125 was intended to give the District Magistrate the right to review the evidence. An argument was based on the fact that section 125 enables the District Magistrate only to cancel the bond, not to set aside the order. The bond may be cancelled not only for the reason that the order is wrong, but, though the order is right on the evidence before the Subordinate Magistrate, for other reasons the District Magistrate considers its continuance unnecessary. The order in such cases cannot be set aside. Again the order under sections 107 and 118 is not to keep the peace, but to execute a bond to keep the peace. With the execution of the bond the order may be said to have spent itself. It is the bond then that remains to be cancelled.

Section 124 also supports this conclusion. It enables the District Magistrate to release any person imprisoned for failing to give security when he is satisfied that he might do so "without hazard to the community or to any other person," or, in other words, when there is no apprehension of any breach of peace or disturbance of public tranquillity as stated in section 107. It is obvious that the District Magistrate may arrive at this conclusion on the evidence taken by his Subordinate Magistrate. If this power can be exercised only in the nature of original jurisdiction, it is probable it would have been conferred also not solely on the Magistrate who originally passed the order. If he could do so under section 124, he surely could do the same under section 125.

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It is also argued that the District Magistrate can interfere only after the bond has been executed or the party has been committed to prison. This is true. But it has to be pointed out that the period for which the security is required commences at the date of the order unless the Magistrate for sufficient reasons fixes a later date—section 120. Therefore the party must execute his bond with or without surety at once, in which case the District Magistrate can deal with the matter under section 125, or he is committed to prison in default, when the jurisdiction of the District Magistrate conferred on him by section 124 may be invoked. The power to fix a later date was only given recently. I see no reason therefore to depart from the natural meaning of the words, and agreeing with BENSON, J. and the Full Bench of the Calcutta High Court, answer the question in the negative, i.e., that the District Magistrate is entitled to entertain a petition to set aside the order of the Deputy Magistrate as having been passed on insufficient grounds.

TYABJI, J.

TYABJI, J.—The question we have to determine is whether the District Magistrate was right in declining to assume jurisdiction under section 125 of the Criminal Procedure Code. The section is as follows :—"The Chief Presidency or District Magistrate may at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of any Court in his district not superior to his Court."

According to the view of the section taken by the District Magistrate, in cases where it is contended that the bond should be cancelled and such contention is based on the same materials as those on which the order was originally made, there cannot be "sufficient reasons" within the meaning of the section for cancelling the bond.

It is not suggested that there is anything in the section itself, or in any other part of the Code, to give a restricted meaning to the words "sufficient reasons." But my learned brother, SUNDARA AYYAR, J., was of opinion that, when section 125 is read with the rest of the Code, and when due consideration given to its context, it appears that the nature of the powers conferred by the section is different from that which would result, if the section were read in its more liberal, and, what seems to me to be, its natural sense. I shall refer to the construction of the section which would permit the Magistrate to cancel the bond

without fresh material on the ground that the bond should never have been ordered to be executed, as the more liberal construction; and by the more restricted construction I mean the construction which has been put upon it by the District Magistrate and accepted by SUNDARA AYYAR, J., and supported before us by the learned Government Pleader.

The first head of argument before us was that, if the section is read in its more liberal sense, it will have the effect of providing for an appeal from an order requiring a bond to be executed, and it is argued that it is indicated sufficiently by the Code that there is an intention on the part of the Legislature not to permit of an appeal from such an order. This argument seems to me to assume, without sufficient grounds, that the jurisdiction that would arise if section 125 were read in its more liberal sense was considered by the Legislature to be exactly in the nature of a power to entertain an appeal. It seems to me that it could not have been so considered. It is admitted that, whichever construction is placed on the section, the Chief Presidency or the District Magistrate may, if he chooses, cancel the bond on a consideration of fresh materials which were not before the Court ordering the execution of the bond. This is not generally associated with appellate powers. It is true that courts with appellate jurisdiction have, in exceptional cases, the power to take fresh evidence, but they are, as a rule, required to give their decisions on the same materials as were present before the Court of First Instance. Hence, if the powers conferred by the section are liberally construed, they would not assume the form of appellate powers.

The argument above referred to seems to me equally to be incapable of withstanding a careful examination from another point of view: for, assuming that the section should be read in its more restricted sense, and if, therefore, it is taken as providing for a review on fresh materials, then it would be more in conformity with the usual and recognised principles of the law of procedure to empower the Court that has made the order in the first instance to review that order; whereas in section 125 it is contemplated that the Court which is asked to cancel the bond is, in most cases, different from the Court initially making the order. In other words, even if the section is read in its more restricted sense (as contended for by the Government Pleader), the powers created by it do not coincide with powers of review. The fact that, in the great majority of cases, the powers under

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section 125 would be exercised by the District Magistrate coupled with the nature of the functions annexed to the office he holds seems also to furnish an indication that, whatever interpretation is given to section 125, it cannot have reference to a jurisdiction exactly similar to that of a Court of appeal or of revision. Neither construction makes the powers created by the section conform exactly to the powers of a Court of appeal or of revision: in either case, they are powers of a special and rather of an exceptional nature.

But assuming that the more liberal construction of section 125 converts the jurisdiction conferred by it into that of an Appellate Court, I fail to see that there is anything in the Code which would constrain us to hold that section 125 ought necessarily to be so construed as to prevent its giving rise to powers of entertaining appeals. Section 404 of the Criminal Procedure Code which has been referred to in this connection lays down that "no appeal shall lie . . . except as provided for by this Code or by any other law . . ." It is not stated that "no appeal shall lie except as provided by Chapter XXXI of the Code" (which deals with appeals), or even "by Part VII" (which deals generally with appeals, reference and revision). Hence, it would seem that the Legislature did not contemplate the rest of the Code to be so interpreted that no appellate or revisional powers should arise under any portion of the Code except under Part VII thereof.

The learned Government Pleader also argued that, if section 125 is read together with sections 124 and 126, it will appear that the power under each of these sections does not arise unless the original order to give security has been given effect to, either the obedience of the person against whom the order is made, or by imprisonment as a punishment for disobedience. Hence, it is argued that it follows that the Court acting under section 125 must proceed on the basis that the order requiring the bond to be executed was rightly made, and the section markedly omits to say that the Chief Presidency for the District Magistrate may set aside the order; and yet, if the said Magistrate cancels the bond on the same material that was before the first Court, it is evident that he, in effect, sets aside the order. This argument fails to convince me for two reasons. In the first place, it seems to me that, for the reasons I have already indicated, the Legislature in section 125 contemplates a kind of jurisdiction which

is different from that of an appellate Court or a Court of review. In the second place, it seems to me that, if I am right in the conclusion that the powers are different, and perhaps, in some respects, more extensive, and if I am right in assuming that the general nature of the functions exercised by the District Magistrate throws light on the nature of the powers conferred by section 125, then it would be more in accordance with the scope of the section, as I interpret it, that the Legislature should save the Magistrate from the necessity of expressing any opinion as to the correctness or the incorrectness of the original order where he is of opinion that the bond which had already been executed should be cancelled. In other words, in the view I take of the true construction of the section, the Legislature intended the Magistrate to exercise the powers quite independently of the necessity to pronounce on the correctness or the incorrectness of the original order. This view, it seems to me, is supported by the nature of the jurisdiction created by section 107 of the Criminal Procedure Code (under which the bond is originally ordered to be executed) and by the mode in which the Legislature deals with orders passed under the section. It will be observed that these orders are not subject to appeal in the ordinary way (see section 406 of the Code). The Legislature, apparently, desired that no person should complain of an order to execute a bond for the purpose of preventing a breach of the peace or disturbance of public tranquillity; but what it does provide is that, if the exigencies of public peace and tranquillity have been sufficiently safeguarded, the authorities responsible for seeing that there is no breach of the peace, or disturbance of public tranquillity may have the power of bringing about a cessation of the operation of the measures, which they find to be no more necessary.

Both the learned counsel who argued the case before us sought to found an argument on the words "at any time" which form part of the section. I accept the interpretation put on those words by each of the counsel and think that the words in question mean "however early or however late." Mr. Adam may make the application, as he suggested, half an hour after the order is passed, and the Government Pleader may make it when there is only one day left for the expiration of the period for which the bond has been executed; but neither can prevent the application of the other. If I am right that this is the effect of the words "at any time," it is plain that no argument can be

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founded on the basis that the meaning to be annexed to them can only be one of the two mentioned by the learned counsel to the exclusion of the other, and that, if they mean "however early," they imply that there is no time for fresh material being brought; if, on the other hand, they mean "however late," then they imply, in the first place, that the delay in obtaining fresh material is not to prejudice the applicant, and secondly, that the section cannot have reference to an appeal, time for which would ordinarily be limited.

For these reasons, I am of opinion that under section 125 of the Criminal Procedure Code, the Chief Presidency or District Magistrate may cancel the bond therein referred to, if the said Magistrate is of opinion that the Court ordering the execution of the said bond ought never to have so ordered.

This case coming on for final hearing (on 15th April 1913), after the expression of the opinion of the Full Bench on the question referred to, upon perusing the petition and the orders of the Lower Courts and the material papers in the case and upon hearing the arguments of J. C. Adam, counsel for petitioner and of the Public Prosecutor for the Crown the Court (BENSON and SUNDARA AYYAR, JJ.) made the following order:—

ORDER.—In accordance with the opinion of the Full Bench we set aside the order of the District Magistrate declining jurisdiction and direct him to proceed to dispose of the case in accordance with law. A copy of the decision of the Full Bench will be furnished to the District Magistrate.

ORIGINAL CIVIL.

Before Mr. Justice Wallis.

K. R. V. FIRM (PLAINTIFFS),

v.

SATHYAVADA SEETHARAMASWAMI AND OTHERS
(DEFENDANTS).*

Limitation Act (IX of 1908), ss. 19 and 20—Payment or acknowledgment by one partner only—Invalid as against other partners in absence of proof of authority to make it—No presumption of such authority—Contract Act (IX of 1872), sec. 251—Necessary or usually done in carrying on partnership—Proof under, insufficient—Judicial notice practice.

Held, that according to the rulings in this Presidency an acknowledgment or payment made by one partner does not bind the other partners, in the

* Civil Suit No. 7 of 1912.

absence of proof that they authorised such acknowledgment or payment, **K. R. V. FIRM v. SEETHARAMASWAMI.** may be an act necessary or one usually done in carrying on the business of partnership; and such authority cannot be presumed.

The decisions in *Valasubramania Pillai v. Ramanathan Chettiar* [(1909) I.L.R. 32 Mad., 421] and *Shaik Mohideen Sahib v. Official Assignee of Madras* [(1912) I.L.R., 35 Mad., 142], require to be reconsidered in the light of the rulings of the English and other Indian High Courts. Such acknowledgments are made as a matter of course by trade debtors, whether carrying on business singly or in partnership and are forthcoming in almost every suit for the price of goods sold and delivered. This is a matter within the daily experience of Courts of First Instance so that they are entitled to take judicial notice of it without requiring proof of the same.

The facts of the case are fully given in the judgment.

C. P. Ramaswami Ayyar for the plaintiffs.

T. S. Rajagopala Ayyar for the second defendant.

JUDGMENT.—This is a suit by the plaintiffs, a firm of WALLIS, J. merchants carrying on business in Madras, against the three defendants, who are brothers alleged to be carrying on business in partnership in the mofussil for the price of goods sold and delivered with interest according to agreement; and the plaintiff alleges that accounts were settled on 7th January 1909 when Rs. 3,976-0-6 were found due to the plaintiffs and the first defendant signed for that amount in the books of the plaintiffs. The second first and third defendants do not contest the suit. The second defendant has filed a written statement in which he denies carrying on business in partnership with the first and third defendants and says that the business belonged exclusively to the first defendant. He also denies that the business was a family trade and says there was no meaning in calling the defendants members of an undivided Hindu family as there is no family property. He also pleads that the suit is barred by limitation.

The transactions with the first defendant are proved and are not barred owing to the acknowledgment by the first defendant. There must therefore be judgment against him in any event. As regards the second defendant, I find it proved against him that he was a partner with the first defendant. His denial that he had anything to do with the business is contradicted by the letters exhibited in his own writing. It is clear that the defendants were undivided and were working together for profit in the business and this it seems to me renders them partners within the definition of section 239 of the Indian Contract Act. The business was no doubt carried on in the name of the first defendant as appears from the plaintiffs' ledger, but there is

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K. R. V. FIRM nothing unusual in that. In the box the second defendant said something about being divided in status but not by metes and bounds. In his written statement however he did not deny he was undivided, but only that there was any joint family property; and before he went into the box his vakil had expressly admitted that he was undivided and that judgment must in any event be given on that basis.

As regards limitation it is contended that the written acknowledgment by the first defendant of January 1909 does not affect the other defendants and that the suit is barred as against them under two recent decisions of this Court—*Valasubramania Pillai v. Ramanathan Chettiar*(1) and *Shaik Mohideen Sahib v. Official Assignee of Madras*(2). This is a question of very great importance, because written acknowledgments such as this are a very ordinary not to say necessary incident of business at any rate in this part of India, and any decision affecting their validity must have a far-reaching operation. As is well known the object of the legislation on the subject was the desire to restrict the rule laid down by Lord Mansfield and the Court of King's Bench in *Whitcomb v. Whiting*(3), that any acknowledgment or payment by one co-debtor was sufficient to take the case out of the statute of limitation as regards the others. This was effected as to acknowledgments by Lord Tenderden's Act, 9 Geo. IV, cap. 14, and as to payments by the Mercantile Law Amendment Act, 1856, 19 & 20, Vict., c. 97, section 14. The Indian Act of 1859 dealing only with acknowledgments provided generally (section 4) that "if more than one person be liable none of them shall be chargeable by reason only of a written acknowledgment signed by another of them." The Act of 1871, section 20, contained the following explanation 2: "Nothing in this section renders one of several partners or executors chargeable by reason of a written promise or acknowledgment signed by another of them." Section 20 of Act XV of 1877 provided that "Nothing in sections 18 and 19 renders one of several joint contractors, executors or mortgagees chargeable by reason only of a written acknowledgment, etc." This is very near the language of Lord Tenderden's Act "No such joint contractor, executor or administrator shall lose the benefit of the said enactments so as to be chargeable in respect or by

(1) (1909) I.L.R., 32 Mad., 421.

(2) (1912) I.L.R., 35 Mad., 142.

(3) 1 Sm., L.C., 579.

reason only of any written acknowledgment or promise made and signed by any other or others of them." The main alteration for the present purpose is that in the Indian Act partners are mentioned separately and not included under joint contractors. It has never been held, so far as I know, that the specific mention of the word partners makes any difference. Construing the language of the English sections STERLING, J., in *In re Macdonald*(1), said that the word "only" is emphatic and in *In re Tucker*(2), LINDLEY, L.J., observed that "the object of the enactment was not to facilitate frauds (by debtors) upon creditors, but to protect debtors from stale demands," and Lord HERCHELL observed that it "was not . . . intended to have any application where the payment . . . was made by him for and on behalf of another co-debtor at his request." It had previously been held by the Court of Queen's Bench in *Goodwin v. Parton and Page*(3), that one of two partners must be presumed in the absence of proof to the contrary to have authority to make a payment on account of a debt due to the firm so as to take the debt out of the Statutes of Limitation against the other. This case was affirmed by the Court of Appeal in *Goodwin v. Parton and Page*(4) and the same presumption is treated as applicable to acknowledgments in Lindley on Partnership and other text-books though I have not found any express decision on the point. In *Khoo-dee Ram Dutt v. Kishen Chand Golecha*(5), a case under the Act of 1871 where a question arose as how far an acknowledgment by one partner was binding on another the Court seems to have been of opinion that if by the ordinary rules of partnership such an acknowledgment would be binding on the other co-partners that would be sufficient, but the language is not very clear. In *Premji Ludhá v. Dossá Doongersey*(6), SCOTT, J., ruled, "It must . . . be shown that the partner signing the acknowledgment had the authority, express or implied, to do so. In a going mercantile concern such agency is, I think, to be presumed as a rule: see Lindley on Partnership and *Goodwin v. Parton and Page*(3)": but he held, following *Watson v. Woodman*(7), that as the partnership had ceased to be a going concern when the acknowledgment was made it was not binding as the

(1) (1887) 2 Ch., 181 at p. 188.

(2) (1894) 3 Ch., 429 at p. 437.

(3) (1879) 41 L.T., 91.

(4) (1880) 42 L.T., 568.

(5) (1876) 25 W.R., 145.

(6) (1886) I.L.R., 10 Bom., 358 at p. 362.

(7) (1875) 20 Eq., 721.

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presumption no longer applied. In *Gadu Bibi v. Parsotam*(1), the Allahabad High Court referred to this decision with approval and held that where an acknowledgment was effected in the ordinary course of business of the firm and was such a transaction as was contemplated in section 251 of the Indian Contract Act, it was sufficient to save limitation. In *Dalsukhram v. Kalidas*(2), CANDY, J., referred to SCOTT, J.'s ruling with approval, and stated that it had been approved by SARGENT, C.J., in an unreported case but the Court eventually sent down an issue whether assuming the partnership to have been existing when the acknowledgment was made, such acknowledgment was or was not an act necessary for or usually done in carrying on the business of the partnership (section 291 of the Indian Contract Act), in which case they held it must be taken to have been done with the authority of the other partners. There it may be observed that section 251 of the Indian Contract Act, 1872, which was subsequent to the Limitation Act, IX of 1871, section 20, in which partners are expressly mentioned, is quite general in its terms and makes no exception as to payments and acknowledgments made in the necessary or ordinary course of the partnership business. Now if, as here held, it be enough to show that the acknowledgment was an act necessary for or usually done in carrying on the business of the partnership that would seem to conclude the question so far as relates to trading partnerships in this part of India. It is the almost invariable practice of trade-creditors there to insist on a written acknowledgment in their books being made by the debtors as a condition of giving credit and engaging in further transactions no doubt as a safeguard against idle and dishonest defences being set up if they should ultimately be obliged to sue. Such acknowledgments are made as a matter of course by the trade-debtors, whether carrying on business singly or in partnership, and are forthcoming in almost every suit for the price of goods sold and delivered. This is a matter within the daily experience of Courts of First Instance and I think they are entitled to take judicial notice of it if relevant and need not require it to be proved by evidence in each case.

Coming now to the decisions of this Court it was held by SUBRAMANIA AYYAR and BODDAM, JJ., in *Rajagopala Pillai v.*

(1) (1888) I.L.R., 10 All., 418.

(2) (1902) I.L.R., 26 Bom., 42.

Krishnasami Chetty(1), that, where a partnership is dissolved by the death of one of partners, the surviving partners cannot bind the representatives of the deceased partner by their acknowledgment of a debt of the firm unless they are specially authorized to do so. Here the learned judges would appear to have been of opinion that but for the previous death of the partner the acknowledgment would have been binding but the point did not arise directly. The first case on which the defendant relies is a decision of the learned Chief Justice and ABDUL RAHIM, J., in *Valasubramania Pillai v. Ramanathan Chettiar*(2). In that case the learned judges dissented from the ruling of SCOTT, J., in *Premji Ludha v. Dossa Doongersey*(3), that in a going mercantile firm agency is to be presumed which they treated as obiter, and laid down that something more must be shown that there must be "some evidence that in the course of business the partners who made the payment had authority to do so on behalf of the firm." If I understand the learned judges rightly, they were of opinion that it was not enough to show that the payment was an act necessary for as usually done in the course of the partnership business, section 251, but there must be evidence as to the authority of the partners who made the payment. The argument is not reported and it does not appear if the decisions in *Goodwin v. Parton and Page*(4) was not brought to the notice of the Court or was regarded as inapplicable. The next case *Shaik Mohideen v. Official Assignee of Madras*(5), was a decision of the learned Chief Justice and SANKARAN NAIR, J. In that case the acknowledgment had been made by the partner in charge of a branch with reference to a debt contracted by that branch, and the learned judges held on appeal from a decision of my own, that there was no evidence that the partner making the acknowledgment had authority to do so on behalf of the firm, and that it was not a legitimate inference for the fact of his being in management that he had such authority. In this case, *Dalsukhram v. Kalidas*(6) as was referred to as well as *Premji Ludha v. Dossa Doongersey*(7), but the Court was of opinion it did not help the respondent plaintiff.

(1) (1898) 8 M.L.J., 261.

(2) (1903) I.L.R., 32 Mad., 421.

(3) (1886) I.L.R., 10 Bom., 358.

(4) (1879) 41 L.T., 91 and (1880) 42 L.T., 568.

(5) (1912) I.L.R., 35 Mad., 142.

(6) (1902) I.L.R., 26 Bom., 42.

(7) (1888) I.L.R., 10 Bom., 358.

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The conclusion to which I have come on this examination of the authorities is that there is a conflict between the decisions of the Bombay and Allahabad High Courts and the decisions of this Court. According to the former it is enough to show that the payment or acknowledgment was an act necessary for as usually done in the course of the partnership business to make it operative when done by one partner against the others. According to the two Madras decisions evidence of authority from the other partners is necessary and cannot be presumed. These decisions are binding on me, though I confess I should be glad either to see them reconsidered or the law altered, because there is no real doubt in these cases about the acknowledgment being made with the knowledge and consent and for the benefit of all the partners, though the creditors may have no means of proving this, so that the effect of the more stringent rule is to facilitate frauds by debtors upon their creditors.

Coming now to the evidence in the present case all that appears is that the second defendant's letters two years before the date of the acknowledgment show that a settlement as it is called was contemplated of which a signature in the plaintiffs' books would be a usual and necessary incident, and that they (plural) were coming to Madras to make it; that the plaintiffs carried on business in Madras and the defendants in the Gōdāvari district; and that the first defendant came up to Madras and signed the acknowledgment in the books of the plaintiffs' firms. Exhibit A is as follows: "Remaining debit balance Rs. 3,976-0-6. We bind ourselves on demand to pay to the plaintiffs' order to persons possessing this order at Madras Rs. 3,976-0-6 being the principal together with interest thereon at 1 per cent. per mensem from this date.

Satyavada Seetharamaswami's
("first defendant's) signature."

The business was carried on in the name of the first defendant and it is argued for the plaintiff that the use of the plural verb in the original shows that he was acting on behalf of others as well as himself and this is borne out by the interpreter. It may therefore, I think, be taken that the acknowledgment purports to be made by the first defendant not merely on his own behalf but on behalf of the firm. There is also evidence in B that the second defendant was in the habit of going to Madras and making

payments on account of the firm. This evidence however does not show that the second defendant was authorized to make the acknowledgment in question on behalf of the others, and following the decisions already referred to I hold that the suit is barred as against the second and third defendants. I may say I attach no importance to the second defendant's statements in the box that the business had stopped two years previously, as his evidence as a whole shows he is not entitled to any credence, and the reference to stopping on account of cholera in one of his letters does not clearly refer to stopping business, and in any case to more than a temporary stoppage. There will be judgment for the amount claimed with further interest at contract rate to date and costs with further interest at 6 per cent. against the first defendant, and against the second and third defendants to the extent of the joint family properties in their hands.

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APPELLATE CRIMINAL—FULL BENCH.

Before Sir Charles Arnold White, the Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

Re SOLAI GOUNDEN AND FOUR OTHERS (ACCUSED NOS. 1 TO 5),
PETITIONERS.*

1913.
February
and
March 13.

Criminal Procedure Code (Act V of 1898), sec. 106—Appellate Court, jurisdiction of, defined.

The jurisdiction of an Appellate Court to order a person who has been convicted of one of the offences mentioned in sub-section (1), of section 106, Criminal Procedure Code, is not restricted to cases where the conviction was by one of the Courts specified in the sub-section. The words "an Appellate Court" are quite general and the word "also" indicates that the powers given by that section may be exercised by the Courts mentioned in sub-section (1) and by an Appellate Court.

The words "under this section" in sub-section (3), have reference to the powers given by that section and not to the Courts by which these powers are in the first instance exercisable.

Muthiah Chetty v. Emperor [(1909) I.L.R., 29 Mad., 190], over-ruled.

* Criminal Revision Case No 637 of 1912 (Criminal Revision Petition No. 524 of 1912.)

Re SOLAI
GOUNDEN.

PETITION under sections 435 and 439 of the Criminal Procedure Code (Act V of 1898), praying the High Court to revise the order of M. H. H. CHATTERTON, the Sub-Divisional Magistrate of Salem, in Criminal Appeal No. 113 of 1912, presented against the conviction and sentence of C. PANDIYAN, the Stationary Second Class Magistrate of Salem, in Calendar Case No. 261 of 1912.

C. S. Venkatachariyar for the petitioners.

Public Prosecutor on behalf of the Government.

This case came on for hearing and the Court (BENSON and SUNDARA AYYAR, JJ.) made the following

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ORDER OF REFERENCE TO A FULL BENCH.—The chief question argued in this petition is whether an Appellate Court has jurisdiction under section 106, sub-section (3), Criminal Procedure Code, to order the appellant to execute a bond to keep the peace when the appellant has been convicted of one of the offences specified in sub-section (1) of the section, not by one of the Courts specified in that sub-section, but by a 2nd or 3rd Class Magistrate.

The pleader for the petitioner relies on the cases, *Mahmudi Sheikh v. Aji Sheikh*(1), *Muthiah Chetti v. Emperor*(2), *Paramasiva Pillai v. Emperor*(3) and *Emperor v. Momin Malita*(4). The three latter cases are direct authorities in support of his contention that the Appellate Court has no jurisdiction where the original conviction was by a 2nd or 3rd Class Magistrate.

But (as was pointed out by BENSON, J., in *Re Ibram Sahib*(5)) the decision in *Mahmudi Sheikh v. Aji Sheikh*(1), was under the Criminal Procedure Code of 1872, in which there was no provision corresponding to the present sub-section (3), and was therefore inapplicable to the present Code. In that case BENSON, J., held that the Appellate Court had jurisdiction where the original conviction was by a 2nd or 3rd Class Magistrate. It does not appear that this decision was brought to the notice of the Bench which decided *Muthiah Chetti v. Emperor*(2). This latter case was followed without discussion in *Paramasiva Pillai v. Emperor*(3) and in several other unreported cases in this Court, and it was also followed in *Emperor v. Momin Malita*(4).

The correctness of the two Madras decisions was, however, doubted in *Dorasami Naidu v. Emperor*(6) and was directly

(1) (1894) I.L.R., 21 Cal., 622.

(3) (1907) I.L.R., 30 Mad., 48.

(5) Criminal Revision Case No. 37 of 1904.

(2) (1906) I.L.R., 29 Mad., 190.

(4) (1908) I.L.R., 35 Cal., 424.

(6) (1907) I.L.R., 30 Mad.,

dissented from *Emperor v. Bhausing*(1) and *Emperor v. Dharam Das*(2), where it was held that the Appellate Court had jurisdiction even when the Original Court was a 2nd or 3rd Class Magistrate.

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BENSON AND
SUNDARA
AYYAR, JJ.

In this state of the authorities we think it desirable to refer the question, as stated at the beginning of this order, for the decision of the Full Bench, as we are inclined to doubt the correctness of the decision in *Muthiah Chetti v. Emperor*(3) and the cases which followed it, having regard to the reasons stated in *Dorasami Naidu v. Emperor*(4).

This case then came on for hearing before the Full Bench who expressed the following

OPINION.—We are of opinion that the jurisdiction of an Appellate Court to order a person who has been convicted of one of the offences mentioned in sub-section (1) of section 106 of the Code of Criminal Procedure, is not restricted to cases where the conviction was by one of the Courts specified in the sub-section. The words "an Appellate Court" are quite general and the word "also" indicates that the powers given by the section may be exercised by the Courts mentioned in sub-section (1) and by any Appellate Court.

WHITE, C.J.,
SANKARAN
NAIR AND
TYABJI, JJ.

We think the words "under this section" in sub-section (3) have reference to the powers given by the section and not to the Courts by which these powers are, in the first instance, exercisable. We are unable to agree with the decision in *Muthiah Chetti v. Emperor*(3) and in the other cases referred to in the order of reference in which that decision was followed. We would answer the question which has been referred to us in the affirmative.

(1) (1909) I.L.R., 33 Bom., 33.

(3) (1906) I.L.R., 29 Mad., 190.

(2) (1911) I.L.R., 33 All., 48.

(4) (1907) I.L.R., 30 Mad., 182.

APPELLATE CRIMINAL.

*Before Sir Ralph Sillery Benson, the Officiating Chief Justice and
Mr. Justice Napier.*

1912,
August
12, 18 and 21.

*Re S. VIJIARAGHAVALU NAIDU AND ANOTHER (SURETIES),
PETITIONERS.**

*Criminal Procedure Code (Act V of 1898), sec. 511 (5) — Bail bond—Bail,
prisoner in, committing suicide Discharge of sureties*

When a person who has been let out on bail commits suicide the sureties are discharged from their obligation to produce him.

PETITION under sections 435 and 439, Criminal Procedure Code (Act V of 1898), praying the High Court to revise the order dated 27th March 1912, of F. D. BIRD, the Chief Presidency Magistrate, Egmore, Madras, in the matter of the bail-bond entered into by the late Mr. Venkataswami Naidu (accused), and his sureties, the petitioners herein and in the said court.

The following are the facts of this case as set out in the order of the Chief Presidency Magistrate:—

“On the 7th February 1912 three persons entered into a bond (duly executed before me) in the sum of Rs. 2,500 each that the said M. Venkatasami Naidu would appear at the Court of the Presidency Magistrate at Egmore at 11 A.M. on the 15th idem and continue so to attend until otherwise directed by the said Magistrate. The said accused duly attended until the 1st March but on that date he was absent and his absence was not satisfactorily explained. As a matter of fact his dead body was recovered that day from a tank situated on his property at Kodambakum and an inquest was held by the Police on it the same evening.

“The first witness at the inquest was Mr. Phillips, who had been attending Venkatasami Naidu for two months. He stated that Venkatasami Naidu had told him on several occasions that he was tired of life and ashamed of the disgrace (of the criminal proceedings against him) and intended to end his life. He repeated this statement on the 29th February. The witness was not at all surprised when he heard that Venkatasami Naidu had drowned himself. The second witness was Narayanasami Naidu, a son of

* Criminal Revision Case No. 169 of 1912.

the deceased. He stated that he had often heard his father say that he would take his life as he could not stand the disgrace. His opinion was that his father had taken his life. The third witness was M. Krishnasami Naidu, another son of the deceased. He had often heard his father say that he would take his life; he had not the slightest doubt that his father had taken his life unable to bear his disgrace and failure. Another witness was Mr. James Short, the family solicitor of the deceased. He stated that Venkatasami Naidu had often expressed his intention to put an end to himself. He was therefore not at all surprised when he heard that he had done so. Colonel Donovan, I.M.S., who was the family doctor, said that he was not surprised to hear of it as the deceased had often told him that he would prefer death to the shame and exposure of the criminal proceedings pending against him. The opinion of the assessors was that the death was due to drowning ‘in all probability suicidal.’ It cannot for an instant be doubted that M. Venkatasami Naidu drowned himself.

“Notices were issued to the two sureties to appear and show cause why payment of the amount of their bonds should not be enforced. The sureties duly appeared in person and were also represented by an attorney. Each put in a petition submitting that it was not by any malfeasance or misfeasance or due to neglect or default on his part that he was unable to produce the said M. Venkatasami Naidu and that he was not aware that he had committed suicide; also, that his bond could not be forfeited seeing that Venkatasami Naidu was duly produced in court as long as he was alive.” In dealing with the point of law raised the Chief Presidency Magistrate referred to *Earl of Leitrim v. Stewart*(1) and *Taylor v. Caldwell*(2) and continued.—“In the case now under consideration the death was not the act of God, it was suicidal and the contracting sureties *did* make default. The death of Venkatasami Naidu might and should have been prevented. It appears extraordinary on the face of it that none of the persons already referred to who were told by Venkatasami Naidu that he meant to take his life, took any steps to guard against his carrying out his threat. That they believed he would do so is shown by their statements that they were not surprised when they heard that he had drowned himself. Sureties

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(1) (1870) 5 I.R. (Common Law Series), 27. (2) (1863) 3 B. & S. 826 at p. 828.

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always take risks and it behoves them to guard their own interests even if they neglect those of others. Presumably the sureties were close friends of the deceased and they should have kept in touch with him and taken precautions for the due fulfilment of their bonds. They were negligent in their own interests, for their bonds would have been cancelled had they applied to the court and Venkatasami Naidu would then have been more carefully provided for. It is clear that the petitioners took no trouble to ensure that they carried out their contract. They undertook to produce the man and the reason why they cannot do so was a preventible reason and one which they should have made themselves aware of and guarded against. . . .

I am of opinion that these sureties have forfeited their bonds and I accordingly direct that they pay the full penalty thereof".

Dr. S. Swaminadhan (instructed by Messrs. Short, Bewes & Co., attorneys) for the petitioners relied on *Nrisingha Deb Chatterjee v. The King-Emperor*(1), as clear authority for the proposition that when a person on bail commits suicide the sureties are discharged as a matter of course. It was not possible to comply with the terms of the bond and no man should be penalized for failure to perform impossibilities. The accused had not failed to attend in any legal sense and the Chief Presidency Magistrate should have held that a man could not be said to fail to attend when he was in fact dead and so could not attend.

J. C. Adam for the Crown Prosecutor *contra*. The Criminal Procedure Code (Act V of 1898), section 514 (5), gives to the criminal courts in India a power analogous to that given by 4 Geo. III, cap. 10, which gave the Barons of the Exchequer power to relieve on petition any person whose recognizance was liable to be estreated. Section 514 makes no limitation upon the power of the court to estreat; all that the section says is that the court must be satisfied that the bond has been forfeited. The question therefore depends upon the term of the bond and here, following the general rule, the bond must be construed strictly. The sureties bound themselves that Venkatasami Naidu would appear on a certain day. If Venkatasami Naidu himself made it impossible to appear, as in this case he did by committing suicide, the sureties were none the less liable

(1) (1912) 16 C.W.N., 550.

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If it were to be held that the suicide of the principal must of necessity absolve the sureties one safeguard would immediately disappear. The desire of a criminal to make away with himself was far from uncommon but many would not do so if they knew that their act would cause heavy loss to those friends who had bailed them.

The whole history of the law of bail in both civil and criminal cases showed how strictly bail-bonds were enforced. No doubt certain exceptions may be recognized. But these exceptions were well defined and did not cover the present case. Originally the principal was delivered to the custody of the sureties; see *HALE's Pleas of the Crown*, vol. I, page 325, and *ibid* vol. II, page 124, who might pursue and take him. [*Bond v. Isaac*(1) and *Capron v. Archer*(2)]. It must be presumed therefore that the sureties should use due care to see that he did not commit suicide. This custody had now become more moral than physical, but it was doubtful whether an action for false imprisonment would lie by a principal against his surety if the latter insisted on confining the former.

The exceptions above referred to, whereby the sureties might be discharged divided themselves into three classes:—

(i) by act of God, (ii) by act of law and (iii) by act of parties.

As regards the first class the death of the principal had been recognized in *Sparrow v. Sowgate*(3), *Parry v. Berry*(4) and *Rawlinson v. Gunston*(5). But in none of these cases did the question of *felo de se* arise. Insanity was not recognized as being ground for discharge. See *Kernot v. Norman*(6), *Nutt v. Verney*(7), *Cock v. Bell*(8), *Cavanagh v. Callett*(9) and *Ibbotson v. Galway* (Lord)(10).

As regards acts of law, various circumstances might exonerate the sureties; such as, the principal becoming a bankrupt, being made a peer or a member of parliament, being sent abroad under the Alien Act [*Merrick v. Vaucher*(11) and *Folkein v. Critico*(12)],

(1) (1757) 1 Burr. 339.

(2) (1757) 1 Burr. 340.

(3) E.T. (1623) K. B. William Jones 29.

(4) M.T. (1726) K.B. 2 Reym. 1452.

(5) E.T. (1795) K.B. 6 T.R., 284.

(6) (1788) 2 T.R. 390.

(7) (1790) 4 T.R. 121.

(8) (1811) 13 East 355: [104 E.R., 407].

(9) (1821) 4 B. & A. 279.

(10) (1795) 6 T.R., 183.

(11) M.T. (1794) K.B. 6 T.R., 50.

(12) E.T. (1811) K.B., 13 East, 457; s.c. 104 E.R., 448.

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being convicted of crime and sentenced to transportation, [*Hallow v. Dunn*(1)], and being impressed [*Robertson v. Patterson*(2)]. On the other hand the act of a foreign state was no ground for exonerating the sureties [*Grant v. Fagan*(3)]. In all the case attention was paid to the point as to whether the principal could have been brought up before the act took place which prevented surrender and where it was possible for this to have been done the court invariably refused to exonerate the surety. In the present case the evidence showed that it was well known that Venkatasami Naidu was thinking of taking his life. His two medical attendants, his family solicitor, and his two sons all gave evidence to the effect that he had frequently stated that he was tired of life and ashamed of the disgrace and intended taking his life. It can hardly be that the sureties were unaware of this intention and they took the risk when they gave bail for him. In *Regina v. Ridpath*(4), it is stated that the person not appearing according to his recognizance, his absence (*be the cause or reason what it will*) was the cause of the forfeiture of the recognizance. In *Hunt's case*(5), it was held that the capture of the principal by French soldiers would not be a good plea if done by his own contrivance. So in the present case, the death of the principal would not be a good plea if done by his own contrivance. In *Nrisingha Deb Chatterjee v. The King-Emperor*(6) no reasons were given. The court seemed to have made a presumption based upon no authority that suicide must of necessity discharge the principal.

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ORDER.—The facts in this revision petition are as follows:—One Venkatasami Naidu was charged before the Chief Presidency Magistrate with an offence under section 415 of the Indian Penal Code. He was released on bail and the two petitioners signed a bond for his appearance in the sum of Rs. 2,500 each. The accused committed suicide before the date of surrender; the Chief Presidency Magistrate called on the sureties to show cause why their bail should not be forfeited and, after arguments

- (1) E.T. (1787) K.B., 4 Burr. 2034.
- (2) T.T. (1806) K.B., 3 Smith, 556, s.c. 103 E.R. 157.
- (3) M.T. (1803) K.B., 4 East, 189.
- (4) E.T. (1713) K.B., 10 Mod., 152 s.c. [88 E.R. 670].
- (5) T.T. (1895) K.B., Comb. 385, s.c. [90 E.R. 544].
- (6) (1912) 16 C.W.N., 550.

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decided that they were liable on the ground that the suicide of the accused was a preventible reason for his non-appearance and one which they should have made themselves aware of and guarded against. It was first argued on this petition that the Chief Presidency Magistrate approached the question from the wrong point of view and that he should have held that the accused had not "failed to attend" and that death prevented his attendance. We intimated at the hearing that we were unable to accept this view and Dr. Swaminadhan was unable to show how a permanent incapacity to attend caused by the act of the accused could be distinguished from a temporary incapacity owing to the same causes. In our opinion the Chief Presidency Magistrate considered the liability of the sureties from the right point of view. But the question to be decided is whether he was right in the view he took of the sureties' liability. Mr. J. C. Adam who appeared for the Crown Prosecutor contended that sureties must be taken to guarantee the appearance of the accused subject to the act of God and the act of the state of which the accused is a subject. He has invited our attention to a large number of English authorities including very properly some which did not support his contention. The decisions in civil cases against the surety rest on the well-established principle that where one of two persons must suffer it "should be the person through whose instrumentality, however innocent, the loss can be said to have arisen"; but we do not think that this principle applies in criminal cases. We do not propose to deal with all the cases quoted but only those which are sufficient to establish the proposition required for our decision. *Merrick v. Vaucher*(1) was an application by the bails for an *exoneretur* to be entered upon several bail pieces on the ground that the defendant had been sent out of England under the Alien Bill, 33 Geo. III, cap. 4. Lord KENYAN C.J. stated the law as follows: "The bail only engaged for the principal in the then situation of the parties; but it is now become impossible for them to render the principal, and this impossibility does not arise from any act which they could control, but from the operation of an Act of Parliament. These bail, therefore, to whom no fault or neglect whatever is imputable, ought not to suffer in consequence of an Act which

- (1) (1794) 6 T.R. 50; s.c. 101 E.R., 429.

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was passed for the benefit of the public." This is exactly the proposition stated by the Chief Presidency Magistrate and it is to be noted that the test applied by the Chief Justice was whether any default or neglect is imputable to the bail. The same view was evidently adopted by the Court of King's Bench in *Folkein v. Critico*(1) which was an application by a bail in like circumstances, though the principle is not clearly stated.

The next question is whether there was a duty cast on the bail to guard the accused so closely that he could not commit suicide. There is no direct authority on the point, but *Robertson v. Patterson*(2) supplies the answer. In that case the defendant being a seaman had been arrested at the suit of the plaintiff for a debt and was released on bail; after which he was impressed into His Majesty's service. The defendant's bail applied for a *habeas corpus*, directed to the Commander of the ship to bring him up for the purpose of being rendered in discharge of his bail. A rule *nisi* was obtained for entering an *exoneretur* on the bail piece. The Court thought it unnecessary to issue the writ of *habeas corpus* but at once entered an *exoneretur* upon the bail piece. Now it is clear that it would have been in the power of the sureties to prevent the accused being impressed. All that they had to do was to do what the Chief Presidency Magistrate seems to think the sureties in this case ought to have done, viz., guard him carefully and confine him, so that he should never be in any public place where he could be impressed. It appears to us that the effective steps to prevent imprisonment would be more easily taken than steps to prevent suicide. Mr. Adam contended that the accused was actually in the custody of his bails. If that is so under the present form of surety bond, which we doubt, it was certainly so in 1806 when this person was impressed into His Majesty's service. Mr. Adam has argued with considerable force that the bailing of the accused gave him an opportunity to commit suicide and that it was necessary to enforce the liability of the sureties so as on the one hand to make them understand the grave risk which they run in entering into these bonds and on the other hand to impress upon persons accused the serious responsibility which

(1) (1811) 13 East 457; 104 E.R., 448.

(2) (1806) 7 East 405; 103 E.R., 157.

they would throw on their sureties if they made away with themselves. These considerations are however germane to all cases where the accused or defendant has allowed himself to be arrested or impressed. But we do not find that the Court of King's Bench has proceeded on this view. In our opinion the fact that the sureties did not take steps to prevent the accused from committing suicide even though the possibility of his doing so may have passed through their minds does not amount to such neglect or default as to make them liable on the bond. The question we have to decide has quite recently come before a Bench of the Calcutta High Court. *Nrisingha Deb Chatterjee v. The King-Emperor*(1), which decided that where an accused commits suicide the sureties are not liable for the default of his appearance. For the reasons stated above we have come to the same conclusion. We set aside the order of the Chief Presidency Magistrate and direct that the sureties be discharged from their liability under the bail bond.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Napier.

RAMANATHAN CHETTIAR AND ANOTHER (PLAINTIFFS),
APPELLANTS,

v.

KALIMUTHU PILLAI AND ANOTHER (DEFENDANTS),
RESPONDENTS. *

Foreign judgment, suit on—Jurisdiction of foreign Court—Submission to, by defendant, when defendant carrying on business in foreign territory through agent—No residence thereby—Service of notice of suit on agent, insufficient as against principals outside jurisdiction—Service on principals out of jurisdiction—Private International Law.

Submission to the jurisdiction of a foreign forum is largely a question of fact in each case or a mixed question of law and fact. Where defendants submitted to the jurisdiction of foreign courts by giving a power of attorney as abovementioned to an agent and a decision was passed against them after service of summons of the suit on them while they were out of jurisdiction, by order

(1) (1912) 16 C.W.N., 550.

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of Court, the defendants are *prima facie* bound by the judgment; and where no other defence is raised but that of non-submission and non-service of notice both of which were found against, a decree against the defendants in accordance with the foreign judgment must necessarily follow.

Persons who carry on business in a foreign country through an agent submit to the jurisdiction of the courts of that country by giving that agent a power of attorney containing very wide powers including the right to institute or defend any suits that might be brought against them touching any matters connected with their business or otherwise. A power of attorney of this character which presumably is brought to the notice of persons dealing with the firm is evidence that the principals adopted the court of the place wherein the business is carried on, as the forum before which their claims were to be brought.

Bank of Australasia v. Harding (1850) 19 L.J.C.P., 345, *In re Hainault Forest Act*, 1858 (1861) 9 C.B., Rep., 648 at p. 661 and *Bank of Australasia v. Nias* (1851) 20 L.J. Q.B., 284, followed.

Obiter.—A decree obtained in a foreign country against a firm after serving the agent of the firm with notice of the suit while the principals of the firm who were defendants in the case were out of its jurisdiction cannot be enforced as a personal decree against them in other courts.

Sahib Thambi v. Hamid (1918) 1 L.R., 36 Mad., 414; s.c., (1912) 22 M.L.J., 109, followed.

Service of suit on an agent of a partnership whose members reside out of jurisdiction, does not create jurisdiction on the ground of residence.

Nalla Karuppa Settiar v. Mahomed Iburam Sahib (1897) 1 L.R., 20 Mad., 112, distinguished.

Fasal Shan Khan v. Gafar Khan (1892) 1 L.R., 15 Mad., 82, *Girdhar Damodar v. Kassigar Hiragar* (1893), 1 L.R., 17 Bom., 662, *Annamalai Chetty v. Murugasa Chetty* (1908) 1 L.R., 26 Mad., 544, (P.C.), *Copin v. Adamson* (1874) 9 Ex. Cases, 345, *Russell v. Cambejort* (1889), 23 Q.B.D., 526, *Roussillon v. Roussillon* (1880) 14 Ch. D., 351, *Schibsky v. Westenholz* (1870) 6 Q.B., 155 and *Emanuel v. Symon* (1908) 1 K.B., 302, referred to.

APPEAL against the decree of C. KRISHNASWAMI RAO, the Additional Subordinate Judge of Madura, in Original Suit No. 6 of 1908.

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

C. V. Ananthakrishna Ayyar for P. R. Sundara Ayyar for the first appellant.

C. S. Venkatachariar for the first respondent.

V. C. Seshachariar for the second respondent.

NAPIER, J.

NAPIER, J.—This is an appeal from the judgment and decree of the Additional Subordinate Judge of Madura dismissing a suit by the plaintiffs against defendants Nos. 1 and 2 on a foreign judgment. Plaintiffs sought to recover Rs. 7,336-1-7 from defendants being balance of the amount with interest due under a decree obtained by them in Suit No. 106 of the Supreme Court of Singapore. The decree is Exhibit A. The suit was

brought by the plaintiffs against Oona Kavena Surmah Pillai and two other persons with whom this suit has no concern, Oona Kavena & Co., and the two defendants to the present suit as carrying on business in Singapore under the firm name of Oona Kavena & Co. The allegation in the plaint in the Court of Singapore, so far as appears from a writ of summons for service out of the jurisdiction (Exhibit B) is that all the defendants made two promissory-notes of August 2, 1905, jointly and severally payable to the plaintiffs and two promissory-notes of the same date made in like manner payable to V. V. R. Somasundaram Chetti and endorsed to the plaintiffs. According to the evidence of the plaintiffs in the present suit the promissory-notes were executed by the first defendant's son, that is the first defendant in the Singapore suit for himself and as agent for the firm of O. K. & Co., that is the defendant's firm, and by the other persons as sureties. It is not alleged that either of the present defendants signed the promissory-notes, as it is admitted by the plaintiffs that they had left Singapore in 1903 and 1904 respectively. They prove however that the amounts for which the promissory-notes were given were debts due from the firm of O. K. & Co. It appears that by order of the Court, dated February 17, 1906, a concurrent writ of summons (Exhibit B) was issued and ordered to be served on the two present defendants out of the jurisdiction and that subsequently all parties were served with notice (Exhibit D) to show cause why judgment should not be entered up against the present defendants and on proof to the satisfaction of the Court of the service out of the jurisdiction leave was given to enter up judgment as prayed on 28th May 1906 (Exhibit E) and judgment was so entered up on May 30, 1906 (Exhibit A). To the present suit on this decree various defences were raised by the two defendants but the suit was dismissed on the ground that the defendants were not carrying on business in Singapore at the time of the institution of the suit in the Singapore Court their agent being only engaged in winding up the affairs of the firm and that being so the Court had no jurisdiction to entertain the suit. In this Court the defendants urge the various pleas set up in the Lower Court and I now proceed to deal with them. The first plea is that accepted by the Lower Court. I am unable to agree with the Subordinate Judge. There was no dissolution of the partnership and the plaintiff's agent, prosecution witness

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No. 1 swears that the business was still being carried on. Even if they had dissolved partnership their obligations continued in all things necessary for winding up the business (Contract Act, section 263). The Subordinate Judge himself uses the phrase "the business of the firm had practically failed." The dismissal of the suit on the ground relied on by the Subordinate Judge can not be sustained. The next plea is that the first defendant in the Singapore suit was not in fact the agent for the defendants at the date of the suit. I agree with the Subordinate Judge that he was. It is contended that the power of attorney given by the second defendant in this suit to the son of the first defendant in this suit, i.e., the first defendant in the Singapore suit, was with reference to some private business of his own in Singapore. This is not so. The document (Exhibit K) is given by him as a trader carrying on business under the name of Oona Kavena Surmah Pillai & Co. and appoints him agent for the business then being carried on by him and is signed by him with the firm name as well as his own. It is also inconsistent with his evidence in this suit in which he swears that he gave the power of attorney as agent only. That plea therefore fails. It is next urged that there was in fact no service out of the jurisdiction on these defendants. I am satisfied on the evidence of Thiruvengidam, plaintiff's witness No. 3, that he did serve the defendants in India as sworn by him in his affidavit before the Court at Singapore (Exhibit F). That plea therefore fails. It is next contended that the first defendant in the Singapore suit was only made a party as a son of the first defendant to make him personally liable. This contention was not raised before the Lower Court and is clearly untenable. He had signed the promissory-notes as agent for the firm in discharge of the firm's debts and was sued and served as first defendant as their agent. The service of the summons is proved by the plaintiff against prosecution witness No. 1. That plea therefore fails. The facts as I find them therefore are as follows: The two defendants were carrying on business in Singapore through their agent at the date of the making of the promissory-notes, he having been duly appointed their agent by the power of attorney, dated 16th March 1905 (Exhibit K). He signed the promissory-notes on 5th August 1905 as their agent in discharge of the firm's liabilities. The suit was brought against him as agent for the firm, against the firm and against them as partners in the firm.

The agent was duly served in the jurisdiction and the partners were served with a concurrent writ out of the jurisdiction in British India they being British Indian subjects. It is argued by the defendants that even on these facts the Court had no jurisdiction to pass a decree against them.

The law is now settled as laid down by FRY, J., in *Rousillon v. Rousillon*(1), following *Schibsky v. Westenholz*(2) and *Copin v. Adamson*(3) and was lately affirmed by the Court of Appeal in the same words in *Emanuel v. Symon*(4). The circumstances that give jurisdiction are alternatively (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared and (5) where he has contracted to submit himself to the forum in which the judgment was obtained. Selection of forum, submission by appearance and contract to submit are treated in Mr. Dicey's 'Conflict of Laws' under one heading 'Submission.' It is first argued that the defendants were resident by virtue of the presence of the agent carrying on business for the firm and that service on him is good service. An incorporated company is a resident wherever it substantially carries on business and so a foreign corporation carrying on business by an agent can be made liable to the jurisdiction by service on the agent within the jurisdiction. See *Newly v. Cott's Patent Firearms Company*(5), *Haggin v. Comptoir D'Escompte de Paris*(6) and *La Bourgogne*(7). But a partnership stands on a different footing. It is an aggregate of individuals having no corporate existence. It is true that, when a suit is filed against a firm, service on an agent at the principal place of business of the firm within the jurisdiction is good service on the firm whether any members of the firm are out of the jurisdiction or not under the rules of the Supreme Court, Order XLVIII (a), rule 1 and Order XXX rule 1 of the Civil Procedure Code of 1908; but even assuming that there was procedure corresponding to this in the Supreme Court of Singapore, that does not make

(1) (1880) 14 Ch D., 351.

(3) (1874) L.R., 9 Ex., 345.

(5) (1872) L.R., 7 Q.B., 293.

(2) (1870) L.R. 6 Q.B., 155.

(4) (1908) 1 K.B., 302.

(6) (1889) 23 Q.B.D., 519.

(7) (1899) Pr. 1.

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judgment against the firm a *personal* decree against the foreign defendants which can be enforced in a foreign Court. This has been expressly decided in *Sahib Thambi v. Hamid*(1), and is supported by the clear authority of *Russell v. Cambefort*(2). We have therefore only to consider the effect in a suit against the partners individually of service on an agent for the firm who held a power of attorney from one partner on behalf of the firm. The point was decided by this Court against the plaintiff's contention in *Nallu Karuppa Settiar v. Mahomed Iburam Sahib*(3). In that case the summons was served on one of the partners resident within the jurisdiction of the Court in Ceylon but it was held that that service did not make the personal decree enforceable by a suit in this Court against a British Indian subject, a member of the partnership, who was himself at the time not resident in the jurisdiction of the Ceylon Court. It is argued that this decision is incorrect and reliance is placed on *Bank of Australasia v. Harding* (4) and *In re Hainault Forest Act, 1858*(5). *Bank of Australasia v. Nias*(6) *Copin v. Adamson*(7), *Fazal Shau Khan v. Gafar Khan*(8) and *Annamalai Chetty v. Murugasa Chetty*(9) a case decided by the Privy Council. This latter case was a suit in British Territory against a French subject not personally resident in British India on a judgment obtained against him in Pondicherry where he resided. It was sought to make him liable in British India by service on a relative within the jurisdiction of the District Court on the allegation that the business was a joint family business of which the relative was the managing member. The finding on these facts was against the plaintiff in the High Court and this was upheld by the Privy Council. The Board go on to make the following observation:—"In both Courts in India it was apparently assumed that the question of jurisdiction turned on section 17 of the Code of Civil Procedure, and that although the defendant was a foreigner, and although the cause of action arose in a foreign country, and although the defendant did not personally reside within the local limits of the jurisdiction of any Court in British India, and was not even temporarily in Arcot

(1) (1918) I.L.R., 38 Mad., 414; s.c., (1912) 22 M.L.J., 109.

(2) (1889) 28 Q.B.D., 526.

(3) (1897) I.L.R., 20 Mad., 112.

(4) (1850) 19 L.J. C.P., 345.

(5) (1861) 9 C.B. Rep., 648 at p. 661.

(6) (1851) 20 L.J. Q.B., 284.

(7) (1874) 9 Ex. 345.

(8) (1892) I.L.R., 15 Mad., 82.

(9) (1908) I.L.R., 26 Mad., 544. at p. 552 (P.O).

when sued there, yet he could be sued in the Arcot Court if he carried on business through an agent in the local limits of that Court's jurisdiction. This assumption appears to their Lordships to require more attention than it has received. Their Lordships see no reason for doubting the correctness of the decision of the case of *Girdhar Damodar v. Kassigar Hiragar*(1) where the defendant was a native of Cutch and the cause of action arose within the local limits of the British Indian Court in which the action was brought." The actual words cannot be relied on in support of the plaintiff's contention as their Lordships expressly reserve the point, but the approval of *Girdhar Damodar v. Kassigar Hiragar*(1) makes it necessary to examine that case. The suit was brought by the plaintiff in the Court of Small Causes to recover from the defendant a sum of Rs. 1,300-11-6 being the price of goods sold by the plaintiff to the defendant in Bombay. It was admitted that the defendant resided in Cutch, out of the jurisdiction of the Court, and that he carried on business in Bombay by a *munim*. It was also the fact that no leave of the Court had been obtained for the institution of this suit. It must be assumed from these words that the contract was entered into in Bombay by the *munim* on behalf of the defendant, that he was not resident in Bombay at the time the contract was made and that he was not personally served within the jurisdiction. Sir CHARLES SARGENT, C.J., held that by carrying on business within it they accepted the protection of the territorial authority and might be fairly regarded by so doing as "*submitting to the jurisdiction of the Courts of the country*," and further in view of the great number of non-British subjects carrying on business in Bombay through *munims* and other agents, the legislature in giving jurisdiction to the Court when the defendant carries on business within the local limits, must be assumed to have intended those provisions to apply to non-resident foreigners. It should be noted that the first ground on which the learned Chief Justice puts his judgment is not the ground of residence but of submission which I will deal with later. It appears therefore that the High Court of Bombay held that the legislature intended the provisions of the Procedure Act to apply to foreigners and also that the

(1) (1898) I.L.R., 17 Bom. 662.

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defendant had submitted to the jurisdiction and the Privy Council must have accepted either or both these propositions; but the case did not raise the question of the enforceability in Cutch of this judgment and the Board does not pronounce on this.

The two cases in which the Bank of Australasia were plaintiffs are treated in Dicey's "Conflict of Laws" as examples of the other conditions which he groups together under the general head of submission; but there are observations as to residence and service on which the plaintiff relies. The bank was one established under a local Act in Australia, one of the sections of which provided that it should sue and be sued in the name of its Chairman. A suit was accordingly brought against the bank and the Chairman served within the jurisdiction and judgment obtained. On that judgment, suits were brought in the High Court of Justice against the two defendants, and both the Court of Common Pleas and the Court of Queen's Bench in the two cases held the plaintiff entitled to recover. In the first case *Bank of Australasia v. Harding*(1), WILDE, C.J., uses the following language:—"If the defendant had given a power of attorney, would not notice to his attorney be sufficient?" and CRESSWELL, J., referring to the Chairman says "Being his own appointed agent, he had notice of the proceedings." (This observation does not appear in the judgment in the Law Journal Reports). In the second case *The Bank of Australasia v. Nias*(2) Lord CAMPBELL, C.J., uses equally definite language: "Nor is there anything at all repugnant to the law of England or to the principles of natural justice in enacting that actions on such contracts, instead of being brought individually against all the shareholders in the company, should be brought against the chairman whom they have appointed to represent them. A judgment recovered in such an action, we think, has the same effect beyond the territory of the colony which it would have had if the defendant had been personally served with process, and being a party to the record the recovery had been personally against him." The language of the learned Judges in these two cases seems to me to be applicable to cases where the persons sought to be made liable are not members of a company

(1) (1850) 19 L.J.C.P., 345.

(2) (1851) 20 L.J.Q.B., 284.

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but are individuals who have appointed a person to represent them; and it must be noted that this is not a Company incorporated under the Companies Acts when a suit would of course not lie against an individual shareholder. It is an association of individuals authorised by a Local Act to sue and be sued by their chairman; and the language of some of the Judges goes a long way towards making the presence of the agent with a right to sue residence, and notice on him good service on which to found a suit on the judgment.

Copin v. Adamson(1) does not decide this point and will be considered on the second point. The last case *Fazal Shau Khan v. Gafer Khan*(2) was one in which the defendant appeared by an agent and defended the suit. The Bench uses the following words:—"It appears, however, from the evidence that the appellant carried on business by his agent within the limits of the territory. Moreover the defendant did not protest that the Court had no jurisdiction, but appeared by an agent and defended the suit. Having done so, and having taken the chance of a judgment in his favour, he cannot now, when an action is brought against him on the judgment, take exception to the jurisdiction." It is difficult to say on which of the two propositions the Court founded its judgment. On the facts there was certainly a clear submission. On the whole in spite of the language used in these judgments on which the plaintiff relies I am not prepared to hold that the law allows service on an agent of a partnership to create jurisdiction on the ground of residence.

The next condition is where the defendant has submitted to the jurisdiction in any of the three ways grouped together under that head. In the view I take this must be largely a question of fact in each case. In this case the two parties now sued did for many years carry on business as a firm in the jurisdiction of the Court of Singapore and each of the defendants was at one time managing the business there: each of them did at one time give a power of attorney to a relative to manage the firm's business during their absence. One of those powers has been exhibited in the case and has already been referred to. It is in English form and confers the widest powers.

(1) (1874) 9 Ex., 345.

(2) (1892) I.L.R., 15 Mad., 82.

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It authorises the agent on behalf of the firm to demand, sue for, collect and receive, etc., the rents and profits of any tenancies, to take and use all lawful proceedings and means by distress or action or otherwise for recovering such rents and for enforcing the performance of any covenants or for evicting, ejecting or recovering damages from tenants; to demand, sue for, enforce payment of all monies, securities or personal estate and to prove in any bankruptcy for any property due, to adjust, settle, compromise or submit to arbitration any debt; to commence, prosecute or enforce or defend, answer or oppose all actions and other legal proceedings and demands touching any of the matters aforesaid or any other matters in which the defendant may be held interested and generally to act as his attorney in relation to all matters in which he may be interested. Now it is obvious that this power to sue on behalf of the defendants, can only have reference to the Supreme Court of Singapore or the Courts subordinate to its jurisdiction; and on these facts I should certainly be inclined to hold that the defendants have submitted to the jurisdiction. It is clearly established that if they had been plaintiffs in the suit, there would have been a selection of the forum and it is also clear that if in any contract there had been an agreement that suits should be decided by the Court of the place of business, there would have been a contract to submit. I can see no reason why a power of attorney of this character which presumably is brought to the notice of persons dealing with the firm should not be evidence that the members of the firm adopted the Court of Singapore as the forum before which their claims were to be brought. Is there anything in the decision which compels me to hold otherwise? This point does not appear to have been pressed on the Judges of this Court who decided *Nalla Karuppa Settiar v. Mahomed Ibura Saheb*(1). There was no power of attorney in that case, the service having been on one resident partner; and it may be that the facts in that case were not nearly as strong as they are in the present case. The decision went entirely on the question whether the defendant was constructively resident and whether service on the resident partner was sufficient to found jurisdiction. *Shaik Atham*

(1) (1897) I.L.R., 20 Mad., 112.

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Sahib v. Davud Sahib(1) and *Sivaraman Chetti v. Ibura Saheb*(2) are of no assistance on this point. The question there was whether the defendant had in fact submitted himself to the jurisdiction by appearance in the suit. In one case it was held that he had and in the other that he had not. But this point does not arise in the present case. Nor is any assistance to be derived from the decision of the Privy Council in *Gurdial Singh v. The Rajah of Faridkote*(3) which was an attempt to enforce an *ex-parte* judgment recovered against a person who had not been served in any way, was non-resident and was not carrying on business within the territory of the state. I can find no decision laying down that the facts, such as are proved in this case, are not evidence of submission in one of its forms. I am strengthened in the view that I take by the language of the Judges in the two Bank of Australasia cases to which I will now refer. The facts have already been set out. There a Colonial Act provided that all actions and suits instituted by the bank and all actions and suits prosecuted against the bank should be instituted by and prosecuted against the chairman for the time being of the said bank; and in the judgment of WILDE, C.J., in *Bank of Australasia v. Harding*(4), he states as follows: "It appears that the defendant was a partner in the company, and that the Act provided that certain rights should be conferred on partners, and that the business should be carried on under certain regulations, all conducing to their benefit. It may be judicially taken that such an act has been obtained at the request of the partners. By this act it is contemplated that the business of the company could be more conveniently carried on if one member were sued instead of all, and execution might be issuable against the property of the rest." The only point strongly argued was whether the remedy by execution was in substitution of the remedy against the partners individually. It seems to me that, if the defendant had thought that this Act which was procured for his benefit could not be considered as a submission by him to the forum in which the chairman was authorized to sue and be sued, that point would have been taken in the two cases. The fact that the power of

(1) (1909) I.L.R., 32 Mad., 469.

(3) (1894) A.C., 670.

(2) (1895) I.L.R., 18 Mad., 327.

(4) (1850) 19 L.J.C.P., 245 (at p. 355).

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the chairman to sue in the courts was given by the statute and not by a power of attorney as in this case, does not, I think, make any difference and one learned Judge, as already pointed out, treated the chairman as his agent for this purpose. These two cases are authorities which have never been questioned and I am unable to distinguish them on principle from the present case. They are treated by Mr. Dicey as examples of submission and it is clear that they are not cases where the defendant's liability is based on the fact that he was the plaintiff in the lower Court, or appeared in the suit or contracted with the other party to the suit to submit the matter of the suit to the jurisdiction of the Court. It must therefore be that submission in one forum or other must be a mixed question of law and fact; and where we find, as appears in this case, that the agent is specifically appointed to bring suits of all sorts with reference to the partnership in the forum in which he is subsequently sued, I cannot construe this as anything but a submission to the forum within the meaning of one of the conditions required for giving a jurisdiction. That Court having acquired jurisdiction and service out of jurisdiction by order of the Court being proved, the defendants *prima facie* are bound by the judgment and as they have not raised any other defence to the suit, the plaintiffs should have been given a decree in the lower Court. The decision of the lower Court is reversed. There will be a decree for Rs. 7,386-1-7 with costs: subsequent interest at 6 per cent. from date of plaint.

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SANKARAN NAIR, J.—I agree.

ORIGINAL CIVIL.

Before Mr. Justice Wallis.

V. BALAKRISHNUDU (PLAINTIFF),

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NARAYANASAWMY CHETTY (DEFENDANT).*

Limitation Act (IX of 1908)—Deposit of money repayable at a fixed date—Articles 66 and 115, applicable, article 145 not applicable—"Deposit" in article 145, meaning of—Probate and Administration Act (V of 1881)—Title of executor to sue even without Probate—Limitation Act (IX of 1908), sec. 17—Same word, re-enacted in a repealing Act—Construction, same meaning as in the repealed Act.

Article 145 of the Limitation Act (IX of 1908) is not applicable to deposits of money.

"Deposit" in article 145 means only deposit of goods to be returned in specie when wanted; it is the sort of bailment known to lawyers under that name in the Roman Law of Bailments which was accepted by BRACON and afterwards by Lord Holt in *Coggs v. Barnard* (1703) 1 Sm. L.C., 173; s.o., 2 Raym. 909 as fit to be enforced in England.

Ishur Chunder Bhaduri v. Jibun Kumari Bibi (1889) I.L.R., 16 Cal., 25, and *Perundevitayar Ammal v. Nammahar Chetty* (1895) I.L.R., 18 Mad. 390, followed.

Administrator-General, Bengal v. Kristo Kamini Dassee (1904) I.L.R., 31 Cal., 519, and *Lala Gobind Prasad v. Chairman of Patna Municipality* (1907) 6 C. L.J., 535, not followed.

A loan repayable at a fixed date is governed probably by article 66 and if not by article 115.

Unlike cases governed by the Indian Succession Act and the Hindu Wills Act, in a case governed by the Probate and Administration Act (V of 1881) the obtaining of probate is not necessary to clothe the executor with the right to sue for debts due to the testator, and the estate is represented by the executor even in the absence of probate, within the meaning of section 17 of the Limitation Act, and time begins to run from the date of the testator's death, as the obtaining of a succession certificate is not a condition precedent to the filing of a suit but is only necessary before getting a decree.

Where a word which is used in one sense in one Act is re-enacted in a subsequent Act which repeals the former, then unless there is some strong reason to the contrary it must be read in the same sense in the subsequent Act in which it is re-enacted.

Mayor of Portsmouth v. Smith (1885) L.R., 10 A.C., 364, at p. 371, referred to. Testatrix lent money to the defendant on 15th August 1900, and died on 16th January 1904. The will was governed by the Probate and Administration Act.

Held, that a suit by the executor in 1910 was barred by limitation either under article 66 or 115 of the Limitation Act.

The facts are fully set out in the judgment.

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T. Ethiraja Mudaliyar for the plaintiff.

C. P. Ramaswamy Ayyar for the defendant.

JUDGMENT.—The plaintiff in this case sues as executor of the will of the deceased V. Nagammal to recover with interest the sum of Rs. 10,680-9-9 alleged to have been deposited by her with her brother's son the defendant on 15th August 1900. It is common ground that this sum was due by the defendant to Nagammal on the date mentioned, but the plaintiff's case is that at that time a suit for waste was about to be filed against Nagammal by the reversioner of her minor son's estate, to which she had succeeded more than twenty years previously, and that, to prevent this sum getting into the hands of the Receiver in that suit, it was arranged between Nagammal and the defendant at the defendant's suggestion that Nagammal should give him a receipt for the money which could be used against the Receiver in case of his seeking to recover the above sum from the defendant as part of the estate of Nagammal's son and that the defendant should execute in her favour a document stating that though she had given a receipt for the money it had not really been paid to her, and that it had been arranged between them that the money should remain on deposit with the defendant who should make her advances for costs of litigation and household expenses and should pay her the amount due with interest at 9 per cent. on the disposal of the suit. The counter-receipt embodying these terms (Exhibit B) which bears the defendant's signature though filed with the plaint, was not in terms referred to in the plaint, and the defendant who was apparently unaware that it was forthcoming pleaded in his written statement that he had paid Nagammal the amount due on the date in question and thus discharged her debt in full and had also a receipt from her of the same date. He also denied that he had agreed to make any further payment to Nagammal, as alleged in the plaint, or that he paid her anything after September 1900. This case was persisted in during the examination of the plaintiff's witnesses, but the only result of the cross-examination was to elicit further confirmation of their evidence and the defendant's vakil was well advised in the interests of his client in not putting him into the box or calling evidence and in relying entirely on the defences that the suit is barred and that the plaintiff is not the proper person to sue.

As regards limitation the following dates are material; the deposit was on 15th August 1900, Nagammal died on 16th January 1904, and the appeal of the reversioner against the decree of the District Court dismissing this suit was itself dismissed by the High Court on 1st December 1904 owing to her death while the appeal was pending. To save limitation the plaintiff in the first place relies on article 145 which in a suit against a depositary or pawnee to recover moveable property deposited or pawned allows 30 years from the date of the deposit or pawn. There has been some difference of opinion in the Calcutta High Court as to whether this article applies to deposits of money, and the plaintiff relies on the decision of MACLEAN, C.J., and STEVENS, J., from which HILL, J., dissented in *Administrator-General, Bengal v. Kristo Kamini Dassee*(1), and on the more recent decision of MOOKERJEE and HOLMWOOD, JJ., in *Lala Gobind Prasad v. Chairman of Patna Municipality*(2) while the defendant relies on certain observations in the judgment of WILSON and O'KINEALY, JJ., in *Ishur Chunder Bhaduri v. Jibun Kumari Bibi*(3), and on the dissenting judgment of HILL, J., already referred to. This article was first enacted in the Limitation Act of 1871 and the proper course in my opinion is in the first place to see what it meant in that Act because at any rate unless there is some strong reason to the contrary it must be read in the same sense, in the subsequent Act in which it is re-enacted. *Mayor of Portsmouth v. Smith*(4). We should perhaps go further back as the language of article 145 is taken from section 1 (15) of the Act of 1859. The only other article in the Act of 1871 in which deposit is mentioned is article 133 "to recover moveable property conveyed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee in good faith and for value" which again is founded on section 5 of the Act of 1859. As to these articles 133 and 145 the learned Judges observe in *Ishur Chunder Bhaduri v. Jibun Kumari Bibi*(3), that "it is clear from the context that the deposit meant is a deposit of goods to be returned in specie, and that is in accordance with the old use of 'deposition' (obviously a misprint for *depositum*) with which all lawyers are familiar." I would

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(1) (1904) I.L.R., 31 Cal., 519. (2) (1907) 8 C.L.J., 585.
(3) (1889) I.L.R., 16 Cal., 25. (4) (1885) 10 A.C., 364 at p. 371.

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venture to go even further and to say that when as in the Acts of 1859 and 1871 there is nothing to suggest the use of the word deposit in any other sense it must be taken to mean the sort of bailment known to lawyers under that name in the Roman Law of Bailments which was accepted by BRACON and afterwards by Lord Holt in *Coggs v. Barnard*(1), as fit to be enforced in England. This *depositum* is a bailment of a specific thing to be kept for the bailor and returned when wanted as opposed to *commodatum* where a specific thing as a horse or a watch is lent to the bailee to be used by him and then returned; and both are contrasted with *mutuum* where corn, wine or money or other things are given to be used and other things of the same nature and quality are to be returned instead. In my opinion there is no ground for holding that in the Acts of 1859 and 1871 the word deposit in the sections and articles already referred to included so-called deposits of money or other things which were not intended to be kept but to be used, and there is nothing in the Acts of 1877 and 1903 to show that any different construction should now be put on articles 133 and 145.

The framers of these Acts were lawyers and must be taken to have used the term deposit in the ordinary legal sense. This conclusion is not, I think, in any way affected by the fact that in 1877 the legislature introduced a new article 60 which speaks of "money deposited under an agreement that it shall be repayable on demand" thus using the word deposit not in its legal but in its popular sense. On the contrary an examination of what happened strongly supports the same view. No express reason was assigned for the amendment, and doubt has been expressed in some cases as to the meaning of the legislature and the reasons for the change, but it seems to me that those reasons are not very far to seek.

In English law and under the Act of 1859 time began to run in the case of loans payable on demand from the date of the loan. In the Act of 1871 the legislature altered this and under article 58 "for money lent under an agreement that it shall be payable on demand" made time run from the date of demand. In 1877 the legislature changed its mind and decided to go

(1) (1703) 1 Sm. L.C., 173; s.o., 2 Raym. 909.

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back to the old rule, and by article 59 made time run, not from the date of demand, but from the date of the loan. They however retained the date of demand as the starting point by a new article 60 with regard to a particular class of loans repayable on demand described in the new article as "money deposited under an agreement, but it shall be repayable on demand." It was then settled law that what are commonly known as deposits with banks and other bodies doing similar business whether carrying interest or not and whether fixed or repayable on demand, are really loans and it would appear that the framers of the Act of 1877 who of course were aware of this considered very reasonably if I may venture to say so, that in the case of such deposits repayable on demand, seeing that repayment is not contemplated until expressly demanded, the date of demand is a more suitable starting point than the date of the loan; and that they accordingly inserted the new article to effect this. This view appears to me to be in accordance with the decision in *Ishur Chunder Bhaduri v. Jibun Kumari Bibi*(1) and *Perundevitayar Ammal v. Nammalwar Chetti*(2).

It seems to me fairly clear that the legislature in 1877 treated deposits of money repayable on demand as a special class of loans which ought to have a special starting point. Accordingly instead of one article dealing with loans payable on demand (article 58 in the Act of 1871) they provided two articles 59 and 60 with different starting points. There is nothing to suggest that they thought deposits of money were covered by article 145. On the contrary if they had done so, they would scarcely have considered it necessary to provide a new article. The necessity was that otherwise article 59 would have been held applicable to such deposits.

For these reasons I have come to the conclusion that article 145 is not applicable to deposits for money and does not help the plaintiff. It has not been argued before me that the deposit should be regarded as one repayable on demand within the meaning of article 60 or that the suit may be treated as against an agent for an account or as a suit against a trustee covered by section 10. There are serious difficulties in the way of all these contentions, but I do not discuss them as the points have

(1) (1889) I.L.R., 16 Cal., 25. (2) (1895) I.L.R., 18 Mad., 390.

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not been argued and the suit fails on another ground than limitation. Treating the transaction as a loan repayable at a fixed date it is governed probably by article 66 and if not by article 115 and I can see no sufficient reason for having recourse to article 120. It is however contended that even if the period is three years the suit is not barred by virtue of section 16 because the estate of the deceased was unrepresented from her death in January 1904 until probate of her will was taken out by the plaintiff in 1910. The will is not governed by the Hindu Will Act and section 187 of the Indian Succession Act is therefore not applicable. Under section 4 of the Probate and Administration Act the estate of the deceased vested in the plaintiff as her executor on her death in January 1904 and there is nothing in that Act to prevent him suing the defendant at once. No doubt if he had omitted to take out probate he could not have obtained a decree without producing a succession certificate, but there is nothing in that Act to prevent his instituting the suit and afterwards obtaining the certificate before decree. In my opinion the plaintiff was capable of instituting the suit within the meaning of section 17 from the death of the testatrix and that section does not help the plaintiff.

I have also come to the conclusion on the third issue that the plaintiff is not entitled to maintain the present suit, because the money sued for belonged to her husband and his son after him and, when she succeeded as heir to her son, she only took a woman's estate for life and on her death the property passed to the heirs of her son as last male owner and they were the proper persons to sue for it. The will of the deceased recites that the property was the self-acquisition of her husband and that she had succeeded as her son's heir though she subsequently purports to dispose of this money in the hands of the defendant. The whole object of the transaction evidenced by Exhibit B was to prevent the receiver in the suit against her for waste from receiving the money in the defendant's hands as part of the estate of her deceased son. The reversioner's suit No. 46 of 1901 in the District Court of Chingleput alleged that the property to which she had succeeded on her son's death included Rs. 40,000 in deposit with the defendant's father of which at the date of suit Rs. 15,000 remained in the hands of the defendant. In her written statement the deceased made the averment which has not been

proved in this case that her relations had advanced Rs. 2,000 to her husband to enable him to start business and raised the curious contention that as his property had been acquired with the aid of this nucleus she had succeeded to it as her absolute property. She also pleaded, pursuant to the secret arrangement made with the defendant that she had received payment from him and given him a receipt, but she did not deny that the money in question had been deposited by her husband with the defendant's father. Lastly the conduct of the present plaintiff as executor and legatee under the will of the deceased in not proving the will and suing the defendant from the date of the death of the deceased in 1904 until late in 1910, though admittedly he was aware of all the facts can scarcely be explained except upon the supposition that he well knew that the deceased had no powers of bequest over the money in the hands of the defendant, and that the persons who became entitled on her death were her son's reversioners. On this ground the suit fails.

There only remains the question of costs. In view of the defence set up and persisted in until the close of the plaintiff's case that the defendant had repaid the money to the deceased, I direct that each party do bear his own costs.

ORIGINAL CIVIL.

Before Mr. Justice Bakewell.

K. SHEIK MEERAN SAHIB (PLAINTIFF),

v.

C. RATNAVELU MUDALI (DEFENDANT).*

Malicious Prosecution—'Prosecution,' what amounts to—Magistrate sending only notice but not summons or warrant, and dismissing complaint, no prosecution—Criminal Procedure Code (Act V of 1898), sec. 202.

Where on receiving a complaint of an offence of defamation a magistrate issued only a notice but not a summons or a warrant to the accused, which notice simply informed him that a preliminary enquiry would be held at a certain time in the matter of the complaint preferred by the complainant, and the complaint was dismissed under section 202, Criminal Procedure Code, after hearing counsel, for both parties.

* Civil Suit No. 260 of 1912.

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Held, that there was no prosecution of any offence by the complainant so as to give room for any suit for malicious prosecution.

De Rozario v. Gulab Chand Anundjee (1910) I.L.R., 37 Cal., 358, and *Golap Jan v. Bholanath Khettry* (1911) I.L.R., 38 Cal., 880, followed.

The sending of such notice and the hearing thereon are not authorized by the Criminal Procedure Code. Prosecution commences with the issue of process (summons or warrant) after the complaint has been entertained by the magistrate and the prior proceedings constitute at most an attempt by the complainant to prosecute the accused.

The facts of the case are fully set out in the judgment.

T. Ethiraja Mudaliyar for the plaintiff.

C. E. Odgers for the defendant.

BAKEWELL, J.

JUDGMENT.—The plaintiff in this case alleges that the defendant preferred a complaint in the Presidency Magistrate's Court charging the plaintiff with the offence of defamation, which on the 30th July last was dismissed, under section 203 of the Criminal Procedure Code, after a preliminary inquiry, and prays for damages for the malicious prosecution of the plaintiff.

Upon the case coming on for settlement of issues counsel for the defendant argued that the plaint does not disclose a cause of action, because the facts averred show that there was no prosecution by the defendant. It is admitted that no process was issued to compel the attendance of the plaintiff before the Magistrate, but the latter issued a notice (Exhibit A) to the plaintiff and held an inquiry under section 202 of the Code, and after hearing counsel for both parties dismissed the complaint.

The notice recites that the defendant had filed an information and complaint before the Magistrate, charging the plaintiff with the offence of having defamed the former and praying that a summons might issue against the latter, and continues as follows:—"Notice is hereby given that a preliminary inquiry will be held in the matter of complaint at this Court at 11 A.M. on the third day of July 1912."

The document is thus a mere intimation that the Magistrate intends to take action upon the complaint, and does not amount either to a summons or to an invitation to the party charged to appear or take any other step in the matter; moreover, it is not included in the fifth schedule of the Code as one of the forms to be used by the Court, nor does it appear to be prescribed or contemplated by the Code of Criminal Procedure, 1898. Nevertheless, upon receipt of a formal document of this kind the party affected by the complaint might well think it expedient

to appear and be represented by his legal adviser on the day mentioned; and if he did so appear, he would naturally desire to be heard and possibly to adduce evidence. Chapter XVII of the Code is entitled "Of the commencement of proceedings before Magistrates," and read together with chapter VI "Of processes to compel appearance," shows that proceedings ordinarily begin with the issue of a summons or warrant. Prior to the issue of process, the Magistrate has to satisfy himself that there are sufficient grounds for setting the law in motion [section 204 (1)], and for that purpose he is bound to examine the complainant (section 200), and may postpone the issue of process while he inquires into the matter himself or a local investigation is made by another person (section 202).

It appears to me that the object of the procedure prescribed by chapter XVI, which is entitled "Of complaints to Magistrates," is the separation of unfounded from substantial cases at the outset, and to prevent innocent persons from being brought into the Police Courts and subjected to the annoyance of frivolous charges, and that this object is frustrated by the procedure adopted in this case.

In a warrant case such as this is, the Magistrate may issue a summons to the accused to appear [section 204 (1)], and may discharge the accused at any stage of the case [section 253 (2)]. Having regard to this provision and the sections of the Code abovementioned, I am of opinion that the hearing in this case by the Magistrate was not authorised by the Code, and cannot therefore be attributed to the defendant so as to render him responsible for any damage caused thereby to the plaintiff. I am also of opinion that these provisions show that the prosecution of the accused commences with the issue of process, after the complaint has been entertained by the Magistrate, and that the prior proceedings constitute at most an attempt by the complainant to prosecute the accused.

I do not think it necessary to discuss the English and Indian cases which have been cited, since they are fully dealt with in two decisions of the Calcutta High Court,—*De Rozario v. Gulab Chand Anundjee* (1) and *Golap Jan v. Bholanath Khettry* (2) with which I entirely agree.

(1) (1910) I.L.R., 37 Cal., 358.

(2) (1911) I.L.R., 38 Cal., 880.

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For these reasons I am of opinion that the plaint discloses no cause of action and accordingly dismiss the suit with taxed costs. I certify for Counsel.

Attorneys for the defendant: *Grant and Groatorex.*

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Abdur Rahim.

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N. VENKATARANGA CHARLU AND ANOTHER (PLAINTIFFS),
APPELLANTS,

v.

N. KRISHNAMA CHARLU AND TWO OTHERS (DEFENDANTS),
RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 92—Religious Endowments Act (XX of 1863), sec. 18—Option to proceed under either so far as reliefs common are prayed for—Collector's sanction for removal of trustee given in 1908, good for suit for removal after coming into force of Civil Procedure Code (Act V of 1908).

A suit instituted with the consent of the Collector is a good suit for all reliefs referred to in section 92 of Civil Procedure Code (Act V of 1908). Section 92, Civil Procedure Code and section 14 of Act XX of 1863, so far as the forms of relief to which they relate are the same, offer a choice to persons interested in the trust, who may proceed under either; they are not bound to proceed under both. The consent of the Collector given in November 1908, i.e., before the Civil Procedure Code came into force is a valid consent for the institution of a suit for the removal of a trustee though at the time the consent was given a suit for removal could not be instituted under the law then in force.

APPEAL against the decree of E. L. VAUGHAN, the District Judge of Nellore, in Original Suit No. 12 of 1909.

The facts of the case necessary for this report are set out in the following portion of the judgment of the District Judge:—

"Issue 1.—Whether the suit is not maintainable for want of a fresh sanction under section 18 of Act XX of 1863?

Sanction was granted by this Court under section 18 of Act XX of 1863 to file a suit, Original Suit No. 1 of 1907. On technical points that suit was allowed to be withdrawn with permission to bring a fresh suit.

* Appeal No. 246 of 1911.

Defendants argue that the old sanction lapsed and fresh sanction was necessary. They quote *Sabhpathi Gurukkal v. Lakshmu Ammal*(1).

I am unable to differentiate the arguments which influenced their Lordships in the above ruling from those applicable to the present suit. Plaintiffs argue that the Collector's sanction under Civil Procedure Code, section 539, is sufficient. I am unable to agree. Section 18 of Act XX of 1863 clearly requires sanction.

I must decide the issue for defendants and dismiss the suit".

The Honourable Mr. T. V. Seshagiri Ayyar for the appellants. P. Subrahmaniam for the respondents.

JUDGMENT.—It seems clear that the suit instituted with the consent of the Collector is a good suit for all reliefs referred to in section 92 of the Code of Civil Procedure. That section and section 14 of the Act XX of 1863, so far as the forms of relief to which they relate are the same, appear to offer a choice to persons interested in the trust; they may proceed under either. It cannot be that they are bound to proceed under both; for that might lead to a dead lock, if perchance the Collector were to consent to a suit and the District Judge to refuse leave. It is not necessary to read the sections as involving this possibility and they ought not therefore so to be read.

The Collector's consent was given to a suit for these reliefs, the plaintiffs prayed for the removal of certain trustees, the appointment of others, and the vesting of the property in the newly appointed incumbents. The consent was given in November 1908, and the suit was instituted on the 27th January 1909. It is now contended that in respect of the prayer for the removal of the trustees there is no valid consent, because in 1908 there was no provision of law enabling a suit to be instituted for that relief with the Collector's consent.

The sanction (or consent) shows that the Collector had considered the question and the merits and made enquiries, and there is no doubt that he deliberately consented to the prayer for the removal of the trustees. Now when the suit was instituted the Court had to see that the Collector had consented to it and that his consent was sufficient to warrant its entertainment at the time of the suit. It formed a consent deliberately given

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for the protection of the trust and for the purpose of enabling a suit to be instituted for a particular relief; and there seems no reason why it should say "I must treat this consent as no consent, because it was made before the end of 1908", till then the Court could not have given the particular relief on a suit instituted on that consent; but that does not make the consent a nullity. The Collector of course was able to give his consent irrespective of any provision of the Code; but under the old Code this consent would have been ineffective; even with it the Court could not entertain a suit to remove a trustee; in 1909 the Court was able to do so; it found a consent already given and it was entitled to accept it as sufficient. The decree dismissing the suit must be reversed and the suit remanded for disposal according to law. We do not decide that all the reliefs asked for in the plaint can be given in this suit. It may be that having regard to the provisions of section 92 or to those of the Collector's consent, some of the claims are inadmissible. That question and the question, should it arise, whether any omission can be cured by a further consent obtained from the Collector after the suit, must be left for decision by the District Judge. The costs of this appeal will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

R. RAMANA REDDI (PETITIONER-PLAINTIFF), APPELLANT,
v.

R. BABU REDDI AND FOUR OTHERS (COUNTER-PETITIONERS,
DEFENDANTS, NOS. 1, 4, 5, 6 and 7), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sec. 230—Decree for land and mesne profits in favour of a minor—Execution after 12 years after decree for ascertaining mesne profits—Limitation—Limitation Act (IX of 1908), sec. 6—Policy of Limitation Acts.

The prohibition contained in Civil Procedure Code (Act V of 1908), section 48, viz., that certain classes of decrees cannot be executed after 12 years, applies even to the case of minors who are decree-holders. Section 6 of the Limitation Act, cannot be invoked to extend the period as section 6, Act X of 1908, is expressly limited to cases where the limitation is provided for in the Limitation

* Appeal Against Order No. 288 of 1911.

Act itself: nor is there any law apart from section 6 to the effect that minority is a ground of exemption from the operation of the law of limitation.

Moro Saddashiv v. Visaji Raghunath (1892) I.L.R., 16 Bom., 536, not followed, *Jhandu v. Mohan Lal* [29 P.R., 489], followed.

English decisions on the policy of Limitation Acts referred to.

Limitation being the result of Statute Law no exemption from it can be recognised except what the Statute itself provides. Under the old Civil Procedure Code (Act XIV of 1882) even where the decree directed that mesne profits should be ascertained in execution, the application for the ascertainment of mesne profits was one in execution only, and not in suit; so that the limitation applicable for such an application was that applicable for execution applications. An application for the ascertainment of mesne profits directed by the decree under the old Civil Procedure Code, but made after 12 years after decree, is barred by the Civil Procedure Code (Act XIV of 1882), section 230. The new Civil Procedure Code which directs an enquiry as to the mesne profits before passing a final decree is not applicable to such a case.

The effect to be given to a document and to the proceedings of a court must be decided by the law in force when the document was executed or the proceedings were passed.

Muthiah Chettiar v. Ramaswami Chettiar (Second Appeal No. 117 of 1911), followed.

Applicant's mother, as next friend of the applicant, obtained a decree in his favour for partition which was confirmed with certain modifications, by the High Court on 3rd August 1897. The decree left the mesne profits subsequent to suit to be ascertained in execution. The decree also declared as follows:—"The plaintiff do recover, when collected, his one-third share of such debts as have been or can be collected with due diligence out of the debts due to the family."

Various applications for execution of the decree were made by the applicant's mother and she entered into a compromise on 6th February 1900 with the judgment debtors regarding all the matters mentioned in the decree and others and the Court passed on 13th January 1900 a final decree in terms of the compromise. Applicant became a major on 29th November 1909 and made the present execution application for partition and ascertainment of mesne profits and outstandings on 1st November 1910, repudiating the compromise on various grounds.

Held, that the applications were barred by the 12 years rule of limitation contained in Civil Procedure Code (Act XIV of 1882), section 230, corresponding to Civil Procedure Code (Act V of 1908), section 48.

APPEAL against the order of E. H. WALLACE, the Acting District Judge of Nellore, dated the 15th day of September 1911, in Execution Petition No. 173 of 1910, in Original Suit No. 6 of 1895 on the file of T. RAMACHANDRA RAO, the temporary Subordinate Judge of Nellore.

The following facts of the case are taken from the order of the District Judge of Nellore:—

"Petitioner seeks to execute a decree passed in his favour in Original Suit No. 6 of 1895 in the Temporary Sub-Court, which

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a minor ; and the circumstance that he has been represented by a guardian does not affect the question." No authority has been cited in support of the enunciation of the rule that there is a general principle of law that time does not run against a minor. The passage cited from Bacon's Abridgment is in the following terms :—"The rights of infants are much favoured in law, and regularly their laches shall not be prejudicial to them, upon a presumption that they understand not their right, and that they are not capable of taking notice of the rules of law, so as to be able to apply them to their advantage. Hence, by the common law, infants were not bound for want of claim and entry within a year and a day, nor are they bound by a fine and five years' non-claim, nor by the statutes of limitation, provided they prosecute their right within the time allowed by the statute after the impediment removed." (1) *King v. Dilliston* (2), is cited as authority for this proposition. After full consideration we have come to the conclusion that the authority relied on in the passage cited does not show that according to the English law, infancy is an answer to a plea of limitation. The question in *King v. Dilliston* (2) was whether a certain custom was applicable to minors, namely, a custom that the person to whose use a copyhold estate is surrendered shall come in and be admitted after three proclamations or otherwise his land shall be forfeited. It was held that it was not and that therefore if a surrender be made in fee and the surrenderee die before the next Court, the estate is not forfeited by the infant heir and the surrenderee not coming in after three proclamations. EYRE, J., observed "that a feoffment of an infant was no forfeiture at the common law, and that as a particular custom may bind an infant for a time, so it may bar him for ever," and that the question was whether the custom in question as it was found in general words should bind an infant after three proclamations ; "All customs," he said, "are to be taken strictly when they go to the destruction of an estate." Strictly, infants were not prevented by the letter of the custom, they were not bound by other customs like this, there was no necessity to construe them to be within the custom. He no doubt observed that, "the right of infants is much favoured in the law, and their laches shall not be prejudicial to them as to entry or claim, upon a presumption

(1) Tit : Infancy and Age, section (g), IV volume, seventh edition page 248.
(2) (1688) 87 E.R., 142 at p. 144 (3 Mod., 221 at p. 223).

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that they understand not their right" but he did not say that they were not bound by statutes of limitation. On the other hand he observed : "it is admitted that if an infant do not present to a church within six months, or do not appear within a year, that his right is bound ; but this is because the law is more tender of the church, and the life of a man, than of the privileges of infancy. So if an office of parkship be given or descends to an infant, if the condition annexed in law to such an office (which is skill) be not observed, the office is forfeited. But that a proclamation in a base court should bind an infant, when he is not within the reason of the custom, is not agreeable either to law or reason." Nor did either of the other concurring Judges GREGORY, J., and DOLBEN, J., make any pronouncement in favour of the exemption of minors from rules of limitation proper. It may be that laches may not be attributable to an infant and that a penalty inflicted for laches may not be enforced on an infant. But laches should not be regarded as the sole or perhaps even the main ground on which rules of limitation are based. Lord ST. LEONARDS observed "all statutes of limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost ; and in all well regulated countries the quieting of possession is held an important point of policy." In *Trustees of Dundee Harbour v. Dowgall* (1) Lord KENYON described the statutes of limitation as statutes of repose. See also the observations of Lord REEDSDALE in *Cholmondeley v. Clinton* (2). Lord COKE says that the limitation of actions was by force of diverse Acts of Parliament, although at a very remote time in England there was undoubtedly a stated time for the heir of the tenants to claim after the death of his ancestor and in case of non-claim before the expiration of the time (a year and a day) the claimant was without remedy. Banning in his work on Limitations, page 1, observes : "the limitation of the times for bringing actions is, at the present day entirely dependent on statute." He states that under the common law the presumption arose after a long time in respect to a legal claim that it had been satisfied. See *Jones v. Turberville* (3). Eminent Judges have repudiated the notion that limitation is based solely on the ground of laches. In *Dalton v. Angus* (4)

(1) 1 Macq. H.L., 321. (2) (1821) 4 Bligh, (P.C.) 1 at p. 108 ; (4 E.R. 721).
(3) (1792) 4 Brown's Chancery Cases, 115. (4) (1881) 6 A.C., 740 at p. 816.

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Lord BLACKBURN observed: "This ground of acquiescence or laches is often spoken of as if it were the only ground on which prescription was or could be founded. But I think the weight of authority, both in this country and in other systems of jurisprudence, shews that the principle on which prescription is founded is more extensive. Prescription is not one of those laws which are derived from natural justice. Lord STAIR, in his Institutions, treating of the law of Scotland, in the old customs of which country he tells us prescription had no place (book 2, tit. 12, s. 9), says, I think truly, "Prescription, although it be by positive law, founded upon utility more than upon equity, the introduction whereof the Romans ascribed to themselves, yet hath it been since received by most nations, but not so as to be counted amongst the laws of nations, because it is not the same, but different in diverse nations as to the matter, manner, and the time of it. . . . It is both fair and expedient that there should be provisions to enlarge the time when the true owners are under disabilities or for any other reason are not to be considered guilty of laches in not using their right within the specified period, and such provisions there were in the Roman law, and commonly are in modern Statutes of Limitations, but I take it that these are positive laws, founded on expedience, and varying in different countries and at different times." Angell in his work on Limitation observes: "although, says Domat, there was no other reason to justify the introduction and use of prescription than that of public policy, it would be just to prevent the property of things from being constantly in a state of uncertainty. Laches like limitation no doubt deprive the plaintiff of his remedy, but it depends upon general principles while limitation depends on express law. Laches may be adapted to the facts of each particular case, but limitation is a matter of inflexible law. A positive rule of limitation must not depend on whether there be laches or no: Courts of Equity in England apart from any rules of limitation refused relief to parties resorting to them for remedies not open to the courts of common law, if they were guilty of laches; but they also followed the Statutes of Limitation by analogy in granting equitable reliefs; although no Statute of Limitations before 3 and 4 Will. IV, c. 27, provided in terms for equitable rights or expressly bound the Courts of Equity." See Darby and Bosanquet on Limitation, page 234.

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Limitation then being the result of statute law, it has been held in England that no exemption from it can be recognised except what the statute itself provides. In *Beckford v. Wade*(1), the Judicial Committee of the Privy Council held that the fact that the defendants in an action were absent from the realm could not postpone the running of limitation. The Master of the Rolls observed: "The proposition, that this construction, under the doctrine of inherent equity, is put upon our English Statutes of Limitation, is, as I apprehend, altogether unfounded. General words in a statute must receive a general construction; unless you can find in the statute itself some ground for limiting and restraining their meaning by reasonable construction, and not by arbitrary addition or retrenchment." He goes on to say: "The true rule on this subject is laid down by Sir EARDLY WILMOT in his opinion in the House of Lords on the case of *Earl of Buckinghamshire v. Drury*(2). He says: 'many cases have been put, where the law implies an exception; and takes infants out of general words by what is called a virtual exception. I have looked through all the cases, and the only rule to be drawn from them is, that, where the words of a law in their common and ordinary signification are sufficient to include infants, the virtual exception must be drawn from the intention of the legislature, manifested by other parts of the law, from the general purpose and design of the law, and from the subject matter of it.' And he mentions the Statutes of Limitations, as an instance of a case, in which infants would be barred, if it were not for the introduction of the saving clause. Accordingly we find, that in the great case of *Stowel v. Lord Zouch*(3), upon the Statute of Fines of Henry the Seventh where the question was, whether, when the bar by five years' non-claim had begun to run in the time of the ancestor of full age, it should continue to run against his infant heir, although there was great difference of opinion among the Judges upon that question, the whole argument turns upon the true construction of the statute itself, with reference to all the parts of it, and to the object it had in view, and not upon any supposed inherent equity, by which infants were to be excepted out of the operation of the Statutes of Limitation. On the

(1) (1805) 11 R.R., 20 at pp. 23 and 24; s.c., 17 Ves. 87 at pp. 91-98.

(2) 1762 (Wilm. 177), [97 E.R., 69].

(3) (1797) 1 Plowden 353 [75 E.R. 536].

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contrary it is laid down in that case and laid down without any contradiction; 'For as much as they intended,' that is, the Legislature intended, 'to avoid universal trouble (as the preamble speaks) and to make peace, which is to be preferred before all other things, and for as much as they have made the provision general, viz. that the fine shall be final, and shall conclude as well privies as strangers: if the Act had stopped there, it would have bound as well infants, *femes covert*, and the others, named in the exception, as people of full age, and who were void of such defects," His Lordship went on to observe, referring to the case before him, that the absence of the defendants from the realm or even the fact of the Courts of Justice being shut up in times of war were no grounds for excluding the Statutes of Limitation. See also Angell on Limitation, page 498, where the opinions of Chancellor KENT and MARSHALL, C.J. in America to the same effect are referred to. It is perfectly clear from *Beckford v. Wade*(1), that minority unless expressly provided for in the statute would be no ground of privilege. See *Mohammed Bahadur Khan v. Collector of Bareilly*(2). We have no hesitation in saying that the same view must be held in this country also.

The earliest statutes of limitation in India therefore made express provisions in favour of minors. See Madras Regulation 2 of 1802, section 18, clauses 1, 2 and 3. In Act XIV of 1859, section 11 provided a general exemption in favour of minors but only in the case of suits. In Act IX of 1871 also the exemption was confined to suits, but a further restriction was introduced by it by limiting the privilege to cases where limitation was provided for in the schedule to the Act. There can be no doubt that the restriction was deliberately made. In section 7 of Act XV of 1877 the privilege was extended to applications; but the restriction to cases for which the limitation was provided for in the Act was continued. The provision in the present Act is in the same terms. We cannot therefore uphold the argument that there is any fundamental rule of law or justice entitling the appellant to claim that the limitation should run only from the date of his attaining majority. The decision of the Punjab Chief Court in *Jhandu v. Mohan Lal*(3), is in accordance with the view we have taken on the question.

(1) (1805) 11 R.R., 20 at pp. 23 and 24; s.c., 17 Ves. 57 at pp. 91--93.
(2) (1874) 1 I.A., 167. (3) 29 P.R., 489.

It is next contended for the appellant that the application is not barred in so far as the claim for mesne profits is concerned, even if section 48 of the Civil Procedure Code would be a bar so far as partition is concerned. The argument is that with regard to mesne profits the decree cannot be regarded as complete until they are ascertained; and that the present application may be regarded as one for the ascertainment of the mesne profits and as such should be regarded as one not for execution of the decree but as one in the suit itself to finish the enquiry and make the decree for mesne profits final. And reliance is placed in support of the argument on *Puran Chand v. Roy Radha Kishen*(1), *Harmanojee Narain Singh v. Ramprosad Singh*(2), *Midnapore Zamindari Company, Ltd. v. Nuresh Narain Roy*(3), *Muhammad Umarjan Khan v. Zinat Begam*(4) and *Waliya Bibi v. Nazar Hasan*(5). The decree here was passed when the repealed Civil Procedure Code was in force. It provided that "the defendants do pay to the plaintiff his one-third share of the mesne profits (to be ascertained in execution) from the date of suit 11th August 1892 until delivery of the lands or until three years from this date whichever event first occurs." The direction for the ascertainment of the mesne profits in execution was apparently made under section 211 of the Code. Section 212 enacted that with regard to mesne profits prior to the institution of the suit "the Court may either determine the amount by the decree itself, or may pass a decree for the property and direct an enquiry into the amount of mesne profits and dispose of the same on further orders." Where the decree provided for the mesne profits up to the date of delivery of the property the enquiry had necessarily to be postponed. Section 244 laid down that "questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit, between the date of its institution and the execution of decree, or the expiration of three years from the date of the decree" should be decided by the Court executing the decree. It is argued that the expression "the Court executing the decree" merely designates the Court which is to hold the enquiry into mesne profits and that the provision in section 244 does not make the

(1) (1892) I.L.R., 19 Calc., 132 (F.B.). (2) (1907) 6 O.L.J., 462.
(3) (1912) I.L.R., 39 Calc., 220; s.c., 16 C.W.N., 109.
(4) (1902) I.L.R., 25 All., 385. (5) (1904) I.L.R., 26 All., 623.

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enquiry a matter relating to the execution of the decree. It is not easy to see why an enquiry for mesne profits accruing subsequent to the date when judgment is given by the Court should be regarded as necessary to make the decree itself complete. Where the mesne profits relate to the period before the decree, it may be said that the decree should, strictly speaking, determine all the rights of the plaintiff including the claim to mesne profits up to the date of the decree; but it is doubtful whether this argument can apply to mesne profits subsequent to decree. Whatever the strictly logical view of the matter may be, it appears to us that the object of provisions of the Code was to enable the Court to separate the question of mesne profits from the claim to the land and to relegate the former to proceedings in execution. It was certainly within the competence of the legislature to do so; and it was regarded as promoting the convenience of litigants and the Court. According to section 244 the enquiry need not be held by the Court which tried the suit. If the execution of the decree is transferred to another Court it might be held by such Court. The enquiry may not logically be one relating to the execution of the decree; but in our opinion it was the intention of the legislature to make it a part of the execution proceedings. This explains the reason for its inclusion in section 244. The language of clause (c) of that section "any other question relating to the execution" shows that the enquiry into the amount of mesne profits was also to be regarded as a question relating to execution. An application for the ascertainment of mesne profits must therefore according to the Code be regarded as an application for execution, though it may be that the decree, in so far as mesne profits are concerned, would be incomplete until they have been ascertained. It may be right to hold that within the meaning of section 230 of the repealed Code, the twelve years prescribed therein for the execution of a decree for money would run only from the date when the mesne profits are ascertained; for it may be said that until that is done, it cannot be said that there is a decree for money. In this view the actual decision in *Harmanojee Narain Singh v. Ramprosad Singh*(1) may not be open to exception and the observation in *Puran Chand v. Roy Radha Kishen*(2) that the

(1) (1907) 6 C.L.J., 462.

(2) (1892) I.L.R., 19 Cal., 132 (F.B.).

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decree is not complete with regard to mesne profits for the purpose of execution until they have been ascertained, may also be unexceptionable; but this does not show that an application for the ascertainment of mesne profits would not be an application for execution as held by the Calcutta and Allahabad High Courts. The Code expressly made it such. *Ram Kishore Ghose v. Gopi Kant Shaha*(1) is in accordance with this view. *Midnapore Zamindari Company, Ltd. v. Naresh Narain Roy*(2), no doubt contains an observation that the whole decree including the decree for possession must be regarded as incomplete until the mesne profits are ascertained; but with all deference we are for the reasons already stated unable to agree in this view. It is not supported by the earlier decisions of the Calcutta High Court. It is based partly upon a judgment of the Privy Council in *Railha Prasad Singh v. Lal Sahab Rai*(3). But that case does not support the proposition. There although there was a declaration that the original defendants were liable for mesne profits, the decree did not determine the important question whether the defendants were liable jointly or severally in respect of wrongful occupation. There was no adjudication upon any of these matters until a long time after the original decree and until after the death of the defendants whose representatives were sought to be made liable. The decision of their Lordships was that the representatives not having been made parties to the investigation about mesne profits, they were not liable for the amount adjudged against them. Their Lordships did not decide any question of limitation. The appellant relies also on the decision of this Court in *Vydianatha Aiyar v. Subramanian Pattar*(4). There the decree directed that the costs of one of the parties should be paid by the other when ascertained. The ascertainment was not directed to be made in execution proceedings. The Court had no power to give such a direction. The question was when limitation began to run for the execution of the decree. It was held that the decree was complete only when the costs were ascertained. We do not think that the case affords any support to the appellant's contention here. According to section 48 of the present Code the execution of all decrees

(1) (1906) I.L.R., 28 Cal., 242.

(2) (1912) I.L.R., 39 Cal., 220; s.c., 16 C.W.N., 109.

(3) (1891) I.L.R., 18 All., 53.

(4) (1911) 21 M.L.J., 546.

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except a decree granting an injunction will be barred after the expiration of twelve years. An application for the ascertainment of mesne profits being in our view an application for execution we must hold that it is barred by the provisions of the section.

But it is contended that this case must be decided according to the provisions of the present Procedure Code which by Ord XX, rule 12, directs that in a suit for the recovery of immovable property and mesne profits the Court may direct an enquiry to the mesne profits and should pass a final decree in accordance with the result of the enquiry. The effect of the provision is to make the decree so far as mesne profits are concerned complete only when the amount has been ascertained while not making the rest of the decree incomplete till then. In this view an application for the ascertainment of mesne profits would not be one for execution of the decree, though the question might then arise whether article 181 would not apply to such an application. We are however of opinion that the question whether the application is one for execution or not should be decided in accordance with the provisions of the repealed Code. The effect to be given to a document and to the proceedings of a Court must be decided by the law in force when the document was executed or the proceedings were passed. The decree for mesne profits in this case cannot be regarded as incomplete and incapable of execution on the ground that according to the present Code it would be so regarded. This view is in our opinion in accordance with the decisions discussed at pages 324 to 333 of Maxwell on the Interpretation of Statutes. See also the judgment of this Court in *Muthiah Chettiar v. Ramasami Chettiar* (1).

Lastly it is contended that the application is not barred at any rate so far as the recovery of outstandings is concerned inasmuch as they had not been collected by the defendants at the time of the decree, according to which the plaintiffs are entitled to recover their share when the outstandings are collected. But the application for execution does not state when they were collected or that they have been collected at all. It does not therefore disclose any right on the part of the plaintiff to recover anything from the defendants. In the result the appeal is dismissed with costs.

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PRIVY COUNCIL.*

1918.
June 28, 24,
25, 26 and 27.
July 24.
November 4,
5, 6 and 7 and
December 10.

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v.

PARTHASARATHY APPA ROW (PLAINTIFF IN ORIGINAL SUIT No. 44 OF 1899) AND ANOTHER.

NARASIMHA APPA ROW (PLAINTIFF IN ORIGINAL SUIT No. 35 OF 1895 AND DEFENDANT IN ORIGINAL SUIT No. 44 OF 1899) NOW REPRESENTED BY VENKATA RAMAYYA APPA ROW

v.

RANGAYYA APPA ROW (PLAINTIFF IN ORIGINAL SUIT No. 35 OF 1895 AND DEFENDANT IN ORIGINAL SUIT No. 44 OF 1899) NOW REPRESENTED BY VENKATADRI APPA ROW †

VENKATADRI APPA ROW (REPRESENTATIVE OF RANGAYYA APPA ROW, PLAINTIFF IN ORIGINAL SUIT No. 35 OF 1895, AND DEFENDANT IN ORIGINAL SUIT No. 44 OF 1899)

v.

NARASIMHA APPA ROW (PLAINTIFF IN ORIGINAL SUIT No. 35 OF 1895, AND DEFENDANT IN ORIGINAL SUIT No. 44 OF 1899) NOW REPRESENTED BY VENKATA RAMAYYA APPA ROW ‡

VENKATADRI APPA ROW (REPRESENTATIVE OF RANGAYYA APPA ROW, PLAINTIFF IN ORIGINAL SUIT No. 35 OF 1895 AND DEFENDANT IN ORIGINAL SUIT No. 44 OF 1899)

v.

PARTHASARATHY APPA ROW (PLAINTIFF IN ORIGINAL SUIT No. 44 OF 1899) AND ANOTHER FOUR APPEALS CONSOLIDATED §

Hindu Law—Impartible estate—Question whether an estate alleged to be a raj was partible or impartible—Question of fact whether estate was a raj—Concurrent decisions of Courts in India—Privy Council, practice of—adoption—joint power to two widows to adopt—Power exercised by surviving widow—

* Present:—LORD ATKINSON, LORD PARKER OF WANDINGTON, SIR SAMUEL GRIFFITH, SIR JOHN EDGE AND MR. AMEER ALI.

† Appeal No. 114 of 1910.

‡ Appeal No. 115 of 1910.

§ Appeal No. 116 of 1910.

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Construction of will—No provision for the death of one of two joint donees—No power in Court construing will to make by its interpellation any addition to testamentary disposition.

In the absence of a sanad under Madras Regulation XXV of 1802, the regulations of that year do not affect the title to any land.

Collector of Trichinopoly v. Lekkamani (1), followed.

The acceptance of a sanad in common form under Madras Regulation XXV of 1802 does not of itself, and apart from other circumstances, avail to alter the succession to an hereditary estate.

The Udayarpalayam Case (2), followed.

Unless there be an existing estate with other incidents which a sanad in common form under Madras Regulation XXV of 1802 can operate to confirm, such sanad will confer on or confirm in the grantee an estate descendible according to the ordinary rules of inheritance of the Hindu law.

Raja Venkata Rao v. Court of Wards (3), followed.

In order to establish that any estate is descendible otherwise than in accordance with the ordinary rules of inheritance of the Hindu law, it must be proved either that it is from its nature impartible and descendible to a single heir, or that it is so impartible and descendible by virtue of a special family custom.

Baboo Gunesb Dutt Singh v. Maharajah Moheshur Singh (4), followed.

The nature of the estate, and the existence or otherwise of a special family custom are questions of fact to be determined on the evidence in each case.

Mallikarjuna v. Durga (5), followed.

In a case in which the question was whether the estate of Nidadavole in the Kistna district of the Madras Presidency, which was the subject of a sanad in common form under Madras Regulation XXV of 1802, was partible or impartible, the appellant contended that the grantee had, at and prior to the date of the sanad, an estate of the nature of a raj or principality, and therefore impartible, but he did not rely on any special family custom.

Held (on the above principles), that the question whether the prior estate was of the nature of a raj or not was a question of fact to be determined on the evidence, and that where both Courts in India had concurrently found it was not a raj but was partible, those findings ought not, according to the practice of the Board, to be disturbed unless they were shown to be not justified by the evidence.

Allen v. Quebec Warehouse Company (6), followed.

Their Lordships, after considering the evidence, so far from being so satisfied, were not prepared to say that they should not have come to the same conclusion on that point. The appeal was therefore dismissed.

A Hindu of the Sudra caste by his will made the day before his death in 1864, after bequeathing his estates to his two widows gave them the following power of adoption: "You should adopt a boy who is our sannihita (one closely

(1) (1874) L.R., 1 I.A., 282, at p. 306.

(2) (1905) I.L.R., 28 Mad., 508, at p. 515; s.c., L.R., 32 I.A., 261, at p. 266.

(3) (1879) I.L.R., 2 Mad., 128 (P.C.); s.c., L.R. 7 I.A., 38.

(4) (1855) 6 M. I.A., 164, at p. 187.

(5) (1890) I.L.R., 13 Mad., 406 (P.C.); s.c., L.R. 17 I.A., 134.

(6) (1886) L.R., 12 A.C., 101, at p. 104 (P.C.).

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related) whenever it strikes you that our samastanam (family) should continue." This power was not exercised whilst both widows were alive, but by the survivor of the two widows in 1890.

Held, without deciding the question of the validity or otherwise, under the Hindu law, of a joint power of adoption (for the proper determination of which their Lordships were of opinion that the materials in this case were insufficient) that the will gave to the widows jointly the power to adopt a son should occasion arise which in their opinion made it desirable to do so: but only one of the widows could receive the boy in adoption so as to step into the position of being his adoptive mother. On a consideration of the surrounding circumstances there was nothing which required or justified their Lordships in interpreting the provisions of the will with regard to the adoption in any special way arising from the fact that the testator was a Hindu; and they must adhere to the plain meaning of the language used. The exercise of the power was vested in the discretion of the joint donees, and it was clearly the law that in such a case the death of one of the donees put an end to the joint power; not by virtue of any peculiar doctrine of English law, or series of English decisions, but flowing from the nature of a joint power. The case was different when the power vested not in specific persons, but in the occupants for the time being of a specified office, such as executors.

The words of the will when properly construed related to choice and adoption by the two widows acting jointly. Hence the words referred only to the period of time when both widows were living. To hold that one of the widows could adopt a son after the death of the other widow would be providing for a period of time which the testator left unprovided for, and would be making an addition to his testamentary dispositions which no Court construing a will was entitled to do.

Consolidated appeals and cross-appeals Nos. 114 to 116 of 1910 from the judgment and decrees (20th November 1905) of the High Court at Madras in Appeals Nos. 122 and 123 of 1900 and in Appeals Nos. 32 and 41 of 1904 which affirmed the decree (2nd December 1899) of the Subordinate Judge of Kistna in Original Suit No. 35 of 1895, and varied the decree (12th December 1903) of the District Judge of Gōdāvari in Original Suit No. 44 of 1899.

The facts sufficiently appear in the judgment of the High Court (DAVIES AND BENSON, JJ.), which will be found in *Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row* (1) where a genealogical table of the names and relations of the litigants is given on page 439.

The subject-matter of the litigation concerned the zamindari estates of Nidadavole and Medur, both of which at one time formed part of the great Nuzvid zamindari. The suit in the

(1) (1906) I.L.R., 29 Mad., 437.

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Subordinate Judge's Court related to the zamindari of Medur alone, and the suit in the District Judge's Court related to both Medur and Nidadavole. The effect of the decrees of the High Court was that one Rangayya Appa Row (No. 11 in the pedigree) and his younger brother Narasimha Appa Row (12), and their cousin Parthasarathy (16) were entitled to each of the two zamindaris in equal shares. The main questions for determination in these appeals were (1) whether the estate of Nidadavole is partible or impartible, and (2) whether an adoption made on 28th December 1890 of Narayya Appa Row (17) by a lady called Papamma Row, widow of Narayya Appa Row (5), was valid or invalid. The first question argued before their Lordships was the question of the partibility or otherwise of Nidadavole.

On that point the District Judge in Suit No. 44 of 1899 held that the Nidadavole estate was not impartible, but descended according to the ordinary rules of Hindu Law, and that view was affirmed by the High Court. The estate of Nidadavole was granted by Government in 1802 by a sanad under Madras Regulation XXV of that year to Narasimha Appa Row (No. 2 in the pedigree). He died in 1827 and was succeeded by his adopted son Narayya Appa Row (5) on whose behalf the estate was managed by the Court of Wards until he attained his majority in 1833. In August 1843 the entire estate was brought to sale for arrears of revenue, and was purchased by Government. The estate was then granted by the Government to Narayya Appa Row (5) who died in 1864.

As to the tenure and nature of the estate previous to 1802 the High Court said:

"In the view that we have taken that the evidence clearly shows that the estate has not been of an impartible character and descendible to a single heir since 1756 we do not consider it necessary to go further back and discuss whether the estate was, prior to that time, held on a military or feudal tenure or partook of the nature of a principality or raj. We may however state briefly that we concur in the conclusion of the District Judge that there is no reason whatever for thinking that the estate ever partook of the nature of a principality or raj. There is more show of reason in support of the idea that it was held on a sort of military tenure, or rather that it was a deshmukhi, or renter's estate burdened with a liability to furnish a certain number of armed men to the ruling power when so required. No doubt, in the first years of their rule the

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English authorities regarded the zamindaris as military or feudal estates (Exhibits 201 and 204), but the incorrectness of that view was explained in the letter of the Board of Revenue to Government, dated 30th September 1786 (Exhibit JJJ), and the same view as to the true character of these zamindaris was maintained in the Fifth Report, pages 6, 7 and 8. Whatever military assistance was required of the zamindars it was quite a minor part of their duty, and it was in respect of this particular zamindari expressly declared (Exhibit 20) to have ceased altogether after the rebel Narayya was deposed in 1784. If it existed up to that time it is quite clear that it was not of such a character as to imply that the estate must be held by a single person only; for we find that the zamindari was, in fact, held by the brothers Venkatadri and Narayya in equal shares from 1756 to 1771 a period which embraced several years under both Muhammadan and British rule. No presumption in favour of impartibility therefore arises from the tenure on which the estate was held, and there is nothing to negative the positive evidence which we have as to the actual facts of enjoyment since 1756, and the inferences to be drawn from them."

De Gruyther, K.C., and *A. M. Dunne* for Venkatadri Appa Row, appellant in Appeals Nos. 115 and 116 of 1910, and one of the respondents in Appeal No. 114.

Sir R. Finlay, K.C., *Kenworthy Brown* and *Dr. Swaminadhan* for the representatives of Narasimha Appa Row, appellant in Appeal No. 114 of 1910 and respondent in Appeals Nos. 115 and 116.

Sir Erle Richards, K.C., *Ross, K.C.*, and *Madhavan Nair* for Parthasarathy Appa Row, one of the respondents in Appeals Nos. 114, 115 and 116.

On the question whether Nidadavole was partible or impartible.

De Gruyther, K.C., and *A. M. Dunne* contended that it had been wrongly decided by the Courts below that the estate of Nidadavole was partible. Both that estate and the estate of Medur were part of the zamindari of Nuzvid of which in 1769 it was officially reported that the zamindari was held by certain Rajas or Chiefs as their hereditary estate, paying a certain tribute to the Government and being subject to service very much in the same manner as the old feudal tenures. The Nuzvid Zamindar was on various occasions called on to render military service, and from this, and its very nature, it was held from its inception as an impartible

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estate, and eventually came to Narayya (No. 1 in the pedigree) who after participating in its management with his brother, became on his brother's death the zamindar. He lost the estate in 1788, but though he had three sons the Government, when it was decided to restore the estate, granted it to the eldest son Narasimha (2) in September 1784, thus, it was submitted, recognising its impartible character. Narasimha's (2) dissolute character and misconduct obliged the Government to consider the estate forfeited in 1794; and though eventually at the time of the permanent settlement in 1802 the Government decided to grant Narasimha (2) only a portion of the zamindari, and made a permanent settlement of about one-third of the estate to his brother Ramachandra (3), that was done, it was submitted, on grounds of public policy, and in no way recognized the estate as being partible; for the shares were not only unequal, but Narasimha (4), Narayya's (1) third son, was given no interest at all in the estate. The zamindari granted to Narasimha (2), was now the Nidadavole estate, and that granted to Ramachandra (3) was now the Nuzvid estate. Then on the death of Ramachandra (3) his son Sobhanadri (6) succeeded to the Nuzvid estate and died in 1868. In October 1871 in the course of disputes whether the estate was partible or impartible Venkata Narasimha (12) brought a suit in the District Court at Guntur against his five brothers to obtain possession of a sixth share of the zamindari. The suit was dismissed in 1873 by the District Judge who found that the "zamindari was ancient and indivisible up to the date of its division by Government in 1802, and that the portion then granted to Ramachandra (3) was granted with unchanged incidents and therefore in an indivisible state." On appeal the High Court at Madras in 1874 affirmed those findings, being of opinion that "it is abundantly clear that there is not an estate in these provinces of which the original impartibility may be more safely predicted"; and that "the evidence showed clearly that the zamindari was an ancient impartible estate in the nature of a principality, and that what had occurred subsequently between the brothers had not altered the character of impartibility attaching to the portions of the original estate which they then agreed to hold separately." *Venkata Rao v. Court of Wards* (1) was taken to the Privy Council on appeal and in the course of the judgment (in December 1879) their Lordships

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said, "It was not disputed that the zamindari, prior to the year 1802, formed part of an ancient and much larger estate which was indivisible and descendible to a single heir, and that prior to the British rule it was a military jaghir held on the tenure of military service, and in the nature of a raj or principality." But their Lordships were of opinion that, assuming the impartible character of the original zamindari, the portion which was granted to Ramachandra (3) was held by him subject to the ordinary rules of the Hindu law, and consequently they decreed the suit in favour of the plaintiff Venkata Narasimha (12). In another suit brought in the Kistna Court in 1872 by the widow of Venkatadri (13), Simhadri (14), and Venkataramayya (15) against the other three sons of Sobhanadri (6) to recover their shares in the Nuzvid estate, the District Judge in 1877, following the decision of the High Court in 1874 in the former case, dismissed the suit. On appeal, after additional evidence had been taken, the question of partibility was reconsidered by the High Court, and in January 1879 that Court came to the conclusion that, on the evidence then offered, it was beyond question that the estate was an ancient feudal principality, and that as such it was impartible. Having regard, however, to the judgment of the Privy Council in December 1879 in *Raja Venkata Rao v. Court of Wards* (1), the Nuzvid estate was partitioned, the share which fell to Venkataramayya (15) was called the Medur estate, one of the properties now in dispute. In 1775 the principle was recognised by the Government of India that none of the large zamindaris should be divided but should go to the eldest son. If an estate was a zamindari, impartibility, it was contended, followed: no matter what was the title of the ruler, whether zamindar, talukdar, raja or anything else. The estate now in suit was a Raj and in the evidence in the case had descended for three generations at least to the eldest son. There was, therefore, it was contended on the evidence, ground for saying that the estate of Nidadavole was impartible prior to 1802; and as the grant of it in that year made no alteration in the nature of its tenure (the sanad was one under Madras Regulation XXV of 1802) the presumption was that it remained the same. That Regulation took away no rights proprietors

(1) (1879) I.L.R., 2 Mad., 123 (P.C.); s.c., L.R., 7 I.A., 38.

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then had: their tenure was the same as before with all the incidents attached to it, and retained in any case its character of impartibility, as did any portion of the estate if held on the same title. Reference was made to Harrington's Analysis, vol. III, page 368: Manual of Kistna District (1883) by Gordon Mackenzie, M.C.S., pages 295, 297: the Fifth Report of the Select Committee on the affairs of the East India Company (dated 1812), Madras edition 1883, vol. II, pages 3, 4, 5, 6, 21, 54, 88, 180, 181 and 205 in which the zamindars are described as "exercising an authority little less than regal": Grant's Political Survey of the Northern Circars [written in 1783 and published by the Select Committee as an appendix (No. 4) to their Report], pages 181 and 205: Madras Regulation XXV of 1802, section 2: *Collector of Trichinopoly v. Lekkmani*(1), *The Udayarpalayam case*(2), *Baboo Gunesb Dutt Singh v. Maharajah Moheshur Singh*(3), *Muttu Vaduganadha Tevar v. Dorasingha Tevar*(4), *Naragunty Lutchmeedavamah v. Vengama Naidoo*(5), *Baboo Beer Pertab Sahas v. Maharajah Rajender Pertab Sahas (the Hunsapore Case)*(6), *Ram Nundun Singh v. Janki Koer*(7), *Malikarjuna v. Durga (the Devarakota Case)*(8), Wilson's Glossary, 481 definitions of "Sibandi", and 563 of "Zamindar"; *Stree Rajah Yanamula Venkayama v. Stree Rajah Yanamula Boochia Vankondora*(9) and *Forbes v. Meer Muhomed Tuquee*(10); the omission of words of inheritance did not necessarily make a sanad not hereditary; *Kooldeep Narain Singh v. The Government*(11), and sections 32 and 90 of Evidence Act (I of 1872), "The Law of Evidence" by Ameer Ali and Woodroffe, page 503. If the estate of Nidadavole was impartible, that of Medur was, it was contended, also impartible.

Sir R. Finlay, K.C., and Kenworthy Brown contended that it had been rightly held by the Courts in India that the zamindari of Nidadavole was not impartible; the history of that estate and

(1) (1874) L.R., 1 I.A., 282, at pp. 294, 304 and 313.

(2) (1905) I.L.R., 28 Mad., 508, at pp. 513 and 515; s.c., L.R., 32, I.A., 261, at pp. 266 and 269.

(3) (1855) 6 M. I.A., 164, at pp. 187, 188 and 191.

(4) (1881) I.L.R., 3 Mad. 29, at pp. 304, 305 and 308 (P.C.); s.c., L.R., 8 I.A., 99, at pp. 112 and 115.

(5) (1861) 9 M. I.A., 68, at p. 88.

(6) (1867) 12 M. I.A., 1, at pp. 18, 38 and 35.

(7) (1902) I.L.R., 29 Calo. 828, at pp. 350 and 351 (P.C.); s.c., L.R., 29 I.A., 178, at pp. 192 and 193.

(8) (1890) I.L.R., 13 Mad., 406, at pp. 420 and 422; s.c. L.R., 17 I.A., 134, at pp. 137 and 143.

(10) (1870) 13 M. I.A., 438, at p. 454.

(11) (1871) 14 M. I.A., 247, at p. 256.

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the evidence in this case showed that it was partible; and even if it was at one time an impartible estate, it was, under the sanad of 1802, as interpreted by this Board in *Raja Venkata Rao v. Court of Wards*(1), constituted a partible estate. A zamindari was ordinarily partible unless it was a raj, or was specially made impartible otherwise; Mayne's Hindu Law, seventh edition, page 632. It must then either be shown that as to the Nidadavole estate there was a special custom of impartibility, or that it was a raj in which case the presumption would be that it was impartible. Here no special custom was either relied upon or proved; nor was there anything to show the estate was a raj; so that on both points the appellants had failed in their proof. Reference was made to the Fifth Report of the Select Committee on the affairs of the East India Company and various passages were cited from vol. II of the Madras edition, pages 5 to 30, to show that Nidadavole was not a raj, and that so far from being of the nature of a raj, or even a military tenure, it was pronounced to be merely a "desmukh" zamindari. Other passages were to the effect that the "Zamindar of Nuzvid was one of those zamindars who could boast of no higher extraction than being descendants from the officers and revenue agents of the Sovereigns of Orissa who were employed by the Muhammadan conquerors in the management of their new acquisitions" and that "the zamindars though they arrogated to themselves many of the attributes of petty rulers . . . were probably never regarded in that light by the inhabitants of their somewhat scattered estates . . . the estate could hardly, therefore, have ever formed an impartible raj, or a feudal holding." Reference was made also to Grant's Political Survey of the Northern Circars (Appendix to Fifth Report of Select Committee), page 205, and the Glossary at the end of the book, definitions of "Zamindar" and "Desmukh": [Lord ATKINSON referred to the definition of "Desmukh" in Wilson's Glossary, page 132], the definition of "Raj" in Wilson's Glossary, page 433, the letter of the Board of Revenue to the Government, dated 30th September 1786; and *Sri Raja Satrucherla Jagannadha Razu v. Sri Raja Satrucherla Ramabhadra Razu*(2), in which the Mirangi zamindari of a nature very similar to the Nidadavole

(1) (1879) I.L.R., 2 Mad., 128 (P.C.); s.c., L.R., 7, I.A., 38.

(2) (1891) I.L.R., 14 Mad., 237, at pp. 244 and 246; s.c., L.R., 18 I.A. 45, at pp. 53 and 55.

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estate and in much the same circumstances, was declared to be partible. The question, however, whether an estate is governed by the ordinary Hindu law, or by any special custom was a pure question of fact, to be decided in each case upon the evidence adduced in it: *Mallikarjuna v. Durga*(1). In the present case both Courts below had concurrently found on the evidence that the estate of Nidadavole was not a raj, nor impartible, but was partible and governed by the ordinary Hindu law; and such concurrent findings it was the rule of this Board not to disturb unless they were shown to be clearly wrong. Reference was made to *Allen v. Quebec Warehouse Company*(2), *Owners of the "P. Caland and Freight" v. Glamorgan Steam Ship Company*(3), *Ram Anugra Narain Singh v. Chowdhry Hanuman Sahai*(4), *Parbati Kunwar v. Chandra Pal Kunwar*(5), *Sajjad Husain v. Wazir Ali Khan*(6) following *Karuppanan Nervai v. Srinivasan Chetti*(7), Civil Procedure Code, 1882, section 596, and *The Udayarpalayam Case*(8); the appeal it was submitted, should therefore be dismissed.

De Gruyther, K.C., called on to reply said his contention was that there was no question of fact; the facts had been found and the law applicable had to be ascertained from them. [Lord ATKINSON:—You have to show us that the Courts in India were clearly wrong in deciding that the estate was partible.] The decisions were wholly wrong because they had not given effect to the rule of succession which had prevailed, in the family that held the estate, for a very long time. As to the status of the Zamindars it was set at rest by legislation in 1793 when they were declared to be the actual proprietors of their estates, and reference was made to the Fifth Report of the Select Committee on the affairs of the East India Company, vol. II, Madras edition, pages 5, 6, 7 and 8; *Muttu Vaduganadha Tevar v. Dorasinga Tevar*(9) as to the Shivaganga Zamindari which was held to be

- (1) (1890) I.L.R., 13 Mad., 403, at p. 423; s.c., L.R. 17 I.A., 134, at p. 144.
- (2) (1886) L.R., 12 A.C., 101, at pp. 104 and 105.
- (3) (1893) L.R., 12 A.C., 207, at p. 216.
- (4) (1908) I.L.R., 30 Cal., 303, at p. 303 (P.C.); s.c., L.R., 30 I.A., 41, at p. 43.
- (5) (1909) I.L.R., 31 All., 457, at p. 474 (P.C.); s.c., L.R., 36 I.A., 125, at p. 134.
- (6) (1912) I.L.R., 34 All., 455, at p. 461 (P.C.); s.c., L.R., 39 I.A., 156, at p. 162.
- (7) (1902) I.L.R., 25 Mad., 215 (P.C.); s.c., L.R., 29 I.A., 38.
- (8) (1905) I.L.R., 28 Mad., 508, at p. 515; s.c., L.R., 32 I.A., 261, at p. 269.
- (9) (1881) I.L.R., 3 Mad., 290; s.c., L.R., 8 I.A., 99.

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impartible; *Collector of Trichinopoly v. Lekkamani*(1), where it was held that a zamindari was impartible and hereditary, and that the Madras Regulation XXV of 1802 made no difference in its impartibility: *Naragunty Lutchmeedavamah v. Vengama Naidoo*(2) and *The Udayarpalayam Case*(3).

The judgment of Their Lordships was delivered on July 24, 1913, by—

LORD
PARKER.

LORD PARKER.—The principles to be applied in determining the question which now arises for decision do not, in their Lordships' opinion, admit of any controversy. These principles may be stated as follows:—*First*, in the absence of a sanad under Regulation XXV of the Madras Regulations of 1802, those regulations do not affect the title to any land [*Collector of Trichinopoly v. Lekkamani*(1)]. *Secondly*, the acceptance of a sanad in common form under Regulation XXV does not of itself, and apart from other circumstances, avail to alter the succession to an hereditary estate [*The Udayarpalayam Case*(3)]. *Thirdly*, unless there be an existing estate with other incidents which a sanad in common form under Regulation XXV can operate to confirm, such sanad will confer on or confirm in the grantee an estate descendible according to the ordinary rules of inheritance of the Hindu law—*Raja Venkata Rao v. Court of Wards*(4). *Fourthly*, in order to establish that any estate is descendible otherwise than in accordance with the ordinary rules of inheritance of the Hindu law, it must be proved either that it is from its nature impartible and descendible to a single heir, or that it is so impartible and descendible by virtue of a special family custom [*Baboo Gunesh Dutt Singh v. Maharajah Moheshur Singh*(5)]. Lastly, the nature of the estate and the existence or otherwise of a special family custom are questions of fact to be determined on the evidence available in each case. [*Mallikarjuna v. Durga*(6)].

The question now arising for decision is whether the Zamindari of Nidadavole is impartible and descendible to a single heir or partible and descendible according to the ordinary rules of

- (1) (1874) L.R., 1 I.A., 282, at pp. 305 and 331.
- (2) (1861) 9 M.I.A., 66, at p. 88.
- (3) (1905) I.L.R., 28 Mad., 508, at p. 515; s.c. L.R., 32 I.A. 261, at p. 269.
- (4) (1879) I.L.R., 2 Mad., 128 (P.C.); s.c., L.R., 7 I.A., 38.
- (5) (1855) 5 M.I.A., 164, at p. 187.
- (6) (1890) I.L.R., 13 Mad., 406 (P.C.); s.c., L.R. 17 I.A., 134.

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inheritance of the Hindu law. The Zamindari of Nidadavole was the subject of a sanad in common form under Regulation XXV, and on the principles above stated it must be held to be partible and descendible according to the ordinary rules of inheritance of the Hindu law, unless the sanad could operate as the confirmation of a previously existing estate which from its nature or by virtue of some special family custom was impartible and descendible to a single heir. The appellant contends that the grantee under this sanad had at and prior to the date thereof an estate which was of the nature of a raj or principality and therefore impartible. He does not rely on any special family custom. At and prior to the sanad the grantee thereunder had no doubt some estate, but whether or not it was an estate in the nature of a raj is a question of fact to be determined on the evidence. Both Courts below have found that the estate was not in the nature of a raj, and having regard to the ordinary practice of this Board it would be wrong to advise His Majesty to disturb this finding unless their Lordships are satisfied that it was not justified by the evidence. [See *Allen v. Quebec Warehouse Company*(1).] So far from being so satisfied, their Lordships after considering the evidence are not prepared to say that they should not themselves have come to the same conclusion. Some stress was laid on the contrary findings of the Courts in the litigation which culminated in the proceedings before the Board [*Raja Venkata Rao v. Court of Wards*(2)] but their Lordships observe that in the present case there was evidence of a very material nature which was not available in the earlier litigation.

In their Lordships' opinion, therefore, the judgments of the Courts below cannot on this point be disturbed, and they will humbly advise His Majesty to that effect. They will consider the question of costs when the other points arising on these appeals have been dealt with.

The question of the validity or otherwise of the adoption made on 28th December 1890 of Narayya (17 in the pedigree) by Papamma, the surviving widow of the testator Narayya Appa Row (5 in the pedigree), was argued on the above dates in November

P. C. * Nov.
4, 5, 6 and 7
and Decem-
ber 10.

(1) (1886) L.R., 12 A.C., 101, at p. 104.

(2) (1879) I.L.R., 2 Mad., 128 (P.C.); s.c., L.R., 7 I.A., 38.

* Present:—LORD SHAW, LORD MOULTON, SIR JOHN EDGE AND MR. AMER ALI.

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1913. The question involved the construction of the will of the testator, dated 6th December 1864, which gave the power to his widows to make an adoption. The terms of the will and the authority to adopt are sufficiently set out in the judgment of their Lordships of the Judicial Committee.

On this question the District Judge had decided that the will was not genuine, and for this and other reasons had held that the adoption was invalid.

On appeal the High Court (DAVIES and BENSON, JJ.) [(see *Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row*(1)] held that the will was genuine and as to the adoption they held that a power to adopt granted jointly to the two widows by the will of the testator was valid under the Hindu law; and that such a power could be exercised by one widow after the death of the other; the case being, the High Court observed, "analogous to that of a power given to a person not in his individual capacity, but as holding a particular office such as that of an executor."

Sir R. Finlay, K.C., and *Kenworthy Brown* for the representatives of Narasimha Appa Row, appellants in Appeal No. 114.

DeGruyther, K.C., and *A. M. Dunne* for Venkatadri Appa Row, appellant in Appeals Nos. 115 and 116.

Sir E. Clarke, K.C., *Sir Erle Richards, K.C.* and *I. Prakasam* for Parasarathy Appa Row, respondent in all three appeals.

Sir R. Finlay, K.C., and *Kenworthy Brown* contended that the power of adoption given by the will to the two widows of the testator was invalid in law. The will, on its true construction conferred a joint power of adoption on the two widows, which according to Hindu law was, it was submitted, an impossible power. An adoption could only be made by one widow who would thereby become the mother of the adopted son. But a power of adoption given to two widows must be exercised by them both in order to comply with the terms of the will by which the authority to adopt was given. The authorities on the law of adoption never speak of "adoptive mothers," but only of the "adoptive mother," and in ordinary circumstances a husband associates one of his wives in an adoption: *Annapurni Nachiar v.*

(1) (1906) I.L.R., 29 Mad., 437.

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Forbes(1) which affirmed on appeal the decision in *Annapurni Nachiar v. Collector of Tinnevely*(2). A joint power given to a widow and an executor has been held to be bad; see *Amrito Lal Dutt v. Surnomoye Dasi*(3). The position too of the adopted son in the family into which he is adopted showed how impracticable would be the exercise of a joint power of adoption to two widows: for according to Hindu law an adopted son takes by inheritance from the relatives of his "adoptive mother," in the same way as a legitimate son: see *Uma Sunker Moitro v. Kali Komul Mozumdar*(4), which was affirmed by the Privy Council on appeal in *Kali Komal Mozumdar v. Uma Sunker Moitro*(5); Mayne's Hindu Law (seventh edition) 214, sections 163 and 164: the adopted son could only occupy that position with regard to one adoptive mother. *Luckhinarani Tagore*, referred to in Sir F. Macnaghten's, "Considerations of Hindu law," page 171, and appendix, page xi, was only an opinion on a case that had never arisen and had no authority to support it. An adoption can only be made by a man in his lifetime, or after his death by one of his widows properly authorised: and in the latter case it must be made strictly in accordance with the terms of the authority. A widow cannot adopt without authority: *Huradhun Mookurjia v. Muthoranath Mookurjia*(6), West and Buhler (last edition), 977: *Rámji v. Ghamáu*(7), *Rakhmabái v. Radhabái*(8), Steele on the "Laws and Customs of Hindu Castes," pages 47, 48 and 187. *The Collector of Madura v. Moottoo Ramalinga Sathupathy*(9) and Mayne's Hindu Law (seventh edition), page 151, section 118. In this case the terms of the will giving authority to adopt, and the proper construction of them must determine whether the power has been properly exercised. *Indar Kunwar v. Jaipal Kunwar*(10) where the power was construed as not

(1) (1899) I.L.R., 23 Mad., 1: s.c., L.R., 26 I.A., 246.

(2) (1895) I.L.R., 18 Mad., 277.

(3) (1900) I.L.R., 27 Cal., 996, at pp. 1002 and 1003: s.c., L.R., 27 I.A., 128 at pp. 129, 132, 133, 134 and 141.

(4) (1880) I.L.R., 6 Cal., 256 (F.B.).

(5) (1888) I.L.R., 10 Cal., 232: s.c., L.R., 10 I.A., 138.

(6) (1849) 4 M.I.A., 414, at pp. 425 and 426.

(7) (1882) I.L.R., 6 Bom., 498, at p. 503.

(8) (1868) 5 Bom., H.C.R., 181 (A.O.J.).

(9) (1868) 12 M.I.A., 397.

(10) (1868) I.L.R., 15 Cal., 725, at pp. 747, 748 and 749: s.c., L.R., 15 I.A., 127, at pp. 143, 144 and 145.

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being an authority to both widows, but only to one. A power given to two persons cannot be exercised by only one of them, and it must be strictly proved and strictly exercised. In the present case the adoption was not valid as it was not made in accordance with the terms of the authority in the will, because one of the widows having died, the adoption was made by one widow only. Reference was made to *Chowdry Pudum Singh v. Koer Oodey Singh*(1), *Mutasaddi Lal v. Kundan Lal*(2) and *Montefiore v. Broune*(3). The power could not be exercised by the survivor: Farwell on Powers (second edition), pages 454, 455. There was no particular form of authority. Cases were referred to in which authorities to adopt had been construed; *Bhaiya Rabidat Singh v. Indar Kunwar*(4) and *Amrito Lal Dutt v. Surnomoye Dasi*(5), affirming the decision of the High Court in *Amrito Lal Dutt v. Surnomoni Dasi*(6) and holding that a joint power to three persons was no valid authority to one to make an adoption: *Surendro Keshub Roy v. Doorgasoonderi Dassee*(7) where a simultaneous adoption by each of two widows was held to be invalid: see also *Akhoy Chunder Bagchi v. Kalapahar Haji*(8) and *Annapurni Nachiar v. Forbes*(9). It was submitted therefore the adoption could not be maintained: but if it were valid the adopted son was divested of his interest in the Medur estate.

De Gruyther, K.C., and *A. M. Dunne* contended that the adoption was invalid because, even if the authority to adopt was established, the adoption was not in conformity with the restrictions placed upon the exercise of the power; and that the adoption in the form in which it was made was bad under the Hindu law. The widow must have authority to adopt which may be oral or in writing. The parties in the case being Sudras, the religious ground for the adoption was not of so much importance as in the case of Brahmans. From the terms of the will the

(1) (1869) 12 M.I.A., 350, at p. 355.

(2) (1906) I.L.R., 28 All., 377 (P.C.); s.c., L.R., 33 I.A., 55.

(3) (1858) 7 H.L.C., 241, at pp. 257 and 263.

(4) (1888) I.L.R., 16 Cal., 536, at p. 534 (P.C.); s.c., L.R., 16 I.A., 53, at p. 59.

(5) (1900) I.L.R., 27 Cal., 996 (P.C.); s.c., L.R., 27 I.A., 128.

(6) (1898) I.L.R., 25 Cal., 662.

(7) (1892) I.L.R., 19 Cal., 513, at p. 530 (P.C.); s.c., L.R., 19 I.A., 108, at p. 122.

(8) (1895) I.L.R., 12 Cal., 408, at p. 411 (P.C.); s.c., L.R., 12 I.A., 198, at p. 200.

(9) (1899) I.L.R., 23 Mad., 1 at p. 9; s.c., L.R., 26 I.A., 246 at p. 252.

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testator intended to give authority to the widows to exercise the power to adopt jointly and not singly. It is suggested that the widows were trustees and that on the death of one the other had the powers of both. But, if so, for whom were they trustees? Certainly not for the testator. Reference was made to Stokes' Hindu Law Books, page 588, paragraph 11. A joint power to adopt was invalid as being contrary to the nature of the principles of the Hindu law as to adoption. For these, as well as for the reasons given for the appellants in Appeal No. 114, adoption should be declared to be invalid.

Sir E. Clarke, K.C., and *Sir Earle Richards, K.C.*, contended that the adoption was valid. The proposition that a joint power to two widows to adopt was invalid was one which was not found in any of the text books or decisions on the Hindu law. In Bombay joint adoption was allowed. On the construction of the will was it absolutely necessary for both widows to adopt? It was submitted it was not, and Mayne's Hindu Law (seventh edition), page 137, section 109, was referred to. The joint power was not necessarily illegal, as it could be exercised by both the widows agreeing in the selection of a child, and by one of them only receiving the child in adoption. In that view the will was in accordance with the law. It was an inferential construction that the widows would agree as to the boy to be adopted, and as to which of them should receive him in adoption, and the widow who received him in adoption would become the mother of the boy. That was a matter of arrangement between them, and a valid adoption, it was submitted, could be so made. The point was never seriously raised in the former litigation of 1888. No objection was ever taken to the adoption that it was made under a joint power to adopt. In neither of the written statements was it suggested that the adoption was invalid because the power to make it was a joint power. In favour of the validity of a joint power of adoption there was the case of *Luckinarrain Tagore* in *Sir F. Macnaghten's "Considerations of Hindu Law,"* page 172, and that had never been held to be erroneous. *Annapurni Nachiar v. Forbes*(1) is relied on as deciding that a joint power was invalid, but, as the High Court in the present case rightly says, there is no such ruling to be found in

(1) (1899) I.L.R., 28 Mad., 1 at p. 3 : L.R., 26 I.A., 246, at p. 252.

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that case: the effect of the decision is that a joint power was good. Then there is *Indar Kunwar v. Jaipal Kunwar*(1) where the validity of a joint power was not questioned [Lord Moulton: The question never arose in that case as Lord Macnaghten construed the will to mean that powers to adopt was only given to one widow]. *Sarada Prasad Pal v. Rama Pati Pal*(2) was a case directly in point. Reference was also made to West and Buhler, page 977: *Akhoy Chander Bagchi v. Kalapahar Haji*(3), *Amrito Lal Dutt v. Surnomoye Dasi*(4), *Surendro Keshub Roy v. Doorgasoonderi Dassee*(5) and Sarkar's "Law of Adoption" (Tagore Law Lectures, 1888), edition 1891, pages 245, 246, a case of a power of adoption being given by a man with two or more wives. The intention of the testator should be considered; he no doubt wanted an adoption to be made from a religious point of view, as through a son he would acquire spiritual benefit; *Surya-narayana v. Venkataramana*(6). As to whether the surviving widow could exercise the power to adopt, it was submitted that to say as the will did that both of them should act, was to give power to each of them to act. The case was not to be governed by the principles derived from the English law as to powers, which was unsuitable to the construction of Hindu wills; and reference was made to *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*(7), *Bai Motivahu v. Bai Mamubai*(8), *Bhagabati Barmanya v. Kali Charan Singh*(9) and *Bhaiya Rabidat Singh v. Indar Kunwar*(10). A reasonable and probable construction of the will should be given on the principle of the Cypres Doctrine and the case should not be decided on principles of English law that because one of the widows died the survivor could not exercise the power of adoption which had been given to both. Though no provision was made in the will for the case of one widow dying, yet the adoption by the surviving widow was not prohibited,

(1) (1888) I.L.R., 15 Calc., 725 at p. 749 : s.c., L.R., 15 I.A., 127 at p. 147.

(2) (1912) 17 C.W.N., 319.

(3) (1885) I.L.R., 12 Calc., 406 at p. 411 : s.c., L.R., 12 I.A., 198 at p. 200.

(4) (1900) I.L.R., 27 Calc., 998 at pp. 1002-1003 (P.C.) : s.c., L.R., 27 I.A., 128 at p. 132.

(5) (1892) I.L.R., 19 Calc., 513 at p. 530 : s.c., L.R., 19 I.A., 108 at p. 122.

(6) (1906) I.L.R., 29 Mad., 382 at p. 388 (P.C.) : s.c., L.R., 33 I.A., 145 at p. 152.

(7) (1856) 6 M.I.A., 393 at p. 411.

(8) (1897) I.L.R., 21 Bom., 708 at p. 720 (P.C.) : s.c., L.R., 24 I.A., 93 at p. 105.

(9) (1911) I.L.R., 38 Calc., 468 at p. 38 I.A., 474 (P.C.) : s.c., L.R., 54 at p. 64.

(10) (1888) I.L.R., 16 Calc., 558 at p. 564 (P.C.) : s.c., L.R., 16 I.A., 53 at p. 59.

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and it would be a better construction of the will, and a better interpretation of the intention of the testator to allow the surviving widow to exercise the power, rather than to hold that by the death of one of the widows the power came to an end and was exhausted. *Suryanarayana v. Venkataramana*(1) upheld the decision of the High Court in that case as to the adoption, but not as to the construction of the power to adopt: see that case in the High Court—*Suryanarayana v. Venkataramana*(2). Reference was made to *Lakshmi Bai v. Rajaji*(3) and Mayne's Hindu Law, seventh edition, page 144, section 113, which it was submitted was incorrect. *Bhagabati Barmanya v. Kali Charan Singh*(4) is later than the passage just cited from Mayne; and Golapchandra Sarkar's Hindu Law (edition 1903), page 97, as to the rights of women as to adoption.

Sir R. Finlay, K.C. in reply. *Luchinarain Tagore* in Sir F. Macnaghten's "Considerations of Hindu Law," 169 at pages 171 and 172, as an authority is unreliable and so far as appears has not been acted upon. In *Sarada Prasad Pal v. Rama Pati Pal*(5), the intention of the testator was held to be not that his widows should act simultaneously in making an adoption, but that they should act in accordance with law, that is that the senior widow should adopt the boy. It was not a proper exercise of the power for both widows to take a boy in adoption, for only one could receive him and become his mother; it was not in accordance with law, nor a proper construction of the will. The difficulty in the present case could not be overcome in the same manner as *MOOKERJEE, J.*, got over it in *Sarada Prasad Pal v. Rama Pati Pal*(5). Where a clear interpretation existed, a strained one in order to take into consideration the intention of the testator should not be given. Reference was made to *Gurusami Pillai v. Sivakami Ammal*(6), *Amrito Lal Dutt v. Surnomoye Dasi*(7) upholding the decision of the High Court that the joint power to a widow and executors was bad, in *Amrito Lal Dutt v. Surnomoni Dasi*(8) and *Hunter v. Attorney-General*(9). The

- (1) (1906) I.L.R., 29 Mad., 382 at p. 388 (P.C.): s.c., L.R., 33 I.A., 145 at p. 152.
 (2) (1903) I.L.R., 26 Mad., 681. (3) (1897) I.L.R., 22 Bom., 996.
 (4) (1911) I.L.R., 38 Calo., 468 (P.C.): s.c., L.R., 38 I.A., 54.
 (5) (1912) 17 C.W.N., 319 at p. 321.
 (6) (1895) I.L.R., 18 Mad., 347 at p. 358 (P.C.): s.c., L.R., 22 I.A., 119 at pp. 127 and 128.
 (7) (1900) I.L.R., 27 Calo., 996 at p. 1003 (P.C.): s.c., L.R., 27 I.A., 128 at p. 135.
 (8) (1898) I.L.R., 25 Calo., 662 at p. 684. (9) (1892) L.R.A.C., 309 at p. 313.

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adoption here was not urgent for the benefit of the testator himself from a religious point of view, nor otherwise in his interest. The will gave power to the two widows to adopt a boy when the occasion seemed to them desirable to do so: this disposed of the argument that the intention of the testator was that an adoption must be made in any case. A probable and reasonable interpretation must be put on the will, and not one that would make the power to adopt inconsistent with the law. *Brassey v. Chalmers*(1) and *Indar Kunwar v. Jaipal Kunwar*(2). There was no provision in the will that the surviving widow might adopt, if the power had not been exercised when both were living: the testator might have made such a provision, but did not: power was only given to the two widows. *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree*(3), *Bai Motivahu v. Bai Mamubai*(4), *Suryanarayana v. Venkataramana*(5), and *Bhagabati Barmanya v. Kali Charan Singh*(6) were also referred to and distinguished.

1913, December 10th:—The judgment of their Lordships was delivered by

LORD MOULTON:—The further question now for consideration in these consolidated appeals is the ownership of the Zamindari of Medur. It is common ground that at one time this zamindari belonged to Narayya Appa Row, the son of Venkataramayya Appa Row, who will for convenience be referred to as Narayya the younger. It is also common ground that Narayya the younger died intestate on the 4th August 1895. The points in dispute are whether at the time of his death Narayya the younger had become by adoption the son of Raja Narayya Appa Rao Bahadur Garu, who died on the 7th December 1864 (and who will for convenience be referred to as Narayya the elder), and whether if such adoption took place, it had the effect of divesting him of the Zamindari of Medur. In order that the respondents in this appeal may sustain their claim to a share of the Zamindari of Medur, it is necessary that they should succeed on both these

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- (1) (1852) 16 Beavan 223 at pp. 231 and 233.
 (2) (1888) I.L.R., 15 Calo., 725 at p. 747: s.c., L.R. 15 I.A., 127 at pp. 143, 144 and 145.
 (3) (1856) 6 M.I.A., 393 at p. 411.
 (4) (1897) I.L.R., 21 Bom., 709 at p. 722 (P.C.): s.c., L.R. 24 I.A., 93 at p. 105.
 (5) (1906) I.L.R., 29 Mad., 382 at p. 389 (P.C.): s.c., L.R. 33 I.A., 145 at pp. 152 and 153.
 (6) (1911) I.L.R., 38 Calo., 468 at p. 474 (P.C.): s.c., L.R. 38 I.A., 54 at p. 64

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points, inasmuch as their claim by inheritance from Narayya the younger depends on his having been validly adopted into the family of Narayya the elder. Their claim must therefore fail if he was not validly adopted, or if, having been so adopted, he thereby forfeited his right to the Zamindari of Medur, which appears to have been ancestral property in his family of origin.

The alleged adoption took place after the death of Narayya the elder and was made by his widow Papamma. The respondents claim that this adoption was a valid exercise of the power given by the last will of Narayya the elder. The appellants, on the other hand, contend that the power of adoption which purported to be given by the said will was in itself invalid, and that even if the power was valid as given in the will the alleged adoption was not in accordance with that power, and was accordingly of no force or validity. If the appellants succeed in making good either of these objections to the validity of the adoption, the whole claim of the respondents admittedly falls to the ground, and their Lordships have therefore considered it desirable that these points should be fully argued in the first instance as preliminary points, and that they should express their opinion on them before considering the other portions of the case.

The will of Narayya the elder is dated the 6th day of December 1864, i.e., immediately previous to his death. He was a member of the Velama branch of the Sudra caste. He had two wives named respectively Papamma and Chinnamma. So much turns upon the language of this will that it is advisable to cite it in full. It reads as follows:—

“As my illness increased, and as I think I would not survive you both should divide in equal shares my Zamindari Nidadavolu and Bahargalli parganas and Ambarpet pargana, the cash in the upstairs building and all other moveable and immoveable property. It has been arranged that my nephew (sister's son) Chiranjivi Vellanki Venkatakrishna Row should enjoy hereditarily from son and grandson the profits of the village of Mandur attached to Ambarpet Muttah, and also of Nagulapalli and Rajupotepalli villages attached to the talukdari, and that my brothers-in-law Vellanki Jagannadha Row Garu and Vellanki Sura Row Garu, should enjoy hereditarily the profits of the village of the Undrajavaram attached to Nidadavolu pargana paying every year the peshkash fixed therefor at the subdivision according to the kistbund (instalments). You both should

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maintain our samastanam, servants, clerks, dasis and other servants. You should for the most part live in harmony with my younger brother Chiranjivi Venkatadri Appa Row. You should adopt a boy who is our sannihita (one closely related) whenever it strikes you that our samastanam should continue. In all matters both should act without quarrelling. I have this day alone caused a petition to be written and sent to the Collector of Godavari in regard to this matter. You both should without fail act according to the aforesaid paddhalis (terms).”

The will is signed by the testator and witnessed by four witnesses, and under their names come the words:—

“We both have agreed to act according to the aforesaid terms” and this is signed by Papamma and Chinnamma.

Chinnamma died in 1881. It was not until the year 1885 that any steps were taken with regard to the adoption of a boy, but in that year the surviving wife Papamma purported to adopt Venkataramayya, the father of Narayya the younger. This so-called adoption of Venkataramayya was declared by the Court to be invalid, and thereupon in the year 1890 Papamma purported to adopt Narayya the younger.

The appellants contend that the proper construction of the language of the will is that, it gives a joint power of adoption to the two wives to be exercised when they shall think it desirable that the testator's *samastanam* should continue. They contend that such a joint power of adoption is in itself invalid, inasmuch as only one wife can adopt, and they further say that, even if this be not so, the occasion for the exercise of the power is when the two wives should jointly decide that it was desirable that the family should be continued, and the act must then be the joint act of the two wives. If this be so, it follows that the power could not be exercised after the death of one of the two wives, since thereafter there could be neither agreement nor joint action.

It is somewhat difficult to set out precisely the contentions of the respondents on these points. Their Counsel admit that while both the widows were living no adoption could take place without the consent of both. But they contend that the proper interpretation of the language of the will is that when the two widows should agree on the desirability of adoption taking place and on the person to be adopted, the adoption should be carried

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out by one of the widows (preferably the first wife) who would thereby become in law the mother of the adopted child. They contend that a joint power of adoption is valid by Hindu law and must be interpreted in the above sense, and, further, that on the death of the one widow the power both of choice and adoption would, under the terms of the will, pass to the survivor.

Before examining the validity of these contentions it will be well to clear up one or two points upon which their Lordships are of opinion that no reasonable doubt can exist.

In the first place there could be no power of adoption by either or both of the widows in the present case excepting such as might be derived from the powers given by the will. In this part of India, at all events, a widow has no power to adopt a son to a deceased husband excepting by express authority given by him in his lifetime or by will. In the next place only one wife can receive the child in adoption so as to step into the position of being its adoptive mother. This is evident from the cases which establish that the receiving mother acquires in the eye of the law the same position as a natural mother to such an extent that her parents become legally the maternal grandparents of the child. To hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law and would produce inextricable confusion in the law of inheritance.

But it does not follow as a matter of necessity from these considerations that a power given to more than one wife to adopt must be an invalid power. In many matters custom solves difficulties which appear to be insoluble when the questions are considered from a purely logical point of view. In the very question that is before their Lordships there are indications in the cases cited that in some parts of India such a power might perhaps be interpreted as giving a preferential right of adoption to the first wife. But their Lordships are of opinion that the validity of a joint power of adoption and its interpretation are questions of far-reaching importance in Hindu law and that in the present case the materials for deciding them are very insufficient. They would greatly regret to find themselves compelled to decide such questions on imperfect materials and inasmuch as in the view which their Lordships take of this case

it is not necessary that these points should be decided they desire to express no opinion upon them, and will assume for the purposes of their decision that the respondents are right in their contention that such a joint power of adoption given to the two widows was, if properly interpreted, a valid power, and that if they had agreed to a person to be chosen for such adoption they could have validly executed the power.

There remains the second point, *i.e.*, whether the power given by the will was exerciseable by the surviving widow alone after the death of the other.

The arguments of the appellants on this point are that upon a proper construction of the will it gives a joint power to the two wives to be exercised when they jointly come to the conclusion that it is desirable that it should be exercised, and that it should then be exercised only in case of a boy to be chosen by them jointly. As a mere matter of construction their Lordships are of opinion that the appellants are right in this contention and in an ordinary case of the giving of a joint power to two donees the legal consequences claimed by the appellants would follow.

But the respondents claim that this must not be treated as a mere question of construction. They submit that the continuation of the line of the testator must be taken to have been for religious purposes in order that he might have the advantages of an heir who could perform the religious ceremonies affecting his future life. They therefore contend that this Board should put aside all rules of law prevailing in England with regard to joint donees of a power and should, as a matter of judicial duty, give effect to the intention of the testator with respect to procuring for himself an heir by adoption, and not permit that intention to be defeated by its becoming impossible of execution by the two donees jointly by reason of the death of one of them.

Their Lordships are of opinion that this reasoning is unsound. In all cases the primary duty of a Court is to ascertain from the language of the testator what were his intentions, *i.e.*, to construe the will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat

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picturesque figure "The Court is entitled to put itself into the testator's armchair." Among such surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions, they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law which provides for succession of property in the absence of testamentary directions applying thereto. But the Court never adds to a will anything which needs to be done by testamentary disposition. In all cases it must loyally carry out the will as properly construed, and this duty is universal, and is true alike of wills of every nationality and every religion or rank of life.

This fundamental principle does not clash with the principle that the Court will not necessarily apply English rules of construction to such a will as we have here to deal with. These rules of construction amount in many cases to nothing more than saying that a special phrase which may be used in more than one sense shall *prima facie* be deemed to be intended to bear one particular meaning, unless from the consideration of the context or the surrounding circumstances, the Court can come to the conclusion that it is there used in a different sense. In other cases the rules are the expression of such tendencies in the Court as the desire to avoid an intestacy or the presumption in favour of immediate vesting of an estate. Such rules are purely an English product based on English necessities and English habits of thought, and there would be no justification in taking them as our guide in the case of Indian wills. Nor does this fundamental principle clash in any way with what is sometimes called "giving a liberal interpretation" to native wills. That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary

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to carry them into effect, is one of the most important of the "surrounding circumstances" which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But those intentions must be ascertained by the proper construction of the words he uses, and once ascertained they must not be departed from.

Applying these principles, their Lordships have to ascertain the true intentions of the testator from the language used in the will. The words are "You should adopt a boy who is our *sannihita* (one closely related) whenever it strikes you that our *samastanam* (family) should continue." Such an adoption would have effects of two very different kinds. In the first place it would provide some one who would offer the customary oblations for the good of the soul of the testator, and in the second place it would change the succession of the property. The devolution after the death of the widows would no longer be to the persons entitled to succeed on an intestacy, but to the heirs of the person adopted. Counsel for the respondents would have us regard the religious motive as the overmastering one, so that the intentions of the testator must be treated as if they were dictated by it alone. Their Lordships fully appreciate how strong such a motive may be expected to be in the mind of a Hindu. But in their Lordships' opinion the language of the testator points to the predominance of the secular motive. He does not direct that there shall be an adoption, as he would naturally have done had he wished in all events to secure that there should be a son to perform the due religious rites. He makes it depend on the opinion of his widows whether and when an adoption should take place. It is common ground that the occasion for an adoption would not arise in the lifetime of the two widows unless they both agreed to use the power, and there is nothing which indicates any intention to interfere with their freedom of choice in the matter, whether the true interpretation be that the power was joint or several.

But this does not exhaust the material which we have for arriving at the testator's true intentions. In judging of the light in which the directions of the testator are to be regarded, it is legitimate to look at the contemporaneous document referred to in the will which he wrote or caused to be written with the

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express intent to render clear his wishes with regard to his succession. This document has, of course, no testamentary effect, but it is legitimate to look at it as one of the surrounding circumstances in order to test the soundness of the principle of interpretation pressed upon us by Counsel for the respondents. In the will the testator writes: "I have this day alone caused a petition to be written and sent to the Collector of Gōdāvari in regard to this matter." This petition, which is signed by the testator and bears the same date as the will, is substantially a repetition of it, though the language is not precisely the same. The passage relating to adoption reads thus: "That, if it should strike them (i.e., his widows) to continue the *samastanam*, they should adopt a boy who is my *sannihita*." This language emphasizes that which is expressed also in the will, viz., that the adoption should only take place if and when the widows thought it desirable that such should be the case, or in other words if and when they thought it desirable that the succession to the property should be changed. Had the testator been moved by an overmastering religious motive to secure that there should be some one to act as his son after his death, it is inconceivable that he would have used such language or made such provisions relating to the future adoption of a son. He would have directed that an adoption should take place and not left it to depend on the problematical concurrence of his widows in their views as to its desirability.

For what it is worth, it is clear that this was the interpretation put upon the will by the widows themselves. It will be remembered that they signed the will at the date of its execution and promised to act according to its terms. Three days after this they write to the Collector of Gōdāvari referring to these provisions of the will in the words "and that if it should strike us that the *samastanam* should continue we should adopt a boy who is our *sannihita*." The testator died in 1864. His widow Chinamma died in 1881 leaving Papamma surviving her. It is not until 1885, four years after the death of Chinamma, that any steps to adopt a boy are taken. It is clear therefore that the widows who were acquainted with the provisions of the testator's will at the time and undertook to carry them into effect did not interpret them as doing more than leaving them quite free to adopt or not as they might think desirable.

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Their Lordships are therefore of opinion that in the present case there is nothing which requires or justifies them in interpreting the provisions of the will with regard to the adoption in any special way arising from the fact that the testator was a Hindu. They must adhere to the plain meaning of the language used. So construing it they are of opinion that it gives to the widows jointly the power to adopt a son should an occasion arise which in their opinion makes it desirable so to do. The power is a joint power and the occasion on which it is to be exercised depends on their joint opinion. In other words, the exercise of the power is vested in the discretion of the joint donees. Now it is clearly the law that in such a case the death of one of the donees puts an end to the joint power. This is not by virtue of any peculiar doctrine of English law or of any series of English decisions. It flows from the nature of a joint power. If power is given to A and B *personæ designatæ* to do an act if and when they think it desirable the occasion cannot arise nor can the power be exercised unless they are both living and in agreement as to the act. This cannot be the case after the death of one of them and the consequence is that the survivor cannot do the act because he has not the warrant of the agreement of his late colleague nor can he then do the act, seeing that the authority to do it is only given to the two acting jointly. The case is different when the power is vested not in *personæ designatæ* but in the occupants for the time being of a specified office such as executors or trustees, but that is not the case which we have to consider here.

The point may perhaps be put in a simpler form not involving any appeal to legal doctrines as to joint donees of a power. Their Lordships are of opinion that the words of the will when properly construed relate to choice and adoption by the two widows acting jointly. Hence those words refer only to the period of time when both widows are living. The will is silent as to the period after the death of one of the widows and if their Lordships were to hold that Papamma could adopt a son after Chinamma's death they would be providing for a period of time which the testator left unprovided for, and unnoticed in his will, i.e., they would be making an addition to his testamentary dispositions which is a thing that no Court is entitled to do.

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It follows therefore that at the death of Chinnamma the power to adopt given to his widows by the testator came to an end, and therefore the alleged adoption of Narayya the younger is of no validity.

On the consolidated appeals (judgment in one of which has already been delivered on the 24th July 1918) their Lordships will therefore humbly advise His Majesty to affirm the decree of the High Court of Madras dated the 20th November 1905 so far as it dismissed with costs Appeal No. 32 of 1904, and to reverse the said decree and the decree of even date therewith so far as they dismissed with costs Appeals Nos. 122 and 123 of 1900, and allowed with costs Appeal No. 41 of 1904, and that it ought to be declared that the adoption of Narayya Appa Row the son of Venkataramayya Appa Row the Zamindar of Medur and Venkayamma Row his wife by Papamma the widow of Narayya Appa Row the Zamindar of Nidadavole was invalid, and that on the death of Venkayamma Row, Rangiah Appa Row and Venkata Narasimha Appa Row, both now deceased, became entitled as reversionary heirs to the estate of Medur and the lands and moveable properties appertaining thereto, and further that the said estate and the lands with mesne profits and the moveable property appertaining thereto, ought to be divided into moieties between the appellants, viz: (1) Venkatadri Appa Row, the only son of the said Rangiah Appa Row as to one such moiety, and (2) Meka Venkataramayya Appa Row and Sobhanadri Appa Row, the two sons of Venkata Narasimha Appa Row, as to the other moiety.

With regard to the costs, their Lordships think that as to the Nidadavole estate there ought to be no costs in the Privy Council and as to the Medur estate there ought to be no costs either in the Privy Council or in the Courts below.

Solicitors for the representatives of Sri Rajah Venkata Narasimha Appa Row: *T. L. Wilson & Co.*

Solicitor for Sri Rajah Venkatadri Appa Row: *Douglas Grant.*

Solicitors for Sri Rajah Parthasarathy Appa Row. *Chapman-Walker and Shephard.*
J.V.W.

P. C.*
1914.
March 4

PRIVY COUNCIL.

CHIDAMBARAM CHETTIAR

v.

SRINIVASA SASTRIAL

and

CHIDAMBARAM CHETTIAR

v.

SAMI IYER.

[On appeal from the High Court of Judicature at Madras.]

Decree, assignment of—Assignment to defeat creditors—Transfer made for valuable consideration, but not bona fide—Transfer of Property Act (IV of 1882), sec. 58—Statute 13 Eliz., c. 5—Validity of transfer of moveable property—Practice of Privy Council—Point not before Courts below.

In this case the Judicial Committee upheld the decision of the High Court as to the invalidity of certain assignments which though for good consideration were made to defeat creditors; and held that the question whether any of the parties could establish rights based not on the assignments but on other grounds such as the actual payment of debts, was a point not before the Courts below, and therefore their Lordships would not decide it.

CONSOLIDATED appeals from decretal orders (18th July 1906) of the High Court at Madras which affirmed decrees (23rd December 1901 and 27th September 1902) of the Court of the Subordinate Judge of Kumbakonam.

The facts of this case and the judgments appealed from will be found in *Chidambaram Chettiar v. Sami Aiyar* (1).

On this appeal which was heard *ex parte*,

De Gruyther, K.C. and *Kenworthy Brown* for the appellant whilst not disputing the findings of fact by both Courts, submitted that under the distribution order in accordance with section 295 of the Civil Procedure Code, 1882, the assignee ought to be allowed to prove for the debts he paid off. [Lord Moulton.—That was not before the High Court and cannot be raised now. The decision of the High Court was only that the appellant was not entitled to claim as assignee in the execution of decree. That Court did not decide that he is not entitled to stand in the shoes of the creditors who were paid off.]

* Present:—Lord Moulton, Lord Sumner, Sir John Edge and Mr. Ameer Ali.
(1) (1907) I.L.R., 30 Mad., 6.

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LORD MOULTON.—Their Lordships are of opinion that the two decisions appealed against are correct; that the High Court acted rightly in setting aside the two assignments, the one to Annamalai and the other to Chidambaram, and that no valid proceedings can therefore be based on either of those assignments. The question whether any of the parties can establish rights based, not on the assignments, but on other grounds, such as the actual payment of debts, is a point which was, in their Lordships' opinion, not before the Courts below, and is not before their Lordships, and on that point therefore they pronounce no opinion.

Their Lordships will, therefore, humbly advise His Majesty that these appeals should be dismissed.

*Appeals dismissed.**

Solicitors for the appellant: *Chapman-Walker and Shephard.*
J.V.W.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

KATIL SHEIK UMMAR SAHEB (DEFENDANT), APPELLANT,

v.

KHAZI BUDAN KHAN SAHEB (PLAINTIFF), RESPONDENT. *

Khazis' Act (XII of 1880), ss. 2 and 4—Khazi not entitled to any exclusive right to officiate as such.

The appointment of a person as Khazi under the Khazis' Act (XII of 1880) does not confer on the appointee any exclusive franchise or any exclusive right to perform the functions of his office.

Where, therefore, the plaintiff, a Khazi appointed under the Act, sued the defendant to restrain him from officiating at marriages, and for the recovery of sums of money received by the latter as fees for *nikkas* performed by him,

Held, that the suit must fail, as the plaintiff had no right to restrain any person from discharging any of the functions of a Khazi.

Muhammad Yussuf v. Sayad Ahmed [(1861) 1 Bom. H.C.R. Appx., 18], distinguished.

Sayad Hashim Sahab v. Hussinsha [(1889) I.L.R., 18 Bom., 429], *Mira Mohidin v. Asan Mohidin* [(1907) 17 M.L.J., 421], *Bhoolwa v. Syud Unwur Ulee* [(1859

* Second Appeal No. 1587 of 1910.

N.W.P.S.D.A. 127] and *Zeenutoollah Cases v. Nujeeboollah* [(1835) 6 Ben. S.D.A. 31], referred to.

SECOND APPEAL against the decree of H. O. D. HARDING, the District Judge of South Canara, in Appeal No. 78 of 1909, presented against the decree of M. NARASINGA RAO, the District Munsif of Kundapur, in Original Suit No. 623 of 1907.

The facts of the case appear from the judgment.

G. Annaji Rau for the appellant.

B. Sitarama Rau for the respondent.

JUDGMENT.—The plaintiff, who is the Khazi of the Kundapur Jumma Masjid, appointed by Government, instituted the suit in this case against the defendant to restrain him from officiating at marriages celebrated in the place and for the recovery of a sum of Rs. 11 which the defendant had received as fees for four *nikkas* performed by him in violation of the plaintiff's rights. The Munsif dismissed the suit, holding that the plaintiff had no cause of action against the defendant, as he acquired no exclusive right by his appointment as Khazi to officiate at marriages. The District Judge reversed his judgment and passed a decree in the plaintiff's favour. The Munsif relies, in support of his conclusion, on section 4 of the Khazis Act XII of 1880, clauses (b) and (c) of which lay down that "nothing herein contained, and no appointment made hereunder, shall be deemed to render the presence of a Kazi or Naib Kazi necessary at the celebration of any marriage or the performance of any rite or ceremony; or to prevent any person discharging any of the functions of a Kazi." We agree with the Munsif that the section shows that an appointment under the Act does not confer on the appointee any exclusive franchise or any exclusive right to officiate at marriages. Section 2 of the Act enacts that the Local Government may, if it thinks fit, after consulting the principal Muhammadan residents, appoint one or more Khazis whenever it appears to it that any considerable number of Muhammadans resident in any local area desire that one or more Khazis should be appointed for such local area. This section supports the view adopted by the Munsif. So far as any claim under the Act is concerned, it is clear to our minds that the plaintiff has no right to restrain any person from discharging any of the functions of a Khazi. Regulation III of 1808, which was in force until it was repealed by Act IX of 1864, also

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contained no provisions conferring any exclusive right on a person appointed as Khazi under it. The opinion of Sir Rowland Wilson, the learned writer on Muhammadan Law is also in support of the Munsif's construction. See page 137. Mr. Sitarama Rau for the respondent relies on *Muhammad Yussub v. Sayad Ahmed*(1) in support of his contention that the plaintiff has an exclusive right. But the plaintiff in that case did not claim the office under an appointment made under any statute. He was appointed by the Governor of Bombay as the representative of the sovereign power which according to Muhammadan Law had the right to appoint Khazis. The office so created was a judicial and administrative office, and registration of marriages and officiating at the same were only part of the functions of the office holder. The plaintiff there complained of the breach of his rights in general, including his judicial and administrative rights. There can be no doubt that a judicial or administrative office created by the sovereign confers rights and privileges of an exclusive character. Act XII of 1880 expressly says that a Khazi appointed under that Act is to have no judicial or administrative powers. We must hold that that case has no bearing on the one before us. Another case was relied on for the respondent — *Sayad Hashim Sahab v. Husseinsha*(2). The suit in that case related to the office of Khatib in a mosque; as also *Mira Mohidin v. Asan Mohidin*(3), which was also cited for the appellant. An office which requires the holder to perform duties in connection with an institution would ordinarily carry with it rights of an exclusive character, and does not interfere with the right possessed by all persons to exercise any profession or calling they might choose to adopt. The object of the Khazis Act of 1880 was merely to appoint a person whose duty it would be to render certain services to such Muhammadans as may choose to resort to him for certain purposes, and does not confer on him any exclusive right to perform the functions which his office requires him to discharge. This was the view adopted in *Bhoolwa v. Syud Unwur Ulee*(4) and in *Zeenutoollah Cases v. Nujeeboollah*(5).

(1) (1816) 1 Bom. H.C.R. Appx., 18. (2) (1889) I.L.R., 13 Bom., 429.
(3) (1907) 17 M.L.J., 421. (4) (1859) Sudder Dewanhi Adawlut, N.W.P., 127.
(5) (1835) 6 Ben. S.D.A., 31.

The respondent also contends that by the custom of Muhammadans the Khazi has the exclusive right of officiating at marriages. But as pointed out in *Muhammad Yussub v. Sayad Ahmed*(1) the office of Khazi is not one created by the community of Muhammadans but by the Sovereign, whose administrative power is the source of the Khazis' rights. Moreover, we do not understand the plaint in this case as asserting any right based on an enforceable legal custom.

We reverse the decision of the Lower Appellate Court and restore that of the Munsif with costs here and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Ayling.

MAHARAJA SREE MAHARAJA SAHEB MEHARBAN
DOSTAN SREE MAHARAJA SRI HONOURABLE RAO
VENKATA SWETACHALAPATI RANGA RAO BAHADUR,
K.C.I.E., THE MAHARAJA OF BOBBILI (PETITIONER,
DECREE-HOLDER, PLAINTIFF), APPELLANT,

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v.

SREE RAJA NARASARAJU PEDDA BALIAR SIMHULU
BAHADUR GARU AND ANOTHER (RESPONDENTS, JUDGMENT-
DEBTORS AND DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), ss. 38, 39, 41 and 50, O. XXI, rr. 18 and 26—Execution application—Application to Court which passed the decree after transfer thereof to another Court for execution, whether according to law and to the proper Court—Limitation Act (IX of 1908); art. 182.

On the application of a decree-holder the Court at Vizagapatam which passed the decree sent to it for execution to the Court at Parvatipur which after attaching certain properties dismissed the execution application on 10th March 1905. On 13th December 1907 the decree-holder again applied to the Court at Vizagapatam for sale of the attached properties, and the application was simply recorded. The present application for execution was made to the Vizagapatam Court on 21st April 1910, for attachment and sale of certain properties.

Held, that the application was barred as the application of the 13th December 1907 though a step in aid of execution [see *Pachiappa Achari v. Poojali Seenan*

(1) (1861) 1 Bom. H.C.R. Appx. 18.
* Appeal Against Order No. 64 of 1911.

MAHARAJA OF BOBBILI (1905) I.L.R., 28 Mad., 577], was not made to the proper Court, and hence could not serve limitation.

SRI RAJA NARABAJU PEDDABALIAR SIMHULU BAHADUR. The Court to which a decree is sent for execution is the only Court which has seisin of the execution proceedings, and it retains its jurisdiction to execute the decree till it certifies under section 41, Civil Procedure Code, to the Court which passed the decree, the fact of execution, or if it fails to execute the decree, the circumstances attending such failure. In such a case the Court which passed the decree has no jurisdiction to entertain an execution application unless concurrent execution had been ordered or proceedings in the Court to which the decree was sent, had been stayed for the purpose of executing the decree in the former Court.

Abda Begam v. Musaffar Husen Khan [(1898) I.L.R., 20 All., 129], followed.

Saroda Prosad Mullick v. Lughmepat Sing Dongur [(1872) 14 M.I.A., 529 at p. 540] and *Krishnakishore Dutt v. Rooplal Dass* [(1882) I.L.R., 8 Cal., 687], distinguished.

APPEAL against the order of A. L. HANNAY, the District Judge of Vizagapatam, dated the 25th day of October 1910, in Execution Petition No. 15 of 1910, in Original Suit No. 11 of 1903.

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

The Hon'ble Mr. L. A. Govindaraghava Ayyar and V. Ramasam for the appellant.

B. Narasimheswara Sarma for the respondents.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—The question is whether the plaintiff's application is barred by limitation. The plaintiff obtained a decree in Original Suit No. 11 of 1903 on the file of the District Court of Vizagapatam. The decree was transferred to the District Munsif's Court of Parvatipur for execution on the 5th October 1904. The decree-holder got certain immoveable properties attached, but the petition was dismissed on the 10th of March, 1905 and no further steps were taken in the District Munsif's Court. The decree-holder then applied to the District Court at Vizagapatam on the 13th December, 1907 for the sale of the property attached by the District Munsif. The petition was returned for amendment under section 235 of the Code of Civil Procedure of 1882. It was represented without amendment and was then recorded without being registered. The decree-holder makes this present application on the 21st April 1910 for notice and for the realisation of the amount by sale of the properties already attached. The question whether this present application is barred by limitation depends on the question whether the application of the 13th December 1907 to the District Court was in accordance with law and to the proper Court.

The application of the 13th of December 1907 prayed for notice under section 248 of the Civil Procedure Code of 1882 and the decision of the District Judge that such application must be treated as a step in aid of execution is in accordance with the decision in *Pachiappa Achari v. Poojali Seenan*(1). The only question that remains therefore for decision is whether the application is made to the proper Court. The District Judge decides that the proper Court to which the application should have been made was the District Munsif's Court of Parvatipur to which the decree had been transferred for execution and that therefore the present application is barred under section 223 of the Civil Procedure Code of 1882 (section 41 of the present Code) the Munsif's Court of Parvatipur to which the decree was sent for execution has to certify to the District Court of Vizagapatam the fact of such execution or if the Munsif's Court fails to execute the decree the circumstances attending such failure. Till that is done the Munsif's Court retains its jurisdiction to execute the decree. See *Abda Begam v. Musaffar Husen Khan*(2). There is no doubt therefore that the Munsif's Court had jurisdiction to entertain a similar application for sale, though that Court had dismissed the application for execution in 1905. This was not denied in argument before us.

The next question is, is that the only Court to which this application could be made or had the District Court also jurisdiction to order the sale of the property. Under section 38 of the Civil Procedure Code of 1908 (section 223 of the Code, Act XIV of 1882) the decree may be executed "either by the Court which passed or by the Court to which it is sent for execution." This in itself does not authorise the District Court of Vizagapatam which passed the decree to execute it after it had been sent for execution to the Munsif's Court of Parvatipur. Section 39 states the conditions under which a decree may be sent to another Court for execution. Under clause (c) it may be sent for execution to another Court if the Court directs the sale or delivery of immoveable property situated outside the limits of the jurisdiction of the Court which passed the decree, and presumably within the limits of the jurisdiction of the Court to which it is sent for execution. The reason for the transfer in this case is

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(1) (1905) I.L.R., 28 Mad., 577.

(2) (1898) I.L.R., 20 All., 129.

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plain enough. By clause (a) it may also be sent to another Court if the judgment-debtor resides there or carries on business or work for gain within the limits of the jurisdiction of that Court. Under clause (b) if the judgment-debtor has no property within the jurisdiction of the Court which passed the decree sufficient to satisfy the decree and has property within the limits of the jurisdiction of the Court to which it is sent, the decree may be sent to that Court for execution; under clause (d) of section 39, if the Court which passed the decree considers for reasons which shall be recorded in writing that the decree should be executed by another Court, then also the decree may be sent to another Court for execution. This section does not say that after the decree has been sent to another Court for execution, the Court passing the decree may not simultaneously carry on execution proceedings, but it is plain enough that section 39 intends that it is only for special reasons that the decree should be sent to another Court for execution. Thus, if there is sufficient property by the sale of which the debt may be realised ordinarily, no Court would be justified in sending the decree to another Court for execution. At the same time it is quite possible that concurrent execution may be necessary. If, for instance, a property within the jurisdiction of the Court which passed the decree is comparatively not of much value, and the property within the jurisdiction of the Court to which the decree is sent is also not comparatively of much value, then there can be no injustice to the judgment-debtor in carrying an execution proceedings in both the Courts. If the decree is sent for execution to two or more Courts to be executed at the same time and the amounts realised in the aggregate may be much higher than the judgment debt, it would manifestly be an injustice to the judgment-debtor to allow the execution proceedings to go on at the same time. Further more, if the full amount of the decree is realised by two or three Courts it is difficult to see how matters can be worked out, which of the sales is to be held valid and on what grounds, and, what interests would be acquired by the purchasers at those sales. It is true the judgment-debtor may apply for stay of execution proceedings under Order XXI, rule 26, but he is not entitled to get the execution proceedings stayed. While therefore these sections may not show that concurrent execution cannot be carried on, they certainly show

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that such execution should be allowed only in exceptional circumstances. It is only when such execution is necessary in the interests of the decree-holder and when it can be carried on without hardship to the judgment-debtor that it ought to be allowed by the Court which passed the decree. The other provisions show that such Court apparently retains control over the execution proceedings. When the decree has to be executed against the representative of the judgment-debtor, then according to section 50 the application has to be made to that Court which passed the decree. When a decree has to be executed at the instance of the assignee of the decree-holder, then also the application has to be made under Order XXI, rule 16, to the same Court. Then again power is given to such Court to stay the execution proceedings in the Court to which the decree is sent for execution. When therefore concurrent execution is necessary the Court which passed the decree may order it. But till such order is passed and permission is given to the decree-holder to execute the decree simultaneously in more than one Court, he is not entitled to carry on execution proceedings at the same time. The decision seem to bear out this view. In *Saroda Prosoud Mullick v. Luchmaseput Sing Doogur*(1), their Lordships of the Privy Council held that it was open to a Court to send the decree for execution to three Courts at the same time. This decision was passed under the Civil Procedure Code of 1859. It may be pointed out that under section 286 of that code the Court was bound to transmit the decree for execution to another Court "unless there be special reasons to the contrary". Under the Codes of 1882 and of 1908 it is optional with the Court to send it to another Court. Under section 284 of the Code of 1859 their Lordships point out, that when the decree is sent for execution to another Court, conditions may have to be imposed upon the decree-holder. This also shows the necessity of the exercise of judicial discretion. In *Krishnakishore Dutt v. Rooplal Dass*(2), also there was an order by the Court which passed the decree for simultaneous execution. These decisions are authorities for the proposition that decrees may be executed simultaneously in more than one Court, but in all those cases there were orders allowing such execution and

(1) (1872) 14 M.I.A., 529 at p. 540.

(2) (1882) I.L.R., 8 Cal., 667.

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the consideration that I have already set out would seem to indicate the necessity of an order permitting concurrent execution before such execution proceedings can be carried out. In the present case after the decree was transferred for execution to the Parvatipur Munsif's Court that Court had seisin of the execution proceedings and it was bound to carry them on until execution was obtained or further execution became impossible. There was no order of the District Court of Vizagapatam staying execution in that Court, for the purpose of executing the decree in the Vizagapatam Court itself. I am therefore of opinion that the Judge is right in holding that the application for sale in 1907 should have been made to the Parvatipur Munsif's Court and that the District Court was not therefore the proper Court to entertain such an application.

The present application is therefore barred. I confirm the order of the District Court and dismiss this appeal with costs.

AYLING, J.

AYLING, J.—I agree.

ORIGINAL CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Napier.

*Re A. MUTYALU—ACCUSED.**

1912.
September
2 & 3.

Criminal Procedure Code (Act V of 1898), sec. 307, Jurisdiction of High Court to convict of offence under section 326, Indian Penal Code (Act XLV of 1860).

The High Court is empowered on a reference under section 307, Criminal Procedure Code, to convict the accused of an offence under section 326, Indian Penal Code.

Sir V. BASHYAM AYYANGAR, J., in *Pattikadan Ummaru v. Emperor* [(1906) I.L.R., 26 Mad., 243], followed.

BENSON, J., in *Pattikadan Ummaru v. Emperor* [(1906) I.L.R., 26 Mad., 243], dissented from.

REFERENCE under section 307 of the Code of Criminal Procedure (Act V of 1898), by Diwan Bahadur M. O. PARTHASARATHY AYYANGAR, the Sessions Judge of Godavari Division, in Sessions Case No. 33 of the Calendar for 1912.

The accused was charged with robbery under section 397, Indian Penal Code, and was tried by a jury who unanimously

* Reference No. 10 of 1912.

found him not guilty. The Sessions Judge in his charge to the jury pointed out that section 397 was a combination of robbery and voluntary causing of grievous hurt and that it was open to the jury to find him guilty under section 326 alone. The offence under section 397 is triable by a jury. Whereas that under section 326 is triable with assessors. The Sessions Judge in referring the case to the High Court made the following order:—"The jury have unanimously found the accused not guilty of any offence. I am unable to agree with the verdict. I should find the accused guilty of voluntarily causing grievous hurt by means of a knife, an offence falling under section 326, Indian Penal Code, though I would give him the benefit of a reasonable doubt as regards the robbery. I am clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court."

Upon this reference under section 307, Criminal Procedure Code, the High Court delivered the following judgment.

The accused was unrepresented.

The Acting Public Prosecutor Mr. L. A. Govindaraghava Ayyar for the Crown.

JUDGMENT.—The Judge has referred the case under section 307, Criminal Procedure Code, on the ground that the evidence establishes an offence under section 326, Indian Penal Code.

On a consideration of the evidence and giving due weight to his opinions and that of the jury we think this is so.

According to the view taken by this Court in *Queen-Empress v. Anga Valayan*(1) and *King-Emperor v. Krishna Ayyar*(2), it would have been open to the jury in this case to have convicted the accused of an offence under section 326, Indian Penal Code, and the same view was taken by BASHYAM AYYANGAR, J. in *Pattikadan Ummaru v. Emperor*(3), though BENSON, J. was of a different opinion. We follow these decisions and deem ourselves empowered under section 307, Criminal Procedure Code, to convict the accused of an offence under section 326, Indian Penal Code, which we accordingly do—and sentence him to 5 (five) years rigorous imprisonment. The stab on the abdomen was a very serious wound, which might have ended fatally.

(1) (1899) I.L.R., 22 Mad., 15. (2) (1901) I.L.R., 24 Mad., 641.
(3) (1903) I.L.R., 26 Mad., 243.

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APPELLATE CRIMINAL—FULL BENCH.

*Before Sir Ralph Sillary Benson, the Officiating Chief Justice,
Mr. Justice Sankaran Nair and Mr. Justice Sundara Ayyar.*

1912.
August 5,
September
18 and 19
and
October 2.

MUNI REDDI AND ANOTHER (PETITIONERS IN REFERRED CASES
NOS. 9 AND 10 OF 1912 AND RESPONDENTS IN CIVIL REVISION
PETITION NO. 485 OF 1911),

v.

K. VENKATA ROW (COUNTER-PETITIONER IN BOTH AND PETITIONER
IN REVISION PETITION NO. 485 OF 1911).*

Legal Practitioners' Act (XVIII of 1879), sec. 13—Gross misconduct—Wilful neglect of pleader to appear after receipt of full fees—"Actionable claim", purchase of, by a pleader—Transfer of Property Act (IV of 1882), ss. 3 and 136—Pleader engaging in trade without intimating to the High Court—Rule 27 of the Rules under Legal Practitioners' Act.

Held by the Full Bench:

The judgment and evidence given in a civil suit, filed by a party, against his pleader, for refund of fees on account of non-appearance of the pleader are admissible, as evidence in an enquiry instituted for the purpose against the pleader, under the Legal Practitioners' Act; but, they are not conclusive proof in the enquiry.

Wilful neglect by a pleader to appear without any justification whatever, and conduct a case after receipt of full fees, is unprofessional conduct for which the pleader could be punished under section 13 of the Legal Practitioners' Act.

Per BENSON (OFFG. C.J.) and SUNDARA AYYAR, J.—A false defence of non-receipt of fees, is an aggravation of the misconduct in failing to appear.

Per SUNDARA AYYAR, J.—The judgment and the evidence in the Civil Suit, are relevant under section 11 of the Evidence Act.

Wilful neglect to appear, after receipt of full fees is worse than gross negligence, for which also a pleader might be punished and it amounts to fraudulent conduct on the part of the pleader.

Obiter: SANKARAN NAIR, J.—A vakil is bound to appear and conduct his case even if the fee or any portion thereof remains unpaid, in the absence of any agreement to the contrary or at least notice to the client in sufficient time to enable him to make other arrangements.

Obiter: SUNDARA AYYAR, J.—In the absence of an agreement that the fee promised should be previously paid, it is, to say the least, very doubtful, whether a plea of non-payment of part of the fee, would be of any avail.

Held by the Full Bench:

A claim is none the less an "actionable claim" within the meaning of section 3 of the Transfer of Property Act, because a suit had been instituted

* Referred Cases Nos. 9 and 10 of 1912 (Civil Revision Petition No. 485 of 1911).

thereon. Purchase of an 'actionable claim' by a pleader, is prohibited by section 136 of the Transfer of Property Act, and a pleader is guilty of unprofessional conduct in such a purchase within the meaning of section 13 of the Legal Practitioners' Act. It is gross misconduct on the part of the pleader, if the purchase be speculative, especially if it is made, just when the claim is ripe for judgment and when the seller is his own client unable to judge of the result of the suit.

Held also by the Full Bench:

Whether the purchase of an 'actionable claim' by a pleader, will amount to gross misconduct on the part of the pleader, is a question to be determined on the particular facts of each case.

Per SUNDARA AYYAR, J.—The onus is on the pleader who purchases an 'actionable claim,' to show that in the circumstances of the particular case, it does not amount to gross misconduct.

Held by the Full Bench:

A pleader who engages himself in trade but does not intimate the same to the High Court as required by Rule 27 of the Rules framed by the High Court under the Legal Practitioners' Act, is guilty of misconduct, within the meaning of the section 13 of the Act.

Their Lordships of the Full Bench, considered it unnecessary to inflict any punishment for such violation of the rules, in the absence of a specific charge to that effect.

Obiter: SUNDARA AYYAR, J.—A pleader who merely supervises a trade even if only during his leisure hours and holidays must be said to be personally carrying on the trade even if the ordinary routine work of the trade is carried on by means of servant and agent. If all the members of a family of whom the pleader is one, enter into a partnership and carry on a family trade as partners, then all of them must be regarded as carrying on the trade. It is otherwise, if some members alone of the joint family carry on the family trade, in which the pleader has no direct concern so far as the outside world is concerned, though as between the members *inter se* all of them might be responsible for the result of the trade.

Obiter: SANKARAN NAIR, J.—In the circumstances of this country and under the present conditions of the legal profession, it may be inexpedient and unnecessary for the High Court, to declare that a pleader should not follow any trade or business and that it is unprofessional for him to do so.

CASES stated under section 14 of Legal Practitioners' Act (XVIII of 1879) by W. W. PHILLIPS in Original Petitions Nos. 102 and 313 of 1911 on the file of his court and petition under section 115 of the Code of Civil Procedure (Act V of 1908) praying the High Court to revise the decree of the W. W. PHILLIPS, the District Judge of Bellary, in Appeal No. 21 of 1911.

Mr. J. L. Rosario the Honourable the Advocate-General on behalf of Government in Referred Case No. 9 of 1912 and on behalf of the Pleaders Examination Board in Referred Case No. 10 of 1912.

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K. Srinivasa Ayyangar on behalf of the Vakils' Association in both. The petitioner in Referred Case No. 99 of 1912 not appearing in person nor by pleader.

The Honourable Mr. *T. Richmond* and *C. Govindarajulu Nayudu* for the petitioner in Referred Case No. 10 of 1912.

T. Rangachariar for the Counter-petitioner in Referred Case No. 9 of 1912.

T. Rangachariar and *S. Ranganadha Ayyar* for the Counter-petitioner in Referred Case No. 10 of 1912.

The facts of all the charges are fully set out in the judgment of SUNDARA AYYAR, J.

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SUNDARA AYYAR, J.—This is a case of misconduct against a first grade pleader practising in Bellary. One Muni Reddi lodged a complaint against the pleader charging him with the misconduct for which he has been tried by the District Judge of Bellary. He subsequently withdrew his complaint, but as the District Judge had before the withdrawal already framed a charge against a pleader, he proceeded with the inquiry, found him guilty of the misconduct charged, and made a report to this Court under section 14 of the Legal Practitioners' Act.

The facts that led up to the charge are briefly as follows: An inquiry into a charge of dacoity was going on about June 1908 in the Sub-Magistrate's Court of Tadpatri against Muni Reddi. The pleader was engaged according to Muni Reddi's case to defend him both in the Magistrate's Court and in the Sessions Court of Bellary in the event of the case being committed to the Sessions Court for trial; and a fee of Rs. 350 was settled and paid for the pleader's services in both Courts. The pleader appeared in the Magistrate's Court but did not defend Muni Reddi in the Sessions Court. He left the district for Rangoon without making any arrangement for Muni Reddi's defence at the Sessions trial. Another pleader had to be engaged for the defence. Muni Reddi was acquitted at the trial. He subsequently instituted a suit for the recovery of the fees paid by him with interest. It was transferred to the Subordinate Judge's Court of Bellary for trial. The pleader defended the suit contending that his engagement with Muni Reddi was only to defend him in the Magistrate's Court and to put in a petition for bail in the Sessions Court, and did not include Muni Reddi's defence at the Sessions trial, that only Rs. 268 and not the whole

of the Rs. 350 stipulated for was paid to him by Muni Reddi, that although Muni Reddi afterwards asserted that he had undertaken the defence in the Sessions Court also, he repudiated any such agreement, and that he had not failed to fulfil the engagement actually entered into by him. The Subordinate Judge dismissed the suit upholding the pleader's defence. On appeal the District Judge Mr. Phillips reversed the judgment of the Subordinate Judge and found the defendant's contentions to be untrue. He passed an order under section 476 of the Code of Criminal Procedure directing the prosecution of the pleader for making a false statement on a comparatively unimportant point. The order was set aside by this Court in revision and it is unnecessary to refer to it further. Muni Reddi afterwards put in a petition against the pleader under the Legal Practitioners' Act requesting that an inquiry should be made into the pleader's conduct, but as already stated, he subsequently withdrew the petition. The charge framed against the pleader was that having agreed to appear for Muni Reddi in the Sessions Court and received the fee for such appearance he failed to appear, and when asked to return the fee he failed to do so, and that in defending the suit filed by Muni Reddi he denied receipt of part of the fees, and also denied that he was engaged to work in the Sessions Court; and that therefore he was guilty of fraudulent and improper conduct in the discharge of his professional duty, an offence under section 13 (b) of the Legal Practitioners' Act. No fresh evidence was recorded in support of the charge and indeed there was no one to let in evidence as Muni Reddi had withdrawn his complaint. The pleader evidently relied on the evidence he had already adduced in the civil suit but he also adduced some fresh evidence. He examined two witnesses and gave evidence again himself. He also put in his account book and diary which he had not filed in the civil suit. The District Judge after considering the fresh evidence adhered to the conclusions he had arrived at in his judgment in the appeal from the Subordinate Judge's decision in the civil suit.

Mr. Rangachariyar who has appeared for the pleader at the hearing of the charge against the pleader in this Court has raised an objection which if well founded would go to the root of the whole proceedings before the District Judge and vitiate his report. That objection is that the Judge was wrong in considering the

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judgment or the evidence in the civil suit, that the proceedings in the suit were not admissible in evidence at all in the inquiry under the Legal Practitioners' Act which he contended was in the nature of a criminal trial and that the charges should have been established by evidence adduced at the enquiry. He argues that a judgment is not admissible in evidence in any judicial proceeding except in the cases covered by sections 40, 41 and 42 of the Indian Evidence Act, and that none of these sections is applicable to the present case. This contention I am entirely unable to accept. In *In the matter of Rajendro Nath Mukerji* (1), a pleader who had been convicted of fraudulently using as genuine a document which he knew to be forged was proceeded against for misconduct under paragraph 8 of the Letters Patent of the Allahabad High Court. That Court not only regarded the judgment convicting the pleader as good evidence of his misconduct but refused to allow the propriety of the conviction to be questioned at the inquiry, and removed his name from the rolls of the Court. The Judicial Committee of the Privy Council upheld its procedure. Counsel who appeared for the pleader before the Privy Council did not indeed question the admissibility of the Criminal Judgment in evidence but merely contended that the Court would not in consequence necessarily disbar him and that the learned Judges of the High Court went too far in not allowing the propriety of the conviction to be questioned which counsel maintained was not justified either in law or in fact. The Privy Council dealing with this argument observed "It is plain that the object of the present appeal is to have the judgment of the Sessions Judge and of the High Court on the appeal reviewed and reversed in substance if not in form. This ought not to be allowed. In effect the appellant would indirectly have an appeal against the conviction when if he had petitioned for leave to appeal against it, the leave would certainly have been refused." These observations shew that their Lordships treated the conviction as conclusive evidence of the offence of which the pleader had been convicted. Their Lordships refer to the judgment of LORD MANSFIELD in *In re Brounsall* (2) where that learned Judge observed with reference to proceedings taken against a solicitor who had been convicted of stealing a guinea.

(1) (1900) I.L.R. 28 All. 49 at p. 53 (P.C.). (2) (1778) 2 Cowper's Rep. 520.

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"This application is not in the nature of a second trial or a new punishment. But the question is, whether, after that conduct of this man," (i.e., in stealing the guinea, it does not say when, where or how) "it is proper that he should continue a member of a profession which should stand free from all suspicion....." And it is on this principle; that he is an unfit person to practise as an attorney." LORD MANSFIELD evidently appears to have regarded the conviction as evidence of the man having committed the offence of theft. Mr. Rangachariar contends that the case before the Allahabad High Court and the cases referred to in the Privy Council judgment therein are distinguishable from the present case, for in those cases the practitioner had been convicted of a serious criminal offence and that such a conviction apart from the question of his being really guilty of the offence or not, would be a sufficient ground for his being regarded as unfit to be a practitioner in a Court. It is no doubt true that a conviction for felony or other serious offence has been regarded as a sufficient ground for punishing a solicitor or an advocate for misconduct, and section 12 of the Legal Practitioners' Act recognises and gives effect to this view. But what is the principle underlying it? The conviction itself is certainly not misconduct on the part of the pleader convicted. Can it be said that whether the pleader be guilty or not, he having been subjected to the infamy of a conviction he must be further punished by the Court in its disciplinary jurisdiction over its practitioners? I do not think that this is the reason for punishing a pleader. The Court is not bound to, nor does it always altogether remove a pleader from the exercise of his profession on the ground of his conviction of a criminal offence. It may inflict a lighter punishment by suspending him for a period. If the infamy due to conviction be the ground of punishment one would suppose that if it makes him unfit to practise he must be regarded as unfit to do so for ever and not for a period only. But as already observed the Court, having regard to the gravity of the offence, the extenuating circumstances, if any, and taking all the facts of the case into consideration, has the power in the interests of the public and of the profession to award such punishment to the pleader, or no punishment at all. I am of opinion that the reason for punishing a person who has been convicted is that the conviction is good evidence of the commission by the pleader

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of the offence in question. But, assuming that the conviction itself is regarded as good cause for punishing the pleader, would not a similar principle apply where a civil court has found the pleader guilty of grave misconduct which requires that he should be dealt with by the Court under its disciplinary jurisdiction? I see no reason why it should not. The principle would of course not apply where the conduct of the pleader was not the direct issue in the Court which found him guilty of misconduct but only arose incidentally in a litigation between other parties. Such was the case in *In re Lubeck*(1). In this case the suit related to the very misconduct charged against the pleader in the present proceedings and I see no reason for holding that the judgment and the proceedings in the civil suit are not admissible in evidence. With respect to the contention that the judgment would not be relevant on the question of the pleader's guilt under any of the sections of the Indian Evidence Act, I do not think it presents any serious difficulty. It appears to me on the other hand to be a rather bold argument to urge that the finding in proceedings against the pleader in which the question was exactly the same as at the present enquiry should be regarded as irrelevant. There is no reason why it should not come within the provisions of section 11 of the Indian Evidence Act which lays down that "Facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable."

I have more doubt whether the finding of the civil Court can be regarded as conclusive. In a criminal trial the guilt of the accused has to be proved by the prosecution beyond all reasonable doubt and a court convicting a pleader of a criminal offence must be taken to have found the offence proved conclusively against him. But in a civil suit the finding on the issue does not proceed on the conclusiveness of the evidence adduced on either side but on the balance of the evidence adduced on both sides. It might for instance be said that in this case the District Judge could not be held to have decided in the civil suit that the plaintiff had proved by the evidence beyond all reasonable doubt that the pleader had agreed to defend the plaintiff in the Sessions

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Court and that he had been paid his fee for doing so. It is unnecessary to decide this precise point in this case, for the District Judge did not treat his own previous judgment in the civil suit as conclusive against the pleader, but allowed him to adduce any evidence he might choose. No complaint has been made before us that the pleader was not allowed to let in any specific evidence or that he was prevented from further cross-examining any particular witness examined in the civil suit on any specific matter. I must therefore disallow this objection of Mr. Rangachariar.

The learned vakil reviewed the evidence adduced in the civil suit and the fresh evidence adduced at this inquiry at considerable length and attempted to shew that the findings of the Judge cannot be sustained. I have given to both the evidence and to Mr. Rangachariar's arguments the anxious consideration which any case against a professional gentleman deserves, but I am unable to differ from the conclusions of the Judge. I do not consider it necessary to repeat the reasons given by the Judge in his careful and elaborate judgment and shall only deal with the principal points urged by Mr. Rangachariar. The first question for decision is whether the pleader undertook to defend Muni Reddi at the Sessions trial also, or whether he merely agreed to put in a bail petition so far as the Sessions Court was concerned. The receipt (Exhibit A) given by the pleader to Muni Reddi contains strong evidence against him in his own handwriting. His explanation that he stated in Exhibit A that the proceedings to which the receipt related were to be in the Sessions Court also merely because he agreed to put in a petition for bail in that Court is not satisfactory to my mind. It is extremely unlikely that a pleader of long experience would not, if that were the case, specifically state in Exhibit A that the fee received by him covered only a bail petition in the Sessions Court. I do not lay stress on the statement made by the pleader in Exhibit B-2 that he would move for bail in the Sessions Court. Such a statement might have been made in the hope that he would be engaged for the Sessions trial also. The pleader pursued in this case the extraordinary course of withholding from Muni Reddi all knowledge of his defence in the civil suit until the actual commencement of the trial. His defence had to be ascertained by Muni Reddi from the questions put to the latter's witnesses

(1) (1906) I.L.R., 33 Cal., 151 (P.C.).

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in cross-examination, and the cross-examination was so skilfully contrived as to disclose as little of the defence case as possible. In fact, it would be impossible to discover a great deal of the defence except from the evidence adduced by the pleader after the plaintiffs' case had been closed. It is most unfortunate for the pleader that he pursued this line of conduct but he has no one else to blame if the same references are drawn against him as would be drawn in the case of any other litigant. It is to my mind also very improbable that Muni Reddi who had been committed for trial on a grave criminal charge punishable with a minimum of seven years' imprisonment would not have taken any steps to procure legal assistance at the Sessions trial until the very day which was fixed for the trial, *viz.*, 14th October 1908, if the pleader had not agreed to defend him. When Muni Reddi was in the box in the civil suit he was not asked whether the reference in Exhibit A to the Sessions Court was not merely because of the pleader's agreement to put in a bail petition in that Court, and not because he had undertaken to defend him at the trial itself. Mr. Rangachariar has placed much reliance on the evidence of Roshi Reddi in the civil suit in support of the defendant's case. Roshi Reddi's evidence has been subjected to close analysis by the District Judge and I shall content myself with saying that I agree with him that his evidence is not trustworthy. I do not attach weight however as the District Judge does to the pleader's objection to Muni Reddi's attempt to shew that he and Roshi Reddi were not friendly to each other when Roshi Reddi gave his evidence. This attempt was not made by Muni Reddi until after the case was closed and I cannot say that the pleader was not then entitled to object to it. It has been strenuously urged before us that Roshi Reddi was an honest man whom the pleader did not know before it was elicited in plaintiffs' cross-examination that he was present when the pleader was engaged for the case. This is not quite correct as pointed out by the District Judge, for Roshi Reddi's name was disclosed in Muni Reddi's answer to the pleader's interrogatories. But what is more important is that the pleader took pains to elicit from Muni Reddi by cross-examination that Roshi Reddi was Muni Reddi's friend. If Roshi had not already agreed to give evidence in favour of the pleader why was this question put? The learned *vakil* for the pleader has not been able to suggest

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any satisfactory reason. I feel convinced that the pleader had already approached Roshi Reddi and Roshi had already agreed to support his defence. In Exhibit I Subba Rao, a second-grade pleader through whom the pleader's engagement was arranged, certainly wrote to the pleader as if he had been engaged to defend Muni Reddi in the Sessions Court. It is not said that the pleader repudiated the suggestion that he had undertaken to appear at the Sessions trial. The accounts filed by the pleader at the inquiry do not support his contention, the reference in them to the case being merely 'the Tadpatri case,' an identification which would be equally consistent with Muni Reddi's contention. No other evidence has been adduced by the pleader to prove that he did not undertake Muni Reddi's defence in the Sessions Court. I have no hesitation in coming to the conclusion that he did do so.

Mr. Rangachariar's next contention is that assuming that the engagement included Muni Reddi's defence in the Sessions Court, as the whole of the pleader's fee was not paid but only Rs. 218 out of Rs. 350, the pleader was absolved from the duty to appear in the Sessions Court. Here again the pleader starts with the initial difficulty that Exhibit B-2 furnishes evidence against him in his own handwriting. The person who actually made the payment Subbanna has no doubt not been called but in the face of Exhibit B-2 it lies on the pleader to prove that the statement in it that the amount was paid was incorrectly made. His case is that it was intended to be paid to his clerk but it was subsequently withheld as he was not able to attend the Magistrate's Court the next day. He says that the clerk told him that the payment was not made, but the clerk is the proper person to speak to the non-payment and he has not been called. Exhibit I, Subba Rao's letter, was relied on by Mr. Rangachariar in support of the pleader's contention. But it appears to me to furnish strong evidence against him. It refers to a sum of Rs. 50 which had not been paid. This probably refers to a further payment which the pleader says was promised to him for defending Muni's co-accused before the Magistrate. It is not alleged to be a part of the Rs. 95 in question. The letter certainly suggests that nothing else was due to the pleader. It is argued that the amount is not mentioned in the receipt Exhibit A which refers to the other payments made by Muni Reddi. This may be because the man who made the payment, Subbanna, did not take the receipt with him.

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when he paid the amount. The pleader admits that moneys paid to him would not be entered in receipts given by him if the receipts were not produced. The accounts of the pleader are strongly relied on to disprove the payment but as pointed out by the Judge this is only negative evidence. Might it not be that there was an omission due to the pleader's clerk? The clerk would have been able to tell the Court but he was not examined. The accounts were not put into Court in the Civil Suit and the explanation given is absolutely unsatisfactory. Roshi Reddi's evidence was as I have already stated rightly rejected by the Judge. It is admitted that the pleader or his clerk made no demand on Muni subsequently for the Rs. 95. I must hold on the evidence available to the Court that the sum of Rs. 95 was paid to the pleader. Having regard to this finding it is unnecessary to deal with the further question whether the non-payment of a portion of the fee would absolve the pleader from his duty to appear for the client. In the absence of an agreement that the fee promised should be previously paid, it is to say the least very doubtful whether a plea of non-payment of part of the fee would be of any avail. The Judge further finds that some few days before the trial there was an altercation between Muni and the pleader in consequence of the latter's assertion that he had not agreed to appear at the Sessions Court for Muni and that Muni finally agreed to pay a further sum of Rs. 50 but the pleader left the place before the date fixed for the trial arrived without making any arrangements for the defence. The defendant examined his brother to prove that when Muni went to Bellary on the 14th October 1908 for the trial he told him that the pleader had not been engaged at all for the Sessions trial. Much emphasis has been laid on Muni taking no steps at all for nearly a year after his trial and acquittal to complain of the pleader's conduct or to demand the return of the fee from him, and it is strongly urged that this was due to his consciousness that he had nothing to complain of and that his subsequent conduct was due entirely to the instigation of the pleader's enemies and particularly of Mr. Krishnama Charlu. But it is remarkable that although the pleader received a notice from Muni in October 1909 and took care to ascertain that Mr. Krishnama Charlu who sent the notice had been authorised by Muni to do so, he sent no reply to it and took no steps to deny the allegations contained

therein. Practically the whole of Muni's case was disclosed in that notice Exhibit C, but the pleader withheld his case until he saw the whole of Muni's evidence adduced in the Civil Suit. A client is not generally in much haste to take proceedings against a pleader of standing. It may be that Muni was prompted by others to make his complaint, but in the circumstances I do not think that any inference adverse to the truth of Muni's case can be drawn from his delay. I therefore hold it to be satisfactorily proved that the pleader after undertaking the defence of Muni at the Sessions trial and receiving payment for it deliberately failed to make any arrangements for the defence on a false plea that he had not agreed to conduct the defence at the Sessions trial.

Mr. Rangachariar argued that if it should be found that the pleader did undertake to appear for Muni in the Sessions Court his default must have been due to forgetfulness on his part as he had arranged for his other cases during his absence. The District Judge was inclined to take this view in his judgment in the Civil Suit but this view is absolutely inconsistent not only with the pleader's own contention both in the Civil Suit and at this inquiry but also with the evidence of his brother that he told Muni Reddi on the 14th October 1908 that the pleader had not agreed to defend him at all in the Sessions Court. It is very difficult to believe that a Sessions Case of so grave a nature in which the pleader had appeared in the Magistrate's Court would have been forgotten. In *Re Venkata Rao*(1) preferred by the pleader against the judgment of the Judge in the Civil case, his counsel stated that the pleader might have forgotten the engagement. As this was inconsistent with the case that his engagement did not include the Sessions trial Mr. Rangachariar was asked to explain the inconsistency and the Court was told that the statement in the memorandum of Civil Revision Petition was made by Counsel without instructions. In the circumstances I am unable to accept the suggestion made as a last resort that forgetfulness might have been the reason for the pleader not arranging for the defence.

It is argued for the pleader that even if all the facts are found against him they amount only to negligence and that the pleader cannot be punished for mere negligence not amounting to fraud.

(1) Civil Revision Petition No. 321 of 1911.

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I am of opinion that what is proved amounts to something worse than negligence; nor am I prepared to accept the contention that a pleader who is wilfully and grossly negligent in the discharge of his duties cannot be punished for his misconduct in the exercise of our disciplinary powers. The pleader was not guilty of a mere omission to do his duty in this case. He repudiated the agreement into which he had entered with his client and he did so deliberately and without justification. I cannot say that this amounts to anything less than fraudulent conduct on his part.

A passage in Cordery on Solicitors, page 180, was referred to on behalf of the pleader. I do not think that that passage lays down anything more than that it is not all negligence which would furnish a cause of action to a client that would be punished by the Court. Certainly that is so. For instance a pleader may not have acted with sufficient diligence in the discharge of his duties. He may not have instructed himself in the facts or the law of a case as he should. He may have acted contrary to the client's instructions in some particular matters, or he may have acted without instructions. In such cases the Court would generally be content with leaving the client to his remedy in an action for damages. But negligence may also be so gross and amount to such a violation of the duties of a pleader as an officer of the Court and to the litigant and as a member of a responsible and honourable profession as to require that the Court should punish him in the exercise of its powers over its officers. The rule to be followed has been very recently laid down by the Judicial Committee of the Privy Council in its judgment in a case in which a *vakil* of this Court was concerned. See the judgment dated 20th June 1912 in *In the matter of Krishnaswami Aiyar* (1). In that case the pleader was acquitted of all direct and personal fraud, but he was found guilty of not exercising any control over his clerks who omitted to discharge their duties and wrote false letters to the client and misled him, and of a grave omission in not informing the Court and the client of the true state of things after he had discovered the improper conduct of his clerks. Lord SHAW in delivering the judgment of the Privy Council observes: "Their Lordships while not interfering, as stated with his acquittance of direct and personal fraud, do not see their

(1) (1912) I.L.R., 35 Mad., 543 at p. 553.

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way to acquit him of conduct in the management of the appeal and of his client's affairs which caused the procedure of the Court to be the very opposite of what all such procedure should be, namely, first responsible, secondly orderly, and thirdly pure. In all these respects there has been a violation of the proprieties which attach to legal procedure." And their Lordships expressed the hope that the *vakil* 'in the management by those under him of affairs committed to his charge, would in future, see to it, that such improprieties as those referred to do not recur.' These statements clearly show that their Lordships were of opinion that gross negligence which interfered with the responsible, orderly and pure conduct of proceedings in Court would be punishable. The same rule has been laid down in America. "Professional misconduct or neglect of duty as an attorney is a good ground for suspension or disbarment."—*Cyclopedia of Law and Procedure*, vol. IV, page 911. The jurisdiction of the Courts in punishing improper conduct on the part of pleaders is expressed in very wide terms in the Legal Practitioners' Act. Section 13, clause (f), provides that a pleader may be punished for any other reasonable cause. It is not in the interests of clients whose interest pleaders are bound to protect, or of the profession to which they belong, or of the pure administration of justice, to attempt to define exhaustively the different kinds of misconduct which are punishable. Any conduct which contravenes the orderly and pure administration of justice would be within the disciplinary jurisdiction of the Courts. The pleader in this case is a person of long experience, and his defence to the charges against him has only aggravated his misconduct. It is not necessary to deal separately with the charge that he made a false defence in the Civil Suit. I wish to say nothing which would deprive pleaders of the privileges in the conduct of their own suits which other litigants possess. But it is impossible not to regard the pleader's defence as a serious aggravation of his prior misconduct.

I agree with the learned CHIEF JUSTICE as to the punishment that should be imposed on the pleader.

Referred Case No. 10 of 1912.

In this case two charges were preferred against the first-grade pleader; first that he trafficked jointly with one Marwadi Vannajee in an actionable claim put into Court obtained by Yadalya

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Pichayya and Papayya against the minor heirs of one Virabhadra in a suit in which he was plaintiff's vakil; secondly that he had been and was engaged in trade under the name of K. V. S. Ramchander & Co. The District Judge Mr. B. C. SMITH in his report to this Court has found both the charges proved. After full consideration of the evidence on record I concur in the findings arrived at by the District Judge. It is not necessary to do more than to refer very briefly to the evidence in support of the charges.

First charge.—On the 7th September 1909 an agreement was entered into between Pichayya and Papayya, the plaintiffs in Original Suit No. 3 of 1910, on the file of the Subordinate Judge's Court of Bellary on the one hand and Vannajee on the other hand for the transfer of the claim of the former in Original Suit No. 8 of 1910 which was then pending for a sum of Rs. 4,750. The amount claimed was about Rs. 10,000. The evidence in the suit had been recorded but judgment had not been delivered. The transferee Vannajee was to take all risk of loss in case the suit was dismissed. The first-grade pleader represented the plaintiffs in the suit. According to the evidence of Papayya one of the transferors, his fee for the suit had been paid prior to the transfer. The case of the petitioner who made the complaint against the first-grade pleader is that the transfer was wholly or partially for the benefit of the pleader himself. The most important fact proved against the pleader is that half of the profit which Vannajee made out of the bargain was paid to him. Vannajee sold his claim to one Virabhadra, the second witness for the petitioner, for Rs. 6,392-8-0. The profit made by Vannajee according to himself was Rs. 1,571-4-0 and of this amount, exactly one half, i.e., Rs. 785-10-0 was received by the pleader. A sum of Rs. 70-12-0 was deducted out of the total amount of Rs. 6,392-8-0 as the interest on the loan contracted by Vannajee at 6 per cent. per annum for the consideration paid by him for the transfer. The amount was borrowed from the firm of a banker S. Donga Chand. It is not denied that the pleader became responsible to the banker for the payment of the amount. The pleader's case is that he merely became surety to the banker for the loan which Vannajee took from him. Vannajee was the gumastah of one Kannajee. The pleader gave a letter or chit to Vannajee addressed to the banker. This letter was dated 9th September 1909. It is stated on behalf of the pleader that the money had been paid by the banker to Vannajee on the

7th before he gave the letter. The first witness for the petitioner, Sivaraj, a partner of the banker, states that the banker's account contains an entry dated 7th September 1909, debiting Kannajee through Vannajee with Rs. 4,000. On the 9th September the debit was transferred to the pleader, Kannajee being credited with amount on that date. This might go to show that the pleader's connection with the loan commenced only after it was actually advanced by the banker but the inference does not necessarily follow. The reason for the alteration of the entry was that Vannajee objected to the entry in the name of Kannajee as he claimed the benefit of the transfer of the claim himself. It is quite clear that on the 9th it was agreed that the pleader should be regarded as the person mainly responsible to the banker for the payment of the loan. Now why did the pleader agree to make himself responsible for the amount? The answer suggested by the payment of half the profits to him undoubtedly is that it was understood that he and Vannajee should go shares in the bargain. The pleader in his written statement does not give any explanation of his receipt of Rs. 785-10-0. He merely denies the allegation that he was interested in the purchase of the claim and states that there was nothing against law, rules or public policy even if he was interested in it. After the witnesses in the present proceedings were examined the pleader made another short statement (not on oath) and offered himself for cross-examination. He gave no explanation of the receipt of Rs. 785-10-0 in this statement either. In cross-examination he admitted his receipt of the amount (the payment being made directly to his father-in-law). He also stated "this Rs. 785-10-0 might have been partly remuneration for spending my time in negotiating the transaction and preparing the necessary documents. I have no account to show the sum due for each piece of work done." This affords no satisfactory explanation. He does not say that the whole amount was paid for his services in bringing about the transfer. He admits that the amount was not entered in his accounts as fees and gives an extraordinary explanation that only remuneration for work done in court is entered as fees in his accounts. He entered the amount under family earnings. Pappayya the transferor of the claim says that he had paid to the pleader the fee due to him for the conduct of

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the suit. This is likely as the case was almost ripe for judgment when the transfer was made. If the amount was not paid as fees due for professional work then the payment must have been on account of a half share possessed by the pleader in the claim by virtue of the transfer. Vannajee, who tries to support the pleader as much as he can is equally unable to show how the amount of Rs. 785-10-0 was made up. He tries to make out that he promised to pay the pleader his fee and a present but he could not give any explanation as to how the fee would amount to Rs. 785-10-0. He admits that that amount was paid to the pleader. He says that the interest payable on the loan was $7\frac{1}{2}$ annas and not 6 per cent. so as to throw doubt on the amount available for division between him and the pleader. But he admits that the profit made out of the transaction was Rs. 1,571-4-0 and he also admits that he charged the pleader 8 annas per Rs. 100 interest on his whole account including this sum of Rs. 4,000. There is absolutely nothing to support his statement that $7\frac{1}{2}$ annas and not 6 per cent. was the interest payable on the loan. In the absence of any explanation forthcoming from the pleader I have no doubt that the Judge was justified in coming to the conclusion that it was agreed between him and Vannajee that he should receive half the profits arising from the transfer of the claim. It is immaterial to consider whether he became interested in the transfer on the 7th September or only on the 9th. The Judge's conclusion is strongly supported by the evidence of the petitioner's second witness who purchased the claim from Vannajee. He states that he negotiated the purchase with the pleader without any reference to Vannajee and that the payment of the consideration was made to the latter at the instance of the former. Papayya who does not admit that the pleader had a share in the claim admits that the negotiations for the transfer to Vannajee took place at the pleader's house.

The next question is whether the pleader's act in purchasing the claims amounts to grossly unprofessional misconduct within the meaning of section 18 of the Legal Practitioners Act. The claim was then the subject-matter of a suit in which the pleader appeared for the plaintiff. The defendants in the suit possessed large properties but were in involved circumstances. Papayya says that it was broadly rumoured that his suit would fail and the

pleader admits that his client told him that the defendants were giving out that the suit would be dismissed. There can be no doubt that the plaintiffs were apprehensive of failure. The pleader on the other hand was in a far better position than his client to judge of the chances of success. There can be no doubt that the transfer was a highly speculative one. There is no force whatever in the contention that the claim ceased to be an actionable claim because a suit had been instituted for its enforcement. That fact is absolutely immaterial according to the definition of actionable claim in section 3 of the Transfer of Property Act. The old definition contained in section 130 of Act IV of 1882 and clause (d) of section 135 as it originally stood put this beyond a doubt. Mr. Rangachariar, on behalf of the pleader, contends that a purchase of an actionable claim is not necessarily unprofessional conduct. Mr. K. Srinivasa Ayyangar, who appears on behalf of the Vakils' Association, supports this argument. I am quite unable to accept this contention. Section 136 enacts as follows: "No Judge, legal practitioner, or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive, any share of, or interest in, any actionable claim, and no Court of Justice shall enforce at his instance, or at the instance of any person claiming by or through him, any actionable claim, so dealt with by him as aforesaid." It does not merely make purchases of actionable claims by the classes of persons named in it unenforceable in law. It expressly prohibits them from being interested in any transfer of an actionable claim. The prohibition is based on the ground of the offices held by them. I cannot doubt that the doing of an act which a legal practitioner is forbidden to do on the ground that he is a legal practitioner is a violation of the conduct that he should pursue as a practitioner and therefore unprofessional conduct. It is urged that the legislature could not have intended to make the purchase of an actionable claim by a pleader under all circumstances unprofessional conduct, that in other countries there is no such absolute prohibition, that the New York Civil Procedure Code forbids purchases of actionable claims and negotiable instruments only where it is made "with the intention and for the purposes of bringing a suit thereon," and that in the French Civil Code the prohibition is confined to claims falling within the jurisdiction of the Court where the

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pleader is practising. The language of section 136 of Act IV of 1882 is in my opinion absolutely clear. It is quite immaterial that the Indian Legislature considered it expedient to enact the rule in wider terms than the legislatures of some other countries have done. It being clear that the pleader's act amounted to professional misconduct, was it *grossly* unprofessional? I have no doubt that it was. I have already referred to the circumstances under which the transfer was made. The Court of First Instance, as a matter of fact, passed a decree for about Rs. 11,000 though the amount was reduced to Rs. 6,000 and odd in appeal. The purchase amounted in this case to trafficking in litigation. It is unnecessary to decide the question whether the purchase of an actionable claim though unprofessional must amount to grossly unprofessional misconduct in every case. Undoubtedly the onus would be on the pleader who purchases an actionable claim to show that in the circumstances of any particular cause it does not amount to gross misconduct. I think that it would not be improper to hold that pleaders should not be permitted to do acts that are liable to subject them to severe temptation. I am of opinion that this charge has been proved against the pleader. I agree with the learned Chief Justice as to the punishment that should be imposed.

The second charge.—The facts relating to this charge are practically undisputed. The pleader belongs to a wealthy family possessed of various kinds of properties including landed estates, houses, directorships in companies, secretaryship in one company, an agency under the Oriental Life Insurance Co., some other trade agencies, shares in Joint Stock Companies and a mill at Bellary known by the name of Medum Seshanna Cotton Manufactory. The evidence of Srinivasa Rao, the pleader's brother, and himself a pleader, shows that in 1894 the members of the family entered into a partnership. A fresh partnership deed (Exhibit G) was executed in 1900. According to this deed each member of the firm is authorised to sign the name of the firm, and the partners of the firm are responsible jointly and severally for the acts of the firm as well as for the acts of each partner and for monies reaching the hands of any one of them. The pleader states in his written statement "The members of the firm supervised the work of the managers and agents whenever they have leisure and during

holidays." He denies that he has engaged himself in trade. In the face of the admitted facts, I am of opinion that the denial is absolutely untenable. It is contended that the actual work of the trade is done by clerks and agents and that therefore the pleader cannot be said to be personally carrying on trade. I am quite unable to agree that the mere appointment of servants or agents is sufficient to show that the trade is not carried on personally by the pleader. In that case any trader who is able to engage clerks and to dispense with attending to customers himself may say that he is not personally engaged in his trade. It is not denied that the agents and managers could be dismissed at pleasure by the pleader and his partners. The admission that the members of the firm supervised their work puts an end to all doubt on the matter. It is contended by Mr. Rangachariar that a pleader who belongs to a trading family should not be regarded as trading, simply because other members carry on trade, the benefit of which would go to all the members of the family including the pleader. I agree with him so far. It is quite true that every member of an undivided Hindu family cannot be said to be carrying on a trade the benefit of which would go to the family. One member of it alone may be carrying on the trade but he may do so with family funds. Although as between the members of the family the profit or the loss must be shared by all of them, it would not follow that every one of them is conducting the trade. Again two or more members may alone carry on a trade as partners and the outside public may be dealing with them alone though as amongst the members of the family *inter se* all might be responsible for the results of the trade. But if all the members enter into a partnership and carry on a family trade as partners then all of them must be regarded as carrying on the trade. This is a distinction well understood in law. In the present case the pleader who is the senior member of his family has entered into a partnership with the other members. He as much as any other member of the family is trading with the outside public whatever may be the actual amount of work done by him in connection with the management of the trade. I hold therefore that the pleader must be held to be personally engaged both in trade and in the other businesses referred to in the deed of partnership. It is then argued that carrying on a trade is not

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professional misconduct within the meaning of section 13 of the Legal Practitioners' Act and that there is no rule framed by this Court under that Act which has declared it to be misconduct. Clause 27 of the rules framed under the Act is in these terms. "If any person, having been admitted as Pleader, accepts any appointment under Government, becomes a student of any school or college for purposes of pursuing his studies or enters into any trade or other business, or accepts employment as a Law Agent other than a Pleader, Mukhtar or Agent certified under Act XVIII of 1879 and these rules, he shall give immediate notice thereof to the High Court, who may thereupon suspend such Pleader from practice or pass such orders as the said Court may think fit." It is true that engaging in trade or other business is not definitely pronounced to be misconduct by this rule. According to it the High Court may give permission to any pleader, if it thinks fit to do so, to engage himself in any particular trade or business. A similar rule has been framed under the Letters Patent of the High Court with respect to High Court Vakils although curiously enough no such rule has been framed applicable to advocates and attorneys. The pleader was undoubtedly guilty of misconduct in not obtaining the permission of the High Court for carrying on trade or other business. He has been engaged in trading business of an important character and it was undoubtedly his duty to apply for and obtain the High Court's permission. No charge however has been framed against him of violating the provisions of clause 27 which requires him to apply for permission to the High Court and I do not think we should find him guilty of misconduct in violating the provisions of this clause without his having an opportunity to explain his conduct. But it does not follow from this that he is not guilty of misconduct by being engaged in trade or other business without the permission of the Court, if his doing so is inconsistent with the profession of a pleader. The rule enables pleaders to avoid all risk of being pronounced guilty of misconduct by obtaining the opinion of the High Court with respect to any business they may propose to undertake but the failure to take advantage of the provisions of the rule cannot absolve them from liability to be convicted of misconduct if they act in a manner inconsistent with their profession. It seems to me that there are two reasons why carrying on trade may be inconsistent with

the profession of a pleader. One reason is that it might prevent him from devoting that attention to his work as a pleader which his duty to the public and to the Court require that he should. But another and certainly not less important reason is that a pleader should not be permitted to engage himself in any pursuit which is inconsistent with his status as a member of a learned and honourable profession. In England every person who wishes to be called to the bar has to state that he is not and has never since his admission as a student "been engaged in trade and that he is not an undischarged bankrupt." I am not aware that according to the rules of the bar in England a Barrister can be punished for being engaged in any trade or business inconsistent with his being actively engaged in the practice of his profession, though there are various offices the holding of which is deemed to be inconsistent with practice as a Barrister. See page 384 of Halsbury's Laws of England, volume II. But I strongly believe that carrying on a trade would be deemed to be generally inconsistent with the active practice of the profession of either a Barrister or an attorney. To do so may not be in some cases inconsistent with the status itself of a legal practitioner. He would probably not be punished for having been engaged in trade or other business if he was not practising his profession at the same time, although it is probable, I think, that there are some trades and businesses which may be regarded as altogether inconsistent with the status of an Advocate. However as the rules stand it would be open to this Court to permit any particular trade or business being undertaken by a pleader. There might certainly be some kinds of business which would in no way be inconsistent with either the status or the active practice of a pleader's profession. There have been instances where engagement even in a trade has also been permitted by this Court although I take it that this would not ordinarily be allowed. It may be that there are enterprises which, having regard to the circumstances of this country, the Court would sanction a pleader actively promoting and devoting a portion of his time to. Whether sanction should be given in any case would no doubt largely depend on the character of the trade or business and the extent to which it is likely to occupy the time and attention of the pleader. But no pleader can be permitted to derive any advantage by taking the responsibility on himself

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and engaging in a trade or business without the sanction of the Court. If he does so he takes the risk of its being subsequently held that his conduct amounts to professional misconduct. If permission would not have been given if he had asked for it, he must be held guilty of misconduct in having done that which the Court would not have sanctioned. This is the rule followed where a trustee acts without the sanction of the Court in a matter for which he could have obtained its permission. I do not consider it possible that the Court would have given permission to the pleader in this case to be engaged as a partner of a large cotton mill and in the various other businesses which the pleader admits to be included in the concerns of the partnership. It is, however, possible that he thought, as he says he did, that inasmuch as he would not have to devote much of his time personally to his work as a partner he was not acting in violation of his duty as a pleader. I am willing to believe that he acted *bona fide* and without any intention to act contrary to his duty as a professional man. I am therefore of opinion that it is sufficient to point out that he acted wrongly and that it is unnecessary to impose any punishment on him for his conduct in this matter.

Referred Case No. 9 of 1912.

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SANKARAN NAIR, J.—I think that Mr. Rangachariar is right in his contention that any charge against the pleader must be proved by evidence taken at this enquiry. But I do not accept the further contention that the judgment in the civil suit is admissible in evidence. The pleader was the defendant in that suit. It was decided therein that the plaintiff had paid him his fee to appear for him at the Sessions; that he failed to appear without making any arrangement for the conduct of the case: a decree was passed against him on these findings. The facts found against him must be taken *prima facie*, to be proved. At the same time I think it is open to him to show that the judgment is wrong and should not be accepted as final for the purpose of this enquiry. Any evidence which should have been put was not produced in the suit will of course be viewed with grave suspicion. Nor is it clear to me why it is not open to us at this enquiry, to consider whether the judgment is right on the materials on which it was based. There is no law preventing us from doing so, and I see no injustice in it.

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I think therefore the Judge is right in allowing the pleader to give further evidence. On the evidence Exhibit A the receipt given by the pleader to Muni Reddi makes it clear that he was bound to defend him at the Sessions. I doubt whether it is open to him to say in this enquiry after giving that receipt, unless he proves mistake or some other invalidating circumstance, anything against that receipt. Because as a pleader it was his duty to grant a proper receipt and not one which is misleading. He has however failed to prove that he did not agree to appear at the Sessions. I do not attach any weight to the other contention that the vakil was not bound to appear as his client owed him a portion of his fee. He has failed to prove that any balance is due.

I am also of opinion that a vakil is bound to appear and conduct his case even if the fee or any portion thereof remains unpaid, in the absence of any agreement to the contrary or at least notice to that effect to the client in sufficient time to enable him to make other arrangements.

Mr. Rangachariar argues that a pleader like Mr. Venkata Rao would not have failed to make some arrangement about his case before going to Rangoon. There is great force in this argument. Mr. Venkata Rao appears to have made arrangements about all other cases. The only explanation that suggests itself to me is that he may have really thought that he was not bound to appear for Muni Reddi at the Sessions. This is supported by the facts that the counterfoil of the receipt kept by him showed that he was to appear only before the Magistrate and that Srinivas Rao told Subba Rao that Mr. Venkata Rao was not engaged to defend Muni Reddi. What took place at the meeting in September between Muni Reddi and the vakil also supports this view. I think that Venkata Rao believed that he was not engaged to defend Muni Reddi at the Sessions. If he had pleaded in this enquiry after the disposal of the appeal, that he acted in this erroneous but honest belief and tendered a proper apology, speaking for myself, the result might have been different. But he has persisted in this enquiry in trying to prove a defence already found false in a civil suit. I agree accordingly to the order which will be pronounced by the Chief Justice.

Referred Case No. 10 of 1912.

The charge against the pleader Mr. Venkata Rao is that he purchased the claim of the plaintiff in Original Suit No. 8 of

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1909 on the file of the Subordinate Judge's Court of Bellary. That was a suit brought by Pichayya and Papayya against certain minors for the recovery of a sum of more than Rs. 11,000. After evidence had been heard, but before judgment was pronounced one Vannaji agreed to purchase the claim of the plaintiffs therein for Rs. 4,750 on 7th September 1909. Now, it appears from the evidence of the vendor, who is the prosecution fourth witness in the case, that so far as he is concerned he had nothing to do with Mr. Venkata Rao, and that, though the negotiations for the sale took place in Venkata Rao's house, the claim was agreed to be sold to Vannaji who was his client without any consultation with Venkata Rao. Vannaji borrowed Rs. 4,000 of this amount from the firm of Satraji Dongerchund. Anadaji who was examined as a witness for Venkata Rao was a partner in that firm. It appears from his evidence, which there is no reason to disbelieve, that when the firm lent Rs. 4,000 to Vannaji, the amount was debited against one Bhataji Khemaji who was the principal of Vannaji; two days later Vannaji told his witness that it should have been debited against him and not against his principal; he refused to do so; then Vannaji got a letter from Mr. Venkata Rao asking him to debit that amount against Venkata Rao's account and that was accordingly done. Mr. Venkata Rao admits having written a letter to the firm asking them to do so. The entry was made by the prosecution first witness and he also gives evidence to the same effect.

On the 7th of December, Vannaji sold the decree to one Veerabhadrapa. Veerabhadrapa was a relative of the defendants in that suit and was naturally interested in them. He says that he heard a rumour that Mr. Venkata Rao had purchased that decree and that he spoke to him and arranged to purchase the decree from him; he paid Rs. 6,392-8-0 to Venkata Rao and got an assignment of the decree from the original decree-holder Papayyah who had agreed to sell it to Vannaji. The money was actually paid to Vannaji as Venkata Rao directed him to do so. According to this witness he never saw Vannaji at all while the negotiations were going on. If the matter had stopped here, the case would have been one of suspicion only.

But there is the following additional circumstance to be taken into consideration. The entire amount borrowed by Vannaji was Rs. 4,750. Now, this with interest at 6 per cent.

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per annum for three months, that is the period between September 7, the date of agreement of sale to Vannaji and December 7, the sale of the decree to Veerabhadrapa, would come to Rs. 4,821-4-0. The difference between the two amounts Rs. 6,392-8-0 and Rs. 4,821-4-0, i.e., Rs. 1,571-4-0 is the profit and half of this is Rs. 785-10-0.

Now, it appears from the evidence and it is admitted that this amount, i.e., Rs. 785-10-0, was paid on Venkata Rao's account to his father-in-law. It is not explained how this particular sum of exactly half of the profits was due to Venkata Rao. He gives no explanation, he produces no account to show that this was due to him for any fee. There is evidence that the interest payable on the sum of Rs. 4,000 was at 6 per cent. The evidence as to the rate of interest payable on the remaining Rs. 750 is discrepant and it is not clear what the real interest was; but there is nothing improbable in their setting apart interest at 6 per cent. for three months for the purpose of calculating profits on the transaction. In the absence of any explanation on the part of Venkata Rao the only conclusion that we are justified in drawing is that he received it as his share of the profits of the transaction, and taken with the other circumstances of the case his advancing the money to Vannaji and the facts disclosed by the prosecution second witness whose evidence is strongly corroborated by these two facts, I come to the conclusion that from the 9th September 1909 Venkata Rao must be treated as a partner with Vannaji and equally interested with him in the decree.

The question then remains for consideration whether this is grossly improper conduct in the discharge of professional duties.

An actionable claim should not be purchased by a pleader and in my opinion the purchase of a claim after suit offends against public policy more than the purchase of such a claim before suit. It is trafficking in litigation and when the vendor is the client of the purchaser, the transaction in the majority of cases is likely to be oppressive to the client. In the case before us, however, not only no undue advantage has been taken but Venkata Rao seems to have acted fairly. Papayyah offered to accept Rs. 4,000 from Veerabhadrapa in full satisfaction of his claim and he got from Vannaji and Venkata Rao Rs. 4,750.

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Further Venkata Rao did not deal with the client and was not in fact the original purchaser on the 7th. It is also proved that a portion of the interest due to the minor was remitted. As this is the first case of the kind that has come before this Court, a lenient view might have been taken of the case, if he had pleaded good faith and placed before the Court all the facts. He has not chosen that course. I agree to the order which will be pronounced by his Lordship the Chief Justice.

The next charge against Mr. Venkata Rao is that he has been trading in cotton and yarn with the other undivided members of his family as partners. That he is a partner with them is proved beyond doubt by Exhibit G. The Company has also bought a spinning mill in Bellary, borrowed money to pay for it and to cover working expenses; it was buying cotton and selling yarn. There are, no doubt, managers and gumastas appointed but Venkata Rao and his brothers do not cease to be persons carrying on trade any the less on that account. Holding then, that Venkata Rao and his brothers are traders, the question remains whether he is guilty of any grossly unprofessional conduct. Rule 27 of the rules framed by the High Court under the Legal Practitioners' Act XVIII of 1879, runs thus :—

“If any person, having been admitted as Pleader accepts any appointment under Government, becomes a student of any school or college for purposes of pursuing his studies or enters into any trade or other business, or accepts employment as a law Agent other than a Pleader, Mukhtar, or agent certified under Act XVIII of 1879 and these rules, he shall give immediate notice thereof to the High Court, who may thereupon suspend such Pleader from practice or pass such orders as the said Court may think fit.

“Provided that when a pleader is appointed by or under the authority of the High Court to the office of District Munsif, whether temporarily or permanently, it shall not be necessary to give the notice prescribed in the first part of this rule; but no Pleader while employed as District Munsif shall be permitted to practice or do any business as a pleader before any Court.”

Now it will be noticed that the High Court can take action under this rule only if the pleader who enters into any trade or business gives notice to the High Court. Under the rule he is

bound to give such notice. Then, section 13 of the Act itself empowers the High Court to punish the pleader in certain circumstances. The words of the section run thus :—“The High Court may also, after such enquiry as it thinks fit, suspend or dismiss any pleader or mukhtar holding a certificate as aforesaid :—

(b) who is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, or

(f) for any other reasonable cause.”

The omission to comply with rule 27 by a pleader would probably come under clause (b). It would certainly come under clause (f). If, therefore, a First Grade Pleader omits to make the application which he is bound to submit to the High Court under rule 27, then he may be suspended under section 13 for breach of that rule until he makes the application under that section or any further time the High Court thinks fit. If he makes the application under rule 27, then he can be dealt with under that rule. Apparently therefore the rule and the section provide adequate remedy for all cases. Whether the pleader should be suspended or should be allowed to carry on a trade under rule 27 depends upon the particular circumstances of each case, the character of the person making the application, the nature of the trade or business, the time that the pleader would have to devote to it. There may also arise other considerations. The trade or business may be one which it may be in public interests to foster in that locality and men other than pleaders may not be available perhaps to carry on the trade or business satisfactorily. Under this rule, applications are being made to the High Court for sanction and they have been granted or rejected according to the particular circumstances of the case. If we lay down a definite rule under section 13 of the Act, it would be depriving the High Court of the discretion vested in it by rule 27; for, it is obvious that once a pleader is declared to be disqualified from engaging in any trade or in any particular kind of trade, it would not be right for the High Court to give any sanction under rule 27 to any other pleader applying for it. I am not therefore able to say that under section 13, the High Court should declare that it is unprofessional for a pleader to follow any trade or business. It is not required by the conditions of the legal profession or the circumstances of the country.

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It may be a question whether any rule even is necessary, because the evil to be guarded against cannot be serious as the sanads of the first grade pleaders have to be renewed every year and the High Court may refuse a renewal. But, in any event, I do not think it necessary that we should take any action under section 13 as against any pleaders to whom rule 27 is applicable. I am also of opinion that it is difficult now to say generally that a pleader should not engage in any trade or business. Confining myself now only to vakils they exercise the profession both of the Advocate and the Solicitor and they should not be debarred from performing those functions which a Solicitor is, and a Barrister may not be, entitled to discharge. Many, if not the majority, of the pleaders are members of joint families who are engaged in trades or business. It would be an unnecessary interference with them now to declare that such trades or business are unprofessional. The notion that no trade however honestly carried on is worthy of a vakil is a relic of the times that have passed away, and I should regret its introduction into India.

On the facts before us, there is no doubt Mr. Venkata Rao has been guilty of a violation of rule 27 in not having reported to the High Court his connection with the firm or with the mill. But he has not been charged with having violated that rule and we cannot take any notice of it as he has had no opportunity of making any answer to that charge. So far, therefore, as the second charge is concerned I am not prepared to inflict any punishment on him.

Referred Cases Nos. 9 and 10 of 1912.

BENSON, OFFG. C.J.—I concur with the conclusions arrived at by my learned brothers in the judgments which have just been read, and which I have had the advantage of perusing.

With regard to the charge in connection with the criminal case against Muni Reddi, I am unable to accede to Mr. Rangachariar's contention that the judgment and evidence in the civil suit against the Pleader, Mr. Venkata Rao, is not admissible as evidence against him in the present proceedings. The question in that suit was the very question which we now have to decide, viz., whether he engaged to defend Muni Reddi in the Session

Case and failed to do so without any valid excuse. Mr. Venkata Rao was the defendant in the case and the decision was against him.

I do not think that the decision is conclusive proof against him in the present proceedings, but it has not been treated as conclusive. He has been allowed in the present proceedings to produce further evidence in support of his defence and he has produced it, and it has been duly considered by the District Judge and by us. There is no suggestion that any evidence which the pleader wished to adduce in the present proceedings has been shut out. We have not been referred to any authority for holding that the judgment is inadmissible in the present proceedings as establishing a *prima facie* case of unprofessional conduct against the pleader, or for holding that we are precluded from considering whether the judgment is right on the evidence on which it was based, nor do I see any ground in reason why we should treat them as inadmissible.

On the merits, the evidence and probabilities in all these cases have been so fully considered in the judgments of the two District Judges and of my learned brothers that I do not think anything would be gained by my reviewing them afresh. I entirely agree with the conclusions at which my learned brothers have arrived.

I do not understand how it can be seriously argued that what the pleader is said to have purchased from the plaintiffs in Original Suit No. 3 of 1909 was not "an actionable claim," and that there was nothing contrary to law or public policy in his purchasing it, if he did do so, and, therefore, his doing so was no professional misconduct. The plaintiffs' claim had, no doubt, been put in action, but that did not render it the less an "actionable claim" as defined in section 3 of the Transfer of Property Act. The claim was still *sub judice*. Though the case was ripe for judgment, no judgment had been given. The claim had not become merged in a decree. Section 136 of the Transfer of Property Act in the most stringent terms declares that "no Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in or stipulate for, or agree to receive, any share of, or interest in, any actionable claim." A pleader holds a privileged position in connection with the administration of justice, and the law imposes on him certain

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MUNI REDDI, restrictions and disabilities by reason of the position or office which he holds, and in order to safeguard the interests of litigants and the pure administration of justice.

It is, I think, futile to contend that it is not professional misconduct for a man to do that which the law expressly forbids him to do by reason of the profession which he exercises. The degree of misconduct will, no doubt, vary with the circumstances of each case, but I cannot doubt that a transaction such as that with which we are now concerned amounts to gross misconduct. The pleader who is conducting a case is in a better position than his client to judge of the probability of his success or failure, and the nearer the case is to judgment the greater will be his opportunity for correctly anticipating the event. It may be that when a case is ripe for judgment there is no longer any temptation to the pleader to conduct the case improperly, but to allow him at that stage to purchase his client's claim would expose him to a strong temptation to mis-represent to his client his prospects of success and the value of his claim. In the present case the transaction was a highly speculative one. The evidence shows that the plaintiffs feared their suit would be dismissed, and were willing, at one time, to sell their claim for Rs. 4,000. They, in fact, got a decree for Rs. 11,000 in the Original Court, though this was reduced on appeal to Rs. 6,000. It is true there is no suggestion that the pleader made any misrepresentation to his clients in this case, and the plaintiffs were satisfied with the price (Rs. 4,750) paid to them, but this does not prevent the pleader's purchase of the claim, in defiance of the express provisions of law, from being professional misconduct of a very grave character.

It only remains for me to state the decision at which we have arrived as to the penalty we should impose under section 13 of the Legal Practitioners' Act on Mr. Venkata Rao in respect of the charges which have been established against him. He cannot plead youth or inexperience in extenuation of his misconduct. Its gravity has certainly not been lessened by the false defences which he has put forward and maintained throughout in regard to the charges relating to his conduct in connection with the criminal case against Muni Reddi, and in purchasing his own client's claim in Original Suit No. 3 of 1909 in the Subordinate Judge's Court. We do not think that a mere warning or censure

would suffice to mark our sense of the gravity of his misconduct in either of these cases. We think that we are required to impose a penalty of a substantial period of suspension in each case. We accordingly direct that Mr. K. Venkata Rao be suspended from the exercise of his profession as a pleader for six months and three months on account of his misconduct in regard to these two cases respectively, the two periods to run consecutively.

We do not think it necessary to impose any penalty in connection with the charge against him for engaging in trade. We think it sufficient to say that he was wrong in carrying on trade without reporting the fact to the High Court under rule 23 of the Rules made by the Court under the Legal Practitioners' Act XVIII of 1879.

The pleader will have to pay the costs of the petitioner in Referred Case No. 10 of 1912.

The Civil Revision Petition No. 485 of 1911 is dismissed.

Memorandum of costs in Referred Case No. 10 of 1912.

<i>Petitioner's costs.</i>				RS.	A.	P.
Stamp for vakalatnama	...	...	...	50	0	0
Pleader's fee allowed	...	...	...	43	8	6
Printing and translation charges	...	...	...			
To be paid by the counter-petitioner (pleader) to the petitioner	...	...	...	93	8	6

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APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Phillips.

NALLAPPA REDDI (SECOND DEFENDANT), APPELLANT,

v

VRIDHACHALA REDDI AND ANOTHER (SECOND PLAINTIFF
AND FIRST DEFENDANT), RESPONDENTS.*

*Estoppel by judgment—Equitable estoppel—Res judicata—Indemnity, contract of
—Breach—Decree against promisee is binding on promisor.*

The second defendant undertook to pay interest on certain debts of the plaintiff, and in default, agreed to indemnify the plaintiff against all losses caused thereby. The second defendant having defaulted, the creditor recovered judgment both for principal and interest on the debts, in a suit to which the plaintiff and second defendant were parties, the court finding that second defendant's plea of payment of interest was false. In a suit by the plaintiff for recovery of damages against the second defendant, on account of the latter's default in payment of the stipulated interest, the second defendant again pleaded payment.

Held, that whether the technical rule of *res judicata* was applicable or not, the second defendant was equitably estopped, by reason of the finding in the previous suit from raising the contention that he had really paid the interest due to the creditor.

Where there is a contract to indemnify, a decree passed against the promisee cannot be impeached by the promisor and if both the promisee and the promisor were parties to the suit by the third party, or if the promisor had notice of the suit, the judgment would be conclusive against the promisor.

The contract on the part of the promisor is substantially broken when the court finds in a suit honestly defended by the promisee, that there has been a violation of duty by the promisor, which has entitled a third party to the damage for which the indemnity has been given.

Parker v. Lewis [(1873) L.R. 8 Ch. A. 1035 at p. 1058], *Mercantile Investment and General Trust Company v. River Plate Trust, Loan, and Agency Company* [(1894) 1 Ch. 578] and *Krishnan Nambiar v. Kannan* [(1898) I.L.R. 21 Mad. 8], referred to.

SECOND APPEAL against the decree of E. L. R. THORNTON, the District Judge of Trichinopoly, in Appeal No. 48 of 1909, dated the 1st day of November 1909, presented against the decree of C. SUBRAHMANYA AYYAR, the District Munsif of Kulittalai, in Original Suit No. 720 of 1903.

The facts of the case appear sufficiently from the judgment.

* Second Appeal No. 477 of 1910.

The Honourable Mr. T. V. Seshagiri Ayyar for the appellant.
N. Rajagopalachariar for the first respondent.

JUDGMENT.—The question raised in this case is one of some importance. The second defendant had agreed, while the plaintiff was a minor, to manage the plaintiff's properties and to hand over possession to him after his attainment of majority. One of the duties that the second defendant undertook to perform was the payment of interest due on the debts. He did not pay the interest on one of the debts and in consequence the creditor instituted a suit (Original Suit No. 521 of 1897) in the Kulitalai District Munsif's Court. The plaintiff and the second defendant were both parties to that suit, the second defendant being the third defendant there. He contended in that suit that he had paid up the interest, but failed to adduce evidence to prove his contention. The plaintiff subsequently paid the amount to the creditor, and instituted this suit to recover the damages sustained by him in consequence of the second defendant's failure to pay.

The Lower Appellate Court has held that the second defendant is bound by the finding in Original Suit No. 521 of 1897, and cannot now be permitted to allege or prove that, as a matter of fact, the interest due to the creditor had been discharged by him prior to the previous suit. Mr. Seshagiri Ayyar contends that the rule of *res judicata* is not applicable to the case as the plaintiff and the second defendant were co-defendants in the previous suit and as it was not necessary to determine the question as between them to give relief to the plaintiff there. We consider it unnecessary to determine whether the case would really come strictly within the rule of *res judicata* as we have no doubt that the second defendant must be held to be equitably estopped from raising the contention that he had really paid the interest due to the creditor. He, as co-defendant in the previous suit, had an opportunity to prove it. It was his duty to do so in order to prevent a decree being passed against the plaintiff here. He failed to do so. He had undertaken to indemnify the plaintiff if, in consequence of the breach of the covenant or his part to pay the interest on debts, the plaintiff was put to any loss. Owing to his failure to adduce evidence a decree was passed against the plaintiff and he was obliged to pay the creditor. It would be monstrous in the circumstances to allow the second defendant now to do that which by his failure

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to do before he put the plaintiff to loss. The case of the plaintiff however might be put even on broader grounds than in the circumstances it is necessary to do. It has been held by both the English and American courts that, where there is a contract to indemnify, if a decree has been passed against the person entitled to indemnity, the correctness of that decree cannot be impeached by the person bound to indemnify. The contract of indemnity might no doubt strictly be said to require that it should be proved that the indemnifier acted in violation of his duty, as well as that his act caused loss to the party entitled to indemnity. But the courts have held, and we think rightly, if we may say so, that the contract is substantially broken when the court has found in a suit honestly defended by the party entitled to indemnity that there has been a violation of duty by the indemnifier which has entitled a third party to the damages for which the indemnity has been given. It has further been held that, if both the indemnifier and the party entitled to indemnity were parties to the action by the third party, as in this case, or if the indemnifier had notice given to him of the suit against the party entitled to the indemnity, the judgment would be conclusive against the indemnifier even as an adjudication by court.

Whether the technical doctrine of *res judicata* is applicable or not, there can be no doubt that the second defendant must be held to be estopped from contending that the debt was discharged. It is unnecessary to refer to the authorities at length.

The earlier cases are referred to in the judgment of MELLISH, L.J., in *Parker v. Lewis*(1). See also *Mercantile Investment and General Trust Company v. River Plate Trust, Loan, and Agency Company*(2). Verman on Estoppel and *Res judicata*, pages 171 to 173 and Bigelow's Law of Estoppel, pages 131 to 145. Our judgment is also in accordance with the decision of this court in *Krishnan Nambiar v. Kannan*(3). We dismiss the Second Appeal with costs.

(1) (1873) L.R. 8 Ch. App. Cases 1035 at p. 1058. (2) (1894) 1 Ch. 578.
(3) (1898) I.L.R., 21 Mad., 8.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Wallis, Mr. Justice Sundara Ayyar
and Mr. Justice Sadasiva Ayyar.

G. GOPALAKRISHNAM RAZU (MINOR, BY MOTHER BANGARAYYA,
PLAINTIFF), APPELLANT,

v.

S. VENKATANARASA RAZU AND THREE OTHERS (DEFENDANTS),
RESPONDENTS.*

1911.
April 11
and
May 2.
1912.
August 12
and
October 8.

Hindu Law—Joint family—Twice-born caste—Debt—Marriage expenses of male member, binding on the family.

Marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahmachari or of a Sanyasi and debts reasonably incurred for the marriage of a twice-born Hindu male are binding on the joint family properties.

Govindarazulu Narasimham v. Devarabhotla Venkatanarasayya [(1904) I.L.R., 27 Mad., 206], overruled.

Kameswara Sastri v. Veerachariu [(1911) I.L.R., 34 Mad., 422], approved.

SECOND APPEAL against the decree of T. GOPALAKRISHNA PILLAI, the Subordinate Judge of Kistna at Ellore, in Appeal No. 145 of 1908, presented against the decree of R. GOPALA ROW, the District Munsif of Narsapur, in Original Suit No. 581 of 1906.

This was a suit for the recovery of a sum of money due by the defendants on a mortgage executed by defendants Nos. 1, 2, 3 and the fourth defendant's husband. The third defendant was a minor at the date of the mortgage and was represented by his elder brother, the first defendant. The mortgagors were members of a joint Hindu Kshatriya family, and the debt due under the mortgage was borrowed for meeting the marriage expenses of the second defendant, who was the undivided brother of the third defendant. Defendants Nos. 1 and 2 set up a plea of discharge which was found against by both the Lower Courts, and a decree for the amount found due was passed against defendants Nos. 1, 2 and 4, and their share of the hypotheca. The third defendant, and his share were exonerated, the Courts below holding that, according to *Govindarazulu Narasimham v. Devarabholla Venkatanarasayya*(1), the debt in question was not binding on his share of the family property.

* Second Appeal No. 1703 of 1909.
(1) (1904) I. L. R., 27 Mad., 206.

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ABDUR RAHIM
AND ATYLING,
JJ.

The plaintiff preferred this Second Appeal.

T. Prakksam for the appellant.

P. Narayanamurthi for the respondent.

ORDER.—By this appeal the question has been raised whether the third defendant in the suit and his property are liable for a debt incurred to meet the expenses of the second defendant's marriage. The defendants belong to a Kshatriya family.

In *Govindarazulu Narasimham v. Devarabhotla Venkatanarasayya*(1), it was held that a sale of land belonging to a joint family of Brahmins to defray the expenses of the marriage of one of its male members cannot be said to have been made for family necessity and is therefore not binding on the other members of the family. This decision has been dissented from in *Sundrabai v. Shivanarayana*(2) and its correctness has been doubted in the judgment of this Court in *Kameswara Sastri v. Veeracharlu*(3). In both of these cases the matter is fully discussed. There is, however, a suggestion in the last-mentioned ruling and in a later judgment in *Malayandi Gounder v. Subbaraya Vanavaraya Gounder*(4) that a distinction might perhaps be drawn between the case of Sudras and that of the three twice-born castes. But though the judgments of CHANDAVAKAR, J., in *Sundrabai v. Shivanarayana*(2) and of KRISHNASWAMI AYYAR, J., in *Kameswara Sastri v. Veeracharlu*(3) show that regarding the question from the point of view of religious ceremonial it may be said that there is a greater necessity for marriage among the Sudras than among the higher castes, the Bombay ruling clearly holds that there is no difference in the law in the two cases and that is also the inclination of opinion as expressed in *Kameswara Sastri v. Veeracharlu*(3).

The question whether the marriage of a male member of a joint Hindu family belonging to one of the twice-born castes is a family necessity and whether a debt incurred for the purpose of such marriage is binding on the other members of the family, is one of importance and ought to be settled. We, therefore, refer the above question for the opinion of a Full Bench. Pending the receipt of the opinion of a Full Bench, the Second Appeal will stand over.

(1) (1904) I.L.R., 27 Mad., 206.

(3) (1911) I.L.R., 34 Mad., 422.

(2) (1908) I.L.R., 32 Bom., 81.

(4) Appeal No. 95 of 1906.

This Second Appeal coming on for hearing as per order of reference before a Full Bench, the Court (WALLIS, SUNDARA AYYAR AND SADASIVA AYYAR, JJ.) expressed the following

OPINION.—It is sufficient to say that we agree with the judgment of KRISHNASWAMI AYYAR, J., in *Kameswara Sastri v. Veeracharlu*(1); that marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahmachari or of a Sanyasi, and this being so, that debts reasonably incurred for the marriage of a twice-born Hindu male are binding on the joint family properties.

This Second Appeal coming for final hearing after the expression of the above opinion of the Full Bench, the Court delivered the following

JUDGMENT.—Having regard to the decision of the Full Bench the decree of the Lower Courts will be modified to this extent that there shall be a decree making the interest of the third defendant also liable. The appellant will be entitled to his costs from the respondents.

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WALLIS,
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AYYAR AND
SADASIVA
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JJ.

ABDUR RAHIM
AND ATYLING,
JJ.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

G. PAPARAYUDU (PLAINTIFF), APPELLANT,

v.

G. RATTAMMA AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Widow—Alienation in part for necessity—Reversioner suing for declaration as to invalidity of sale, on payment of binding portion of the consideration—Absence of offer to pay, if fatal to suit—Conditional declaration—Form of decree.

When a reversioner, during the life-time of the widow, sues for a declaration that an alienation in part for necessity, is invalid beyond the life-time of the widow, on payment of the binding portion of the consideration,

Held, that the suit should not fail on the mere ground of the absence of an offer in the plaint to pay the amount that was binding on the reversioner.

(1) I.L.R., 34 Mad., 422.

* Second Appeal No. 930 of 1911

1912.
October 9.

PAPARAYUDU v. RATTAMMA. *Singam Setti Sanjivi Kondayya v. Draupadi Bayamma* (1908) I.L.R., 31 Mad., 153, not followed.
Bhagwat Dayal Singh v. Debi Dayal Sahu (1908) I.L.R., 35 Calo. 420 (P.O.), applied.

Held also, that a conditional decree may be passed.

Mahomed Shumsool v. Shewukram (1874) 2 I.A., 7, referred to.

Per SUNDARA AYYAR, J.—The uncertainty regarding the person who would be entitled to succeed the widow is no ground for refusing a declaration regarding the character of the alienation, and a declaration may be made that the alienation is invalid as a whole, but that on equitable grounds the alienee should have a charge declared in his favour for the binding portion of the consideration.

Isri Dut Koer v. Mussumat Hansbutti Koerain (1883) 10 I.A., 150, applied.

Sembla.—The proper form of the decree in such suits is merely to make a declaration that the alienee has a charge for a certain sum of money.

SECOND APPEAL against the decree of T. GOPALAKRISHNA PILLAI, the Subordinate Judge of Kistna at Ellore in Appeal No. 426 of 1910, preferred against the decree of G. G. SOMAYAJULU, the District Munsif of Tanuku in Original Suit No. 674 of 1909.

The facts of this case are sufficiently set out in the Judgment of SUNDARA AYYAR, J. The prayer in the plaint was as follows:—

“The plaintiff prays that the Court will be pleased to pass a decree . . . that the sales by the first defendant to defendants Nos. 2 and 3, cannot, after payment of the sale amount to defendants Nos. 2 and 3, affect the plaintiff who is the heir of the first defendant after her death.”

P. Narayanamurthi for the appellant.

A. Visvanatha Ayyar for the respondents.

SUNDARA
 AYYAR, J.

SUNDARA AYYAR, J.—This is a suit by a Hindu reversioner for a declaration that two sales made by the widow of the last owner, the first defendant in the suit, to the second and third defendants respectively are not valid beyond the life-time of the widow. The sales were admittedly made for the discharge of the widow's husband's debts. The attack against them was based on the ground that the prices settled for the sales were very inadequate. Both the Lower Courts have dismissed the suit on the ground that the plaintiff not having offered to pay to the purchasers the consideration money which was used for the discharge of the husband's debts the suit is not maintainable. The decision is rested on the authority of *Singam Setti Sanjivi*

Kondayya v. Draupadi Boyamma(1). That case no doubt supports the proposition that such an offer should be made by the party seeking to set aside a sale. But the decision of the Privy Council in *Bhagwat Dayal Singh v. Debi Dayal Sahu*(2), is authority for the position that the suit should not fail on the mere ground of the absence of an offer in the plaint and that a conditional decree might be passed. The case before the Privy Council was one in which the suit was instituted after the death of the alienor and plaintiff was entitled to possession at the time of the suit. There can be no doubt that a reversioner suing for possession after the death of the widow can only get a decree on condition of paying whatever portion of consideration for the sale by the widow is held to be binding on the estate. In *Singam Setti Sanjivi Kondayya v. Draupadi Bayamma*(1), two decisions of the Bengal High Court are relied on. In one of them *Mutteeram Kowar v. Gopaul Sahu*(3), the suit was instituted after the reversioner had become entitled to possession and there can be no doubt that he could not claim a decree except on condition of paying the amount. The case probably went too far in laying down that there should be an offer in the plaint to make payment of any amount that was binding on the reversioners. The other case is *Phool Chund Lall v. Rughoobuns Suhaye*(4). It was decided in 1867 before the enactment of the Specific Relief Act, section 42 of which lays down the conditions under which declaratory decrees might be granted. One of the illustrations to that section shows that a Hindu reversioner might institute a suit for a declaration that a transaction entered into by a Hindu widow is not binding on the reversioner. According to the view of the Privy Council in *Isri Dut Koer v. Mussumat Hansbutti Koerain*(5), a decision in a suit instituted by one reversioner may not be binding on another person who may happen to be the actual reversioner when the widow dies. See also *Mussumat Chand Koer v. Partab Singh*(6). But there can be no doubt that notwithstanding this inconvenience a suit by a presumptive reversioner at the time of the alienation for a declaration of its invalidity is maintainable. In *Phool Chund Lall v. Rughoobuns Suhaye*(4), the judgment

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(1) (1908) I.L.R., 31 Mad., 153.

(3) (1873) 11 Ben. L.R., 418.

(5) (1883) 10 I.A., 150.

(2) (1908) I.L.R., 35 Calo., 420 (P.O.).

(4) (1868) 9 W.R., 108.

(6) (1883) 15 I.A., 156.

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was partly rested on the ground that the plaintiff did not ask that the Court should put the vendee (alienee) in the same position as if he had obtained a mortgage for the amount which was binding on the reversioner. This suggests that the Court might declare the sale invalid but at the same time declare that the vendee has a charge for the portion of the consideration paid by him which is binding on the reversioner. Sir BARNES PEACOCK no doubt points out that a declaration that a reversioner may obtain possession on the death of the widow on condition of paying a certain sum of money ought not to be made because the plaintiff who institutes a suit for declaring an alienation invalid may not survive the widow and it would be optional with the actual reversioner who becomes entitled to the estate on the widow's death to recover possession or not, but as already observed this inconvenience arising from the fact that the plaintiff may not be the actual reversioner who succeeds the widow exists equally whether the decree is one altogether setting aside or upholding a sale or one pronouncing it invalid as a sale but declaring a charge in favour of the alienee. The law as to declaratory suits was not the same when *Phool Chund Lall v. Rughoobuns Suhaye*(1), was decided as it has been after the enactment of the Specific Relief Act. And the decision in that case therefore, cannot safely be relied on in cases arising under the present Act. In *Mahomed Shumsool v. Shewukram*(2), where a person having a reversion sued to set aside a sale made by a life-owner, their Lordships of the Privy Council felt no difficulty in passing a decree that on the death of the life-owner the plaintiff would be entitled to possession on payment of portion of consideration for the sale which was binding on him. Their Lordships did not decide whether the estate would on the death of the life-owner pass to any one as the owner of a vested reversion or to the person entitled to succeed under Hindu Law as reversioner on the termination of the life estate. That decision therefore would be authority for the position that even if the reversioner has no vested interest, a decree might be passed that the reversioner would be entitled to possession of the property after the death of the life-owner on his complying with certain conditions. Whatever that may be, it is difficult having regards

(1) (1888) 9 W.R., 108

(2) (1874) 2 I.A., 7.

to the ruling of the Privy Council in *Ieri Dut Koer v. Mussumat Hansbutti Koerain*(1), that the uncertainty regarding the person who would be entitled to succeed the widow is a ground for refusing a declaration regarding the character of the alienation; and if an alienation may be declared to be altogether valid or altogether invalid notwithstanding the uncertainty about the reversion there seems to be no apparent reason why a declaration should not be made that the alienation is invalid as a whole but that on equitable grounds the alienee should have a charge declared in his favour. In *Gobind Singh v. Baldeo Singh*(2), a decree was given declaring that the reversioner would be entitled to possession on payment of a certain sum of money which was binding on the reversioner. *The proper form of the decree however would appear to be to make merely a declaration that the alienee has a charge for a certain sum of money.* The question whether a decree in such a form could not be passed was not considered in *Singam Setti Sanjivi Kondayya v. Draupadi Bayamma*(3). The decrees of the Lower Courts must be reversed and the suit remanded to the Court of first instance for fresh disposal according to law. Costs up to date will abide the result.

SADASIVA AYYAR, J.—It is now settled law that a widow inheriting to the husband's estate obtains only a qualified interest in her husband's properties. It is further settled law that the nearest contingent reversioners can bring suits attacking the widow's alienations in her lifetime. To say under these circumstances that the suit of an honest reversioner who admits that the alienation was partially justified should be at once dismissed as a suit for a conditional declaration while a suit by a dishonest reversioner who seeks to have the alienation wholly declared void as against the reversioner should be tried to the end seems to be anomalous. On principle I do not see why a declaration that a sale is wholly void should be treated on a better footing than a declaration that the sale is void as a sale and can only be treated as a charge for a certain amount on the property alienated. The very object of allowing a suit by a contingent reversioner has been unfortunately (if I may be permitted to say so) defeated to

(1) (1888) 10 I.A., 150.

(2) (1908) I.L.R., 25 All., 380.

(3) (1908) I.L.R., 31 Mad., 159.

NARAYANUDU a very large extent by the decisions which are binding on us to the effect that a decree passed in favour of or against such a reversioner is not binding on a remoter reversioner. I may be permitted to hope that the legislature should see fit to enact that the decree in a suit *bond fide* brought and litigated by the then nearest reversioner is binding on the remoter reversioners. In the result I concur in the decree proposed by my learned brother.

RATTANMA.
SADASIYA
ATTAR, J.

APPELLATE CRIMINAL.

Before Mr. Justice Napier.

1912,
October 18.

Re NARAYANA PADAYACHI (ACCUSED IN CALENDAR CASE No. 318 OF 1912 ON THE FILE OF THE SECOND-CLASS MAGISTRATE OF PANRUTI).*

Forest Act (Madras Act V of 1882), ss. 26, 53 and 55—Compounding offence.

The words "no further proceedings shall be taken" in section 53 of the Forest Act (Madras Act V of 1882), mean that proceedings then in progress must lapse.

CASE referred for the orders of the High Court under section 438 of the Criminal Procedure Code by M. AZIZ-UD-DIN KHAN Bahadur, the District Magistrate of South Arcot, in his letter, dated 18th August 1912, No. 1124 M.C. of 1912.

The facts of the case are stated in the order below.

The Acting Public Prosecutor Mr. L. A. Govindaraghava Ayyar, for the Crown.

The accused not appearing in person nor by pleader.

NAPIER, J.

ORDER.—The accused in this case was charged with an offence under section 26 of Act V of 1882. This offence is compoundable under section 55 of the Act. It is admitted that the accused has paid Rs. 2 by way of compensation to the village *monegar* for the Forest authorities.

Section 53 provides that on such payment no further proceedings shall be taken against such person. This section must mean that proceedings in progress must lapse. That being so the Magistrate had no jurisdiction to convict the accused. I set aside the conviction and order the fine to be refunded.

* Criminal Revision Case No. 479 of 1912.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Spencer.

B. VENKAYYA AND ANOTHER (DEFENDANTS NOS. 2 AND 3),
APPELLANTS,

v.

K. SATEYYA AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT),
RESPONDENTS.*

1911.
October,
11 and 21.

Ejectment—Landlord and tenant—Right of lessee after expiry of lease, to eject a trespasser.

Where a lessee whose lease had expired prior to suit, sued for possession of the land leased to him, from a trespasser :

Held, that the expiration of the lease did not necessarily imply the expiration of the lessee's right of possession, and the lessee was entitled to a decree for possession as against trespassers *a fortiori* where the landlord acquiesces in plaintiff getting a decree.

Gibbins v. Buckland (1868) L.J., 32 Exch., 156 and *Knight v. Clarke* (1885) 15 Q.B.D., 291, referred to.

SECOND APPEAL against the decree of T. GOPALAKRISHNA PILLAI, the Subordinate Judge of Kistna at Ellore, in Appeal Suit No. 42 of 1909 presented against the decree of S. NILAKANTAM PANTULU, the Additional District Munsif of Tanuku, in Original Suit No. 79 of 1908.

The second defendant was in possession of certain lands belonging to a temple of which the first defendant was the trustee. The plaintiff took a lease of the lands from the first defendant for faslis 1314, 1315 and 1316 and entered upon the lands and forcibly dispossessed the second defendant, who however sued the plaintiff under section 9 of the Specific Relief Act, and was reinstated in possession on the 30th August 1906, in pursuance of the decree of Court. The plaintiff thereupon filed the present suit on the 17th September 1906, after the expiry of fasli 1316, for establishing the first defendant's right to the lands, and for recovery of possession thereof from the second defendant together with mesne profits. The second defendant pleaded *inter alia* that he was trustee of the temple, and that he possessed permanent

* Second Appeal No. 308 of 1910

VENKATTA right of occupancy in the suit land. Both the Lower Courts decreed the suit in favour of the plaintiff, negating the pleas of the second defendant.

The second defendant appealed.

P. Narayanamurti for the appellants.

S. Gopalaswamiayyengar for the first respondent.

S. V. Padmanabhachariyar for the second respondent.

JUDGMENT.—The District Munsif has found on the third issue that the appellants (defendants Nos. 2 and 3) had no occupancy rights and, although the Subordinate Judge has not recorded any express finding on this point, it is clear from his judgment that he regarded the relations in which the parties stood, as precluding any independent right of occupancy existing in these appellants. We think that Exhibits C and II show that the District Munsif's conclusion on this issue was correct. It was contended for the appellants that the (first respondent's) plaintiff's title having been determined before suit by expiry of his lease deed he was not entitled to obtain a decree of ejectment against the appellants, but we think that the expiration of his lease deed does not necessarily imply the expiration of his right of possession and as against parties who are in no better position than trespassers he is entitled to a decree: [vide *Gibbins v. Buckland*(1) and *Knight v. Clarke*(2)].

We may add that the landlord, who is the first defendant, acquiesces in the plaintiff getting a decree and it has been shown that the appellants are not in a position to resist the landlord's right. This Second Appeal is dismissed with costs (one set).

(1) (1883) L.J., 32 Exch., 158.

(2) (1885) 15 Q.B.D., 294.

APPELLATE CIVIL.

Before Sir Charles Arnold White, K.T., The Chief Justice, and
Mr. Justice Sankaran Nair.

P. VENKATACHELAPATHY (PLAINTIFF), APPELLANT,

1912.
November
4 and 5.

v.

SRI RAJAH BOMMAVARA SATYANARAYANA VARAPRA-
ADA SIVA ROW NAIDU BAHADUR, ZAMINDAR GARU, MINOR
UNDER THE COURT OF WARDS BY HIS GUARDIAN *ad litem*, THE COLLECTOR
OF KISTNA AND FOUR OTHERS (DEFENDANTS NOS. 2 AND 3 TO 5, THE
RESPONDENTS NOS. 2 TO 5 ARE THE LEGAL REPRESENTATIVES OF THE
DECEASED FIRST DEFENDANT), RESPONDENTS.*

*Madras Court of Wards Act (I of 1902), sec. 49 (1)—Notice of suit—Suit for
money is a suit relating to property of a ward.*

A suit for money is a suit relating to the property of a ward within the
meaning of sub-section 1 of section 49 of (Madras Act) I of 1902 (Madras Court
of Wards Act) and requires a notice of suit under that section.

A mere demand for payment is not a notice of suit.

APPEAL against the decree of the Subordinate Judge of
Cocanada in Original Suit No. 76 of 1908.

The facts of this case are stated in the judgment below.

The Honourable Mr. L. A. Govindaraghava Ayyar for the
appellant.

Dr. S. Swaminadhan for the first respondent.

P. Nagabhushanam for respondents Nos. 3 to 5.

Suit upon a promissory-note against a ward under the
Court of Wards.

WHITE, C.J.—One of the points first raised in this appeal is
not altogether free from difficulty, but as we have made up
our minds about it, we do not think anything is to be gained by
further consideration. The two points which have been raised
by Mr. Govindaraghava Ayyar on behalf of the appellant arise
under the second issue in the case, viz., whether the second defend-
ant, the Collector, was entitled to notice of suit under section 49 of
Madras Act I of 1902; and if so, was a valid notice served on him.
Section 49 is in these terms "No suit relating to the person or

* Appeal No. 42 of 1910.

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property of any ward shall be instituted in any civil court until the expiration of two months after notice in writing has been delivered to or left at the office of the District Collector specified in the notification under section 19 or the Collector appointed under section 46, as the case may be."

Mr. Govindaraghava Ayyar has argued *first* that no notice is necessary; and *secondly*, if notice was necessary, the notice which the evidence shows was given in this case was sufficient. As regards the first point, the question turns on the construction of the words "No suit relating to the person or property of any ward shall be instituted, etc.," and the question we have to consider is what is the meaning of the words "relating to the person or property of any ward" for the purpose of the section. Mr. Govindaraghava Ayyar has pointed out that the words are "relating to the person or property" and not "affecting or which may affect the person or property" of a ward. The suit before us is a money suit, a claim on a promissory-note, in which it was sought to make the ward or the estate of the ward liable. There can be no question that if the plaintiff succeeds in this suit the estate of the ward will be affected because execution will have to go against the estate. But the words are not "affecting" but "relating to." It is quite clear if we adopt Mr. Govindaraghava Ayyar's construction we shall have to exclude from the scope of the section every money suit, because such a suit according to him, though the result may affect the estate, does not relate to the estate. But a suit for money in which a decree may be realised in execution against the estate of the ward seems as much within the mischief of the section as a suit relating to the specific property of any ward which according to Mr. Govindaraghava Ayyar is what the legislature meant. According to Mr. Govindaraghava Ayyar so far as I can see the suits which come within the section would be limited to mortgage suits and ejectment suits. However that may be, a suit for money would certainly be excluded from the operation of the section.

On the other hand, the construction which Dr. Swaminadhan on behalf of the respondent contends is the right construction no doubt leads to this. It is difficult to think of a suit against a ward which does not relate to the person or property of the ward, and that being so,

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his construction to a great extent, if not entirely, renders the words "relating to the person or property of any ward" superfluous or meaningless and section might as well run: "no suit against a ward shall be instituted in any Civil Court." Dr. Swaminadhan suggests, and there is some force in the suggestion, that the words "relating to the person or property" were adopted as a compendious form of expression having regard to the general scheme and scope of the Court of Wards Act which gives protection to the person and property of the ward. The conclusion I have come to, although the point is not altogether free from doubt, is that the learned Judge is right in the construction which he adopted that a suit for money is a suit relating to the property of a ward within the meaning of sub-section (1) of section 49 of the Madras Act I of 1902.

Our attention has been called to a few authorities. I do not think that the decision in *Sri Venkatachallapathy Sahaya Vijayasaya Company v. Kanakasabapathia Pillai*(1) to which Mr. Govindaraghava Ayyar called our attention helps him much. That was a case in which a question as to the construction of the words "relating to trust" within the meaning of article 18 of the schedule II to the Provincial Small Cause Courts Act arose, and it was there held that the suit in that case was not a suit relating to a trust. A case which is more in point is an English case—*In re Staines*(2). The question there was with reference to the construction of Order LI, rule 1 of the English Rules of the Supreme Court. That rule provides that if in any cause or matter relating to any real estate it appears necessary that the real estate should be sold the Court or a Judge may order the same to be sold. The question was whether the "cause or matter" in question related to real estate. The action was by the next friend of an infant claiming an account of the personal estate and rents and profits of the real estate. NORTH, J., held that that was not a cause or matter relating to real estate. He said it was really an action for the recovery of rents and profits and that the Court had no power to sell an infant's real estate merely because it thought it would be for his benefit that it should be sold. The words of Order LI, rule 1 are "relating to real estate." Here the expression is much wider "relating to

(1) (1910) I.L.R., 38 Mad., 494.

(2) (1888) 33 Ch. D., 172.

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person or property." The property may be real or personal. As has been pointed out the legislature could not have adopted wider or more comprehensive words than "relating to" and I am of opinion that the words "relating to the person or property" are wide enough to include a case in which a claim for money is made against a ward.

The second point I can dispose of very shortly. Here again I think the learned Judge was right. It seems to me that neither Exhibit E read alone nor Exhibit E read by the light of the other documents and the other facts proved or admitted can be said to constitute a notice of suit for the purpose of section 49 of Madras Act I of 1902. They all come to nothing more than a demand and cannot be said to amount to a notice of suit. That being so it is really unnecessary to consider whether the notice was bad on the further ground that it was not delivered to or left at the office of the District Collector and it is not necessary to consider whether in a case where the evidence shows that notice was given to the manager and brought to the knowledge of the Collector it is enough for the purpose of the section.

On both the points I think the learned Judge was right and I dismiss the appeal with costs, one set to first respondent and Rs. 50 to respondents Nos. 3 to 5.

SANKARAN NAIR, J.—I agree.

ANKARAN
NAIR, J.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Abdur Rahim.

P. SEETHAI AMMAL (PLAINTIFF), APPELLANT,

v.

P. NACHIAR AMMAL AND FIVE OTHERS (DEFENDANTS),
RESPONDENTS.*

1912,
November 4,
5 and 6.

Hindu Law—Succession—Step-mother cannot inherit under Mitakshara law but may inherit according to a special caste custom.

A step-mother is not to be allowed to inherit to her step-son as a gotraja sapinda.

* Appeal No. 161 of 1910 (Civil Miscellaneous Petition No. 88 of 1911).

Mari v. Chinnammal (1885) I.L.R., 8 Mad., 107 (F.B.), explained.

The *Mitakshara* Law (apart from usage) does not recognise a step-mother as in the line of heirs at all. Property should go to the Crown in preference to her.

This case was remanded on the following additional issue (*inter alia*), "whether according to the usage of the caste to which she and the first defendant belong, the step-mother is entitled to inherit to her step-son?"

APPEAL against the decree of T. SWAMI AYYAR, the Subordinate Judge of Kumbakonam, in Original Suit No. 50 of 1909, and petition to admit in evidence a copy of the judgment of A. N. ANANTARAMA AYYAR, the Subordinate Judge of Kumbakonam, in Original Suit No. 15 of 1908.

The Honourable Mr. T. V. Seshagiri Ayyar and T. V. Muthukrishna Ayyar for the appellant.

T. Ranga Achariyar for the first respondent.

K. Parthasarathi Ayyangar for respondents Nos. 2 to 6.

MILLER, J.—The plaintiff and the first defendant are both widows of the father of the last male owner of the property in dispute and they are both step-mothers of the last male owner; and the question is whether the plaintiff has any right to share in the property in dispute which has been conveyed to the first defendant by certain persons who alleged themselves to be the sons of the grand-father of the last male owner. The question so far as it turns on Hindu Law is whether a step-mother is entitled to succeed in any circumstance to the property of her step-son; and it has divided itself practically into two parts in this Court, first, whether she should not be given a right to succeed as being in the class of gotraja sapindas and secondly whether, even if she has no right as a member of that class, still she is a sapinda within the meaning of that term in the *Mitakshara* and should be allowed to succeed, before the Crown at any rate, as a relation, though not as a gotraja sapinda. In his opening Mr. Seshagiri Ayyar suggested, but he did not press the contention, that the step-mother should be allowed to succeed as being equivalent or next door to the mother. I think it is clear that that contention cannot succeed in the face of the decisions of this and the other High Courts. The contention which he did press then was that as a gotraja sapinda she ought to be allowed to succeed. It seems to me that that question has been decided against him by a Full Bench of this Court in *Mari v.*

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Chinnammal(1). It is suggested that we should treat that case as merely deciding that the step-mother is to be postponed to the paternal uncle; but it seems to me that there is nothing in that case either in the judgment of Sir CHARLES TURNER, C.J. or in the judgment of MUTTUSWAMI AYYAR, J. which suggests that they had in mind the necessity of deciding any question other than whether the step-mother is in the line of heirs at all. Perhaps I am wrong in saying that it is not suggested because the learned Chief Justice does suggest the question, whether if she is in the line of heirs she is not postponed to the paternal uncle. But the decision of the matter did not proceed upon any preference of a male sapinda to a female sapinda except in this sense that female sapindas unless they are named in the text of the Mitakshara are excluded altogether. That, I think, is what *Mari v. Chinnammal*(1) clearly lays down. No doubt both the Chief Justice who spoke for the majority and MUTTUSWAMI AYYAR, J. who agreed with him, though perhaps on slightly different grounds both those learned Judges took it that the step-mother was a sapinda within the meaning of that term as defined in the Mitakshara, but they do not base their decision excluding her from inheritance on the ground that, though a sapinda, she must be postponed to the paternal uncle; they distinctly exclude her altogether and not merely postpone her. That is clear from the judgment of both the learned Judges. "The claim of the step-mother as a gotraja sapinda" (that is her right to succeed in that capacity) says the learned Chief Justice "has not been in my judgment established and" (for that reason) "the claim of the paternal uncle must be allowed" not that she might come in if the paternal uncle were not a preferential heir, but that her claim as gotraja sapinda had not been established. And MUTTUSWAMI AYYAR, J. says "Though I entertain no doubt that she is a gotraja sapinda in the Mitakshara sense of sapinda relationship, I do not think that all female sapindas are recognised to be heirs in this Presidency"; and then he gives certain instances and he suggests that if usage were in favour of the step-mother's claim he could not say that the Mitakshara actually declared

(1) (1885) I.L.R., 8 Mad., 107 at p. 129 (F.B.).

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against its legality, but he is not inclined to depart on that ground from the course of decisions upon the point. The result seems to be that the case we are asked to decide here has been decided by a Full Bench of this Court and that decision is clearly binding on us, and I for one am quite content to follow it and am not disposed to question it now. I therefore take it that it has been decided, so far as this Court can decide it, that the step-mother is not to be allowed to inherit to her step-son as gotraja sapinda.

Then I come to the second point which Mr. Seshagiri Ayyar raised, that is, whether she should not be allowed to succeed as a relation. Now it is very difficult for me to find any place in the scheme of succession laid down by the Mitakshara for relations who are not either those specially named or gotrajas or bandhus. No doubt there is a passage in *Kutti Ammal v. Radakristna Aiyar*(1), which has been relied upon and which is criticised in *Jogdamba Koer v. Secretary of State for India in Council*(2), which might suggest that the learned Judges there considered that all relatives however remote, whether they be sapindas or bandhus or not, have to be exhausted before the estate, can pass to the Crown. The passage might suggest that; but the decision in that case has been explained in this Court to be that a sister was there allowed to succeed as being a bandhu and, as has been pointed out in *Lakshmanammal v. Tiruvengada*(3), it does not necessarily follow from this passage that the learned judges who decided *Kutti Ammal v. Radakristna Aiyar*(1) intended to suggest that there were other classes of heirs who were not in any of the classes mentioned in the Mitakshara. There is undoubtedly a passage in *Gridhari Lall Roy v. The Bengal Government*(4), which lends support to the contention of the appellant. Taking a passage in the *Viramitrada* as reading that "maternal uncles and the rest" must be comprehended under the term bandhus as otherwise they would be omitted and their sons would be entitled to inherit and after them they themselves, which would be objectionable, their Lordships say that if that be the correct reading, it would follow that even if the maternal

(1) (1875) 8 M.H.C.R., 88 at p. 93.

(3) (1882) I.L.R., 5 Mad., 241.

(2) (1889) I.L.R., 16 Cal., 367.

(4) (1868) 12 M.I.A., 448 at p. 467.

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uncle and others who are not mentioned in the text of the Mitakshara relied upon were excluded from the list of bandhus, that is to say, as I understand it, are not bandhus, still according to the Viramitradaya they would inherit after the bandhus. But in that case it was not decided whether it should be taken to be the law that persons who cannot be classed as bandhus but were still relations could succeed after them. Their Lordships say, "it is, . . . , unnecessary to consider whether the title of any remote relation who could not be brought within the category of *Bandoos* or other class of heirs specified by the *Mitakshara* would prevail against that of the Crown;" and they held in the case before them that the maternal uncle of the father was a bandhu of the father and as such entitled to inherit as a bandhu. Therefore though that observation as to the construction of the passage in the Viramitradaya certainly does suggest that their Lordships were prepared, if necessary, to consider the question whether there might not be relatives who might succeed though they were not bandhus, that case does not decide that there was any such class of persons to be really found. I think it is very difficult as I said at the outset to find a place for any such class. The step-mother is certainly not a bandhu. If she comes in at all she must come in as gotraja sapinda, it is difficult to suggest where she comes, whether after all the sapindas or after the *Samanodakas* or after all the males gotrajas and bandhus as one class or otherwise.

The only other authority which has been cited to us as suggesting that there may be relatives who are not bandhus is *Sundrammal v. Rangasami Mudaliar*(1), in which there is an observation. That has been explained in a later case *Venkatasubramaniam Chetti v. Thayarammah*(2), where the learned Judges point out that the same Judges who speak in *Sundrammal v. Rangasami Mudaliar*(1), of the sister's daughter as not being a bhinnagotra sapindas have subsequently in another case reported in the same volume *Balamma v. Pullayya*(3), said that the sister is admitted on the ground that she may be considered a bhinnagotra sapinda so that that case as it has been explained in later decisions of this court does not afford any authority for the

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proposition that there is a class of relatives who are not bandhus or gotraja sapindas who can inherit. The case I have referred to—*Gridari Lall Roy v. The Bengal Government*(1), and the cases in this court which have admitted certain female classes to inherit as bandhus do not go further than this, that the list of bandhus as given in the Mitakshara is not exhaustive, and that others who can be brought within the class of bhinnagotra sapindas may be allowed to inherit as bandhus. That being the state of the authorities I certainly am not prepared to set up a different view that there may be another class of relations who are entitled to inherit. There is no suggestion of that to my mind in the text of the Mitakshara, laying down that in the absence of bandhus certain strangers can inherit—a text supported by a citation from the work of Apastamba to the effect that in the absence of male issue the nearest kinsman is entitled to succeed and if there are no kindred, strangers can inherit: it has been argued before us that there is something in that text which suggests that there may be persons who are kindred who are not either bandhus or sapindas or any of the special heirs described in the opening of chapter II, section 2, of the Mitakshara. But the text of Apastambas, we are told, relates to the nearest sapinda and whether that is so or not, whether the text distinctly refers to sapindas or not, there is no reason that I can see why we should in order to arrive at a proper interpretation of the term kindred in the text of Apastamba go outside those classes of persons who are mentioned as heirs by the Mitakshara. No other text has been cited nor any other decision of this Court, I think which warrants the bringing in of relatives who are not bandhus. And there is no case that I know of in the other High Courts which warrants it. On the other hand in *Jogdamba Koer v. Secretary of State for India in Council*(2), it has been held that the brother's widow who is also a gotraja sapinda is not entitled to succeed in preference to the Crown. I hold then that so far as the Mitakshara Law goes and apart from usage the step-mother is not in the line of heirs at all and if it were necessary to decide the point I should say that the property goes to the Crown in preference to her.

(1) (1895) I.L.R., 18 Mad., 193 at p. 199.

(2) (1898) I.L.R., 21 Mad., 268.

(3) (1895) I.L.R., 18 Mad., 168.

(1) (1868) 12 M.I.A., 448 at p. 467.

(2) (1889) I.L.R., 16 Cal., 367.

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Then a question of *res judicata* was raised on behalf of the respondent on the ground that in a former suit a person alleging himself to be a nearer relation of the last male holder than the vendors of the present first defendant preferred a claim to the possession of the property now in question. The present plaintiff was the first defendant in the suit and the present first defendant was the second defendant therein, and the present plaintiff alleged that there were no dayadis of the last male holder entitled to succeed before her. The only finding in that judgment, as I understand that passage in the judgment, is that the plaintiff in that suit was not so near a relative of the last male holder as the vendor of the present first defendant. No doubt the Subordinate Judge in that case does say that the present first defendant's vendors were the nearest legal heirs, but I do not think that by saying so he intended to decide anything which was really in any way in question between the first two defendants. He does not discuss that in his judgment or decide it expressly and it was not necessary for him to decide that in order to dispose of that suit. Consequently I am of opinion that there is no bar by that suit.

Then the Lower Court was asked shortly before disposing of the case, after the first hearing and after the issues were settled to frame two new issues, one as to estoppel and the other as to the custom of the caste. As to estoppel I do not think there is any real ground for such an issue and the Subordinate Judge was right in not allowing it to be raised.

As to custom no doubt what was asked for was an issue as to the custom of the Presidency. The petition runs "moreover according to the custom prevailing in the Presidency the step-mother is also heir according to Hindu Law." Really that does not suggest that the plaintiff was referring to any special caste custom. But I am not clear that we ought on that ground to refuse to allow the issue to be raised. It ought no doubt to have been presented in the pleadings or at the first hearing, but it was actually presented before the evidence was taken, before anything more had been done than to settle issues and set down the case for argument on the preliminary issue of law. In those circumstances I am disposed to allow the plaintiff to raise a special issue, viz. "whether according to the usage of the caste to which she and the first defendant belong the step-mother is entitled to

inherit to her step-son." I would ask the Subordinate Judge to take the evidence that may be adduced upon that issue and return a finding to this Court within a period of two months. If the finding is in the affirmative, that is, if by usage the step-mother is entitled to succeed, the Subordinate Judge will also return a finding on the two following issues: (1) Are Langasami Chetti and Vasudevan Chetti mentioned in paragraph 3 of the first defendant's written statement heirs of Langasami Chetti the plaintiff's step-son and (2) if so, is the plaintiff by virtue of the usage established entitled to succeed in preference to them.

Evidence may be taken on these issues. Seven days will be allowed for objections after the return of the finding.

ABDUR RAHIM, J.—I agree.

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APPELLATE CIVIL.

*Before Sir Charles Arnold White, Kt., the Chief Justice,
and Mr. Justice Sankaran Nair.*

KANAKAMMAL (FIRST DEFENDANT), APPELLANT,

v.

ANANTHAMATHI AMMAL AND TWO OTHERS (PLAINTIFFS AND
THE SECOND DEFENDANT), RESPONDENTS.*

Hindu Law—Stridhanam—Order of succession according to Mitakshara—Brother's widow not an heir—Burden of proof in suit for possession.

The stridhanam property of a Hindu female devolves on her death, on her husband, and failing the husband, on his sapindas in the order laid down in the Mitakshara with reference to the succession to the property of a male.

Marya Pillai v. Sivabagyathachi (1911) 2 M.W.N. 168, followed.

A brother's widow is a gotraja sapinda, but is not entitled to succeed as an heir under the Madras system of inheritance.

Balamma v. Pullayya (1895) I.L.R., 18 Mad., 168, followed.

Mari v. Chinnammal (1885) I.L.R., 8 Mad., 107, and *Venkatasubramaniam*

Chetti v. Thayarammah (1898) I.L.R., 21 Mad., 263, referred to.

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September
12 and 27
and
November 13.

* Second Appeal No. 870 of 1912.

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On failure of the husband's sapindas, the blood relations of the *propositus* are entitled to succeed to the exclusion of the Crown.

A plaintiff seeking to recover possession from a defendant in possession though as a trespasser, must prove his own title.

SECOND APPEAL against the decree of Raja K. C. MANAVEDAN RAJA, the District Judge of North Arcot, in Appeal No. 128 of 1908, presented against the decree of M. G. KRISHNA RAO, the District Munsif at Ranipet, in Original Suit No. 16 of 1907.

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

T. R. Ramachandra Ayyar and P. Elayalwar Ayyangar for the appellant.

The Honourable Mr. L. A. Govinduraghava Ayyar for the first and the second respondents.

WHITE, C. J.
AND
SANKARAN
NAIR, J.

JUDGMENT.—The suit out of which this Second Appeal arises was brought by the mother and brother of one Manikkammal (deceased) to recover, with mesne profits, certain lands belonging to her, which are now in the possession of first defendant, who is the widow of Manikkammal's husband's brother.

It may be premised that both Manikkammal's husband and his brother (first defendant's husband) predeceased Manikkammal: and that the findings of the lower courts, (a) that the property was of the nature of stridhanam and (b) that Manikkammal's marriage was in an approved form are not now contested.

The District Munsif dismissed the suit on the ground that first defendant was the proper heir to the suit property: but the District Judge found (1) that first defendant was not an heir at all, (2) that second plaintiff was in the line of succession and (3) that in the absence of any allegation in defendants' written statement of the existence of a nearer heir, second plaintiff was entitled to succeed. He accordingly gave a decree for possession of the suit lands, though without mesne profits, which were not proved.

All the above points (and no others) have been argued before us.

As regards the first point the principal governing succession to the stridhanam of a Hindu female, married according to an orthodox form and dying without issue, have been considered in a very recent judgment of this Court to which one of us was a party. *Marya Pillai v. Sivabaggyathachi*(1). It was held that such property devolved on her husband and, failing her husband,

(1) (1911) 2 M.W.N., 168.

on his sapindas in the order laid down in the *Mitakshara* with reference to the succession to the property of a male. No authority has been quoted for the suggestions of the learned vakil for appellant that the term sapinda in *Mitakshara*, chapter II, section 11, plac. 11, should be understood in a different sense to that in which it would be used in reference to inheritance from a male; and applying this test to the case before us, we must hold that first defendant cannot be recognised as an heir.

A brother's widow is no doubt a gotraja sapinda: but it does not follow that she is entitled to succeed as an heir, and as a fact under the Madras system of inheritance she is not.

This is clearly laid down in *Bulamma v. Pullayya*(1): "The law as settled in this Presidency is that a widow can only succeed to her husband's property which was actually vested in him either in title or in possession at the time of his death. As observed by Mr. Mayne, she must take at (once at her husband's) his death, or not at all. No such right can accrue to her as widow in consequence of the subsequent death of any one to whom her husband would have been heir if he had lived."

Neither of the cases quoted by appellant's vakil *Mari v. Chinammal*(2) and *Venkatasubramaniam Chetti v. Thayarammah*(3) are in any way opposed to this. The former indeed contains a specific expression of the same opinion (*vide* page 129, *Muttuswami Ayyar, J.*). The latter recognises the claims of a husband's brother's daughter (not wife) to succeed as a bandhu to a woman's stridhanam,—a totally different case.

Passing to the second point, it is argued on behalf of the appellant, that on failure of husband's sapindas qualified to succeed the line of succession is exhausted, and the property escheats to the state.

This is a doctrine contrary to the general spirit of Hindu law of inheritance, and one to which we should be loth to give effect. It is unsupported by any text to which our attention has been drawn. No ruling has been quoted on either side, but Dr. Bannerjee in his *Hindu Law of Marriage and Stridhanam* discusses the point, and comes to the conclusion that the widow's blood relations would, at any rate, succeed to the

1) (1895) I.L.R., 18 Mad., 168 at pp. 169 and 170.

(2) (1885) I.L.R., 8 Mad., 107 (F.B.).

(3) (1898) I.L.R., 21 Mad., 262.

KANAKAMMAL exclusion of the Crown (see page 378). The same view is deducible from "West and Buhler," page 544: and we concur in it.

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AND
SANKARAN
NAIR, J. It may be remarked here that although there is no contest between the two plaintiffs, the learned District Judge is in error in giving the decree in favour of second plaintiff. As remarked by Dr. Bannerjee in the passage quoted above, the mother (first plaintiff) and not the brother, is the preferential heir and respondent's vakil agrees that the decree must be modified in this respect.

There remains only the third point, regarding which the District Judge appears to us to be in error. On the findings indicated above first defendant is in the position of a mere trespasser: but it is none the less necessary for plaintiffs, who seek to oust her, to prove their own title. Her failure to plead a *justertia* does not absolve them of this duty. We must therefore call for a finding on the following issue.

At the time of the death of Manikkammal were plaintiffs the nearest heirs to her?

Fresh evidence may be adduced by either side: the finding should be submitted in six weeks and seven days will be allowed for filing objections.

In compliance with the above order the District Judge of North Arcot submitted the following report.

ORDER.—I have been directed to return a finding on the following issue, viz.: "Whether at the time of the death of Manikkammal, plaintiffs were the nearest heirs to her."

The vakils who appeared for the appellant and respondents in the High Court stated that they had no instructions and did not propose to call any evidence. I am unable from the records to record any finding on the issue sent down.

This Second Appeal coming on for hearing after receipt of the report from the lower appellate court in pursuance of an order of the High Court, dated 27th September 1911, calling for a finding the court (The CHIEF JUSTICE and AYLING, J.) made the following

WHITE, C.J.
AND
AYLING, J. ORDER.—The vakils on both sides now say their clients are in a position to adduce evidence. The case will go back to the District Court for a finding on the issue framed on the 27th September 1911 in the above Second Appeal.

The finding will be submitted within one month after the re-opening of the District Court and the parties will be at liberty to file memorandum of objections to the said finding within seven days after notice of return of the same shall have been posted up in this court.

In compliance with the above order, the District Judge of North Arcot submitted the following

FINDING.—I have been directed to return a finding on the following issue "Whether at the time of the death of Manikkammal, plaintiffs were the nearest heirs to her?"

Three witnesses were examined on behalf of the first defendant (appellant in the High Court). The plaintiffs (respondents in the High Court) did not appear in person and were not represented by a vakil. It appears from the evidence of the witnesses examined before me that one Yesotha Nainar, the father-in-law of first defendant and the deceased Manikkammal had an elder brother named Santhinatha Nainar who is dead. The latter had a son Appasami Nainar who died leaving him surviving two sons Yesotha Nainar and Santhinatha Nainar who are alive. The father of Yesotha Nainar (first defendant's father-in-law) had a younger brother named Santhinatha Nainar who is dead. It is stated that he had four sons who are now living. Their names are Appachi Nainar, Ananthanatha Nainar, Lokapala Nainar and Jenathos Nainar. Plaintiffs in the suit are respectively the mother and brother of the deceased Manikkammal. The evidence of the witnesses examined before me appears to be trustworthy and is not contradicted. I would therefore return a finding that the plaintiffs were not the nearest heirs to the deceased Manikkammal at the time of her death and her nearest heirs were her husband's dayadis Yesoda Nainar, Santhinatha Nainar, Appachi Nainar, Ananthanatha Nainar, Lokapala Nainar and Jenathos Nainar. The two former appear to be the nearest heirs being the grand-sons of Manikkammal's husband's father's brother.

This Second Appeal coming on this day for final hearing after the receipt of the finding from the Lower Appellate Court, the Court delivered the following

JUDGMENT.—The respondents do not appear and there is no memorandum of objections.

WHITE, C.J.
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RAHIM, J.

Secretary of State for India(1) does not, it seems to me, support the contention of the respondent. All that is laid down there is that, if the possession is shown to be wrongful, then the plaintiff would not be entitled to a declaration of title. But here it cannot be said upon the findings as they now stand that the plaintiff's possession is wrongful. It is not necessary to discuss *Rassoonada Rayar v. Sitharama Pillai*(2), because in my opinion the subsequent judgment of the Privy Council in *Ismail Arief v. Mahomed Ghous*(3) is quite clear and conclusive on the point. I may observe that at first I was inclined to entertain some doubt as to whether in a case where the defendant has not actually dispossessed the plaintiff, the plaintiff would be entitled to a declaration of his title on the strength merely of possession not extending over the statutory period. But it seems that the decision of the Privy Council at least goes to the extent that, if the plaintiff has been in possession even though for less than 12 years, he would under section 42 of the Specific Relief Act be entitled to a declaration that he is in lawful possession as against a wrong doer who sought to interfere with his possession. The levying of penal assessment on the land, if it was not justified, would amount to unlawful interference with the plaintiff's possession.

Then apart from the question whether the plaintiff is entitled to a declaration in the terms asked for by him, it seems to me to be clear that, if the land is not shown to be communal land, the Secretary of State would have no right to collect penal assessment from a person in possession thereof simply on the ground that he is not the legal owner of the land, but somebody else. It thus becomes necessary that we should have a finding on the question whether the land in dispute is *Ashalmenaha* land or not. The finding must be on the evidence on record. The finding will be submitted within three months from the date of this order and 10 days will be allowed for filing objections.

AYLING, J. — I concur in the order proposed by my learned brother.

I am not altogether satisfied that in face of the findings of the Subordinate Judge, the plaintiff's prayer for a declaration of title to the suit site is sustainable, although at this stage I am

(1) (1901) I.L.R., 25 Bom., 287.

(2) (1864) 2 M.H.C.R., 171.

(3) (1898) I.L.R., 20 Cal., 834 (P.C.).

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not prepared to differ. On the other hand it seems to me clear that for the disposal of the second and third of the plaintiff's prayers the findings are defective. The right of the Government to levy penal assessments is conditional on the land being communal or, as it is here described, *Ashalmenaha*; and the learned Subordinate Judge seems to have overlooked the fact that, although the plaintiff may not have established his title to the suit land, he may nevertheless claim immunity from penal assessment thereon unless the land is *Ashalmenaha*. There is no finding as to this and a finding on this point indicated by my learned brother becomes necessary.

In compliance with the order contained in the above judgment, the Subordinate Judge of Kistna at Ellore submitted the following

FINDING.—I am directed to submit my finding on the evidence on record on the following issue:—

Whether the land in dispute is *Ashalmenaha* land or not?

The suit site is situated in the village of Vandram. It is deposed to by plaintiff's witnesses Nos. 1 to 4 and admitted by defendant's witnesses Nos. 11 and 15 that the suit site lies in the middle of the village surrounded by houses. The defendant's witnesses Nos. 1 to 10 are admittedly residents of other villages who do not know anything about the suit site. The defendant's witness No. 12 only speaks to his attestation of a certain mortgage document. The only material evidence is that of defendant's witnesses Nos. 11, 13, 14, 15 and 16.

The defendant's witness No. 11 is G. Venkataswami, who is a resident of Vandram. The defendant's witness No. 11 deposed that plaintiff's vendor Subbarayudu lived in Vandram only for 3 years on the suit site but the witness was unable to state in his cross-examination to whom the suit site belonged. The witness stated that the suit site is in the middle of the village and that potters "come and occupy it and go."

The defendant's witness No. 12 did not say anything about the ownership of the suit site. The defendant's witness No. 13 A. Narasimulu is the most important witness. He was the karnam of the village Vandram for 40 years from 1860 to 1900. The witness deposed that plaintiff's vendor Subbarayudu came to the suit site in 1900 and lived there for 3 years. The witness further

On the finding which we accept the decree of the District Judge is set aside and that of the Munsif restored with costs here and in the Lower Appellate Court.

The vakil for respondents appeared later and said he did not contest the findings.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Abdur Rahim.

B. AYYAPARAJU (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(REPRESENTED BY THE COLLECTOR OF KISTNA DISTRICT,
DEFENDANT), RESPONDENT.*

Penal assessment—Right of Government to levy—Interference with possession—Possession short of the statutory period, insufficient basis for a suit for a declaration of title—Specific Relief Act (I of 1877), sec. 42.

Per curiam.—The Government has no right to collect penal assessment from a person in possession of land simply on the ground that he is not the legal owner of the land, but such right is conditional on the land being communal.

Per ABDUR RAHIM, J. (AYLING, J. dubitante).—A person in possession of land even though for less than 12 years, would, under section 42 of the Specific Relief Act, be entitled to a declaration that he is in lawful possession as against a wrong doer who interferes with his possession.

Ismail Arif v. Mahomed Ghous (1893) I.L.R., 20 Cal., 834 (P.C.), applied.

Hanmantarav v. Secretary of State for India (1901) I.L.R., 25 Bom., 287, distinguished.

Rassoonada Bayar v. Sitharama Pillai (1864) 2 M.H.C.R., 171, referred.

The levying of penal assessment on land if not justified amounts to unlawful interference with possession.

SECOND APPEAL against the decree of T. GOPALAKRISHNA PILLAI, the Subordinate Judge of Kistna at Ellore, dated the 20th December 1909, in Appeal No. 128 of 1908, preferred against the decree of R. GOPALA RAO PANTULU GARU, the District Munsif of Narasapur, in Original Suit No. 873 of 1906.

* Second Appeal No. 1291 of 1910.

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

P. Narayanamurthi for the appellant.

The Government pleader Mr. C. F. Napier for the respondent.

ABDUR RAHIM, J.—In this case the plaintiff sued the Secretary of State asking for a decree declaring his title to a house-site in a certain village, for recovering a certain sum of money which had been levied from him as penal assessment and for a perpetual injunction restraining the defendant from levying any such assessment on the lands in question. The defendant's case was that the land *Ashalmenaha* being what is called Potter's Inam, and does not belong to the plaintiff and that on that ground the defendant was entitled to collect penal assessment from the plaintiff.

Both the lower courts, on a consideration of the evidence, have found that the plaintiff did not succeed in proving the ownership of the land. It is found however at the same time that the plaintiff is in possession of the land and has been so for about three years. He is in possession under two documents of title derived from two persons, Venkatasami and Subarayudu, one of whom at least was in possession of the land. There is no finding by either court as to whether the land is *Ashalmenaha* or Potter's Inam or not. They thought that, inasmuch as the plaintiff failed to prove the title of his vendors, the suit must be dismissed. In my opinion that would not be sufficient to conclude this suit. It is found that the plaintiff is in possession of the land and we may take it that he is in possession, under a *prima facie* title, derived from persons in possession of the land. That being so, if the defendant failed to prove that the land was an *Ashalmenaha* or Potter's Inam and he had a legal title to it, the plaintiff would be entitled at least to the declaration that he is in lawful possession of the land to use the language of the Privy Council in *Ismail Ariff v. Mahomed Ghous*(1). It is contended however by the learned pleader who appeared for the respondent that mere possession is not sufficient to found a declaration of title; and in support of this he cited *Hanmantarav v. Secretary of State for India*(2) and *Rassoonada Bayar v. Sitharama Pillai*(3). The ruling in *Hanmantarav v.*

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(1) (1893) I.L.R., 20 Cal., 834 (P.C.). (2) (1901) I.L.R., 25 Bom., 287.

(3) (1864) 2 M.H.C.R., 171.

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RAHIM, J.

Secretary of State for India(1) does not, it seems to me, support the contention of the respondent. All that is laid down there is that, if the possession is shown to be wrongful, then the plaintiff would not be entitled to a declaration of title. But here it cannot be said upon the findings as they now stand that the plaintiff's possession is wrongful. It is not necessary to discuss *Rassoonada Rayar v. Sitharama Pillai*(2), because in my opinion the subsequent judgment of the Privy Council in *Ismail Arief v. Mahomed Ghous*(3) is quite clear and conclusive on the point. I may observe that at first I was inclined to entertain some doubt as to whether in a case where the defendant has not actually dispossessed the plaintiff, the plaintiff would be entitled to a declaration of his title on the strength merely of possession not extending over the statutory period. But it seems that the decision of the Privy Council at least goes to the extent that, if the plaintiff has been in possession even though for less than 12 years, he would under section 42 of the Specific Relief Act be entitled to a declaration that he is in lawful possession as against a wrong doer who sought to interfere with his possession. The levying of penal assessment on the land, if it was not justified, would amount to unlawful interference with the plaintiff's possession.

Then apart from the question whether the plaintiff is entitled to a declaration in the terms asked for by him, it seems to me to be clear that, if the land is not shown to be communal land, the Secretary of State would have no right to collect penal assessment from a person in possession thereof simply on the ground that he is not the legal owner of the land, but somebody else. It thus becomes necessary that we should have a finding on the question whether the land in dispute is *Ashalmenaha* land or not. The finding must be on the evidence on record. The finding will be submitted within three months from the date of this order and 10 days will be allowed for filing objections.

AYLING, J.

AYLING, J. — I concur in the order proposed by my learned brother.

I am not altogether satisfied that in face of the findings of the Subordinate Judge, the plaintiff's prayer for a declaration of title to the suit site is sustainable, although at this stage I am

(1) (1901) I.L.R., 25 Bom., 287.

(2) (1864) 2 M.H.C.R., 171.

(3) (1898) I.L.R., 20 Cal., 834 (P.O.).

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not prepared to differ. On the other hand it seems to me clear that for the disposal of the second and third of the plaintiff's prayers the findings are defective. The right of the Government to levy penal assessments is conditional on the land being communal or, as it is here described, *Ashalmenaha*; and the learned Subordinate Judge seems to have overlooked the fact that, although the plaintiff may not have established his title to the suit land, he may nevertheless claim immunity from penal assessment thereon unless the land is *Ashalmenaha*. There is no finding as to this and a finding on this point indicated by my learned brother becomes necessary.

In compliance with the order contained in the above judgment, the Subordinate Judge of Kistna at Ellore submitted the following

FINDING.—I am directed to submit my finding on the evidence on record on the following issue:—

Whether the land in dispute is *Ashalmenaha* land or not?

The suit site is situated in the village of Vandram. It is deposed to by plaintiff's witnesses Nos. 1 to 4 and admitted by defendant's witnesses Nos. 11 and 15 that the suit site lies in the middle of the village surrounded by houses. The defendant's witnesses Nos. 1 to 10 are admittedly residents of other villages who do not know anything about the suit site. The defendant's witness No. 12 only speaks to his attestation of a certain mortgage document. The only material evidence is that of defendant's witnesses Nos. 11, 13, 14, 15 and 16.

The defendant's witness No. 11 is G. Venkataswami, who is a resident of Vandram. The defendant's witness No. 11 deposed that plaintiff's vendor Subbarayudu lived in Vandram only for 3 years on the suit site but the witness was unable to state in his cross-examination to whom the suit site belonged. The witness stated that the suit site is in the middle of the village and that potters "come and occupy it and go."

The defendant's witness No. 12 did not say anything about the ownership of the suit site. The defendant's witness No. 13 A. Narasimulu is the most important witness. He was the karnam of the village Vandram for 40 years from 1860 to 1900. The witness deposed that plaintiff's vendor Subbarayudu came to the suit site in 1900 and lived there for 3 years. The witness further

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deposed that Subbarayudu's brother Venkataswami, defendant's witness No. 3, was not known to him. In his cross-examination, defendant's witness No. 13 stated that as he had not reported the encroachment of Subbarayudu when it occurred, he (witness) was fined after it was reported by him. I may here observe that the defendant's case, as set out in the written statement (*vide* paragraph 1), was that the suit site is a portion of an *Ashalmenaha* land set apart for communal purposes. But not a single question appears to have been asked by defendant's vakil about this to defendant's witness No. 13 in his examination-in-chief. And the only facts elicited in his cross-examination by plaintiff's vakil are that "those who came to live on the suit site were not Circar servants, that they used to live in a paka (shed) on a cent of land and that the potters have a (separate) inam in the village. With reference to this admission of defendant's witness No. 13 it is argued for this plaintiff that the suit site was not the "*Ashalmenaha*" land of defendant. It is further argued that if the suit site had really been a part of *Ashalmenaha*, the defendant would have certainly produced the accounts showing the *Ashalmenaha* lands. In other words, the best evidence would have been the production of the accounts relating to *Ashalmenaha* lands. The non-production of the said accounts is a very strong circumstance against defendant because the presumption is that the production would be unfavourable to him.

The evidence of the remaining defendant's witnesses Nos 14 to 16 tends to show that the suit site was in the enjoyment of successive potters for a long period before plaintiff's vendor Subbarayudu came to reside on the suit site in 1900. The evidence on plaintiff's behalf is that the villagers introduced the several potters in succession and allowed them to remain on the suit site. It is not proved by defendant that the several potters occupied the suit site with the permission of the *Village officers* as stated in paragraph 3 of defendant's written statement. On the contrary the admissions elicited in the cross-examination of the (karnam) defendant's witness No. 13) to the effect that "those who came to live on the suit site were not Circar servants" and that "there was a separate inam for potters in the village" lend strong support to the plaintiff's case that the suit site was in the enjoyment of successive potters who were introduced by the villagers themselves as the site in question did not belong

to Government. The plaintiff's witnesses Nos. 5 and 6 deposed that the Government had no right to the suit site at any time.

Thus with reference to the evidence discussed *pro* and *con* in the foregoing paragraphs, I hold that the *onus* of providing that the suit site is a part of *Ashalmenaha* lay on the defendant and that this *onus* has not been discharged. Nothing was elicited in the examination of the karnam (defendant's witness No. 13) as to the right set up by defendant in respect of the suit site as *Ashalmenaha* land. The defendant could have produced the accounts relating to *Ashalmenaha* lands. This would have been the best evidence. But such evidence has not been produced and the karnam himself does not depose that the suit site is a part of *Ashalmenaha* land. I therefore find the issue in the negative.

This Second Appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.

There is evidence in support of the finding and we must accept it.

A question is now raised for the first time that the cause of action for the recovery of the money was barred by the provisions of the Act III of 1905; we cannot decide that question in the appellant's favour, seeing that neither of the Courts below was asked to consider it.

Accepting the finding we reverse the decree of both Courts and declare that the plaintiff is in lawful possession of the land in suit, directing the payment to him of Rs. 6-4-0 wrongfully collected from him.

The plaintiff's costs throughout should be paid by the defendant. Six months' time will be allowed under section 82 of the Code.

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APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

V. ADINARAYANA (PLAINTIFF), APPELLANT

v.

P. RAMUDU alias RAMASWAMY AND THREE OTHERS
(DEFENDANTS), RESPONDENTS.*

1912.
October, 17
and 21,
and
November,
19.

Easements—Water rights—Distinction between surface water, and water flowing in a definite channel.

No claim can be made, either as a natural right or as an easement by prescription, to water which does not flow in a definite course, but which should be regarded as surface water or surface drainage.

The right to the water of a stream does not cease, when it ceases to flow in a confined water course, unless it exhausts itself as a stream, and merely soaks into the ground.

The chief characteristic of surface water is its inability to maintain its identity and existence as a water body. When the flow of water on one person's land can be identified with that on another, a right to such flow can arise, although the water may flow along an intervening piece of land.

Water flowing into a field from a known channel and passing along the field onwards into another field though not over a confined track in the former field, but along its whole area is not surface water.

Well-defined existence arising from an ascertained course is the real test in coming to a conclusion against any body of water being regarded as surface water.

The question whether or not particular water is surface water is one of fact to be determined by the circumstances attending its origin and continued existence.

The right to the water of a stream is sustainable notwithstanding the fact that the water in the stream is not always sufficient for the purpose for which the right is claimed, or that it reaches the plaintiff's land not directly, but indirectly by flowing into another channel.

A river channel supplied the means of irrigation for the lands of the parties to the suit, and the other ryots of the village. A branch leading from the main channel passed through the lands of defendants Nos. 1, 2 and 3 in a definite water-course up to the fourth defendant's lands; when it entered the fourth defendant's field, and after irrigating it, flowed over its bunds and joined another channel which irrigated the plaintiff's lands. Defendants Nos. 1, 2 and 3 blocked up the channel at a point higher than the fourth defendant's land. In a suit by plaintiff for declaration of his right to the customary supply of water

* Second Appeal No. 931 of 1911.

through the channel, and for an injunction restraining the defendants from obstructing the water-course.

Held, that the water of the channel when it entered the fourth defendant's field could not be regarded as surface water, but continued in a definite water-course, and plaintiff was entitled to the usual supply of water unobstructed.

SECOND APPEAL against the decree of A. L. HANNAY, the District Judge of Vizagapatam, in Appeal No. 20 of 1910, presented against the decree of T. N. LAKSHMAN RAO PANTULU, the District Munsif of Vizagapatam, in Original Suit No. 721 of 1908.

The necessary facts are fully set out in the judgment.

B. Narasimheswara Sarmia for the appellant.

K. V. L. Narasimham and *V. Ramesam* for the first and the second respondents.

JUDGMENT.—In this case the plaintiff asked for a declaration of his right to take water through a channel for the cultivation of certain land belonging to him and for an injunction restraining the defendants from obstructing the course of the channel. The lands both of the plaintiff and defendants are situated in a proprietary estate. According to the plaintiff a river channel supplied the means of irrigation for the lands of the parties and other ryots who had lands alongside the stream. A branch leading from the main channel passed through the lands of the defendants Nos. 1, 2 and 3 and then the fourth defendant's land and, according to the plaintiff, afterwards reached his own land. Defendants Nos. 1, 2 and 3 are alleged to have blocked up the channel at a point higher than the fourth defendant's land. They contended that the channel never irrigated the lands either of the fourth defendant or of the plaintiff, and that it stopped somewhere near their own lands. The fourth defendant did not contest the suit.

The facts found by the Lower Appellate Court, as we understand the judgment of the District Judge, are:—that the channel in question continued, as a definite water-course, up to the fourth defendant's lands, and that the water of the channel flowed over the bunds of the fourth defendant's fields and joined another channel which irrigated the plaintiff's lands.

The District Munsif held that the plaintiff was entitled to the flow of the channel water along the fourth defendant's lands to the channel which was the direct source of irrigation for his land, and that the contesting defendants were not entitled to interfere with

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the flow. On appeal the District Judge held that, as the water of the stream did not flow direct to the plaintiff's land in any defined course, it must be taken that it was not intended to supply water to the plaintiff's land. He regarded the water as it flowed from the fourth defendant's land over his bunds as mere surface drainage and was of opinion that the plaintiff could not claim any legal right to it. He, consequently, dismissed the plaintiff's suit.

The question argued in Second Appeal is whether the plaintiff is not entitled to the customary flow of the water of the stream A-1 along the fourth defendant's field until it joined the channel which supplied water to his own field. There was, according to the finding of the Appellate Court, no definite water-course across the fourth defendant's field, the water-course ceasing to have any definite bed and banks after it reached the fourth defendant's field. We must also take it, on the findings, that the water in the stream was not always sufficient to irrigate the lands of the fourth defendant or to supply a flow to the plaintiff's channel. But this we regard as immaterial; such is the case with many streams and channel in this country. It is also immaterial that the water of the stream flowing through the fourth defendant's land did not reach the plaintiff's land direct but joined another channel out of which the plaintiff got his water. If the water of the stream supplied a means of irrigation to the plaintiff, it is immaterial whether it did so by directly reaching the plaintiff's land or indirectly by flowing into another channel.

The substantial question for decision is whether the fact that there was no defined channel across the fourth defendant's field but that the stream spread itself all along the field and overflowed the bunds to reach the plaintiff's channel puts the plaintiff out of Court. The question is one of considerable importance in this country. It was stated by the learned vakil for the appellant, and we believe with good reason that irrigation channels do not always go direct to every field irrigated by them and that the water often flows from one field to another, either through cuts made in the bund of the field or by overflowing the bund. And he submitted that it would be disastrous if it should be held that the owners of fields on the further side of channels could not support their right to the waters of the channels in the absence of a confined passage along each field irrigated by them.

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The respondents' pleader contended, on the other hand, that no claim can be made by anyone to a flow of water except to water flowing in a definite channel, and that all water which disperses itself over a field without a definite water-course must be regarded as drainage and surface water which the owner of the field over which it passes is entitled to appropriate or divert as he pleases.

After full consideration we are of opinion that the respondents' contention should not be sustained. It is no doubt true that no claim can be made, either as a natural right or as an easement by prescription except to water flowing in a definite course and that no such claim could be maintained with regard to what should be regarded as surface water or surface drainage in the proper acceptance of those expressions. But if this principle be understood correctly, it cannot, in our opinion, be held that the right to the water of a stream ceases when it ceases to flow in a confined water-course. If the stream has exhausted itself as a stream and merely soaks into a field, then, no doubt, no right to the water so soaking can be sustained in the same manner as no right can be recognised to water falling on a field from the sky overhead or oozing from the soil underneath. Water of any of these descriptions cannot be the subject of any right until it again begins to flow in a definite course. The reason why no right to such water can be recognised is explained in various decided cases. In *Acton v. Blundell*(1) the question arose with regard to water flowing in a subterraneous course and supplying a valley, which was drained away by a land-owner who carried on mining operations in his own land in the usual manner. TINDAL, C. J., explaining the ground and origin of the law which is held to govern running streams, observed as follows:—

“The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious: that the enjoyment has been long continued—in ordinary cases, indeed, time out of mind—and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has always been transmitted to the lower.” The right to use such water the

(1) 1843 12 M. and W., 324, at pp. 349 and 350.

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learned Judge regards, as stated by STORY, J., in *Tyler v. Wilkinson*(1) to be 'an incident to the land.' He continues, "But in the case of a well sunk by a proprietor, in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its surface: no man can tell what changes these underground sources have undergone in the progress of time: it may well be, that it is only yesterday's date, that they first took the course and direction which enabled them to supply the well: again, no proprietor knows what portion of water is taken from beneath his own soil: how much he gives originally, or how much he transmits only, or how much he receives: on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all." In addition to the uncertainty and changes in the supply, his Lordship refers to two other reasons why no right to any such water should be recognized, namely, that every man, by virtue of his ownership, is entitled to abstract everything he can from his own land, and secondly, he is entitled to make the best use of his land for his own benefit. He observes, "In the case of the running stream, the owner of the soil merely transmits the water over its surface: he receives, as much from his higher neighbour as he sends down to his neighbour below: he is neither better nor worse: the level of the water remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil: and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbour, he may impose on such neighbour the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of mining, and discovers, when too late, that the appropriation of the water has already been made."

(1) 4 Mason's American Reports, 401.

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In *Rawstron v. Taylor*(1) the reasons why no right could be obtained over surface water were pointed out. The judgments of the Court throw light also on what should really be regarded as surface water. PARKE, B. said "This is the case of common surface water rising out of springy or boggy ground, and flowing in no definite channel, although contributing to the supply of the plaintiff's mill. This water having no defined course, and its supply being merely casual, the defendant is entitled to get rid of it in any way he pleases." MARTIN, B. emphasised the right of every land-owner to enjoy his land as he chooses. He said "The proprietor of the soil has *prima facie* the right to drain his land. He is at liberty to get rid of the surface water in any manner that may appear most convenient to him; and I think no one has a right to interfere with him, and that the object he may have in so doing is quite immaterial." PLATT, B. observed "The plaintiff could not insist upon the defendant maintaining his fields as a mere water-table." In *Broadbent v. Ramsbotham*(2) which also related to surface water, the grounds of decision were the same. The plaintiff claimed four sources of water which he said supplied the Longwood Brook on which his mill was situated. One of the sources was a swamp of 16 perches. ALDERSON, B. observed that it was merely like a sponge fixed (so to speak) on the side of the hill and full of water. "If this overflows it creates a sort of marshy margin adjoining; and there is apparently no course of water, either into or out of it, on the surface of the land. As to the subterranean courses communicating with this swamp, which must no doubt exist, it is sufficient to say, that they are not traceable, so as to show that the water passing along them ever reaches Longwood Brook." It will be observed that the learned Judge considered it material that there was no course of water into the swamp. The judgment of Lord HATHERLEY, L. C. in *Grand Junction Canal Company v. Shugar*(3), is also important as throwing light on the nature of surface water. He observed referring to *Chasemore v. Richards*(4) "Mr. Justice WIGHTMAN there laid down the law very plainly in giving the opinion of the Judges upon the subject, and the distinction was there drawn—and, I should have

(1) (1855) 11 Exch. 360, at pp. 378, 382, 383 and 384.

(2) (1856) 11 Exch. 602, at p. 615. (3) (1871) L.R. 6 Ch. App. 482, at p. 486.

(4) (1859) 7 H.L.C. 349.

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thought, firmly established—between water which comes no one knows exactly whence, and flows no one knows exactly how, either underground or on the surface, unconfined in any channel, either as rainfall or from springs of the earth, which may vary from day to day, or spring up from beneath the surface in a direction which no one knows—between that species of water and water once confined in a regular channel.” His Lordship’s description is quite inapplicable to water flowing into a field from a known channel and passing along the field, onwards into another field, though not over a confined tract in the former field but along its whole area. We may refer also to the observations of Lord Watson in *M’Nab v. Robertson*(1), “water, whether falling from the sky or escaping from a spring, which does not flow onward with any continuity of parts, but becomes dissipated in the earth’s strata, and simply percolates through or along those strata, until it issues from them at a lower level, through dislocation of the strata or otherwise, cannot with any propriety be described as a stream.” It is impossible to apply this description to the water of a stream flowing into it and afterwards passing out of it after irrigating it, though without making a cutting for itself, over any particular portion of the field. The true test of the existence of a common right is explained in Angell on “Water-courses,” section 108 (o), page 187. The learned author says: “It is to be observed that it is only when the flow of water on one person’s land is identified with that on his neighbour’s, by being traceable to it along a distinct and defined course, that the two proprietors can have natural relations with each other in respect of it, considered as the subject of separate existence. If the waters on the two lands do not possess this unity of character, they are in the same category as fish and birds, etc., and are only incident to, and form part of, the produce of, their respective soils, while actually resting upon them; no proprietor can make claim to water in such condition before it arrives within his own borders. Nor can any proprietor claim that another shall receive it within his borders or that he shall not take appropriate measures upon his own land, and in the reasonable use thereof, to prevent its collecting upon his soil.” The next section illustrates

(1) (1897) A.C. 129, at p. 184.

the real character of surface water: “Thus water rising naturally, making land spongy and wet, and squandering itself over the surface, has no public character whatever, although it ultimately finds its way to, and feeds, a stream; and therefore, before it arrives at any defined natural channel, it belongs solely to the owner of the land which it covers, and he may deal with it exactly as he thinks fit, while he is making a reasonable use of his own land. Such, also, is the case with water which percolates through the porous basin of a pond, or overflows the edge of a well, or which passes or runs off the surface of the soil, before, in either instance, it makes itself some natural channel. And, clearly, water severed from all other water, as in a pond or tank, and resting solely on the proprietor’s own ground, must be in a similar plight.” When the flow of water on one person’s land can be identified with that on another, there is no reason why a right to such flow should not exist although the water may flow along an intervening piece of land. “A mere right of a drainage over the general surface of land is very different from the right to the flow of a stream or brook across the premises of another.” Farnham in his ‘Law of Waters and Watercourses,’ vol. III, page 2556, observes, “when water appears upon the surface in a diffused state, with no permanent source of supply or regular course, and then disappears by percolation or evaporation, its flow is valuable to no one, and it must be regarded as surface water, and dealt with as such. In *Crawford v. Rambo*(1) it is said that surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters, whether derived from the surface or springs; and then it becomes the running water of a stream, and ceases to be surface water. In each case the question whether or not particular water is surface water is one of fact to be determined by the circumstances attending its origin and continued existence. If the water is spread out and flows sluggishly over the surface, losing itself by percolation and evaporation, it is surface water, although it has its source in springs. But the mere fact that the water spreads

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(1) 44 Ohio St. 287; s.c., 7 N.E. 429.

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out at some places, and flows sluggishly without sufficient force to form a channel for itself, does not make it surface water if the flow has sufficient force to maintain itself, and it is subsequently gathered together into a channel so as to form a water course. The chief characteristic of surface water is its inability to maintain its identity and existence as a water body. But marsh lands through which overflow water from a lake reaches a natural stream are not governed by the rules applicable to mere surface water." Well-defined existence arising from an ascertained course appears to be the real test in coming to a conclusion against any body of water being regarded as merely surface water. See Farnham, page 2556. Angell refers to a case which throws light on what is really necessary to make a water course. For seven rods the stream descended rapidly in a well-defined course to a piece of marshy ground where it spread so that its flow was slight and not sufficient to break the turf but was generally sufficient to form a continuous sluggish current along the surface in a natural depression to a watering place within the plaintiff's land. This was adjudged to be a water-course within the meaning attached in law to that term. Domat states the rule of Civil law as follows: "If waters have their course regulated from one ground to another, whether it be by the nature of the place, or by some regulation, or by a title, or by an ancient possession, the proprietors of the said grounds cannot innovate anything as to the ancient course of the water. Thus, he who has the upper ground cannot change the course of the waters, either by turning it some other way, or rendering it more rapid, or making any other change in it to the prejudice of the owner of the lower grounds."

It is quite clear that the water of the channel in dispute between the parties in the present case when it entered the fourth defendant's land could not be regarded as surface water. It came from the channel in dispute. Its origin is not on the fourth defendant's land, nor did it come upon the surface of his and through the pores of the earth. The channel did not, according to the findings, 'lose itself' and get mixed up with the earth of the fourth defendant's land but continued its course along his field. The identity of the stream was preserved when it passed out of the field. It may be that the fourth defendant could, if he chose, restrict the passage of the stream along his land by

confining it to a channel, occupying only a small portion of his field. It was not, however, the fourth defendant that obstructed the course of the stream, but defendants Nos. 1, 2 and 3; and the obstruction was made at a place before the stream reached the fourth defendant's land. They had no right to do so. In *Dudden v. Guardians of Clutton Union*(1) the water from a spring flowed in a gully or natural channel to a stream on which was a mill. The spring having been cut off at its source and the water received into a tank as it rose from the earth, by the license of the owner of the soil on which the spring rose: it was held that an action would lie against the obstructor by the owner of a mill who used to receive a supply of water for his mill.

The obstruction in this case, according to the finding, was at a place where the channel undoubtedly existed as a regular water-course. In our opinion, it did not cease to be such before it reached the channel which directly irrigated the plaintiffs' land. It did not become surface water on reaching the fourth defendant's land.

We reverse the District Judge's decision and restore the decree of the District Munsif with costs both here and in the lower appellate court.

The plaintiff will also have the further relief of an injunction against defendants Nos. 1 to 3 from interfering with the plaintiff's rights declared and granted by the District Munsif who refused that relief of injunction on insufficient grounds and against which refusal, the plaintiff filed a memorandum of objections in the District Court and has also complained in the Second Appeal memorandum before us.

(1) (1857) I. H. and N. 627.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

VYAPURI GOUNDAN AND TWO OTHERS (COUNTER-PETITIONERS),
APPELLANTS,

v.

A. C. CHIDAMBARA MUDALIAR (PETITIONER), RESPONDENT.*

Res judicata—Execution proceedings—Order returning execution application for correction of the amount claimed, without notice to judgment-debtor, whether binding on the decree-holder.

Where the Court without issuing notice to the judgment-debtor returned an execution application, directing the decree-holder to amend the same by reducing the amount claimed, and the decree-holder failed to appeal against the order,

Held, that the order was a judicial adjudication in a proceeding between the parties, that the decree-holder was not entitled to the larger amount, and that the decree-holder was consequently debarred from claiming the larger amount in a fresh execution application. The fact that the judgment-debtor had no notice is immaterial, except when the order is passed against him, in which case it is an *ex parte* order, and cannot bind a party who had no opportunity to make his defence.

Hiralal Bose v. Dwija Charan Bose [(1906) 3 C.L.J., 240], *Bholanath Das v. Prafulla Nath Kundu Chowdry* [(1901) I.L.R., 28 Calc., 122] and *Delhi and London Bank, Limited, v. Orchard* [(1877) I.L.R., 8 Calc., 47 (P.C.)], distinguished.

APPEAL against the order of C. G. SPENCER, the District Judge of Trichinopoly, in Appeal No. 44 of 1911 (Execution Petition No. 1791 of 1910 in Original Suit No. 289 of 1897 on the file of C. V. VISVANATHA SASTRI, the District Munsif of Trichinopoly).

The necessary facts appear from the judgment.

K. V. Krishnaswamy Ayyar for the appellants.

C. V. Ananthakrishna Ayyar for the respondent.

JUDGMENT.—The plaintiff obtained a decree on a mortgage against the defendants. The decree directed a certain amount to be paid with future interest on the principal at 18 per cent. per annum. Various payments were made by the defendants from time to time. There have in all been 14 applications by the plaintiff for execution. In the first 12 applications he appropriated the payments in a certain way (which it is necessary

* Appeal Against Appellate Order No. 70 of 1911.

to describe). In the 13th application, *i.e.*, the one immediately preceding the present one, he made his calculation of the amount due to him in quite a different way with the result that the amount was shown to be much larger than what would be due according to the method of calculation adopted in the previous applications. The Court held without issuing notice to defendants that the plaintiff was not entitled to the larger amount and returned his application with the direction that he should amend the amount due to him in accordance with the mode of calculation previously adopted by him. He never appealed against this order, nor did he obey the direction to amend his petition. It was accordingly rejected. He put in the present application after the period allowed for amendment had elapsed but before the previous application was rejected. He made his claim in the present application on the same basis as in the 13th application. The District Munsif held that he could not do so. On appeal the District Judge held that the plaintiff was not bound to adopt the mode of calculation previously adopted erroneously in the Judge's opinion. We are of opinion that the order of the Munsif on the 13th application holding that the plaintiff was not entitled to claim a larger amount on a new basis must be held to bar the contention that he is entitled to do so. The order was a judicial adjudication that the plaintiff was not entitled to calculate the amount due to him on a certain basis. The plaintiff was certainly entitled to appeal against it, if so advised, and he failed to do so. The ground in which the District Judge has held the contrary view is that the order was passed without notice to the defendants and could not therefore be regarded as a decision between the two parties. In our opinion this view is wrong. The plaintiff's petition for execution was a proceeding between him and the defendants and the order decided the question of the plaintiff's right as against them. The fact that the defendants were not called on to appear and answer the plaintiff's claim is immaterial. Suppose a suit is dismissed as barred by limitation without notice to the defendant on the ground that the plaintiff's own allegations show that the suit is barred. It would be impossible to hold that the plaintiff could sue again on the same cause of action. In execution proceedings orders may be passed without notice to defendant. If any such order is

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against the defendant and further proceedings in execution are subsequently dropped by the plaintiff and afterwards commenced again, the previous order against the defendant would not bar him from setting up any defence that may have been adjudicated on without notice to him. This is not on the ground that the former order was not one passed between the parties, but because an *ex parte* order cannot bind a party against whom it is passed without his having an opportunity to make his defence. But the bar of former adjudication cannot be avoided by a party who had such an opportunity. The learned vakil for the respondent has relied on three cases in support of his contention that the former order is not conclusive against his client. *Hiralal Bose v. Dwiija Charan Bose*(1), *Bholanath Das v. Prafulla Nath Kundu Chowdhry*(2), and *Delhi and London Bank, Limited, v. Orchard*(3); but none of these is in point. In *Bholanath Das v. Prafulla Nath Kundu Chowdhry*(2), the judgment-debtor put in a counter-petition stating that the plaintiff's application for execution was barred. Both parties failed to appear on the date fixed for the hearing and the Court dismissed for default both the petition for execution and the counter-petition. When the plaintiff again applied for execution, the defendant again set up the plea of limitation and the Court held that the former order did not bar his plea as the dismissal of the counter-petition was not based on the merits of the plea. In *Hiralal Bose v. Dwiija Charan Bose*(1) also the previous application for execution was struck off without any judicial determination on the question of limitation which was set up in the subsequent application. In *Delhi and London Bank, Limited, v. Orchard*(3) the head note of which in the report is inaccurate, all that Their Lordships of the Privy Council held was that an order sending an application for execution to the record room on the ground of non-receipt of the Commissioner's sanction which was required under the law was not a judicial determination of any question between the parties. There was no decision on the question of limitation at all. See *Manjunath Badrabhat v. Venkatesh Govind Shambhog*(4).

We reverse the order of the Lower Appellate Court. The plaintiff may amend his petition by substituting the amount

(1) (1906) 3 C.L.J., 240.

(2) (1901) I.L.R., 28 Cal., 122.

(3) (1878) I.L.R., 3 Cal., 47 (P.C.).

(4) (1882) I.L.R., 6 Bom., 54.

due to him in accordance with his former calculation. He must pay the appellants' costs here and in the Lower Appellate Court.

The case is remanded to the District Munsif's Court for fresh disposal according to law.

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APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

Re S. SUPPAYA THARAGAN, ACCUSED (IN CALENDAR CASE
No. 19 OF 1912 ON THE FILE OF THE JOINT MAGISTRATE
OF PALGHAT).

1912.
November 26.

*Criminal Procedure Code (Act V of 1898), sec. 476—Sanction to prosecute—
Section 537 (b)—Illegality or Irregularity.*

Where a sanction to prosecute given under section 476, Criminal Procedure Code (Act V of 1898), did not order accused to be sent before the nearest First Class Magistrate but merely ordered his prosecution.

Held, that though the sanction was irregular it was not illegal and that the irregularity was cured by section 537 (b), Criminal Procedure Code.

In the matter of the petition of Bhup Kunwar (1904) I.L.R., 26 All., 249 at p. 256, dissented from.

CASE taken up under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), by the High Court to revise the judgment of A. EDINGTON, the Acting District Judge, in Criminal Appeal No. 27 of 1912, preferred against the judgment of J. F. HALL, the Joint Magistrate of Palghat Division, in Calendar Case No. 19 of 1912.

In this case the accused was convicted of giving false evidence by the Joint Magistrate of Palghat who took proceedings under section 470, Criminal Procedure Code, and directed the prosecution of the accused but did not send him to the nearest First Class Magistrate as required by section 476 because he considered it would be more convenient if he were tried by his successor. On appeal to the Sessions Court this conviction was reversed on the ground that the failure to send the accused to the nearest First Class Magistrate rendered the sanction order

(Criminal Revision Case No. 458 of 1912.)

(Taken up Case No. 12 of 1912.)

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illegal. In his judgment the Sessions Judge said:—"The word 'Court' in this section has been held in *Begu Singh v. Emperor*(1) to mean the Judge who tries the case and both in the case quoted and in the Full Bench ruling *Ayyakannu Pillai v. Emperor*(2), it has been ruled that the power conferred by section 476, Criminal Procedure Code, can be exercised only at or immediately after the conclusion of the trial in which the offence was committed before the Court.

A. Sundaram for the accused.

The Public Prosecutor Mr. C. F. Napier, for the Crown.

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AND
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LYTAR, JJ.

ORDER.—We are unable to agree with the Sessions Judge that there was any illegality in the order of THOMAS, the Magistrate, under section 476, Criminal Procedure Code, on the 15th January 1912.

His omission to at once direct the accused to be taken before the nearest First Class Magistrate was at most an irregularity, which was set right by the subsequent order directing him to be taken before such Magistrate. Such irregularity is expressly cured by section 537(b), Criminal Procedure Code. We are unable to agree with the view taken by STANLEY, C. J., in *In the matter of the petition of Bhup Kunwar*(3) with reference to the construction of that clause.

We set aside the order of acquittal made by the Sessions Judge and direct him to restore the appeal to his file and dispose of it according to law.

(1) (1907) I.L.R., 34 Cal., 551. (2) (1909) I.L.R., 32 Mad., 49 (F.B.).
(3) (1904) I.L.R., 26 All., 256.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

P. LAKSHMINARASIMHAM PANTULU GARU
(PLAINTIFF), APPELLANT,

v.

SREE SREE RAMACHANDRA MARIDARAJA DEO GARU
(MINOR, BY GUARDIAN, THE COLLECTOR OF GANJAM,
THE DEFENDANT'S LEGAL REPRESENTATIVE), RESPONDENT.*

Madras Estates Land Act (I of 1908), s. 77—*Madras Local Boards Act* (V of 1884)
ss. 78 and 74—*Right of land-holder to distrain property of intermediate,
tenure-holder for cess paid.*

Neither section 77 of the *Madras Estates Land Act*, nor sections 78 and 74 of the *Madras Local Boards Act* authorizes a land-holder to levy distraint against an intermediate tenure-holder for recovering any portion of cess collected from the land-holder.

SECOND APPEAL against the decree of M. MUNDAPPA BANGERA, the District Judge of Ganjam, dated 29th March 1910, in Appeal No. 86 of 1909 preferred against the decree of E. SITARAMA RAO NAYUDU, the Head-quarters Deputy Collector of Ganjam, in Summary Suit No. 368 of 1908.

The facts are fully given in the judgment.

V. Ramesam for the appellant.

Dr. S. Swaminathan for the respondent.

This second appeal coming on for hearing the Court (ABDUR RAHIM and AYLING, JJ.) delivered the following

JUDGMENT.—In this case the suit was instituted to set aside a distraint upon the plaintiff's land made by the defendant who is a zamindar. The plaintiff is an intermediate tenure-holder under the defendant. The distraint was levied in order to recover a portion of certain arrears of cess which had been collected from the defendant under section 78 of the *Madras Local Boards Act* and which portion he was entitled to recover from the plaintiff.

The first question argued before us is that section 77 of the *Estates Land Act* does not authorize the zamindar to levy distraint against an intermediate tenure-holder and we think the language of section 77 is clear to support that contention. This,

1912.
April 8.
1913.
January 17.

ABDUR
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* Second Appeal No. 1259 of 1910.

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in fact, is not disputed by the learned vakil for the respondent. Section 77 says, "At any time after an arrear of rent has become due . . . the land-holder may, in addition to any other remedy to which he is entitled by this Act, in respect of any arrear of rent which has accrued due within the next preceding twelve months, distrain upon his own responsibility the moveable property of the defaulting ryot . . ." There can be no doubt that the plaintiff is not a ryot within the meaning of the Estates Land Act. But it is argued that sections 73 and 74 of the Madras Local Boards Act give power to a zamindar to recover arrears of cess as arrears of rent, and that, since the zamindar has got power to recover arrears of rent from the ryot by distraint, he has similar power as against intermediate tenure-holder from whom he is entitled to recover arrears of cess paid by him. The argument is *prima facie* untenable. Section 73 says " . . . Provided that in all cases where a person holds lands with or without a right of occupancy as an intermediate land-holder on an undertenure created, contained or recognised by a land-holder, it shall be lawful for the land-holder to recover from the intermediate land-holder the whole of the tax paid by the land-holder in respect of lands held by the intermediate land-holder less one-half the tax assessable on the amount of any kattubadi, jodi, porappoo or quit-rent payable by the intermediate land-holder to the land-holder," and section 74 says that "every land-holder (or intermediate land-holder as the case may be) shall, in collecting or recovering the portion which may be due to him" under the proviso referred to "be entitled to exercise the same powers as may, under any Act or Regulation which now here is, or hereafter may be, in force, be exercised by any land-holder in the collection and recovery of rent . . ." The learned pleader for the respondent wants us to say that every land-holder is entitled to exercise in collecting a cess the same powers as those which any land-holder may possess as regards rent. But such power of a land-holder must be considered with reference to the person against whom the power is to be exercised. There is no Act or Regulation which authorises the landlord to levy distraint upon the property of a tenure-holder for recovery of rent. Section 77 of the Estates Land Act, as we have pointed out, only authorises a landlord to levy distraint upon the moveable property of the ryot. Thus, even if we read the word

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"any" as meaning any one of the class of land-holders vested with the largest possible powers for recovery of rent it is not shown that any land-holder has got power to levy distraint upon the property of a person other than a ryot. But we may observe that the words "any land-holder" in section 74 of the Local Boards Act possibly mean such land-holder. We are of opinion that section 77 of the Estates Land Act does not apply. The result will be that the distraint will be declared to be illegal and will be set aside. We must therefore ask the District Judge to enquire and find what damages, if any, were sustained by the plaintiff by reason of the distraint complained of. Further evidence may be taken on the point. The finding will be submitted within three months from the date of the receipt of this order, and ten days will be allowed for filing objections.

In compliance with the order contained in the above judgment, M. MUNDAPPA BANGERA, the District Judge of Ganjam submitted the following

FINDING.—I have been required by the High Court to submit my finding on the following issue:—

"What damages, if any, were sustained by the plaintiff by reason of the distraint complained of?"

When the matter was taken up for enquiry, the vakils on both sides informed me that they had no fresh evidence to adduce. The distraint complained of was admitted. Plaintiff's vakil stated that his client who is a rich and influential person was put to considerable indignity and suffered much pain of mind and that he is entitled to substantial damages. He admitted that his client did not suffer any actual pecuniary loss by reason of the distraint. The vakil for the respondent stated that his client acted *bonâ fide*, that the provisions of law as to distraint were not clear and that plaintiff is not entitled to damages, unless he proves actual pecuniary loss and in any event, is only entitled to nominal damages. I am of opinion that the plaintiff is entitled to damages even though he has not proved actual pecuniary loss. The plaintiff is a well-to-do man and there can be little doubt that a distraint of moveable properties is looked upon as a disgrace. In the present case, the distraining officers entered his house and took away a silver rose water sprinkler and some other article. The distraint has been held by the High Court to be illegal and consequently plaintiff is entitled to some

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damages. The defendant, when he took it upon himself to dis-
train property, did so at his own risk and his ignorance of law is
no excuse, however difficult or complicated the law on the subject
might be. The fact that he acted without any malice and in
the *bona fide* belief that he was entitled to distrain can only go
in mitigation of damages.

As there is no evidence of any actual pecuniary loss to
plaintiff and as it has not been shown that the defendant acted
with malice or any ulterior motive, I am of opinion that Rs. 50
would be a reasonable sum to award to the plaintiff.

This Second Appeal coming on for final hearing, the Court
delivered the following

INSON AND
AYLING, JJ.

JUDGMENT.—We accept the finding and reversing the decrees
of the Courts below award the plaintiff Rs. 50 damages with
interest at 6 per cent. from this date to the date of payment.
The defendant will pay the plaintiff's costs throughout.

APPELLATE CIVIL.

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

1912.
October 8
and
1913.
January 24.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
BY THE COLLECTOR OF GANJAM (FIRST DEFENDANT), APPELLANT,

v.

K. JANAKIRAMAYYA AND TWELVE OTHERS (PLAINTIFFS AND
DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

*Madras Irrigation Cess Act (VII of 1865).—“River belonging to Government,”
meaning of—Zamindars and Rajas, rights of, to waters of rivers passing
through their lands—Water, proprietary rights in, discussed—Madras Land
Encroachment Act (III of 1906), effect of, upon such rights.*

Per MILLER, J.—In a suit for the recovery from Government of water-cess
illegally levied the cause of action arises on each occasion on which the cess is
demanded and article 181 of schedule II of the Limitation Act does not apply.

The High Court having held in *Kandukuri Mahalakshamma Garu, Proprie-
tris of Utlam v. Secretary of State for India* (1911) I.L.R. 34 Mad., 295 on
facts similar to those relied upon in the present case, that the Vamsadhara
river is a river belonging to Government such finding was a matter of law

* Appeal No. 124 of 1904.

which should be followed until overruled by a Full Bench or a Higher Court.
Followed accordingly.

Per SANKARAN NAIR, J.—Under the customary law of the country water
belonged to the owner of the estate through which it passes, so long as the water
remained on the land, subject to the claims of the proprietors below. The
members of the village community and the zamindars or poligars were entitled
to the water which flowed through their lands. If Government are the pro-
prietors of the land they are the owners of the water thereon and those rivers
and streams of which they own the bed and the banks belong to Government.

It was the policy of the East India Company in granting the permanent
sanads to recognise private proprietary rights and to divest themselves of such
rights which may have been vested in them. It is against the policy and the
spirit of the permanent settlement regulation to hold that the Government
reserved to themselves any power to increase the revenue on the zamindari or
to levy any assessment for the use of water.

The permanent sanads granted to Rajas and chieftains did not interfere
with their use of the waters of natural streams for the cultivation of all lands
within the ayacut (i.e., the area of land that can be irrigated according to the
customary methods) subject to the claims of the ryots. The new zamindaris
created by the East India Company were placed on the same footing as
the old.

“Speaking generally, whenever the Government contend that these zamindars
are not entitled to exercise any of the rights which are capable of private
ownership, and that such rights are vested in the Crown, it lies on the
Government to prove that such zamindars were deprived of them either
expressly or by necessary implication under the sanads granted under that
regulation (Regulation XXV of 1802); the new zamindaris were placed on
the same footing. The sanads referred to are those which were granted by
Lord Clive, a copy of which will be found in the earlier editions of the
Standing Orders of the Board of Revenue”.

Under the Regulation of 1802, the Government did not enter into any
engagements with the landholders to supply water. The circumstances under
which the permanent sanads were granted preclude any such engagement.

In the case of new zamindaris created, there may be cases in which the
Government reserved to themselves the control of water-courses.

Act VII of 1865 was intended by the legislature to refer to all rivers and
streams in those ryotwari districts where no mirasi or any corresponding right
prevailed, and the words “rivers belonging to Government” do not apply to
rivers running through or by zamindaris. The Act was not intended to effect
any change in the substantive law but to enable Government to levy a cess
on account of the large expenditure incurred by Government in the construction
and improvement of irrigation works. The ryotwari lands were assumed to be
Government property; and all rivers running through ryotwari lands were
accordingly treated as belonging to Government. But it does not enable the
Government to levy a water-cess where the landowners use the waters of
rivers in accordance with the rights they had before.

The exemption clause in section 1 of the Act—“Where a zamindar or
zamindar by virtue of engagements with the Government is entitled to irrigation
free of separate charge, no cess under this Act shall be imposed for water

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supplied to the extent of such right and no more"—does not apply to those zamindaris and proprietors who themselves take and are entitled to take the water for irrigation from the rivers and streams in their zamindaris without it being supplied to them by Government.

Even if the section with the exemption clause applied, the "engagement" to be implied is one to allow the proprietors to irrigate all their lands within the ayacut which could be irrigated without any fee and without any charge.

As Act III of 1905 does not interfere with vested rights, it cannot be used to interpret Act VII of 1865 to take away such rights.

Therefore under Act VII of 1865 (standing unaffected by subsequent legislation) it was not competent to the Government to levy any cess for any water taken from the Vamsadhara river without the aid of Government works.

"See the end of the judgment for a summary of the conclusion."

APPEAL against the decree of W. B. AYLING, the District Judge of Ganjam, in Original Suit No. 80 of 1904.

The facts of the case are stated in the judgment of SANKARAN NAIR, J.

The Honourable the Advocate-General for the appellant.

P. Nagabhushanam for respondents Nos. 1 and 5 to 7. The other respondents not represented.

MILLER, J.

MILLER, J.—The learned Advocate-General argued only two questions at the hearing of the appeal—

(1) Whether the suit is barred by limitation and

(2) Whether the water-cess was properly levied by reason that the Vamsadhara river is a river belonging to the Government.

As to the first question, it is not denied that if the suit is a suit to establish a periodically recurring right, a suit, that is, to which article 131 of the second schedule of the Limitation Act of 1877 is applicable, then it is barred; but it is contended that that article does not apply and that a cause of action arises on each occasion on which the cess is demanded.

This contention is supported by *Sriman Madhabushi Achamma v. Gopisetti Narayanasawmy Naidu*(1) and the case therein referred to, *Gopaladasu v. Perraju*(2); in fact, it seems to me that if those cases are rightly decided the respondents' contention must prevail. The Advocate-General did not succeed in satisfying me that *Sriman Madhabushi Achamma v. Gopisetti Narayanasawmy Naidu*(1) can be distinguished. Following that case I must hold that the suit is not barred.

(1) (1910) I.L.R., 38 Mad., 171.

(2) (1902) 12 M.L.J., 126.

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On the second point MUNRO, J., and I in *Kandukuri Mahalakshamma Garu, Proprietrix of Urlam v. The Secretary of State for India*(1), have held as a matter of law on the facts put before us in that case that the Vamsadhara is a river belonging to the Government: Mr. Nagabhushanam did not on this point lay before us any facts which were not before the Bench in *Kandukuri Mahalakshamma Garu, Proprietrix of Urlam v. The Secretary of State for India*(1) but argued as a matter of law that the decision in that case is wrong. It has however been followed by another Bench and has not yet been overruled by a Full Bench or a Higher Court; till that is done it is in authority which I ought to follow, and I follow it.

Mr. Nagabhushanam presented for our consideration some evidence as to the repair and control of the Mobagam channel by the Urlam zamindar. That evidence, it seems to me, does not affect the case; it might perhaps be evidence in favour of the zamindari of a contract with the Government, but does not help the plaintiffs, who do not allege any contract with the Government for the supply of water.

I would allow the appeal and dismiss the suit with costs in both courts.

SANKARAN NAIR, J.—This is an appeal by the Secretary of State for India in Council from the judgment and decree of the District Judge of Ganjam, by which it was declared that the Government are not entitled to levy any water-cess from the plaintiffs for having cultivated their lands with the waters of the Vamsadhara river and the Mobagam channel. The plaintiffs are the inamdars of the village of Varahanarasimhapuram paying a quit-rent to the Zamindar. Their case is that the lands in their village were irrigated by the Mobagam channel which conveyed water to their lands from the Vamsadhara river. They alleged that they have been cultivating their lands from time immemorial with this water and that the Government have illegally collected from them since 1894 water-cess under Act VII of 1865 for the water from this channel used for converting dry lands into wet and for raising second wet crops on lands which were already under wet cultivation. They therefore prayed for a declaration of their title alleged and an injunction

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(1) (1911) I.L.R., 34 Mad., 295.

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to enforce such declaration, and also for the recovery of the amount illegally collected from them. The Government pleaded that the Vamsadhara river is a Government source of irrigation and that the Mobagam channel is the property of Government. They also pleaded that a right to the free use of water supplied from a Government source cannot be acquired by immemorial user but can be acquired only by virtue of an engagement with Government and that there was no such engagement with the plaintiffs. The defendant also pleaded that the payments made by the plaintiffs were voluntary and not therefore recoverable and that the suit was barred by limitation. The District Judge held that the payments were not voluntary and there was no limitation bar; on the merits, he held that the plaintiffs have failed to prove that the Mobagam channel was constructed by their ancestors as alleged by them; and that before 1803 it was the property of Government but that in 1803, when the Urlam estate was granted to the predecessor-in-title of the present Zamindar, the Mobagam channel was also granted to him. As to the Vamsadhara river he found that the Government had failed to prove that it was tidal and navigable, and he was further of opinion that, even if it was a tidal and navigable river, that would make no difference with reference to the claims advanced by the plaintiffs. On the questions of law which were raised, he held that the plaintiffs were only entitled to claim any rights relating to the irrigation of the lands which were recognized by the title-deeds and according to them their right to irrigation must be limited to a single wet crop on the wet lands. He also held that, even if the plaintiffs had acquired a prescriptive right to the use of water as against Government, this would only debar the Government from interfering with the supply of water but would not affect the right of Government to charge water-rate for wet crops, as he was of opinion that such right is only limited by any engagement with Government under Act VII of 1865, and the title-deed showed no such engagement in this case. However, on the finding that neither the Vamsadhara river nor the Mobagam channel was a Government source of supply he decreed the plaintiffs' claim. Against this decree the Secretary of State appeals.

The appeal was first argued before MUNRO, J., and myself by the then Advocate-General, Mr. Sivaswami Ayyar. The

questions of law in this case were argued before me and ABDUR RAHIM, J., in another Second Appeal by Advocate-General Mr. Napier and finally the appeal was again re-heard by MILLER, J., and myself when the Advocate-General Mr. Rosario argued the case on behalf of the appellant.

As to the voluntary nature of the payment, I cannot help expressing my regret that the Government ever put forward the plea that the plaintiffs are not entitled to recover the amount paid by them and which would have been collected from them by the Revenue Officials by coercive processes if they had not paid, even if they establish their title alleged by them and the illegality of the demand on the ground that it was a voluntary payment. It was given up in this Court as the question had been decided in *Kandukuri Mahalakshamma Garu, Proprietor Urlam v. the Secretary of State for India*(1), following *Sriman Madhabushi Achamma v. Gopisetti Narayanaswamy Naidu*(2). I also hold that the suit is not barred by limitation. I now proceed to consider the main question.

The facts found by the District Judge were scarcely disputed in appeal by the Advocate-General on either occasion, and as to the questions of law reliance was placed upon a decision of this Court in *Kandukuri Mahalakshamma Garu, Proprietor Urlam v. the Secretary of State for India*(1). The suit out of which that appeal arose was also tried by the same District Judge. It had reference to the claims of certain proprietors to irrigate lands from the same river and channel, i.e., the Vamsadhara and the Mobagam, and if the conclusion therein arrived at is right, it is conceded that this judgment under appeal cannot be supported. As no further arguments were adduced on behalf of the Crown in support of those conclusions than those contained in that judgment, I shall state briefly the grounds of decision in that case. The learned Judges therein pointed out that under section 2 of Act III of 1905, subject to easement and natural and customary rights of landholders, all standing and flowing waters which are not the property of any one else are the property of Government. Vamsadhara river being undoubtedly a natural stream and the waters of that river in their opinion not belonging to any one else, it followed that the body of water forming the river is the property

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(1) (1911) I.L.R., 34 Mad. 295.

(2) (1910) I.L.R., 33 Mad., 171.

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of Government and from that it followed that the river itself belongs to the Government.

They found on the evidence, agreeing with the District Judge on this point, that when the estate was granted to the predecessor-in-title of the present Urlam zamindar the beds of the channels were not reserved by Government but passed with the lands to the proprietors to the same extent and in the same way as tank-beds, village sites and other poramboke lands passed; but the non-reservation of the beds did not show anything more than that Government fixed the revenue with reference to the extent of land then under cultivation and is no evidence of any agreement in any particular case to permit free irrigation from Government source of water-supply. They further found that the fact that there was no water-cess charged until the year 1901 is not evidence of a lost grant, as in this case before the Settlement in 1803 the Government had the full rights of owner apart from the rights of ryots, if any, and the sannad itself does not give the inamdars any right to take water free of any cess; and as they were of opinion that the Government are entitled under Act VII of 1865 to charge water-cess if water is supplied from a river or channel belonging to Government and there is no engagement between the parties that the irrigation is to be free of a separate charge, they held that the Government were entitled to impose the cess.

It will thus be seen that in appeal the question was decided on grounds very different from those which were urged in the Court below; and if we are now to reverse the decree of the Lower Court in favour of the Government and justify their action in imposing the assessment, it will be on grounds very different from those on which such assessment was imposed by the Government on the plaintiffs and by reason of an Act III of 1905, which was passed subsequent to the institution of the suit.

If the Acts III of 1905 and VII of 1865 enable the defendant to levy a water-cess when the water of a natural stream is used by a zamindar or other landed proprietor for irrigating his lands, in the absence of any engagement with Government to the contrary, then the facts that the Government had no such rights before, that the proprietor was entitled to use such water for irrigation without the leave of the Government, and that the

Government promised not to levy any cess, unless such promise amounted to an engagement, would make no difference.

In order to decide the questions in issue it appears to me necessary to state the facts in some detail. Vamsadhara river rises in the Jeypore zamindari and after leaving the zamindari it flows through ryotwari lands for a very small portion of its course. It passes then through the Urlam zamindari, and the Mobagam channel takes off from its left bank in the village of Mobagam in the Urlam estate. It has a course of about 7 miles and passes through eight or nine villages. It irrigates about eleven villages. It has a total ayacut of about 4,000 acres, of which about 500 acres are ryotwari lands. Four of the villages belong to the Urlam zamindar, and there are seven inam villages irrigated by this channel. Of these seven villages, Varahanarasimhapuram belonging to the plaintiffs is one. The plaintiffs' village as well as certain other villages, mainly ryotwari, are irrigated by channels which take off from the Mobagam channel. One of such channels is Merakabatti. It takes off from the Mobagam main channel within the limits of the plaintiffs' inam village and after partially irrigating it, enters the Government village of Madapam. This Merakabatti channel has no head sluice or regulator and its control, as well as the title of the Secretary of State in it, is found by the District Judge to begin only at the point where it enters ryotwari land, and the Judge finds that the Secretary of State has nothing to do with this channel from where it takes off from the main Mobagam channel to where it enters the ryotwari village of Madapam. This finding has not been attacked before us in appeal. Mobagam channel has a head sluice which was constructed in 1892 by the zamindar of Urlam, and the Judge finds that there is evidence to show that sums have been expended by the Urlam zamindari from time to time on the channel. He also finds that the Revenue officials never exercised any control over the distribution of water from the main channel and that no money has been expended towards its upkeep.

There is another channel, Lukulam, which also takes off from the left bank of the Vamsadhara river from what is now a ryotwari village. Its head sluice is under the control of the Government; the Lukulam channel and the four branches which take off from the Mobagam channel to which I have already

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referred also irrigate some of the same villages in addition to certain others. This is the system of irrigation of the village. The finding of the District Judge that the Mobagam channel was not constructed by the plaintiffs' ancestors was not disputed in argument before us. We must therefore take it that the Mobagam channel, when the village was granted to the predecessor-in-title of the Urlam zamindar, belonged to the Government subject only to the claims of the ryots, if any. The lands through which the Vamsadhara and the channels flowed after leaving the Jeypore zamindari also belonged to Government subject to the rights of the ryots. In 1803 the villages were constituted into three or four zamindaris. Urlam, which includes the bed of the Vamsadhara river and the bank at the place where Mobagam channel has its head, was one of them, and one of the important questions for decision is what were the rights acquired by the zamindar and conferred by the Government.

It must be remembered that in 1802 and in the subsequent years sannads were granted to three classes of landholders. Some of them were representatives of those who were really Ruling Princes. Within their small kingdoms they exercised all the powers of a ruler. They commanded armies, they made wars on their own account and concluded treaties and they had their own coins. As an instance, I refer to the Rāmṇād zamindar. See *The Ramnad case*(1). Some of them like the Parlakimedi zamindar in the district of Ganjām were the descendants of the ancient Hindu Sovereigns. As to this class of zamindars in the Circars see Fifth Report, page 35. Another class was composed of those who were chieftains under rulers exercising various degrees of authority. Some of them like the Telugu poligars of the south and the Hindu zamindars of the Telugu district were really viceroys who exercised the delegated powers of their sovereign in every respect. Others were originally only revenue officials or military commanders or police officers who usurped other functions. The history of this class of chieftains is given in the judgment of this High Court in *Lekkamani v. Puchaya Naikar*(2). See also Privy Council judgment in *Collector of Trichinopoly v.*

(1) (1901) I.L.R., 24 Mad. 618.

(2) (1870) 6 M.H.C.R., 208.

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Lekkamani(1). Besides these two classes of holders a new class of zamindars was created by the East India Company.

They carved zamindaris out of what were called Havelli lands in the Circars which were under their own control subject to the claims, if any, of the ryots. In the north of the presidency, they were parcelled out and sannads granted to persons who became the proprietors of those estates thenceforward. It is important to remember that, when these new estates were formed out of the Havelli lands, the purchasers of those estates, thenceforward the proprietors, were placed on the same footing as the other classes of holders, viz., the descendants of ancient chiefs and rulers who were already in possession of their own lands and to whom sannads were granted, with one exception in the case of rights to water which will be noticed later. (See paragraphs 58 and 60 of the instructions issued to Collectors as to Permanent Settlement of lands, pages 330, 331, volume II of the Fifth Report). They thus acquired by grant all the rights which the other two classes of the ancient rajas had before they obtained the sannad and the immunity from enhancement of land revenue or rent which they acquired under the sannad. The sannads were in the same terms.

What were those rights? These ancient rajas exercised all the powers of a sovereign over their raj as well as proprietary right over some of the lands. They levied taxes; they received a share of the produce from those ryots who were bound to pay mēlvaram; they received the full rent of the lands when they were cultivated not by ryots but by tenants who had no ryotwari interest in the land. It was in this state of things that Regulation XXV of 1802 was passed and "Sannads-i-Milkeut Istimirar or deeds of permanent property," as they were called, were given to some of them. This Regulation has been fully discussed in the judgment of the Judicial Committee in *Collector of Trichinopoly v. Lekkamani*(1). In that case the Judicial Committee say, "The only difference between a polliem or zamindari which is permanently settled and one that is not, is that, in the former, the Government is precluded for ever from raising the revenue; and, in the latter, the Government may or may not have that power". See *Collector of Trichinopoly v. Lekkamani*(1).

(1) (1874) L.R. 1, I.A., 298 at pp. 813 and 814.

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The policy of the East India Company's Government at that time was to take away from these chiefs or zamindars the rights which according to the western ideas should be exercised only by a ruling sovereign and to leave to them all such rights as could be exercised by a private proprietor. There were some claims which apparently did not fall clearly within the scope of the one or the other and they were dealt with by name. It was necessary that there should be no doubt on the question and great care was therefore taken to enumerate the rights which were till then exercised by the rajas and which should no longer be exercised by them. For instance, all salt and saltpetre revenue, duties of every description by sea or land, tax on liquor and intoxicating drugs, all taxes personal and professional, all taxes and lands for Police establishments were expressly excluded in the sannads. (See the fourth clause of Lord Clive's Permanent Sannads—appendix to the Standing Orders of the Board of Revenue, and Fifth Report, page 321.) Waste lands were especially referred to as having been granted to the zamindars. There were claims which were generally included in the name *Sayar* understood to refer to taxes generally. (See Fifth report, page 321, paragraphs 13, 14, 15 and 16.) As already stated, it was not intended to deprive these rajas of any rights which they were at that time exercising as the proprietors of those lands. And looking to the items which were by name resumed and the purpose of the regulation and the words in the permanent sannad, there is very little doubt that they were confirmed in the excise of those rights other than those which were enumerated, and in the cases of zamindars of Government creation those rights were granted to them unless specially reserved. In my opinion, speaking generally, whenever the Government contend that these zamindars are not entitled to exercise any of the rights which are capable of private ownership and that such rights are vested in the Crown, it lies on the Government to prove that such zamindars were deprived of them either expressly or by necessary implication under the sannads granted under that regulation; the new zamindars were intended to be placed on the same footing. The sannads to which I refer are those which were granted by Lord Clive, a copy of which will be found in the earlier editions of the Standing Orders of the Board of Revenue.

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It now remains to consider how far these views may be acted upon in cases of water-supply. In considering what title to waters passed to those to whom sannads were granted, it is desirable to bear in mind all the different forms of water-supply for the cultivation of lands. Except on the western coast, throughout the Presidency the rainfall is moderate and insufficient for the satisfactory production of rice, the crop which is most abundantly cultivated, so that the country depended a good deal upon the supply of water otherwise than by rain. In many districts there were tanks for the conservation of water which depended for their supply mainly on the rains. They even now exist in vast numbers throughout the Presidency for the irrigation of lands. Most, if not all, of them are of old native construction though some few of them have been kept under repair by the British Government. It can scarcely be suggested that, where these tanks are situated in zamindari lands, it was not the intention of Government entirely to part with their control to the zamindars. There were also groups of rain-fed tanks connected with each other for cultivation by means of channels. There is very little doubt that in their case also, whenever this group of tanks was situated in a zamindari, the control completely passed over to the zamindars. Some of these tanks are large reservoirs which contain a good deal of water, and the supply of water therefrom can be safely relied upon after the monsoon had commenced. The water supply, however, of a great number of these tanks is very precarious, and the cultivation often suffers from water not being sufficiently supplied and does not attain the general standard which it secured from other sources. Greater dependence is placed therefore upon tanks supplied by river-water. Many tanks are supplied not only by the rains but by the high freshes of rivers by means of channels unconnected with any dams. But in the majority of cases the level of the river is lower than that of the adjoining fields and it is usual to put up an anicut or masonry dam right across the river bed in order to store water and raise its level. Generally, except in the cases under Government supervision, the dam consists of a row of granite posts of the necessary height, with the interstices filled with turf earth—often a wall with the same materials being put in front of the posts, which is washed away during the monsoons leaving

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the posts alone standing. The water whose level is thus raised passes into the channels. From these channels water is taken or distributed for cultivation. It is also stored in reservoirs and rendered available for purposes of irrigation often by channels from those reservoirs. The area of land that can thus be irrigated according to the customary methods is called the *ayacut* of the river, a well-known revenue term which is thus defined in the Standing Orders 1820—1865 of the Board of Revenue: "*Ayacut*.—The total area of land in a village; when applied to irrigation estimates, it means the land that can be watered by the tank or channel referred to." Garden land is often, if not generally, cultivated with water by cattle-power or manual power. With reference to the channels conveying waters from the river for irrigation and river fed tanks, it cannot be denied that the ancient chiefs who afterwards became zamindars under sannads were exercising every form of control subject only to the claims of the ryots, if any. The central power seldom interfered with such exercise of control. Even when the Muhammadan rulers considered that such an interference was necessary, it was done by depriving the old chiefs and mirasidars of those rights and transferring them to their Governors and other officials who took their place who were also constituted zamindars by the East India Company. Agriculture and the wealth of the country depended upon the water-supply, and it was scarcely likely that they ever meddled with it. After the grant of permanent sannads the supply of river-water continued to be as necessary as before, for the cultivation of those lands which depended upon river-fed channels and tanks. There is nothing to indicate that the Government ever desired to interfere with what was believed to be the ancient usage. Everything tends to show that the zamindars and the ryots were allowed to exercise rights of ownership and to use the river water as before. When the sharing system prevailed it is possible that a Melvaramdar or Government did not take the trouble to ensure the necessary supply of water. But a Permanent Settlement with peshcush or cash payment to the Government pre-supposes the continuance of the usual water-supply. If the lands did not receive it, Government could not have expected the zamindar to pay. The twelfth clause of the sannads contemplates engagements by the zamindars with the ryots. Such

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engagements for payments of rent show that the zamindari ryots were entitled to get the required supply. See also paragraph 37 of the Fifth Report, page 326. The zamindars and the ryots therefore must have continued to receive the supply. It is obvious that in the zamindaris the Government did not undertake to, and did not, supply water. The landholders therefore must have continued to take the water as before for irrigation from the rivers. There is absolutely nothing in the volumes of papers relating to the revenue settlements to show that there was any restriction placed upon them in using the waters of the rivers or exercising any right as before, assuming that it was open to the Government to restrict it. The presumption is that they allowed it. The Government contemplated the cultivation of the waste lands—see page 324, paragraph 27, Fifth Report. That is unlikely unless the right to take waters from the rivers was conceded. Any increase of revenue due to such increased cultivation was certainly not contemplated any more than if such cultivation had been carried on by water from wells or tanks constructed at the expense of the zamindar. If such an increase is claimed on account of the right of Government to take a share, it could be claimed quite as well in the one case as in the other. We see in the ryotwari district the Government actually taking a share of the produce when waste lands are brought under cultivation.

The Regulation and the sannads granted thereunder make it quite clear that the object was to give security to property; there is no security if at the pleasure of Government any assessment not regulated by law, not under the control of the Courts, may be imposed for the use of what is a necessity for cultivation. The sannads declare that the assessment on the zamindari lands should "never be liable to change under any circumstances." An unlimited power to tax a commodity indispensable for cultivation is undoubtedly against this solemn assurance.

I now refer to the one difference which was recognised in the case of Havelli lands which places this question in my opinion beyond all reasonable doubt. I stated in a previous part of the judgment that besides granting these permanent sannads to the ancient chiefs the Government also came to the resolution of transferring the property which was at their disposal like the Havelli lands in the north. For that purpose,

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they had to divide the Havelli lands into various lots, such division being made with reference to the facilities of water-supply. In the case of these lands, unlike the case of ancient zamindaris, the tanks and the water courses belonged to the Government. It was open to them to transfer them to the new zamindars or to retain the control in their own hands; it was however distinctly stated then that the construction and repair of tanks and water courses were to be left to the zamindars except in those cases where there may be works of great general importance to the country or too extensive to be entrusted to the charge of individual proprietors or where there may be other reasons to make it advisable for Government to reserve to themselves the right or duty of looking after these water sources. See page 381, paragraph 59 of the Fifth Report. It will be noticed that the Government evidently did not consider it necessary to point out that in the case of ancient chiefs they proposed to transfer such rights or obligations to them or to reserve any control to themselves as obviously such right of control was not with the Government and the zamindars were entitled to it. In the case of these zamindaris formed out of Havelli lands, therefore, there may be cases in which the Government reserved control of the water courses, but that has to be made out by Government; where the Government do not prove that any such control was reserved there is nothing to distinguish the case of these new zamindaris from that of the old—see paragraph 60, Fifth Report, page 381. This appears to me to be decisive of the question in the case of old zamindaris as well as in the case of the zamindaris formed out of these Havelli lands. The water courses are generally of no use without the supply of water from the river.

If we look at the usage and practice that prevailed, it also tends to the same conclusion. In no estate from the time the permanent sannad was granted up to 1865 when the Cess Act was passed is it the fact that the Government ever increased the land revenue—there was no law entitling them to claim a charge otherwise—on account of water being taken from any natural stream, or imposed any separate charge from the zamindars for taking water from the rivers themselves.

In the ryotwari districts, if a ryot used water from the river for other than the usual cultivation, they levied an enhanced

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revenue. If a second crop was raised with additional water, there was a second crop assessment. If a well was sunk within the ayacut of a river and cultivation carried on with the water of that well, it was usual even for years after the passing of Act VII of 1865 to impose additional revenue on the ground that he had had the benefit of the river water. In the case of the zamindaris no such demands have ever been made. I am not aware that in cases of ancient zamindaris any head sluice has ever been retained under Government control. Whenever the Government wished to interfere with any such sluice for the benefit of their own lands, it was, as in the Vaigai case—*Ponnusawmi Tevar v. Collector of Madura*(1)—with the consent of the proprietor. Most of these zamindaris were at some time or other under the Court of Wards. The Court of Wards, so far as I know, never recognized such a claim on behalf of Government. The decisions till within the last few years assumed and, where necessary, held that where there is no limitation in the grant itself the proprietor was entitled to unlimited water-supply. *Secretary of State for India in Council v. Perumal Pillai*(2).

I now come to the change in the law introduced by Act VII of 1865. In 1802 and for some years afterwards, it was not the policy of the British Government to embark upon any irrigation projects. The irrigation works of the Cauveri river and of the Gōdāvari and the Kistna rivers in the Gōdāvari and Kistna districts were completed before 1855, when the general survey and settlement of the Presidency was undertaken. They entailed an enormous expenditure and the Government looked to increased revenue to recoup them. So far as the ryotwari lands were concerned, they could get over the difficulty by increasing the land revenue on those lands which profited by these irrigation works, and it appears that, when lands were permanently irrigated from such sources, a consolidated assessment was imposed leaving it to the ryot to occupy or throw up that land. If only a temporary use of such water was made, a water-rate was added to the dry land rate and the aggregate formed the revenue demand.

In the case of zamindaris and inams to which water was supplied, it was open to the Government to impose conditions before supplying them with water. But the Secretary of State

(1) (1869) 5 M.H.C.R., 6.

(2) (1901) I.L.R. 24, Mad., 279 at p. 288.

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suggested for the consideration of the Madras Government, in considering their proposals for a general survey and settlement, whether a separate water-rate might not be charged when water from these sources was used or was permanently available so that the profits derived on account of these irrigation works could be ascertained. At that time British Government hoped to attract British capital and enterprise to India in the construction of irrigation works as in Railway undertakings. The Madras Irrigation company started in 1858 was the result of this policy. It was given up only some years after the passing of Act VII of 1865. If British capital was to be attracted to India it was necessary to recognize the principle of a separate charge to be levied for water supplied in order to realize this. If therefore water-cess was to be imposed and levied separately from land revenue, legislation was necessary to recover it in the same way. I have referred in some detail to the proceedings which led to the passing of Act VII of 1865 in my judgment in *Kapileswataupram Zamindar v. Secretary of State*(1). They show in my opinion beyond all doubt that the object the Government had in view was to obtain a return for the cost incurred by the Government and not to realize increased revenue where none was incurred and where the ryots and the zamindars were only utilizing such facilities of irrigation as existed before. This return was to be obtained out of the increased profits which would naturally be derived by the ryots. They show further that when the Government interfered with any pre-existing source of water-supply, they supplied water free of charge from Government sources. See in particular G.O. No. 101, Revenue, dated 16th January 1864 and G.O. No. 986, Revenue, dated 11th May 1865, which contain "the drafts of a bill and of rules for the levy of a water-cess in localities where the Government may see fit to adopt that mode of realizing the revenue *from works of irrigation* in preference to levying a consolidated assessment."

The preamble of Act VII of 1865 points out that "large expenditure out of Government funds has been and is still being incurred in the construction and improvement of irrigation and drainage to the great advantage of the country and of

proprietors and tenants of the land," and then states that "it is right and proper that a fit return should be made to the Government on account of the increased profits derivable from the lands irrigated by such works." So far the preamble makes it quite clear that under the Act what was intended was that there must be works of irrigation or drainage constructed or improved by the Government and that there should be increased profits derivable from lands *irrigated by* such works. There was no idea that, where water was taken as before by a zamindar or ryot without having recourse to any such works, any revenue was to be imposed. Then section (1) empowers the Government to levy a cess in certain cases; under section 1 of Act VII of 1865 it is a necessary condition that the "water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to or constructed by Government." The question for decision is whether these words "river, stream belonging to Government" apply to natural streams like Vamsadhara. A "river" is composed of bed, banks and water—"Angell," pages 3 to 5; "Farnham," volume II, pages 1462, 1557. The bed of the river is the part between the banks. The banks are the elevations of land which confine the water to a definite course. He is therefore the owner of the river who owns the beds, the banks and the water. It follows therefore that in zamindaris where the zamindars own the beds and banks of rivers, as in Jeypore and Urlam, they cannot be called "rivers belonging to Government." It has been contended that all tidal and navigable rivers, and they only, belong to Government. I do not think so, as such an interpretation will exempt from the operation of the Act many natural streams to which the Act is evidently intended to apply and also, as the Judge points out, hitherto no difference has been recognised so far as irrigation rights are concerned between tidal and navigable rivers and others. The English law when the Act was passed was laid down in *Embrey v. Owen*(1). "Flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property

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(1) (1914) I.L.R., 37 Mad., 355.

(1) (1851) 6 Exch. Rep., 353 at p. 360.

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in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of possession only. . . . But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it." It is possible that the words "river, stream belonging to Government" were used in the section to indicate only this kind of ownership. I am satisfied it certainly includes that right. The river therefore may be said to belong to Government when they have got the proprietary interest in the bed or adjacent land which gives them access to it and power to exclude others. This reason limits the ownership to the part of the stream adjacent to the land and excludes therefore rivers and streams in zamindaris and inams or adjacent to them. But I think the section includes other claims as well. The riparian right above referred to depends upon vicinage and consequent right of access. This power does not generally vest in the Government or zamindars. It vests often, perhaps generally, in the ryots. Moreover this riparian right will not entitle Government or zamindar to use the water for the cultivation of tenements not in the vicinity while it is undoubted that they have been doing so from time immemorial. The customary law of the country may throw some light.

So far as the old customary law in the Madras Presidency is concerned, the question appears to be clear. In the deeds of conveyance before the days of British rule and in conveyances executed even afterwards, at least in the early years of the century, by mirasidars and landed proprietors like zamindars, inamdars, etc., which have come before the Courts it is generally stated that the lands are conveyed with the eight incidents of ownership;

"The eight incidents of ownership in land are stated in the following verse:—

1	2	3	4	5	6
Nidhi	nicshēpa	pashanam	siddha	sādhya	jalānwatam
7	8				
Acshiny'	āgāmi'	samyuctam	ash'ta-bhōgā	samanwatam.	

1. *Treasure trove.* 2. *Property deposited in the land not claimed by another.* 3. *Mountains, rocks and their contents, mines, minerals, &c.* 4. *All land, &c., yielding produce.* 5. *All produce*

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from such land, etc. 6. *Rivers, tanks, wells and all other waters.* 7. *All privileges actually enjoyed.* 8. *All privileges which may be conferred; these are expressed by the general terms Ashta-bhōgam; the eight rights enjoyed by the owner of land."* See Mirasi papers, page 206. These papers were compiled and the translation made by Mr. Bayley, who was a member of the Board of Revenue, and they were finally corrected by Mr. W. Hudleston, secretary. It will be noticed that the conveyance carries with it "*Jalam*," i.e., "rivers, tanks, wells and all other waters." These rights were possessed by mirasidars and other proprietors of land. The deeds, printed in Mr. Hudleston's Mirasi papers were executed by the mirasidars. The various water sources are therein mentioned in some deeds separately and also under a general term. Where the landed proprietors known by different names like mirasidars and others in different districts were dispossessed of their ancient rights by Hindu and Muhammadan Chiefs and Governors, such rights were vested in these latter. But when lands were granted to favourites, etc., by rulers, these rights were conferred upon them. In a case reported after this case was heard, a grant in 1768 by the Tanjore Rajah under which the properties were held till recently was produced containing the same words; "Total of 60 velies of land including wet and dry lands, water, trees, stones, *Nidhi*, *Nicshēpa* (Treasure), *Siddha*, *Sādhya* (whatever is and may be brought into existence) present and future patta all *banb* and all *Kana* with all *Samudanams* with water poured from the hand." See *Jeeyamba Bai v. The Secretary of State for India*(1).

The right to water was therefore treated as a proprietary right and ownership in it was recognised as in land, treasure trove, etc.

The ownership ceased when the water left the land. There is no reason to think this rule was discarded. The right which the proprietor has to use the water for agriculture is obviously not the right of easement as there is no dominant or servient tenement. Nor is it, as already pointed out, the natural right of a riparian proprietor. Both the Government and the zamindar claim and concede in this case the right of landholders, in no way riparian proprietors, to the use of river water. The right

(1) (1912) 12 M.L.T., 541, at pp. 542-543.

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claimed by Government is not to prevent the zamindar from using such water but to impose a water-cess, even if he is entitled to use it for irrigation and this is the right upheld by the District Judge.

In the ryotwari districts, villages which are not adjacent to the natural stream use river water for irrigation. The right to prohibit such use has never been recognised.

If I am right in my view of the customary law of the country that the proprietor of the land is the owner of the water thereon, then those rivers or streams of which they own the bed and the banks on either side belong to Government. Except on the west coast where the cultivation is dependent upon the rains, not river water supplied by Government, and in those few and dwindling places in the eastern districts where the mirasi right is recognised, the Government have asserted their claim to all waste and poramboke which include river bed and the banks; and any channel therefore could be constructed only by Government or with their leave. I have therefore little doubt that the Legislature, which only carried out the behests of the Executive Government, intended this section to refer to all rivers and streams in those ryotwari districts where no mirasi or any corresponding right prevailed. For the same reason, it did not apply to rivers running through or by zamindaris.

Further, if the words "rivers belonging to Government" apply to zamindaris, it will be open to Government to impose water-cess on zamindari lands in the exercise of their natural rights for irrigating their lands with river water as before the permanent settlement. This is clearly against the Regulation of 1802 and, as the amount of the water-cess is not open to discussion in the Civil Courts, practically repeals the Regulation and cancels the sannads in this respect and involves such gross breach of faith that the Courts should not, if possible, adopt a construction which will have that effect. But to escape from this consequence, reliance is placed on behalf of Government on the exemption clause. It runs thus: "where a zamindar or inamdar by virtue of engagements with the Government is entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water *supplied* to the extent of such right and no more". It will be noticed that under section (1) the water cess may be imposed when water is *supplied or used*,

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but the exemption applies only to cases where water is *supplied*, of course, by Government. These terms have been explained in *Venkatappayya v. The Collector of Kistna*(1), followed in *Krishnayya v. Secretary of State for India*(2), and since the amendment of the Act in 1900 on account of those decisions retained this word as before, the judicial interpretation may be taken to have received legislative sanction. This exemption therefore does not apply to those zamindars and proprietors who themselves take and are entitled to take the water for irrigation from the rivers and streams in their zamindaris without its being "supplied" to them by Government. In their cases you cannot imply a demand.

Moreover, if we are to presume an engagement to "supply" water by reason of the grant of permanent Sannad then the Government are *bound to supply* the zamindars with water, but such is clearly not the case. I am therefore unable to accept this argument. It is only advanced to meet the untenable position in which the Government find themselves in asserting that a river like the Vamsadhara is a Government source of irrigation for zamindaris. That the exemption clause does not apply is conclusive to show that the section itself does not apply to such rivers.

If however the word "supplied" only means "used" and the section with the exemption clause applies, I am clearly of opinion that the "engagement" to be implied is one to allow the proprietors to irrigate all their lands which could be irrigated, i.e., all those comprised in the ayacut, without any fee and without any charge. There is nothing to suggest in any Government papers that the unqualified power which the old zamindars had to cultivate waste lands with river water was taken away and such right was confined to the cultivation of those lands then under wet cultivation. The usage till 1865 tends to the same conclusion. The object of Act VII of 1865 was only to collect a cess for water supplied from Government works. Further to hold that the "engagement" was to allow water for the cultivation of lands then under wet cultivation is to ignore the history of the permanent settlement. In some cases a comparatively small *pesheush* alone was fixed as a pledge of submission to

(1) (1889) I.L.R., 12 Mad., 407.

(2) (1896) I.L.R., 19 Mad., 24.

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Government without any reference to assets—Arni, for instance, a jaghir of ancient days. It was a complaint of the Famine Commission in 1880 that, receiving substantial benefit from Government works, the proprietor declined to contribute and could not be compelled by law to pay any cess. See Madras section of the Report, page 164, section 61. In a few others the *peshcush* was simply an equivalent for the military services formerly rendered by them without any reference to their assets. The great zamindaris of Venkatagiri, Kalahasti and Karvetnagar are among these. Their *peshcush* was a proportion of the cost of the zamindar's military establishment inclusive of *amarams* and *kattubadis* less the revenue from salt, abkari dues, etc. Some were settled without any enquiry into their resources. Sivaganga is one of the most important of them. A few of these estates, when they passed under British rule, had to pay a certain proportion of what they were paying to the old Rulers—Kangundi for instance.

In all these instances the obvious intention of Government was to leave it to the zamindar to exercise all the proprietary rights as before. The extent of wet cultivation or the assets had nothing to do with the *peshcush*. The conditions under which the *peshcush* was imposed rebut any other presumption.

In the district of Ganjam, with which we are now immediately concerned, no proportion of the *jamma* was adopted, but the *peshcush* was in each case in point of fact fixed by the Board of Revenue at their discretion on a consideration of all the circumstances and accounts before them.

When the Act was passed the Government had these facts before them, because about that time another important operation to afford security of title was going on—the enfranchisement of inams. The Inam Commissioner, the Board and Government had to consider the circumstances under which every estate was held to decide whether they had the right to the reversion and therefore to enfranchise the inams therein. It also appeared at that time that the accounts on which the settlements of some zamindaris like Ramnad may have been based were lost in the Government offices. How is it possible in all these various cases to assume that the word “engagement” in the exemption clause in section 1 of Act VII of 1865 had reference to the “wet land”

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at the time of the permanent settlement when it had either nothing to do with assets or it was not possible to find out whether it was so. In some of the important zamindaris like Pittapuram the *peshcush* was fixed on certain accounts taken by the circuit committee between 1776 and 1786. Are we to ignore the very probable increase in cultivation between 1786 and the Sannad? It seems to me to raise a strong presumption that the extent of wet cultivation was not the determining factor. In those other cases, where the *peshcush* was a proportion of the fixed assets, it was the average of certain years before the permanent settlement that was adopted. Is it then seriously contended on behalf of the Crown that a zamindar like Urlam was entitled to cultivate wet land to the average extent but must pay cess if he cultivates lands of the larger extent cultivated in the other years? No zamindari was then surveyed. The wet area was never localized. If the zamindar is now made to pay cess for the excess area, he cannot now localize the area, if any, then under cultivation so as to demand their contribution from the tenants of the excess area; and where the wet area, if any, adopted as the basis of the settlement is less than the actual extent of wet cultivation before the settlement, as it well might happen on account of the average area having been adopted, it would be impossible for the zamindar to localize the wet area. I am therefore unable to accept the view that the zamindar was entitled to cultivate only the mamool wet free.

I am therefore of opinion that under the Act as it stood unaffected by the subsequent legislation (Act III of 1905 to which I shall presently refer) it was not competent to the Government to levy any cess for any water taken from the Vamsadhara river, of course, without the aid of Government works. I make this reservation to exclude Lukulum with reference to which I express no opinion.

We have now to consider the plaintiffs' position as inamdars. The village was granted to their predecessors-in-title in 1764 by the zamindar of Parlakimidi. When the Havelli lands along with this village were granted under a deed of permanent Sannad to the predecessors-in-title of Urlam, the quit-rent was included in the assets. The Sannad is not before me but if the general practice was adhered to the reversion was in the Government, and accordingly the Crown enfranchised the inam

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afterwards. As I have pointed out already, the evidence is not clear as to the circumstances under which the Mobagam channel was constructed; but as it was in the Havelli land at the time of the permanent settlement it may be presumed to have belonged to Government. The inamdar was undoubtedly irrigating his lands from the Mobagam channel at that time as it was his source of irrigation. The general policy of the Indian Governments was against any restriction on irrigation as they shared in any increase in produce. There is no reason to suppose that this inamdar was entitled to use only a certain quantity of water or to irrigate only a certain extent of land. INNES, J., rightly states the principle applicable to such cases: "where a channel has been constructed by Government acting as the agent of the community to increase the well being of the country by extending the benefit of irrigation and in pursuance of that purpose a flow of water is directed to the villages designed to be benefited, it becomes simply a question upon the circumstances of the case whether there has not been a conveyance to such villages in perpetuity of a right to the unobstructed flow of water by the channel. Looking at the permanency of such works and to the permanency attaching to the object, that there was a transfer in perpetuity would seem an almost necessary conclusion, unless there were other circumstances to lead to one of an opposite character. It might of course be capable of being shown that the privilege was granted as a mere license and that before the water was allowed to flow to the villages, it had been left open to Government by arrangements then made to obstruct the flow at will at any future period"—*Ponnusami Tevar v. Collector of Madura*(1). Any arrangement between the zamindar and Government at the permanent settlement cannot prejudicially affect him. After the enfranchisement, it is said that he is only entitled to irrigate the land then declared "wet." But we cannot imply an engagement between the Government and the inamdar, as the Mobagam channel and the Merakabatti channel which takes water from it to irrigate the inam are not under Government control and they cannot control the distribution of water therefrom. The fact that the Government has control over the Merakabatti channel only after

(1) (1869) 5 M.H.C.R. 6 at p. 29.

it leaves the inam is significant. Moreover there is nothing in the title-deeds or proceedings to show that the inamdar is only entitled to cultivate with channel water those lands entered as wet free of charge and that even those lands are entitled to exemption only for the first crop. Neither in the despatch from the Government of Madras to the Secretary of State, Revenue, dated 9th August 1859, with the enclosures thereto giving full information of the intended proceedings to enfranchise inams, nor in the final report of Mr. Blair on the operations of the commission, dated 30th October 1869, the proceedings of the Madras Government and the despatch of the Secretary of State thereon, dated 10th August 1871, nor in the mass of records relating to the enfranchisement of inams, is there any indication that it was the intention of Government to advance any claim on account of any excess cultivation or that the inamdar's right was confined to the wet area mentioned in the title-deeds. If it was so, the Government could very easily prove it without asking the Courts to upset a practice upon theories. The available records support the contrary conclusion; when water was supplied from Government anicut works, no cess was levied on the mamool wet presumed to have been under wet cultivation at the time of the permanent settlement or the enfranchisement of the inams, but cess was levied on water taken for the irrigation of the rest. That the claim was so restricted to water from Government works is not without significance. The copies of the inam title-deeds show that the inam is only "claimed to be of acres of dry land and acres of wet land." All information had to be given in the registers as the assessment was fixed at the discretion of Government; no inference can be drawn therefore that any fact therein mentioned was the basis of any contract. In asking the Government to cancel their order that inams limited to a limited number of lives should not be interfered with, the Inam Commissioner said: "It is superfluous to add that in all such settlements every care is taken that the interests of Government do not suffer. A fair addition is made to the present value of the village on account of the prospective improvement from the cultivation of waste lands."

The Government accordingly cancelled their Order No. 945, Revenue, dated 3rd June 1864. This seems decisive. See also the

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Commissioner's order quoted in my judgment in *Secretary of State v. Ambalavan Pandara Sannadhi*(1).

Further the inamdar as such is only entitled to Government revenue. The title-deeds have been declared by legislation not to interfere with the mirasidars or ryots. Any engagement would probably have been with them. I am therefore of opinion that in each case it is for the Government to prove that the right of cultivation is limited as alleged by them; otherwise the so-called engagement will be taken to be in accordance with usage or with the conclusion arrived at by INNES, J., already referred to.

After the passing of the Act, the practice continued the same as before, the Government claiming a cess only when water was taken from Government works. The first note of dissatisfaction was that of the Famine Commission in the report presented by them to the houses of Parliament in July 1880. They pointed out what they deemed to be an abuse, that the zamindari lands, which on the introduction of canal irrigation were in the enjoyment of any means of irrigation however inferior and precarious, were supplied with canal water without any additional charge, with the consequence that the zamindar gets a continuous and unlimited supply for the whole of the area he had ever brought under cultivation. They thought there is no reason why this benefit should be conferred. The Government supplied this water in consequence of their having interfered with the zamindar's channels. Many of these channels supplied him with river water. His right to irrigate with such water was thus assumed. From this time began the efforts ever since continuously maintained to carry out the above suggestion. Among the suggestions were that the proprietors should be required to prove with reference to every field that it was being fully irrigated to entitle them to claim Government canal water; that they must prove what extent they were cultivating according to the permanent settlement accounts, which were in Government custody and which they are not bound to produce and which the Government condemned as inaccurate when they were against their contention; see G.O. No. 844, Revenue, dated 18th September 1902. An Irrigation and Navigation Bill

(1) (1914) I.L.R., 37 Mad., 369.

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was introduced in 1884 (No. I of 1884) which assumed the law as I have stated it. The local officers continued the old practice. In 1886 the Collector stated the usage correctly when he directed his Assistant Collector that no cess should be levied for water taken from rivers by lifts or by channels dug and repaired by private proprietors (Exhibit XIV). In 1889-90 there was an inquiry, and the Revenue Board came to the conclusion that, as nothing was spent on the channel by Government, the Government had nothing to do with the regulation or distribution of water in the Mobagam channel—Board's Proceedings No. 3014, Miscellaneous, dated 29th July 1890. That this was the opinion entertained till then appears also from the records and the judgment in the Full Bench Case decided by the CHIEF JUSTICE, MUNRO, J., and myself. The question is not whether these orders or opinions are binding on the Government but whether they do not supply strong evidence of the usage till then prevailing.

I may now refer to the Urlam judgment—*Kandukuri Mahalakshamma Garu, Proprietrix of Urlam, v. The Secretary of State for India*(1). It holds that, as the Government owned these lands before conversion into zamindaris, the sannads must expressly or by necessary implication convey the irrigation rights claimed; otherwise they must be taken to continue with the Crown. This is perhaps so in the case of ordinary Crown grants. But, as I have pointed out, these are sannads granted under a Regulation with a particular object and it was intended with one possible exception to place the new zamindaris in the same position, as the old zamindars who had full proprietorship before the grant. No distinction so far as I know has ever been recognized between the two classes. It is stated in the judgment that it was "not contended that the water is their property"—i.e., of those who own the banks of the river; and "it follows it is the property of the Government," but "water" is their absolute property for ordinary uses. It is limited property for extraordinary uses. It is further pointed out that as the water is Government property, the stream also is Government property and the explanation to section 7, Easements Act, and *M'Nab v. Robertson*(2) are referred

(1) (1911) I.L.R., 34 Mad., 295.

(2) (1897) A.C., 129.

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*to. The explanation throws no light on the question before us. It is intended to show that permanency or tidality is not an indispensable element. It says however there must be a "known course" which implied definite bed and banks. The case cited illustrates this. There a lessor let two ponds to a tenant "together with right to the water in the said ponds and in the streams leading thereto," and the question was whether the word "stream" was used in the ordinary sense of a rivulet or course of running water or any water which found its way into the pond even by percolation through marshy ground. The majority of the Lords held in favour of the former view. The decision had nothing to do with the question before us. The word "stream" no doubt is also used to indicate water in motion. But this use is exceptional. Lord HALSBURY who took this view says it ordinarily means definite stream within definite banks. In Act VII of 1865 it is used after the word "river" to mean a little "river"; if it means anything else it has no bearing on the case as Vamsadhara is a "river" and not a stream. It is assumed in the judgment that the assessment was fixed with reference to the extent of land under irrigation at the time, not with a view to any possible extension of cultivation; as a general proposition applicable to all zamindars and inamdars, this is obviously incorrect as I have already shown. The Permanent Settlement accounts are with the Government. They seek to alter the existing practice. It is for them therefore to prove that the assessment was so fixed. I seriously doubt whether the Government will be able to prove it, as my experience is that, where the assessment was based on the assets, it was the average demand and the average collection for a series of years that formed the main element in the consideration of the question. No Court is justified in raising a presumption or proposing a theory to upset a usage that has prevailed for a long time. The proper function of a theory is to explain or to find a legal origin for a long-standing practice; it should not be used to get rid of it and to unsettle the claims which have long been deemed to be well established. This must be done, if at all, by legislation.

The pleader in that case appears to have given up the ground on which the District Judge based his judgment that Mobagam channel was the source of water-supply. For these reasons, I am unable to follow that decision on these points.

It is contended, and the Urlam judgment decides, that under Act III of 1905 all flowing waters which are not the property of any one else are the property of Government and therefore the waters in the Vamsadhara river and consequently the river itself belong to Government. I am clearly of opinion that if under Act VII of 1865, as it stood before this Act III of 1905, the Government were not entitled to impose any water-cess, this Act coupled with the other Act does not give them the right to do so. Act III of 1905 was passed to prevent encroachments on Government property, and it is not permissible to construe the water-cess Act in the light of the provisions of this later Act unless there is some special provision to that effect. In *Nairn v. St. Andrews University*(1), the House of Lords decided that such a construction is not justifiable; under an Act of 1868 the right to vote was given to "persons" which *prima facie* would include women; but it was held on account of the usage that had prevailed till then that the Act confined the franchise only to men; the argument was that a later Act of 1899 taken with the Act of 1868 had the effect of conferring the franchise upon women too. With reference to this argument the Lord Chancellor stated "It proceeds upon the supposition that the word 'person' in the Act of 1868 did include women, though not then giving them the vote, so that at some later date an Act purporting to deal only with education might enable commissioners to admit them to the degree, and thereby also indirectly confer upon them the franchise. It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process. It is a dangerous assumption to suppose that the Legislature foresees every possible result that may ensue from the unguarded use of a single word, or that the language used in statutes is so precisely accurate that you can pick out from various Acts this and that expression and, skilfully piecing them together, lay a safe foundation for some remote inference. Your Lordships are aware that from early times Courts of law have been continuously obliged, in endeavouring loyally to carry out the intentions of Parliament, to observe a series of familiar precautions for interpreting statutes, so imperfect and obscure as they

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(1) (1909) A.C. 147, at p. 161.

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often are." It also appears to me that the words of the Act III of 1905 do not support the contentions. It only declares that the water is Government property; but the river does not thereby become so. Again if the water or the river must be considered Government property always by the provisions of that Act, there is no reason why we should go back only to the Act of 1865 and not to the Regulation of 1802. It appears to be clear that the Government must have conveyed all their rights including the water and the river within the boundaries of the properties in the sannad. Such a construction was not till now adopted as the Government did not own them. Further the Act preserves natural rights and rights by easement. There is no natural right to appropriate and consume entirely or to some extent another's property. The proper construction therefore to be adopted is that, in so far as the riparian proprietor has any property in water or any person has any customary right, it is not Government property. Any other construction would enable the Government to levy a cess when a person is exercising his natural rights and should not, therefore, be adopted. It will be an interference with the Permanent Settlement, Regulation and the Sannads. Moreover, if I am correct in my view, according to the customary law flowing water in a river belongs for certain purposes to the owner of the bed and banks; and the act does not interfere with vested rights. For these reasons I disallow this contention.

As to the reported cases, *Ponnusami Tevar v. Collector of Madura*(1) shows that the zamindar was using the water of the Vaigai for other than riparian villages; that the Government got his consent to erect a sluice in the channel to convey water to ryotwari villages and the Government claim to interfere with the flow of water so far as the zamindar was concerned was not recognised, while it was recognised so far as ryotwari tenants were concerned.

I am unable to agree with some of the *dicta* in the Perandai dam case which deal with the right of Government to regulate the distribution of water in zamindaris. It is stated therein, —see *Fischer v. The Secretary of State for India*(2)—“We are prepared to hold that the paramount right of Government under the law of this Presidency is independent of the ownership of the

bed of the stream. We also think that no distinction can be drawn between cases where the interest said to be affected is that of ryotwari tenants and where the interest which is said to be affected is that of holders of proprietary estates.” No authority is cited in favour of this proposition. It is really unsupported by any authority. The Government have, I believe, a right to regulate the distribution of water among ryotwari villages without causing injury to any of them. But they have clearly no such right in zamindaris. The reason of the thing is against it. Because the zamindar is at least under the same obligations to his ryots as the Government are towards their own. To assume such a right is to ignore the history of the Permanent Settlement, the conduct of the persons concerned and their legal consciousness; common law is the offspring of such consciousness and conduct and in India particularly it is unsafe to rely upon anything else in opposition to it. A Royal prerogative is presumed when it is in public interests to do so, but not for revenue purposes, and any such prerogative is entirely against zamindars' and zamindari ryots' interests, in whose case Government have no power of remission of revenue or rent.

The decisions in *Lutchmee Doss v. Secretary of State for India*(1) and *Chidambara Rao v. The Secretary of State for India in Council*(2), referred to sources of irrigation outside the estate. In *Secretary of State for India v. Swami Naratheeswarar*(3), the river and channel were admitted to be Government property. There are some observations in it however which may require further consideration.

The decision in *Secretary of State for India v. Ambalavana Pandara Sannadhi*(4), only follows the Urlam judgment. The latest decision, *Secretary of State v. Venkataratnammah*(5) (BENSON and SUNDARA AYYAR, JJ.) is, it appears to me, in direct conflict with the Urlam judgment. It holds that a natural stream of which the beds and banks belong to the inamdar was not a stream belonging to Government.

My conclusions are—The Rajas and Chieftains who afterwards were granted permanent sannads were using the waters of

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(1) (1869) 5 M.H.C.R., 8. (2) (1909) I.L.R., 32 Mad., 141 at p. 160.

(1) (1909) I.L.R., 32 Mad., 456.

(2) (1903) I.L.R., 26 Mad., 66.

(3) (1911) I.L.R., 34 Mad., 21.

(4) (1911) I.L.R., 34 Mad., 366.

(5) (1914) I.L.R., 37 Mad., 361.

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natural streams for the cultivation of all lands that lay within the ayacut of the streams subject to the claims of the ryots.

While the sannads deprived them in express terms of some of the powers they were exercising, there was no interference with their claim to use the waters of natural streams.

There is no evidence whatever to support the suggestion that the zamindars were entitled only to cultivate lands then under wet cultivation free or that the Government reserved any right to themselves to increase the revenue if waste land was brought under cultivation or additional or different crops were raised on the land. This suggestion that part of a zamindari alone was to be under permanent settlement is inconsistent with probabilities and against the policy of the permanent settlement.

Usage disproves the suggestion. The Government imposed revenue when waste lands in ryotwari estates were brought under cultivation but never claimed any revenue from zamindars for cultivating waste lands. Similarly they claimed enhanced revenue when river water or water from well sunk at ryot's expense within the ayacut of a river was used by ryots but not from zamindars when they used such water.

The ground on which the contention for the Government is based, that the peshcush was generally fixed on the basis of a certain area under cultivation has no foundation in fact. It is disproved in a great number of instances.

River water is indispensable for the cultivation of the lands that lay within its ayacut and any prohibition of its use either directly or indirectly by the imposition of a cess or increase of land revenue is improbable.

The Government were precluded from recovering any charge for water as land revenue by the terms of the permanent sannad and there was no law entitling them to recover it otherwise any restriction placed upon the use of water either by prohibition or imposition of any assessment, at the pleasure of Government, is a breach of faith destructive of the security of property which it was the object of the permanent settlement to create.

The new zamindaris created by the East India Company were placed on the same footing as the old.

Act VIII of 1865 was not intended to effect any change in substantive law. It was only intended to enable Government to recover water-cess for anicut water, to recoup themselves for

the expenditure incurred for the construction of irrigation works, or when a ryot used the water in a natural stream owned by Government.

Act III of 1905 cannot be used to interpret Act VII of 1865; it does not make the river or water therein Government property.

Under the customary law of the country river water belongs to the owner of the estate through which it passes subject to the claims of the proprietors below.

I would therefore confirm the decree and dismiss the appeal with costs.

Under section 98, Civil Procedure Code, the appeal is dismissed with costs.

The following three cases printed in small type form foot-
notes to *Secretary of State v. Janakiramayya*(1) :—

I

* SECOND APPEAL No. 573 OF 1911.

SANKARAN NAIR, J.—The appellant is one of the Nuzvid Zamindars whose judicial history will be found in *Raja Venkata Rau v. Court of Wards*(2) and *Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row*(3). The Zamindar alleged that the defendant, the Secretary of State, constructed in 1863 the Ellore Canal to carry the anicut water through the Zamindari and thereby obstructed the flow of water into one of his tanks Voddu Cheruvu from his other three tanks, and since that time the Government have been supplying him with water free of charge for the cultivation of his lands, about 507 acres 14 cents, which depended on these tanks for their irrigation. From 1889 they allowed water-supply free of charge only for 427 acres 91 cents, and on his appeal from such reduction it was still further reduced to 202 acres 67 cents. He prays for a declaration of his right to the supply of water as before and for certain reliefs consequential on such declaration. The Government filed their written statement and issues were framed which covered all the questions of fact relied upon by the plaintiff. But without taking any evidence, the question whether the plaint discloses a cause of action was first argued and decided against the plaintiff.

The Subordinate Judge held that no express "engagement" under Act VII of 1865 having been alleged, all lands irrigated by Ellore canal water must pay cess. The Judge in appeal held that a promise by the Government in 1863 to

(1) (1914) I.L.R., 37 Mad., 322. (2) (1879) I.L.R., 2 Mad., 128. (P.O.).
(3) (1906) I.L.R., 29 Mad., 437.

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supply water may perhaps be implied in the plaint, though the issues according to him show that the claim was based on a letter of a Deputy Collector of May 1891, which, it may be remarked, however, is not referred to in the plaint. He was of opinion that unless there was an express agreement, the Government are entitled to levy water-cess at pleasure.

The decisions of the Lower Courts go beyond the claim set up by the Government, who concede the plaintiff's right to water free of charge for 200 odd acres in their written statement. The Subordinate Judge states that the plaintiff's pleader in argument before him relied on a contract with the Government and the Judge states that the plaint apparently implies it. Issues Nos. 1 to 4 were necessary only if an implied agreement formed the basis of the claim. They certainly include it. In these circumstances as the evidence had not been taken and the plaintiff relied only on the facts alleged in the plaint and raised by the issue, an amendment of the plaint setting forth that the plaintiff relied on an "engagement" with Government should have been allowed if necessary. I do not think the omission to mention it is fatal to the suit. However to remove any difficulty we have allowed the plaint to be so amended. The question whether the facts set forth disclose a cause of action has been fully argued before us. As the plaintiff relies upon an "engagement" in 1863 with the Government in the sense in which that term is used in Act VII of 1865, it is necessary to refer to the events which led to the passing of that Act. We assume that the facts on which the plaintiff relies are true. When it was proposed in 1856 or thereabouts to undertake a general survey and reassessment of the lands in the Madras Presidency, the question arose how those lands irrigated from the Godavari and Kistna anicuts were to be assessed. Till that time the practice in the Presidency when water was supplied from irrigation works was to charge a consolidated wet assessment when water was permanently available and to levy a water-rate only when it was temporarily required for cultivation. The lands were classified as either "irrigated" or "non-irrigated". The Secretary of State suggested that this classification of lands according as they were capable of irrigation or otherwise from the Government sources should be abolished and all land should be classified with reference to its soil and productiveness without irrigation; a water-rate being charged when water is used or permanently available.

After a long correspondence which showed that different views were put forward and various difficulties pointed out, among them the practical impossibility of fixing the assessment to which the land which has been long under wet cultivation would be liable as unirrigated land, it was finally resolved to accept the suggestion of the Secretary of State and orders were issued by the Government of Madras on the 12th March 1853 that "a water-cess calculated with reference to the additional irrigation canal communications, drainage and embankments is to be levied invariably on all lands irrigated from the Godavari and Kistna channels from the second year of irrigation, without any reference to whether they are Government land, Inam lands or belonging to proprietors, and if in the latter two cases the Acting Collector (Masulipatam) has neglected to take *engagements* and opposition is made, he is forthwith to stop the supply." These instructions received the sanction of the Secretary of State, and one of his reasons was that this would be the easiest and most equitable mode of obtaining a fair contribution from the Zamindars towards the re-payment of the expenditure incurred in the construction of "drainage irrigation and other works undertaken by Government

and benefiting the lands of those proprietors as well as of Government." This is how the term "engagement" (see proviso to section 4 of Act VII of 1865 of which the draft bill was then under consideration) was used, so far as I know, for the first time.

These instructions were communicated to the Revenue Board and officials to be carried out.

From this the following conclusions may be deduced.

Water-rate was intended in re-payment of the cost of those irrigation works which supplied the water. It was not intended to assess lands which received their supply from sources, as in this case, completely under the zamindars' control with which the Government had nothing to do. No "engagements" with ryots were contemplated obviously for the reason that it could be included in land revenue, the only mode at that time of recovering the water charge from proprietors as distinguished from ryots of Government lands was to enter into *engagements* with them, and if they refused to do so, the remedy suggested was to stop the supply of water. It is clear that the zamindar was not bound to enter into any engagement with Government to take water when he was the owner thereof as when it was confined in tanks or reservoirs or in virtue of his riparian or easement rights from rivers, as it was not open to Government to prevent him from doing so. The Government were not in those cases supplying him with water; nor could they therefore stop the supply.

It is probable therefore that where the Government continued the supply it was under some engagement.

With reference to these two classes there was no difficulty. In the first class of cases in which the irrigation was carried on without any cost to Government and in exercise of the proprietors' rights of easement by vicinage, of ownership, no water-cess was levied, or in fact, could be claimed. In the second class of cases where irrigation was carried out with water supplied from the anicuts and only by means of Government irrigation works, channels, etc., the Government were entitled to dictate their own terms for the supply of water. If they were not accepted, they were entitled to stop the supply. The result was that, between the construction of the anicut and the passing of the Act of 1865, water was supplied to the proprietors on terms.

There were, however, other cases which it was more difficult to deal with.

Inams were exempted from permanent sanads and the nanja inams were irrigated from Government sources. Similarly where there were zamindari lands irrigated from Government sources. Similarly where there were zamindari lands irrigated from Government sources. (and those formed out of Havelli lands in which water sources were retained under Government control would be such) which were irrigated from Government sources. As they were entitled to Government water, the following rule for water assessment was passed for their benefit on the 26th October 1861:—

"Lands granted as nanja inams and fully irrigated accordingly at the Government cost will not be charged with water assessment." The same rule was applied to zamindars.

There was a fourth class. Water from the Government anicut works was often carried to the ryotwari lands by means of the old channels which passed through zamindari lands and were for that purpose improved, enlarged and extended by the Government. The zamindar who obtained his water through these channels naturally claimed the ancient water which flowed through his channels. Some of the Government channels flowed through the tanks or reservoirs

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which were samin property, and the zamindar was thus deprived of his tank water. Some channels, as the Ellore canal in the case before us, cut off the supply to the tanks on which the cultivation of zamindari lands depended. It is obvious that the zamindar in all these cases had a just grievance. The Government however considered that the water-supply before the days of the anicut was precarious and irregular and they issued the following rule on the 26th October 1861 :—

No. 12. "Such nanja Inams as were formerly imperfectly irrigated and have since been fully supplied with water from the anicut works, will be charged at half the above water-rates." The rule was made applicable to samindaries also. There was a proposal sometime afterwards that even the rule which allowed the full supply without any charge should be altered to allow half rate on the ground that there was never any adequate supply before. On account of the strong protest of the Board of Revenue the Government altered the half rate rule and allowed water free of charge even where the half rate had been levied on lands which "owing to the construction of the several anicut channels and other works connected therewith were found to have lost wholly or partially their pre-existing sources of supply." See G.O. No. 101, Revenue, dated the 16th January 1864. For determining what lands lost their sources of supply, the order states "the real criterion is the rate of assessment which the accounts show the land is liable to." The order further says, "If this indicates the title of the land to water or if other reasonable proof can be adduced, then no charge should be made for irrigation, as the *engagement* to supply water manifestly implied a full and not an imperfect supply."

There is only one further order to be referred to. The Secretary of State, in considering whether a cultivator should have the option to refuse Government water, said: the 16th January 1864 "with reference to your question, 'whether the ryot should be allowed the security against an excessive charge which the option of deciding, by a stated period of each year, whether he will have water or not, will give him,' I am clearly of opinion that such option should be permitted. There is little ground for apprehension that the option would be exercised by the cultivator in the way of declining to use the means of irrigation when they are supplied to him at a moderate price, and the possession of it would in no respect limit the right which the Government, acting on your own behalf or on that of the Irrigation Company, must retain, the right of declining to supply any particular tract of country with water, unless the cultivator should be prepared to enter into engagements to take the water at the stipulated rate in such numbers and for such terms of years as might warrant the required outlay. Although few would probably reject the opportunity, yet no compulsion to take the water must be exercised towards the dissentients, and they must in no way be disturbed in the possession of their lands, so long as they desire to hold them, and continue to pay the ordinary rate of assessment."

This despatch makes it clear that the Secretary of State wanted to give the ryots the same option of taking anicut water as the zamindars and inamdars had. This order was communicated by the Madras Government to the officers concerned and it was pointed out by the Government that "as regards lands which have been fitted for irrigation by the owners and have actually been irrigated for at least one season it may fairly be held that such preparation

and acceptance of water imply acquiescence with the usage of the country which does not require any formal engagement." That really means, in other words, an engagement will be implied between the Government to furnish water and the ryots to receive this supply. In these cases where the water was forced on the ryots the option was allowed and agreements were directed to be taken from them for any further supply of water. And they added "The same rule must of course apply equally to the holders of lands in zamindaries until the zamindars come to terms with the Government and collected cess." In accordance with those directions rules were framed in 1864; the bill which subsequently became Act VII of 1865 was directed to be prepared in accordance with these orders of the Secretary of State. I extract below two of the rules :—

Rule (7).—"Where ryots desire to convert dry land into wet application is to be made to the Collector either directly or through the Tahsildar on or before 31st March, and the Collector will arrange with the Public Works Department for the supply of water. *Where the means of Irrigation for such land already exist*, the ryot shall, as a rule, have the option of continuing or ceasing to use the water at his pleasure, provided that where water is taken, etc." This shows clearly no water-cess was intended where the ryot uses only the means of irrigation he already had.

Rule (10).—"These rules shall apply to zamindari and inam lands except in the case of zamindaries, a composition shall have been made either for fixed yearly payment or according to the quantity of water supplied. Provided always that no charge whatever shall be made under these rules for a single crop for zamindari or inam land where such lands are proved to have been customarily cultivated with wet crops under old tanks, channels, or by any means of irrigation whatever prior to the construction of anicuts, or to have been charged in the accounts with such a rate of assessment as indubitably indicates the title of such land to water or by the terms of the grant to have been given as nanja inam."

There were thus three circumstances recognized as conferring a right to exemption from water rate otherwise leviable :—

- (1) The existence of any means of irrigation including tanks, channels whatever prior to the construction of anicuts;
- (2) lands being charged with nanja assessment; and
- (3) the title-deed showing that an inam was granted as nanja.

Two conclusions follow :

That it was not intended to levy any charge on cultivation carried on with any pre-existing source of supply, tank, channels and rivers; and that in these instances the Government were only carrying out a legal obligation created by interference with such pre-existing source of supply which would have been enforced by the courts.

An Act was necessary to collect the cess in the same way as land revenue and perhaps to remove the difficulties that might be caused by taking water through zamindari and inam lands. It was first intended only for the districts which used the Godavari and Kistna water and power was reserved in the original draft to extend it to the other districts. But finally the bill was drafted for the Presidency.

Before considering what the relations of the parties were or whether there was an engagement between the parties at this time, i.e., in 1863 and 1864, I shall finish my review of the proceedings which led to the Act.

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In forwarding the draft Act to the Government Pleader, the Government asked his opinion whether it was necessary to specify zamindari and inam lands in order to enforce the special cess "on land newly irrigated from Government sources at Government expense. The opinion of the Government Pleader was in the affirmative and he drafted the section in these terms: "This Act shall extend to all lands held, by samindars or inamdars for the irrigation of which water may be, *after the passing of this Act, newly* supplied or used from any such river, stream, channel, tank or work as specified in section 1." On its being pointed out that this might preclude the levy of any water rate for irrigation newly supplied to such lands since the construction of the anicut but prior to the passing of the Act and which supply may hereinafter be continued, the Government modified it by omitting the words "after the passing of this Act, newly" and the section then ran in the form in which it was finally passed by the Legislative Council thus: "This Act shall extend to all lands held by zamindars, inamdars or any other description of landholders for the irrigation of which water may be supplied or used from any such river, stream, channel, tank or work as is specified in section 1, provided always that where a zamindar or inamdar by virtue of engagements with the Government is entitled to irrigation free of separate charge no cess under this Act shall be imposed for water supplied to the extent of such right and no more."

In the case before us the water is supplied to the lands in suit from a Government source, to wit, Ellore Canal and Government anicut works, and therefore unless the plaintiff proves the 'engagement' that he sets up the Government are entitled to levy water tax. The word 'engagement' in the section is no doubt used in the same sense in which it was used in the proceedings to which I have already drawn attention. Now, what was the state of things when the Act was passed? When the Government intercepted the flow of the water from the other three tanks mentioned in the plaint into Voddicheruvu, they undoubtedly inflicted an injury upon the plaintiff, and if the plaintiff had enforced his claim in a civil court he would have obtained a decree for compensation payable to him for such interference, which would probably have been a direction to supply him with that water which his tank was usually getting before the interruption or some equivalent compensation. Now, it is not to be presumed that the Government did a wrongful act if the facts are consistent with any other supposition. The natural presumption is that they compensated him in some form. We find that the Government had issued orders that where their irrigation works had interfered with a pre-existing source of supply, water was to be supplied free. We see here there was such interference and the consequent free supply. The orders also show that in other cases water was to be supplied to zamindars under engagements to pay at certain rates. We see here no such payment received or demanded. We further find that even as to the ryotwari lands the Government proceedings directed that engagements should be entered into and that the Government presumed that, when the ryots prepared their lands for irrigation and received water from such irrigation sources, an engagement might be implied. Under these circumstances, unless the free supply of water from 1863 is explained by Government, it appears to me the presumption, not only natural but almost irresistible, is that there was an implied engagement between the parties for the free supply of water. The Judge rightly observes: "the Act

was an embodiment of the Government Order"; but he holds that "it was for the zamindar to have entered into an engagement with Government as to the extent of irrigation to which he was entitled." In my opinion he is wrong in holding that an express agreement is necessary. That the plaintiff was irrigating the lands in suit with Government water free of charge is clear evidence that he was entitled to water sufficient to irrigate them either because they were then being irrigated with his tank water or could have been so irrigated or it was only on those conditions that he permitted any interferences with his property.

The Government Pleader contends that, though there may be an engagement, it is only to the effect that the zamindars are entitled to receive from the Government water necessary for the old customary irrigation of their lands, that is to say, they are only entitled to water sufficient to irrigate that area which is entered as wet in the permanent settlement accounts, and, in the absence of any allegation in the plaint that the land for which they claim free supply of water is land so entered as wet in the old accounts, the plaintiff is not entitled to maintain the suit. If the argument is that the 'engagement' in 1863 with reference to this estate had reference only to the old settlement accounts to the knowledge of both the parties, it is open to the Government to plead it and prove the same. That would be an express agreement. Otherwise it cannot be used to limit the plaintiff's claim based on the state of things in 1863. For, the zamindar may have improved the capacity of his tank or increased the area of his wet cultivation since the sanad and the supply of water must have been made to compensate him for his loss then sustained. If the argument is that an 'engagement' referred to is to be implied from the conditions that existed at the date of the permanent sanad, it is not an answer to the plaintiff's claim; because, if the facts imply an engagement in 1863 when the supply was obstructed, that there was another engagement in 1802 or afterwards, when the permanent sanad was granted, unless it is shown that that is the only engagement which is intended by the Act of 1865, is not material. The section itself is not restricted to any engagement at the time of the permanent settlement. And I have no doubt it was open to the parties to enter into any engagement at any time they liked. The plaintiff may be entitled to say that if the old Gudigat wet area according to the permanent settlement accounts entitled him to more land than what he now claims then he should be entitled to the free cultivation of lands to that extent in addition. He may also be entitled to say, if he was getting water sufficient to cultivate more lands than the area he now claims, he is entitled to such quantity of water and cultivate more lands with it as it is reasonable to presume that the Government could not have intended to deprive a man of his property without compensation. This is apparently the effect of G.O. No. 2416, 17th June 1895 "where the mamul wet areas to be allowed are found to be in excess of the highest recorded areas under wet cultivation in the village concerned, the maximum area irrigable should be allowed." It is unnecessary however to consider this question as he makes no such claim in the plaint. The rules, already extracted, in force at the time the Act was passed, support this conclusion. He is entitled to exemption if his pre-existing source of supply is interfered with or if the accounts show a *nanja* assessment or if the title-deed supports the claim. The one is not exclusive of the others. The Act, as rightly pointed out by the Judge being only an embodiment, so far as this matter is concerned, of

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the pre-existing rule, an engagement will be implied if any of these grounds exist. The tanks, if any, in the zamin undoubtedly belonged to the zamindar. The Government lay no claim to them. It is not probable that there was therefore any engagement by the Government to supply water for the irrigation of such lands under those tanks. From where could the Government supply such water? Not from these tanks with which they had nothing to do, and it is not shown there was any other source of water supply. No engagement can therefore be implied. An engagement can only be implied in those cases in which it was in the power of the Government to stop the supply of the water claimed or when they undertook to supply such water themselves. Otherwise I see no reason for any implied contract so far as the lands irrigated with any pre-existing source of supply which did not belong to the Government are concerned. For these reasons I am unable to accept the Government Pleader's argument that the engagement to be proved has reference only to the wet area as shown in the permanent settlement accounts. If, however, it is necessary to prove what the area was so entered, then, the fact that these lands were under cultivation from 1863 to 1889, and it is not shown by the Government that the lands were brought under cultivation only some time after the permanent sanad was granted, would be evidence to show that they were mamul wet even at the date of the permanent settlement. The permanent settlement accounts are with the Government and if the extent to wet cultivation under these tanks is referred to in those accounts, it is for the Government to produce them if it is material.

The only case that has been cited in argument before us is against the Government Pleader's contention. *Secretary of State v. Kameswaramma*(1) was a similar case and the learned Judges, BENSON and MILLER, JJ., stated the question for decision in these terms: "The question for decision in this appeal is in effect what is the extent of land in the village of Ravipad which was irrigable from the irrigation works existing before the construction of the Godavari anicut irrigation system." I entirely agree. It appeared that various accounts showed the various extent of lands under cultivation but they adopted the greatest area irrigated which no doubt showed those lands were capable of irrigation works before the days of anicut. They did not put the plaintiff to proof of what the settlement area was. I am therefore of opinion that, if the facts relied upon by the plaintiff are proved, a cause of action is disclosed. The Judge is therefore directed to return findings on the issues in the case. It will be open to him to direct the Subordinate Judge to submit findings to himself.

Six months are allowed for findings, and seven days for objections.

SADASIYA
AYYAR, J.

SADASIYA AYYAR, J.—I concur in the decision just now pronounced by my learned brother, and if I add a few words in my own language, it is merely on account of the importance of the questions involved in this case. This is one of those cases arising out of the Government's having constructed anicut channels and other works connected therewith in the Godavari and Kistna deltas. Some of these channels interfered with the sources of irrigation to the lands of certain landholders or interfered with the flow of water to the tanks which formerly supplied water for irrigation to such lands. The Proceedings of the Board of Revenue, dated the 11th February 1898, contain the following:—

"When the system of anicut irrigation was introduced into the Godavari and Kistna deltas Government allowed free irrigation from the anicuts, to all lands

which, owing to the construction of the several anicut channels, and other works connected therewith, were found to have lost, wholly or partially, their pre-existing sources of supply (G.O. No. 101, Revenue, dated 16th January 1864)."

This shows that about 1864, the Government offered to allow free irrigation from the anicuts to such lands as were deprived of their former sources of supply. The owners of such lands who did not enter into litigation with the Government in order to prevent Government from interfering with the old sources of supply and who took the water supplied by the Government from the Government anicuts must be taken to have accepted the offer of Government as satisfaction of their claims against Government. The fourth paragraph of the plaint in this case says that the Government supplied the plaintiff's land with water from the year 1863 to fasli 1900 and that the plaintiffs accepted such water. There was, in my opinion, therefore a clear, completed engagement between the Government and the plaintiff set out in the plaint and hence the plaint shows a good cause of action. Similar suits to this were instituted by the proprietrix of the village of Ravipadu, the proprietor of Chinobinada and by two other proprietors in 1902 in the District Court of Godavari. Mr. Hamnett, the learned District Judge who decided those suits, acted upon the Government Order of 1864 and found an implied engagement between the Government and the proprietors of those estates and gave effect to that engagement as against the Government. On appeal to the High Court by the Government, it was contended as the very first ground in the appeal memorandum [see the appeal memorandum in *Secretary of State v. Kameswaramma*(1)] that the District Judge erred in law in finding that there was an implied contract between the plaintiff and the Government to allow free irrigation for the extent of land, the irrigation sources of which had been cut off by the anicut works. The learned Judges (BENSON AND MILLER, JJ.) who decided that appeal and connected Appeals Nos. 183 and 184 of 1904 saw nothing in that contention and begin their judgment at once with the sentence:

"The question for decision in this appeal is in effect what is the extent of land in the village of Ravipad which was irrigable from the irrigation sources existing before the construction of the Godavari anicut irrigation system." Following the decision in those appeals, we must in this case set aside the decisions of the lower Courts which held that the plaint discloses no cause of action. I may add that in *Secretary of State v. Kameswaramma*(1), it was assumed that, if there was an engagement between the Government and the proprietor, that engagement was to supply water free of tax on the extent of land which was irrigable from the irrigation works existing just before the construction of the Godavari anicut irrigation works, and not merely on the lands which were irrigable as wet lands at the time of the permanent settlement. The contention of the learned Government Pleader before us that the engagement mentioned in Act VII of 1865, section 1 (a) relates to the engagement at the time of the permanent settlement cannot be accepted in the face of the decision in *Secretary of State v. Kameswaramma*(1). It seems unreasonable to hold that after a landholder has improved his zamindari and brought between 1802 and 1864, a large extent of land under wet cultivation by improving his irrigation sources, when the Government by their new anicut system cut off the

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sources of irrigation supply to those large extents of lands, they intended to arrange with the zamindar to supply him water free of charge only to the wet area, which existed in 1802 but not to the area which had begun to be permanently cultivated as wet at the time when they constructed the anicut channels. The Government Order of 1864 and the Board's Proceedings of 1898 already referred to are against the contention that the Government did not undertake liability to supply water free to all those lands whose then existing irrigation sources were interfered with by the Government's constructions. In the result I agree in the order proposed by my learned brothers.

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APPEAL No. 15 OF 1907.

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ORDER.—To enable us to decide this appeal satisfactorily, we consider it desirable to allow the parties to adduce further evidence on the following point:—

(1) What, if anything, passed to the grantee under Exhibit XX under the words 'besides poramboke' and whether she obtained a right to the channels conveying water to the tanks irrigating the lands of the Lakkamdidi village or to those tanks themselves?

The lower Court has not dealt with this point in its judgment, but appears to have assumed that the Government did not reserve the channels and tanks at the time of the Inam settlement.

We request the District Judge to take the additional evidence that the parties may adduce and to submit the same together with his opinion on the effect of such evidence within one month after the re-opening of the District Court after the recess.

In pursuance of the above order, the District Judge of Ganjam took additional evidence, both oral and documentary. As regards the oral evidence he found that it was of very little use. The accounts given by the witness might be set aside as of little value in coming to a conclusion on the question whether the inamdars of the plaint village of Lakkamdidi were entitled to the beds of the plaint Yellamanchili channel and its sub-channels so far as those beds lay within the limits of the Inam village of Lakkamdidi.

As regards the documentary evidence he found that the plaint village of Lakkamdidi was one of the villages in the Chicacole Haveli. Before 1768 the Haveli belonged to the Mogul Emperor. The Emperor granted the management of the Circars to the East India Company, which leased the lands in Chicacole to one Sitaram Raz. The latter granted Lakkamdidi to Kannepilli Ramavadhanulu for subsistence. It was Yekabogha Agrahar up to 8th February 1861 on which date the holder of the village died leaving Kannepilli Venkataratnamma,—his childless young widow (see Recitals in Exhibit 16). The Haveli lands were resumed by the Government from the temporary lessees and sold in lots in 1803 and 1804 to the highest bidders on permanent settlement. Twenty proprietary estates were formed by the sale of the Chicacole Haveli lands in 1808. One of them was Jarjangi. The plaint Agraharam village of Lakkamdidi was within Jarjangi. The proprietors of those twenty estates were entitled to get only *kattubadi*. The Government seemed to have reserved to themselves the reversionary right in the inam tenures included in these proprietary estates. (See page 149, Exhibit N.) There could be no doubt that Lakkamdidi was an

Yekabhoga Agraharam (whole village inam), enjoyed by Brahmin inamdars. Besides the major whole village inams there were minor inams which related to grants of defined extents of lands as contrasted with grants of entire villages (see paragraph 29, page 155 of Exhibit N).

A reversionary right to resume the inam on failure of direct lineal heirs seemed to have been always asserted by the Government [Gunnaiyan v. Kaniakchi Ayyar (1)]. In 1854, the Government wished to give up their reversionary interests in the whole village inams and similar inams situated in the zamindaris, after fixing a permanent quit-rent. The Deputy Collector, as Inam Commissioner, being appointed to fix such values, prepared the register for Lakkamdidi (Exhibit 16). The whole village of Lakkamdidi was an Yekabhoga inam till the middle of the 19th Century. Then one-tenth of the village area seemed to have passed to Ravi Janikiramayya by a court auction sale and nine-tenths was enjoyed by Kannepilli Venkataratnamma. Two title-deeds were issued to Venkataratnamma and Janikiramayya in 1867. Neither of these is forthcoming now. The form of grants then obtaining in respect of whole village inam title-deeds appeared from Exhibits K, K-7, K-10, K-11, L-1, 2 (a) and 2 (b). The form in the first page first set out the grantee's present title and was then followed by the Government proposals to give up their reversionary right in consideration of a quit-rent. Then on the second page, the conversion into free-hold in favour of the grantee was entered as the grantee had agreed to pay the quit-rent demanded. The form in page 1, paragraphs 1—3 was as follows:—

1. On behalf of the Governor in Council of Madras, I acknowledge your title to the shrotriem village of . . . claimed to be of . . . acres of dry land and . . . acres of wet land besides poramboke.

2. This inam is subject to a jodi or quit-rent of . . . and is hereditary, but it is not otherwise transferable; and in the event of failure of lineal heirs it will lapse to the estate.

3. On your agreeing to pay an annual quit-rent of . . . inclusive of the jodi already charged on the land as above said, your inam tenure will be converted into a permanent free-hold.

Venkataratnamma got her title-deed in this form (dry and wet lands "besides poramboke"). It had to be observed that in the case of minor inams, the title-deeds issued about that time did not contain the manuscript additional words "besides poramboke." Act VIII of 1869 made clear that only the rights of Government were intended to be granted and that no proprietary right in the soil (which did not already exist in any particular inamdar) were intended to be newly given. About 1898 Venkataratnamma wanted a renewal of her last title-deed of 1867. Exhibit 20 was issued to her on 20th June 1898. Although this title-deed varied from that of 1867 in some particulars, it followed the old form including the insertion of the manuscript words, "besides poramboke" after the mention of the area of dry, wet and garden lands. As regards the meaning of these words "besides poramboke," one very important entry appeared in Exhibit K-2 (the Lukulam Register of 1862). The Inam Commissioner first mentioned the *gudikat* extent of the lands in Lukulam for purposes of valuation. He then deducted the extent of poramboke

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melvaram was levied or payable on poramboke there could have been no intention to recognise the inamdar's title to any poramboke by the grant of title-deed. We do not decide in this case that the mere insertion in the margin of the title-deed of the words "besides poramboke" must necessarily be taken to be an acknowledgment by the Government of the inamdar's title to all kinds of poramboke. It was held in *Narayanaswami v. Kanniappa*(1) by this Court that such is not the necessary effect of the insertion of those words. The question in that case related to the bed of a stream. The inam there was granted by the British Government in 1802 in lieu of certain lands held as emoluments of the office of Nattuvar which had been resumed by the Government. No boundaries were stated in the documents relating to the grant and no mention was made of the river or river-bed. The Court held that notwithstanding the insertion of the words "besides poramboke" in the margin of the title-deed the documents in the case showed that it was not intended to acknowledge the inamdar's title to the bed of the stream. In *Ambalavana Pandara Sannadhi v. Secretary of State for India*(2), it was held that a grant of village "with all wells, tanks and waters" within the boundaries did not pass to the grantee an artificial water-course then existing which irrigated the village granted and other lands. There was no mention in the grant of the channel although the existence and importance of channels as separate entities was present to the mind of the grantor and although tanks and wells were separately mentioned. It was held that the omission of the channel was intentional and that from that circumstance it was clear that it could not have been the intention of Government to recognise the inamdar's title to the channel or its bed. The effect to be given to the insertion of the words "besides poramboke" must depend on the evidence available in each case and the circumstances attending the grant. In this case it is extremely unlikely that when the whole of the village was granted in 1767 by Sitaramraz it was not intended to convey to the grantee all the waste and poramboke in the village. The British Government accepted that grant and recognised the inamdar's title under it. The channel was not one which passed through any Government property before it reached the village of Lakkimiddi. It is apparently not a large stream connected with any system of irrigation maintained by Government and as found by the former District Judge the channel was not controlled by the Government to any appreciable extent. There was no intention on the part of Government at any time to derogate from the grant made in 1767. Both of the learned District Judges who dealt with the case proceeded on the footing that the channel and other poramboke in the village belonged to the inamdar. On the whole we see no reason to dissent from that conclusion. It has therefore not been proved that the water irrigating the village belongs to Government. In the result, we dismiss the appeal with costs. The memorandum of objections has not been argued and is also dismissed with costs.

(1) Second Appeal No. 1445 of 1910. (2) (1905) I.L.R., 28 Mad., 539.

III

SECOND APPEALS Nos. 1831 AND 1834 OF 1908.

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v.
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SANKARAN NAIR, J.—The plaintiff is the inamdar of Adangarkulam village in Nanguneri taluk. He states that a natural stream, Hanumanadhi which takes its rise in the Western Ghats flows through his village; that he has been taking the water of that river to his tanks, six in number, at certain seasons of the year when it was required for the irrigation of his lands; that in order to divert the water into his channels he had to put up a dam across the river-bed as the river is on a level lower than that of the channels and water could not flow into them when it was knee-deep or less than that and that he has been doing so, according to him, from time immemorial. The dam consisted of a masonry anicut with interstices between the vertical stones which he filled up when necessary, with mud or palmyra leaves. The plaintiff states that the masonry anicut in some places was damaged and he had therefore, to put up a temporary mud dam in front of it, for diverting the water into his channels. The first defendant the Government, recently levied an assessment from him for taking the water into his tanks. The other defendants are the ryots of some of the neighbouring villages who also deny plaintiffs' right to take water as claimed by him. He therefore seeks a declaration of his right to take the water of the stream to his tanks by diverting it into the channels and for that purpose to put up a dam across the river-bed, and also a declaration that the Government had no right whatever to levy any tax on him for taking such water. The first defendant who is the Secretary of State for India in Council denies that the river where it passes through his village belongs to the plaintiff. It is asserted that the river belongs to Government and that the plaintiff at the time of the inam grant did not acquire any rights claimed in the plaint to the use of the water. It is also denied that the anicut belongs to the plaintiff or that he is entitled to put up any dam across the river or to take water as he alleges through the channel for purposes of irrigation. The Government also allege that the plaintiff can only take water to irrigate the lands which were under wet cultivation at the time of the inam grant and that the assessment was imposed because he utilized the water of the stream for the purpose of raising nanja crop on lands on which it was not usual to raise before. The other defendants also deny the plaintiff's right. They allege that if the plaintiff is allowed to take water as claimed by him irretrievable loss and injury would be caused to the defendants who hold lands below. The right of the Government to the river bed, however is not accepted by them in their written statement.

The facts which are admitted or proved beyond doubt are—the Hanumanadhi river takes its rise in the Western Ghats and after running through various ryotwari villages in the midst of which the plaintiff's inam village is situated flows into the sea. Three of the hamlets belonging to this village lie on the western side of the river and the fourth or the last one, Uramali hamlet lies on the eastern side of it. For the irrigation of the lands belonging to these three hamlets lying to the west of the river, there are five tanks and there is one tank for the Uramali hamlet on the east side of the river. The masonry anicut which is referred to in the plaint is built across the river-bed to raise the level of the water to divert it into the channel which takes water for the stream to the five tanks of the three hamlets. That masonry

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ancient being now in disrepair the plaintiff has put up a mud-dam in front of it to divert the water. At some distance below that ancient the river bifurcates and at or near the point of bifurcation the plaintiff has put up a mud dam to prevent the flow of water along one of the branches and to make it flow into the other, that is the eastern branch that he might take it into his Uramali tank.

The plaintiff's case is that this system of taking water into his tanks has been in existence from time immemorial. The subordinate judge has found that the ancient across the bed of the river was built by the plaintiff's predecessors within the limits of the Adangarkulam village, that the river Hanumanadhi ran through the village both the banks of the river belonging to the plaintiff. He also found that he was a riparian owner of the inam village. The question whether he was a riparian owner was raised apparently with reference to the plaintiff's claim as an inamdar. On the question whether the plaintiff was entitled to take the water he found that the plaintiff as a riparian proprietor was entitled to take the water for the irrigation of his own lands without causing any material injury to the other riparian proprietors and that the method he had adopted of constructing ancients for the purpose of damming the river was in the circumstances of the case, the only reasonable method of enjoying his right. He also found that no material injury was thereby caused to the other riparian proprietors. He also came to the conclusion that the plaintiff's predecessors-in-title had been putting up the dams in question and thereby diverting the water of the stream into his channels for a very long time probably from the year 1803 and certainly for more than 30 years. He was therefore of opinion that even if the plaintiff's natural right to take the water as a riparian proprietor has not been proved he has proved a right by prescription to take the water and he was also of opinion that in the circumstances of the case there is a presumption of a grant by the Government in favour of the plaintiff. He further held that the first defendant was not justified in imposing penal assessment on the ground that the plaintiff had put up a dam and that the plaintiff as a riparian owner was entitled to the use of his stream to irrigate his inam village to any extent provided he did not thereby interfere with the rights of the other riparian owners either above or below him. It was also held that it was only when the plaintiff used Government water for the irrigation of any lands in excess of the original area that the Government had a right to raise any revenue on that account and that this was not Government water in that sense. The other questions which were argued before him and decided are not material for the purposes of this Second Appeal. He accordingly passed a decree in favour of the plaintiff declaring his right to put up a dam in the river.

In appeal it is first contended before us that the finding of the Judge that the dam erected at A in the plan across the bed of the river to take water to the five tanks is within the plaintiff's village of Adangarkulam is wrong. The Survey plan of the inam village of Adangarkulam on the west of the river and of Thanakulam on the east of it, shows that the bed of the stream is included within the limits of Adangarkulam. The river at that place is called Adangarkulam river in the Pymash accounts and is described as the boundary of another village, Kalyanakulam also on the eastern side (k). The Government Revenue accounts of 1803 treat the bed of the stream adjoining it as part of the Adangarkulam village (Exhibits R, R-1, and R-2). These are the reasons given by the learned Subordinate Judge for his finding.

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The Advocate-General however states that though the village is recognised as belonging to the plaintiff and the descriptions of the boundaries and the Revenue accounts of the village may show that the river bed is included within its limits, yet unless it is expressly stated that the river bed is conveyed it will not pass and he relies upon the decision in *Narayanaswami v. Kamniappa*(1) and in *Kondappaneni Kotayya v. Ganguru Seshayya*(2). That was a case of a grant on shrotriem tenure and it is stated in the judgment that the object of the grant was to make a provision for an official whose office was no longer necessary and "what was regarded was the land as producing an income." In the case before us there is no grant produced. There is therefore nothing to rebut the inference drawn by the Subordinate Judge from the facts above set forth. It also appears that the plaintiff and his predecessors have been exercising acts of ownership in the bed of the stream by putting up stone pillars. Moreover when the plaintiff applied to the Inam department of the Revenue Board office that the poramboke in the village may be ordered to be expressly included in the Inam patta he received this reply, "It is not the practice to enter the extent of poramboke lands too in the pattas issued on the Settlement of the whole village. The term entire village includes the poramboke and all other lands which are within the four boundaries and comprised in inam patta Huk. The inamdar, therefore, may enjoy in any way he pleases all the lands within the boundaries of each village. There is no necessity to pay separate tax to Government for it" (Exhibit S). I uphold the finding of the Subordinate Judge on this question.

It is next urged by the learned Advocate-General that the plaintiff's claim to erect a bund or dam up a river is unreasonable. The plaintiff is a riparian proprietor: he has a natural right to use the water of the stream for irrigating the lands of his Adangarkulam village provided he does not thereby cause any material injury to the other riparian proprietors. What quantity of water he is entitled to take and how he is to take it for irrigating the lands must depend upon the circumstances of each case. Erecting a dam or bund across the bed of a river when it is low to raise the water to a sufficient height to divert it into an artificial channel for irrigation is one of the common methods in this Presidency of using the water of a stream by a riparian proprietor. That a dam may be erected when it is reasonably required for the use of stream water is recognised by the Judicial Committee. See *Minor v. Gilmour* (3) and *Debi Pershad Singh v. Joynath Singh*(4). The Subordinate Judge in a careful judgment finds that, when the water in the stream is only knee-deep or below that level, the erection of bunds to raise the level to divert the water into channels is necessary for purposes of irrigation. He finds that the holders of land above and below have been similarly erecting bunds to take water to their lands. Six permanent ancients above and two below were erected by the Government to divert stream water into irrigation channels. In 1873, 1874, 1882 and 1889 the existence of the dam and its prejudicial effects on the cultivation of Government ryotwari lands was brought to the notice of the Government and they recognised the plaintiff's right to take water by the erection of dams (Exhibit O). It is difficult to believe that, if this had been unusual, it would have received any recognition. There is therefore strong evidence to support the conclusion of the Subordinate Judge that the

(1) Second Appeal No. 1445 of 1910. (2) (1913) 14. M.W.N., 495 at p. 496.
(3) (1858) 12 Moo., P.C.C., 131. (4) (1897) I.L.R., 24 Calo., 885 (P.O.)

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erection of bunds at certain seasons when the water was only knee-deep is reasonable and in Second Appeal we cannot interfere with that finding.

The Subordinate Judge also finds that no material injury has been caused to the defendants by the erection complained of. We therefore uphold the decision of the Subordinate Judge that the plaintiff has the right to erect dams which he has erected to enjoy his natural rights. No objection has been taken to the dimensions of the dam or to the time of its erection.

The Subordinate Judge goes further and finds that even if material injury was caused to the other riparian proprietors they are not entitled to complain as the plaintiff has acquired a right to take water to his tanks by prescription. He finds that even if the masonry anicut was put up for the first time only in 1872 or 1878 the plaintiff has been damming up the stream to take water through his channels to his tanks for irrigation by putting up mud or sand dams across the bed of the river long before that time. He finds from the documentary and oral evidence adduced in the case that these channels have been in existence as supply channels for his tanks from before the year 1803. He discredits the defendant's evidence that they were only *marukalls* or drainage channels. This finding is supported by evidence and we see no reason to interfere with it, and on this finding also the plaintiff is entitled to the declaration that he has obtained.

It is contended on behalf of the Government that the plaintiff was not entitled to take water to raise wet crops on lands on which hitherto it was only customary to raise dry crops, on the ground that it must be taken that the plaintiff was only entitled to receive so much of the water of the stream as was conceded to him by the Government when the village was granted to him in inam, and if he takes any more water he is liable to pay any assessment that may be imposed under the Madras Act VII of 1865. The Subordinate Judge disallowed this claim on the ground that the river did not belong to the Government under section I of that Act as he had found that it ran through the plaintiff's village, the banks on either side belonging to him and also on the ground that he is a riparian proprietor. It is however urged by the learned Advocate-General that under Act III of 1905 whatever might have been the law before it must now be taken that the water of the stream belongs to the Government. The provisions of this Act were not considered by the Subordinate Judge as the suit was instituted in 1904 before the Act was passed. In reply to this it is urged before us by the respondent's pleader that, first of all, the Act did not interfere with the rights which existed before and the riparian rights of the plaintiff are preserved and, secondly, that neither the water nor the stream belonged to the Government. It was also urged that on the facts found in this case there was an engagement between the plaintiff and the Government by which the former was entitled to irrigation free of charge. It is not contended that the plaintiff has taken more water than he has been taking before. It appears that he has taken water from the river only to fill the tanks as he has been doing hitherto. The carrying capacity of the channels is not said to be greater now than before nor is it said that the tanks have been widened or deepened in order to take in more water than hitherto. The plaintiff is clearly entitled to irrigation of such land as it is in his power to do so with the water which according to the findings, he is entitled to take from the stream. The right that is proved is the right to take the water until the tanks are filled. It is not shown that he

has taken more water than that. We must therefore disallow the contention on this ground. The Second Appeals are dismissed with costs under section 82, Civil Procedure Code. We allow a period of three months for payment of costs. ABDUR RAHIM, J.—I agree.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

PRAMATHAN THUPPAN NAMBUDRIPAD (SON OF
PATHAIKARA MANAKKAL THUPPAN PRAMATHAN NAMBUDRIPAD)
(PLAINTIFF), APPELLANT.

v.

CHOORAKKAPATTI MINDEKOTTIL ITTICHIRI AMMA
AND ELEVEN OTHERS (DEFENDANTS), RESPONDENTS.*

1912.
February 22
and
March 1.

Adverse possession—Possession by person claiming as trustee—Animus possidendi determines nature of right prescribed—Estoppel—Landlord and tenant.

When a person purports to hold property as a trustee, he cannot by such possession acquire a right to the property by prescription for himself against the beneficiaries.

The character in which possession is held, and the *animus possidendi* of the holder determines the right which the possession would confer.

Madhava v. Narayana (1886) I.L.R., 9 Mad. 224, *Thakore Patesingji v. Bamanji A. Dalal* (1903) I.L.R., 27 Bom., 515, *Secretary of State for India v. Krishnamoni Gupta* (1902) I.L.R., 29 Cal., 518 (P.C.), *Lyell v. Kennedy* (1889) 14 A.O. 437 and *Soar v. Ashwell* (1898) 2 Q. B., 390, referred to.

The plaintiff's father claiming to be the trustee of a temple demised temple lands in 1866 on *kanom* to the first defendant, and the second defendant was the ultimate assignee of the *kanom* interest at the date of suit. The plaintiff's claim to the trusteeship was negatived by decree of Court in 1894 when a third party was declared to be the trustee. It was found that the plaintiff was not the trustee at the date of the present suit instituted by the plaintiff for recovery of possession of the *kanom* lands from the second defendant.

Held, that the suit must fail, as the plaintiff was not the trustee. *Held* further, that the second defendant was not estopped from denying the plaintiff's right on the ground that he was no longer the trustee, though he would be estopped from denying the title of the temple.

SECOND APPEAL against the decree of A. N. ANANTARAMA AYYAR, the Subordinate Judge of South Malabar at Calicut in Appeal No. 28 of 1910, preferred against the decree of S. K. SUBBIEB,

* Second Appeal No. 1516 of 1910.

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the District Munsif of Walluvanad, in Original Suit No. 273 of 1909.

The facts appear fully in the judgment.

T. R. Ramachandra Ayyar and *M. Kunjuni Nair* for the appellant.

J. L. Rosario for the second respondent.

BENSON AND
SUNDARA
ATTY, JJ.

JUDGMENT.—The suit out of which this Second Appeal arose was instituted by Pathaikara Pramathan Thuppan Nambudripad, the Manager of a Nambudri Illom, to recover possession of certain lands demised on kanom in 1866 to the first defendant by the plaintiff's father. At the time of the suit the lands were in the possession of the second defendant. The original demisee, the first defendant, assigned his rights to one Krishnan Nair in 1894. He subsequently in 1901 attorned to one Kodalur Nambudri who claimed the lands as the property of a temple Kizhuthir kovil Devasvam. The second defendant subsequently, obtained an assignment of the rights of Krishnan Nair. The second defendant denied the plaintiff's right to redeem the mortgage and set up the right of the Devasvam to the lands and his holding under the Devasvam. He denied the genuineness of the demise sued on; but both the lower Courts have held it to be genuine. In view of the findings of the Appellate Court it is unnecessary to refer to certain other contentions raised by the second defendant. In the kanom deed, Exhibit VII, the lands in question are described as belonging to the temple and the counterpart-Kychit, Exhibit A, provides that the annual rent should be paid at the Devasvam Office.

Both the lower Courts have found that the lands belong to the Kizhuthir kovil Devasvam. The District Munsif gave the plaintiff a decree for possession. He said, "I find that the plaintiff's properties are attached to the Kizhuthir kovil Devasvam properties and belong to the plaintiff and that they are held under the plaintiff Kychit, Exhibit A. He was of opinion that the second defendant who was an assignee from the assignee of the original kanomdar was estopped from denying the plaintiff's title to recover the properties and was bound to surrender them. One of the two defendant's contentions was that it had been finally decided between the plaintiff and Kodalur Nambudri that the latter was the trustee of the temple and not the former; but the District Munsif decided this issue in the negative in plaintiff's favour.

On appeal, the Subordinate Judge held that the plaintiff's claim to the trusteeship of the temple was negatived long before the suit and that he was not the present trustee of the temple. He also held that as the lands were demised by the plaintiff's father as the property of the temple and as the plaintiff was not the present trustee thereof, he could not claim to recover the land and dismissed the suit. The District Munsif's judgment is rather confused. While holding that the lands belong to the temple, he also observes that they might have been kept apart as property belonging to the plaintiff's family when the temple itself was made over to the Kodalur Nambudri in 1848 by a member of the plaintiff's family. It is not quite clear whether he intended to decree the lands to the plaintiff as the private property of his Illom or as the property of the temple. His judgment must be regarded as based on his finding that the second defendant was estopped from denying the title of the plaintiff from whose father the kanom was originally obtained by the first defendant. It is quite clear that if the lands still belong to the temple and if the plaintiff is no longer its trustee, the principle of estoppel would not apply inasmuch as the demise was made by the plaintiff's father as trustee of the temple. The temple being the virtual demisor, the second defendant could be estopped from denying only the title of the temple, and would not be estopped from denying the plaintiff's right on the ground that he was not the trustee at the date of suit.

Mr. T. R. Ramachandra Ayyar, the learned vakil for the appellant, contends that the temple itself is treated in the demise as the property of the demisor and that therefore the plaintiff's father must be treated as having demised the property as his own. This proposition clearly cannot be upheld. Even assuming that there is foundation for the appellant's argument, that the temple was a private one in which the public had no rights, it is quite clear that it was still trust property though the beneficiaries might be only members of the Pathaikara family. The lands demised would also be trust property attached to the private temple. It is argued the stipulation for payment of rent at the temple office merely described the place where the rent was to be delivered and did not indicate the ownership of the temple over the lands; but taken along with the clear description of the lands in the kanom deed as belonging to the temple, we have no hesitation

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in confirming the finding of the Subordinate Judge that the lands in question were demised by plaintiff's father as the trustee of the temple. No attempt has been made at the hearing to dispute the correctness of the finding that the plaintiff at the date of the suit had no right whatever over the temple. It would therefore follow that the decree dismissing the suit must be upheld.

Mr. Ramachandra Ayyar urges two contentions in support of his argument that the plaintiff is entitled to recover the property. First, that the right of the temple and of the Kodalur Nambudri as trustee thereof to the property is extinguished by limitation and that the plaintiff has acquired a right thereto by adverse possession: secondly, that assuming the property to have been originally temple property, it ceased to be such in 1848 and that it has since remained as private property.

It will be convenient to deal with the latter contention first. The second defendant in his written statement stated that, in 1814 at a division between the then karnavan of Pathaikaramana and an adopted son of his, subsequent to the birth of a natural born son, the temple was assigned to the adopted son and that this person sold the temple with its properties, to the Kodalur Nambudri in 1848. The demise in question in this suit, it will be remembered, was in 1866 by the Pathaikara Nambudri subsequent to the transfer of the devasvam to the Kodalur Nambudri. The argument is that the temple being a private one in which the members of the Pathaikaramana alone had any beneficial rights, the trust ceased to exist when it passed away to the Kodalur Nambudri in 1848. To begin with, this argument is based on the assumption that the temple was a private devasvam and not a public one. The District Munsif no doubt observes in paragraph 11 of his judgment, "It is admitted that the Devasvam was a private property of the plaintiff's mana." But the Subordinate Judge says, "There is no admission of the defendants on record that the Devasvam was a private property of plaintiff's mana and set apart to an adopted son after the birth of a 'natural' son as stated by the District Munsif in paragraph 11 of his judgment." Evidently the defendants denied in the Court of Appeal that they made any admission regarding the private character of the temple. We cannot, in the circumstances, proceed on the assumption that the temple was a private institution. But

assuming that it was such, we cannot assume that the trust ceased to exist when the Kodalur Nambudri obtained a transfer of the temple. Admittedly, there were disputes about the temple the Pathaikaramana and the Kodalurmana regarding the right of management of the temple; and the question was finally decided in favour of the Kodalurmana. This is not reconcilable with the cessation of the temple as a religious institution with properties attached to it. Even in this suit the plaintiff contended before the Munsif that he was the manager of the temple. After the transfer to the Kodalurmana the presumption would be, even if the temple was a private one, that the members of the Kodalurmana at least would all be entitled as beneficiaries, to the temple and its properties. The temple would still continue to own the lands attached to it though the beneficiaries might have changed by the transfer to the Kodalurmana. It is not shown that the plaintiff lands ceased to belong to the temple by their being severed from it by any valid act on the part of the trustee. The demised property must therefore still be regarded as belonging to the temple and vesting in its trustee unless the right of the temple has been extinguished by limitation. It is therefore necessary to deal with the contention that the plaintiff has acquired a right to the property by adverse possession. Mr. Ramachandra Ayyar argues that as the plaintiff and his father have always continued to remain in possession of the lands the temple has lost its right under the statute of limitation. But, the demise in question was made by the plaintiff's father as the representative and trustee of the temple. In 1866 when the demise was made the demisor was evidently claiming to be the trustee and the litigation which negatived his right ended only in 1894. We must hold that the demisor purported to deal with the lands as trustee of the temple. As a matter of fact, he has been held to be *not* trustee now. He never succeeded in acquiring the right of trusteeship by adverse possession. But when a person purports to hold the property as a trustee, he cannot by such possession acquire a right to the property by prescription for himself against the beneficiaries. In determining what right adverse possession would confer on the holder the *animus possidendi* is the decisive factor. The character in which possession is held must determine the right which the possession would confer. Thus a person who has

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been in possession for the statutory period in the assertion of a kanom right would acquire only a kanomdar's interest by limitation: *Madhava v. Narayana*(1). Similarly one who asserts to the right of a permanent lessee would acquire that right; see *Thakore Fatesingji v. Bamanji A. Dalal*(2). "When a person takes wrongful possession of land, and keeps it for the prescribed period of limitation, claiming to be himself entitled in fee, or not setting up any title at all, he gains the estate for his own benefit; but if he enters, claiming a limited interest under some instrument, it does not follow that he can, by possession till the rightful owner is barred, claim the whole estate in perpetuity. Thus, if a man obtains possession of land claiming under a will, he cannot afterwards set up another title to the land against the will, though it did not operate to pass the land in question; and if he remain in possession till twelve years have elapsed and the title of the testator's heir be extinguished, he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the will." Bosanquet and Merohant on "Limitation," page 498. "The nature of an inchoate possessory title may be stated as follows:—If a stranger upon entering claims an existing particular estate in the land, as a life estate, he is seised of that estate. . . . If he only claims an existing term, he is possessed of that term . . . and his possessory title will devolve as personality;" Lightwood's Time Limit on Actions, page 125. The same principle is applicable where a person is in possession as a trustee and not for his own benefit, because his possession in such a case is really that of the beneficiaries under the trust. In *Secretary of State for India v. Krishnamoni Gupta*(3), the Judicial Committee of the Privy Council held that if a person is in possession as the tenant of another of land which really belongs to himself he would lose his right by continuing to hold as tenant for the statutory period because, in reality, his possession is that of the landlord. In *Kernaghan v. M'Nally*(4), it was held, in a case where wrongful possession was held by a person as *cestui que trust* under a will which did not divide the property, that his possession would be regarded as the possession of the trustee and would inure to the

(1) (1886) I.L.R., 9 Mad., 244.

(3) (1902) I.L.R., 29 Cal., 518 (P.C.).

(2) (1903) I.L.R., 27 Bom., 515.

(4) 12 Ir. Ch. Rep., 89.

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benefit of all who would take if the property had really been demised to him. "A person purporting to act as trustee cannot be allowed to say for his own benefit that he had no right to act as trustee and is estopped from taking advantage of the lapse of time." In *Lyell v. Kennedy*(1), this principle was affirmed by the House of Lords. There a person was managing certain land as the agent of a life tenant. After the death of the life owner he continued to receive the rents and pay them into the Bank as he was doing before, not informing the tenants in actual occupation by stating to several persons that he was acting as agent and receiver for the true owner whoever he might be; after the expiration of twelve years from the death of the life tenant he claimed the property on his own account. The assignees of the heir brought an action against him to recover possession of the land, and for an account of the rent and profits. The House of Lords held that the agent could not claim any right by virtue of his possession as he purported to hold on behalf of the true heir whoever he might be. Lord SELBORNE regarded the principle as well established. After referring to the earlier cases—*Backham v. Siddall*(2) and *Life Association of Scotland v. Siddal*(3)—His Lordship observed, "The principle of those decisions, as stated by TURNER, L.J., in the latter case, was, that a person who had assumed to be a trustee 'could not be heard to say, for his own benefit, that he had no right to act as a trustee.' Mr. Lewin, in his learned and accurate treatise upon the Law of Trusts, thus puts it (seventh edition, page 191: 'If a person, by mistake or otherwise, assume the character of trustee when it really does not belong to him, and so becomes a trustee *de son tort*, he may be called to account by the *cestui que trust* for the monies he received under colour of the trust.'" In *Soar v. Ashwell*(4), the same rule was acted upon by the Court of Appeal. Lord BOWEN says, referring to the case of *Life Association of Scotland v. Siddal*(3): "This extension of the doctrine is based on the obvious view that a man who assumes without excuse to be a trustee ought not to be in a better position than if he were what he pretends." KAY, L.J., said, "The result seems to be that there are certain cases of what are, strictly speaking, constructive trusts, in which the Statute of

(1) (1889) 14 A.C., 437 at p. 459.

(2) (1850) 1 Mac. and G., 607 at p. 621.

(3) (1861) 3 D.F. and J., 58 at p. 69.

(4) (1898) 2 Q.B., 390 at pp. 396 and 405.

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Limitations cannot be set up as a defence. Amongst these are the cases where a stranger to the trust has assumed to act and has acted as a trustee."

It is clear from the abovementioned cases that the law will not permit the plaintiff in this case to say that he held in any character other than that of trustee of the temple. It is not alleged that at any time subsequent to the demise he repudiated the character of trustee and claimed to hold the land for his own benefit. Mr. Ramachandra Ayyar urges that he did not apply the rents of the property for the benefit of the temple but took them himself, but this cannot better his position. It would only have the effect of making him liable to account for the rents which he, having collected in the character of trustee, misappropriated for his own benefit. It was observed in *Shaw v. Keighron*(1), "I think it is necessary to go beyond the mere circumstance that some one not entitled to the rent has received and kept it. The section requires not only that the rent should have been received by a person other than the person rightfully entitled, but that it should have been received under some claim of title and that a wrongful one. For example, if rent were received by a person falsely pretending to be agent to the rightful owner and who never accounted for it this would not bar the rightful owner."

We must therefore hold that the plaintiff did not acquire any title to the property by adverse possession as against the temple. The right to the property must go with the right to the trusteeship. See *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*(2); also the judgment of this Court in *Ambalam Pakkiya Udayan v. Bartle*(3).

We dismiss the Second Appeal with costs.

(1) I.R., 8 Eq., 574. (2) (1900) I.L.R., 23 Mad., 271 at p. 279 (P.C.).
(3) (1913) I.L.R., 36 Mad., 418.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sadasiva Ayyar.

N. K. SANKUNNI MENON (PLAINTIFF), APPELLANT

v.

N. K. GOVINDA MENON (DEFENDANT), RESPONDENT.*

1912.
February
15 and 28
and
March, 6.

Limitation Act (IX of 1908), arts. 49, 60, 61, 62, 81, 89, 120 and 145—'Specific moveable property,' meaning of, in article 49—Whether includes money—Residuary article, when to be applied—Money had and received to the plaintiff's use.

Where the karnavan of a Malabar tarwad sued a junior for recovery of a sum of tarwad money received by the latter, but withheld by him in denial of the plaintiff's right to the same.

Held, that the case was governed by article 62, of the Limitation Act (IX of 1908), as the defendant had received monies belonging to the plaintiff which *ex æquo et bono* he ought to refund, and the cause of action was for money had and received to the plaintiff's use, and arose on the date of the receipt, and not on the date of the denial of the plaintiff's right to the money.

Mahomed Wahid v. Mahomed Ameer (1905) I.L.R., 32 Calo., 527, referred to.

'Specific moveable property' in article 49 does not include money, though money is 'moveable property' within article 89. Specific property is property which is recovered *in specie*, i.e., the very property itself, not any equivalent or reparation.

The residuary article 120 should be applied only as a last resort, if no other article is applicable.

Sharoop Dass Mondal v. Joggessur Roy Choudhry (1899) I.L.R., 26 Calo., 564, referred to.

SECOND APPEAL against the decree of L. G. MOORE, the Acting District Judge of South Malabar, in Appeal No. 14 of 1910, preferred against the decree of K. IMBICHUNI NAIR, the Sub-ordinate Judge of South Malabar, at Palghat, in Original Suit No. 48 of 1909.

Plaintiff and defendant were brothers, and members of a Malabar tarwad, the plaintiff being the karnavan. Defendant asked plaintiff to assist him with a loan to enable him to deposit security for the post of a teller in the Currency office, Calicut. Plaintiff and defendant jointly executed a promissory note on 14th October 1908 in favour of karnavan who paid the

* Second Appeal No. 1402 of 1910.

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money to the defendant, who in turn deposited the money as security in the treasury. Subsequently the defendant's appointment ceased, and he took back the money on 14th October 1904, but did not pay it over to the plaintiff. The plaintiff paid the promissory note amount to karnavan on 11th March 1906, and the defendant repudiated the plaintiff's title to recover the amount on 6th November 1906. The plaintiff then brought the present suit for recovery of the amount from the defendant on 30th September 1909. The District Munsif dismissed the suit as barred by limitation under article 61 or 81 of the Limitation Act. The District Judge confirmed the decision of the Munsif agreeing with his reasoning. The plaintiff preferred this Second Appeal.

C. V. Anantakrishna Ayyar for the appellant.

J. L. Rosario for the respondent.

BENSON AND
SADASIYA
ATTAR, JJ.

JUDGMENT.—The plaintiff is the appellant before us in the Second Appeal. As karnavan of a Malabar tarwad he brought this suit for the recovery of tarwad money (Rs. 3,000) which the defendant (a junior member of the tarwad) has been withholding from him (the plaintiff), the defendant having denied the plaintiff's title to recover that amount as tarwad money from the 6th November 1906 to the plaintiff's knowledge. The cause of action is stated in the seventh paragraph of the plaint to have accrued on the 6th November 1906. The suit was brought on the 30th September 1909.

The facts have been found in the plaintiff's favour by the lower Courts and the only question we have to decide is whether, on those facts, the suit is barred or not, the lower Courts having dismissed the suit as barred.

The lower Courts have held that either article 61 or article 81 of the second schedule to the Limitation Act applies. Article 61 applies to a suit "for money payable to the plaintiff for money paid for the defendant." The plaintiff in this case did not pay any money for the defendant (to any creditor of the defendant or otherwise) but claims money belonging to the plaintiff which the defendant had all along admitted to be tarwad money till November 1906. Neither does article 81 apply as the plaintiff was not a surety and the defendant was not a principal debtor in respect of the tarwad money in the hands of the defendant. The lower Courts seem to us to have been misled by the nature of the previous transactions which resulted

in the defendant (a junior member of the plaintiff's tarwad) becoming possessed of the tarwad money in 1904.

If neither article 61 nor article 81 applies, what is the proper article to be applied to the facts? The plaintiff's (appellant's) vakil contended before us that articles 49, 60, 145 or the general article 120 applied. Article 49 relates to suits "for specific moveable property or for compensation for wrongfully taking . . . or detaining . . . the same." We do not think that a suit for money or for compensation for wrongfully detaining money can be brought under this article, as money is not "specific moveable property." Money has been held to come within the phrase "moveable property" in article 89 ("by a principal against his agent for moveable property received by the latter and not accounted for"), but it cannot be held to come within the meaning of the phrase "specific moveable property." Specific property is property which is recovered *in specie*, i.e., the very property itself, not any equivalent, substitute or reparation. In a suit for money specific coins or notes are not claimed, only coins or notes of a certain value. Order XXI, rule 31, of the Civil Procedure Code uses the expression "specific moveable." Rule 30 which precedes rule 31 relates to the execution of decrees "for the payment of money" and rule 31 to decree for "specific moveable" thus showing that the words "specific moveable" cannot include "money."

Article 60 is also inapplicable as the plaintiff did not make any deposit of money with the defendant but the defendant got the tarwad money into his hands from the person with whom it had been deposited. Article 145 is likewise inapplicable as the defendant was not a depositary or pawnee. The last article relied on by the appellant is the residuary article 120, but it should be applied only as a last resort [see *Sharoop Dass Mondal v. Joggesur Roy Chowdhry*(1)] if no other article is applicable and we have therefore to see if really no other article applies. We are of opinion that the correct view is that the defendant received the money for the use of the plaintiff as representing the tarwad. In that view article 62 is applicable. The application of this article is fully discussed in *Mahomed Wahib v. Mahomed Ameer* (2). As observed in "Blackstone's

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(1) (1899) I.L.R., 26 Calc., 564 (F.B.). (2) (1901) I.L.R., 32 Calc., 527.

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Commentaries," volume III, page 162, an action lies "when one has had and received money belonging to another, without any valuable consideration given on the receiver's part: for the law construes *this to be money had and received for the use of the owner only*; and implies that the person so receiving promised and undertook to account for it to the true proprietor. And, if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repair the owner in damages, equivalent to what he has detained in such violation of his promise. This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex æquo et bono* he ought to refund." In the present case, as in *Mahomed Wahib v. Mahomed Ameer*(1), the money was received by a co-sharer of the plaintiff, and it may be said: "These words very aptly describe the present case the defendant has received monies belonging to the plaintiff which *ex æquo et bono* he ought to refund; the plaintiff's cause of action therefore is for money had and received to the plaintiff's use, and the money is none the less received to the use of the plaintiff, because the defendant unjustly detains it for his own benefit." In *Subanna Bhatta v. Kunhanna Banta*(2), article 62 was applied where money was received by a benamidar for the plaintiff. See also the decision of the Privy Council in *Syad Lutf Ali Khan v. Mussamat Afzalunissa Begum*(3).

The period of limitation under article 62 is three years from the date of receipt of the money (1904) and this suit is therefore barred.

We therefore dismiss the Second Appeal with costs.

(1) (1901) I.L.R., 32 Cal., 527. (2) (1907) I.L.R., 30 Mad., 298.
(3) (1871) 9 B.L.R., 343 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar.

MOTTAI REDDY *alias* RAMASAMI REDDY AND TWO OTHERS
(DEFENDANTS), PETITIONERS

1912.
January 18.

v.

THANAPPA REDDY (DIED) AND THREE OTHERS (PLAINTIFF AND HIS
LEGAL REPRESENTATIVES), RESPONDENTS.*

Contract—Illegality—Promissory-note executed for compounding a charge of grievous hurt, if valid—Practice—Revision—Grounds of interference—Moral as opposed to legal justice—Mere errors of procedure, or technical defects.

Where a promissory-note was executed as consideration for compounding a charge of grievous hurt against a person who had died previous to the complaint.

Held, that, as the offence could not be compounded except with the consent of the person to whom the grievous hurt was caused, the agreement to pay money, evidenced by the promissory-note was illegal, and the promissory-note consequently unenforceable. The fact that the complainant may have a right to claim damages for the injury caused to the deceased would make no difference, unless such right had been set up and proved.

The High Court as a Court of Revision has no power to consider justice apart from such justice as the law recognises.

Sheikh Nubbee Buksh v. Mussamat Bebes Hingon. (1887) 8 W.R., 412, referred to

PETITION, under section 25 of the Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the decree of J. SUNDARANANA RAO PANTULU, the District Munsif of Sholinghur, dated the 19th April 1910, in Small Cause Suit No. 195 of 1910.

The facts fully appear from the judgment.

V. V. Srinivasa Ayyangar for the petitioners.

The Honourable Mr. L. A. Govindaraghava Ayyar for the respondent.

JUDGMENT.—The plaintiff is the endorsee of a promissory-note executed by the defendants in favour of two persons Muthammal and Chenga Reddi. The defendants denied that the plaintiff paid any consideration of the promissory-note. It does not appear that the plaintiff claimed in the lower Court to be a holder in due course. No issue was framed to try that question. The promissory-note, Exhibit A, states that it was executed in pursuance

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* Civil Revision Petition No. 646 of 1910.

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of the razinamah presented by the parties in Calendar Case No. 121 of 1909. That razinamah, Exhibit B, states that the amount for which the promissory-note was executed was due as consideration for compounding Calendar Case No. 121. In that case the executants of the promissory-note were charged with grievous hurt caused to one Gopal Reddi who had died previous to the complaint. It is not denied that the offence could not have been legally compromised except with the consent of the person to whom grievous hurt was caused, and the agreement to compound was therefore one prohibited by law. It was not contended in the lower Court that the consideration for the promissory-note was anything different from what is stated in Exhibits A and B. The agreement to pay money evidenced by the promissory-note appears therefore to be clearly illegal. The learned vakil for the respondents contends that, as the complainant would also in law be entitled to claim damages for the injury caused to Gopala Reddi, the claim to damages must also be taken to be at least part of the consideration for the promissory-note. But this case was not set up in the lower court, and no evidence was given in support of any such allegation; I must take it therefore that the consideration was merely the compounding of the criminal offence. Mr. Govindaraghava Ayyar has drawn my attention to *Sheikh Nubbee Buksh v. Mussamut Bebee Hingon*(1). Whether in that case the claim to damages was also part of the consideration for the document in question, I cannot say; but if the learned judges meant to lay down that, even though it may not be proved that such was the case, an agreement to pay money in consideration of compounding a criminal offence could be supported on the ground that the party who executes the agreement would also be liable for damages, I am unable with all deference to follow that judgment. It is also argued that, as the executants of the promissory note would be liable in a Civil Court for damages, the ends of justice do not require that this Court should interfere. I do not think that this Court as a Court of Revision has any power to consider justice apart from such justice as the law recognises. I believe there are some cases where Courts have gone to the extent contended for by Mr. Govindaraghava Ayyar, but, in the absence of any decision of this Court binding on me, I am not prepared to

(1) (1897) 8 W.R., 412.

hold that I can refuse to interfere on the ground that moral, as opposed to legal, justice is a ground for refusing to interfere in revision. No doubt, mere errors of procedure or technical defects not affecting the legal justice of a case will not be encouraged by a Court of Revision; but when the law prohibits an agreement and requires that effect should not be given to it, I am of opinion that I am bound to interfere. The order of the Lower Court must be set aside and the plaintiff's suit dismissed. There will be no order as to costs.

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APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Ayling.

I. NAGIAH (PLAINTIFF), APPELLANT,

v.

A. VENKATARAMA SASTRULU AND SEVEN OTHERS
(DEFENDANTS), RESPONDENTS.*

1912.
April 19.

Specific Relief Act (I of 1877), sec. 15—Contract by managing member of joint Hindu family under circumstances not binding on the other members—Right to specific performance—Hindu Law.

Where the managing member of a joint Hindu family consisting of himself and his sons, some of whom were majors, entered into a contract to sell family lands to the plaintiff, under such circumstances that the contract was held not binding on the sons,

Held, in a suit for specific performance against both the father and the sons composing the joint family, that under section 15 of the Specific Relief Act, the plaintiff was not entitled to a decree even as against the father.

Section 15 applies to a case where a member of an undivided family agrees to sell part of the joint property in which he has only a share; and the circumstance that an undivided father has an interest in every portion of the undivided property does not take the case out of the operation of the section.

Koovari Ramaraju v. Ivalury Ramalingam (1903) I.L.R., 26 Mad., 74 and *Brinivasa Reddi v. Sivarama Reddi* (1909) I.L.R., 32 Mad., 320, not followed.

Poraka Subbarami Reddi v. Vadlamuri Seshachalam Chetty (1910) I.L.R., 33 Mad., 359, *Govinda Naicken v. Apathahaya Iyer* (1912) M.W.N., 87 and *Barrett v. Bing* (1854) 2 Sm. and Giff., 43; s.c., 65 E.R. 294, referred to.

SECOND APPEAL against the decree of Diwan Bahadur T. T. RANGACHARIYAR, the District Judge of Guntur, in Appeal No. 13 of

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1908, preferred against the decree of A. NARAYANA PANTULU, the District Munsif of Tenali, in Original Suit No. 238 of 1906.

The necessary facts appear from the judgment.

E. Venkatarama Sarma and *P. Nagabhushanam* for the appellant.

T. Prakasam for the respondent.

WALLIS AND
ATLING, JJ.

JUDGMENT.—This is an appeal from the decision of the Lower Courts refusing specific performance of a contract of sale entered into by the first defendant. The suit is brought against the first defendant who is the managing member of the family and against defendants Nos. 2 to 4, his major sons, and defendants Nos. 5 to 8, his minor sons, who appear by their guardian the first defendant. The Lower Courts have both found that this contract is not binding on defendants Nos. 2 to 8, and the question which we have to decide is whether specific performance should in these circumstances be granted or not.

We have been referred to a decision in *Kosuri Ramaraju v. Ivalury Ramalingam*(1) in which it was decided without specific reference to the provisions of the Specific Relief Act that the proper course in such cases as this would be to give a decree for specific performance of the whole contract against the first defendant leaving it to be settled in future litigation what passed under the conveyance.

Another case to which we have been referred is *Srinivasa Reddi v. Sivarama Reddi*(2) in which similarly a decree was granted directing the first defendant to sell the whole land without determining whether such a sale would bind the second defendant. In that case the provisions of section 15 of the Specific Relief Act were referred to and it was observed that "section 15" of the Specific Relief Act "would be applicable only if the first defendant had no interest in any portion of the property agreed to be conveyed as in illustration (a) or is unable to convey such portion as in illustration (b) to that section."

In *Poraka Subbarami Reddi v. Vadlamudi Seshachalam Chetty*(3) the Court considered it unnecessary to express any opinion as to the correctness of the observations that we have just cited, and refused in that case to grant a decree for specific performance of the whole contract distinguishing the previous

(1) (1908) I.L.R., 26 Mad., 74.

(2) (1909) I.L.R., 32 Mad., 320.

(3) (1910) I.L.R., 38 Mad., 359.

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case on the ground that the contract before them was one entered into on behalf of the minors as well, but gave the plaintiff the benefit of the latter provision of section 15 of the Specific Relief Act.

In *Govinda Naicken v. Apathsahaya Iyer*(1) these cases were again considered and *Srinivasa Reddi v. Sivarama Reddi* (2) was distinguished from the case before the Court and was explained as proceeding on the ground that an undivided father has an interest in every portion of the undivided property, and that therefore section 15 of the Specific Relief Act does not apply. To us, however, it appears that the consideration that an undivided father has an interest in every part of the undivided property in no way takes the case out of the operation of the section which runs thus: "Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, . . . the is not entitled to obtain a decree for specific performance." We think the words of the section apply where a member of an undivided family agrees to sell part of the joint property in which he has only a share; and the present case is a particularly plain one, because according to the plaintiff's own evidence the first defendant agreed to get the other members of the family to execute the sale deed. Further the contract has been decided in the present suit not to be binding on the other members of the family; and to decree specific performance against the first defendant only would be merely encouraging useless litigation. We may add that *Barrett v. Ring*(3) is no authority on the present point as the facts were entirely different.

The plaintiff does not claim the benefit of the latter part of section 15 of the Specific Relief Act and we dismiss the Second Appeal with costs.

(1) (1912) M.W.N., 87.

(2) (1902) I.L.R., 32 Mad., 320.

(3) (1854) 2 Sm. and Giff., 43 s.c. 65 E.R., 294.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

MUNIA KONAN (FIRST DEFENDANT), APPELLANT,

v.

PERUMAL KONAN AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

Contract—Minor—Minor's rights over property purchased for his benefit, by maternal uncle—Sale of such property by father, invalid.

Where certain immoveable property was purchased for the benefit of a minor by his maternal uncle, and was subsequently sold by the minor's father, as if it belonged to the joint family of which himself and the minor were members, Held, in a suit by the minor after attaining majority to recover the property from the alienee that the purchase for the benefit of the minor was valid, and he was entitled to recover.

Kulla Pandithan v. Ramayi Second Appeal No. 881 of 1909, followed.

The essential fact which renders void a transaction by a minor is that some agreement by the minor is necessarily an essential part of the transaction. But when a contract by the minor is not a necessary condition for upholding his right in property, his right should be maintained.

Mohori Bibee v. Dharmadas Ghose (1903) I.L.R., 30 Cal., 539 (P.O.) and *Navakotti Narayana Chetty v. Logalinga Chetty* (1910) I.L.R., 38 Mad., 812, referred to.

Kamta Prasad v. Sheo Gopal (1904) I.L.R., 26 All., 342, *Ulfat Rai v. Gauri Shanker* (1911) 8 A.L.J., 670 and *Meghan Dube v. Pran Singh* (1900) I.L.R., 30 All., 63, referred to.

SECOND APPEAL against the decree of H. MOBERLY, the District Judge of South Arcot, in Appeal No. 104 of 1909, preferred against the decree of K. SUNDARAM CHETTIYAR, the District Munsif of Tiruvannamalai, in Original Suit No. 6 of 1909.

The facts of the case appear from the judgment.

K. R. Subrahmanya Sastri for the appellant.

T. Rangachariyar for the first respondent.

JUDGMENT.—The facts found in this case are that certain immoveable property was purchased for the benefit of the plaintiff in the suit by one Ramaswami Konan, his maternal

uncle, and that it was subsequently sold by the third defendant, the plaintiff's father, as if it belonged to the family of which he and the plaintiff were members. Defendants Nos. 1 and 2 claim under the sale by the third defendant. The contention on the merits in the Lower Courts was that the purchase in the name of the minor was really *benami* for the third defendant or the family, and that therefore the plaintiff has no exclusive right to the property, and the sale by the third defendant was valid.

On the finding of the District Court that the purchase was made by the maternal uncle for the benefit of the minor, the sale by the third defendant cannot be upheld and defendants Nos. 1 and 2 have no title. It is contended that on the finding that the sale was for the benefit of the minor, it must be held to be a void transaction as a minor is incompetent to purchase property. The answer to this is substantially what is given by the District Judge, viz., that the minor was not a contracting party in the transaction of purchase by Ramaswami Konan, although the minor became the beneficiary owner under the deed of purchase. This case is on all fours with *Kulla Pandithan v. Ramayi* (1) decided by MUNRO and SANKARAN NAIR, JJ. In that case a person executed a deed of sale of certain property in the name of his wife, and when she sued for the recovery of the property, it was contended that the sale was void. The learned Judges answered this contention thus: "The decree is right, the contract being found to have been between the plaintiff's father (i.e., father of the wife) and the appellant (i.e., her husband)." We might be content to rest ourselves on the authority of this case, but out of deference to the arguments that have been urged on behalf of the appellant we shall state our reasons a little more fully.

According to the Indian Contract Act, a minor is incompetent to make a contract. The judicial committee of the Privy Council decided in *Mohori Bibee v. Dharmadas Ghose* (2) that a contract by a minor must, according to the Contract Act, be regarded as void and not merely voidable. The case before their Lordships was one of a mortgage made by a minor. Of course a mortgage by a minor is a contract by him to pay a sum of money which he borrows on the security of certain property. Many transactions resulting in the creation of rights over property

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* Second Appeal No. 400 of 1910.

(1) Second Appeal No. 881 of 1909. (2) (1903) I.L.R., 30 Cal., 539 (P.O.).

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arise out of contracts; and when a minor enters into any such transactions where a contract by him is an essential condition preliminary to the transaction or contractual obligations on his part flow from the transaction, it must be regarded as void.

In *Kamta Prasad v. Sheo Gopal*(1) the decision of the Privy Council was followed and a mortgage by a minor was held to be void. On the other hand in *Ulfat Rai v. Gauri Shankar*(2), it was held that, where money is already due to a minor beneficiary by his trustee on accounts between them, a conveyance by the trustee in favour of the minor for the amount so due was valid. That case perhaps is not quite reconcilable with the decision of this Court in *Navakotti Narayana Chetty v. Logalinga Chetty*(3). There in answer to a suit for possession of certain property, the defendant, a minor, set up a claim to the right obtained under a sale deed. BENSON and KRISHNASWAMI AYYAR, JJ., held that the sale was void. It is there pointed out that the creation of a right in the property by a sale must necessarily be proceeded by an agreement between the minor and the vendor and the minor being incapable of entering into the agreement the resulting transaction, the sale must also be held void. KRISHNASWAMI AYYAR, J., points out that even where the consideration money is already due to the minor and is used as consideration for the sale, it is necessary in order that the sale may be upheld, that the minor should enter into an agreement that the debt already due to him should be appropriated as consideration for the sale and he being incompetent to enter into such an agreement, the sale must be void. But, in all these cases where a transaction by a minor has been held to be void, the essential fact which rendered it void, was that some agreement by the minor was necessarily an essential part of the transaction. Now it cannot be denied that a person may purchase property and hold it as a trustee for a minor. There is no reason why he should not create a trust by purchasing it in the name of the minor. No contractual obligations are undertaken by the minor in such a case. Any personal obligations arising as between the vendor and the vendee would have to be discharged by the party contracting with the vendor, i.e., by Ramaswami Konan in this case. If there are obligations

(1) (1904) I.L.R., 26 All., 342.

(2) (1911) 8 A.L.J., 670.

(3) (1910) I.L.R., 33 Mad., 312.

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enforceable against the property purchased, no doubt the property in the hands of the minor would be liable for the satisfaction of such obligations. We can see no reason for holding that when a contract by the minor is not a necessary condition for upholding the rights of the minor in the property, his right should not be maintained. In *Meghan Dube v. Pran Singh*(1) where a mortgage was taken in the name of a minor but for the benefit of the joint family of which he was a member, BANERJI and RICHARDS, JJ., observed that "the contract in this case was made by persons of full age (i.e., adult members of the joint family), but the person in whose favour the mortgage deed was executed was a minor. The question of the validity of the mortgage does not in our opinion arise."

For the reasons mentioned above we are of opinion that the decision of Lower Appellate Court is right.

The finding of the Lower Appellate Court on the merits was also attacked by the learned vakil for the appellant but we are unable to see any legal objection to it. The Second Appeal is dismissed with costs.

APPELLATE CIVIL.

*Before Sir Charles Arnold White, Kt., the Chief Justice, and
Mr. Justice Sankaran Nair.*

DEVARAYAN CHETTY (PLAINTIFF), APPELLANT,

v.

V. K. M. MUTTURAMAN CHETTY AND ANOTHER
(DEFENDANTS), RESPONDENTS.*

1912,
November
25 and 26
and
December 5.

Indian Contract Act (IX of 1872), sec. 23—Contract between third parties for the payment of money on the failure of a marriage void as opposed to public policy.

An arrangement between A and B, that B's daughter shall marry A's son and that, if she fails to do so, B shall pay a sum of money to A, is opposed to public policy and void under section 23, Indian Contract Act (IX of 1872).

Venkata Kristnayya v. Lakshmi Narayana (1909) I.L.R., 32 Mad., 184 (F.B.), applied.

Hermann v. Charlesworth (1905) 2 K.B., 123, referred to.

Purshotamdas Tribhovandas v. Purshotamdas Mangaldas (1909) I.L.R. 21 Bom., 23, explained.

(1) (1900) I.L.R., 30 All., 63 at p. 65

* Appeal No. 199 of 1908.

DEVARATAN v. MOTTURAMAN. APPEAL against the order of S. RAMASWAMI AYYANGAR, the Subordinate Judge of Madura (East), in Original Suit No. 143 of 1907.

The facts of this case appear from the judgment of WHITE, C.J.

T. Narasimha Ayyangar for the appellant.

K. Srinivasa Ayyangar for the respondents.

WHITE, C.J. K. V. Krishnaswami Ayyar for the second respondent.

WHITE, C.J.—The agreement which is sued on in this case was entered into between the plaintiff and two of the relatives of one Cellayappa Chetty. The effect is clearly stated in paragraph 5 of the judgment of the Subordinate Judge.

"The agreement was that the plaintiff's daughter should be married to Cellayappa's son on the 18th January 1903 and should be given usual jewel and streedhanam, etc., in the usual manner, and that in exchange Cellayappa Chetty's daughter, apparently then too young to be married, should be given in marriage in three years from the date of the plaintiff's daughter's marriage, i.e., on or before January 1906, and that in default of either, the plaintiff to accept that girl or of Cellayappa's relations and the defendants to give her in marriage, the defaulter, i.e., the plaintiff or the defendants, as the case may be, should pay the other Rs. 5,000 in case of the plaintiff's default, with interest from 1906 January, and in case of the default of the defendants and Cellayappa Chetty's party, with interest from the date of the plaintiff's daughter's marriage, i.e., the 18th January 1903."

The plaintiff's daughter was married to Cellayappa's son but died soon afterwards. The plaintiff thereupon took back the marriage presents. After the expiration of the three years, the plaintiff made a formal demand with defendants that Cellayappa's daughter should be given in marriage to his son. This was not done. Hence this suit. The Judge held that in law the agreement was not against public policy and could be enforced; but he held on the facts that the carrying out of the contract had been abandoned by agreement between the parties.

As regards the question of abandonment I am unable to agree with the learned Judge. The defendant's evidence that the plaintiff had stated that he did not desire that the agreement should be carried out is not supported by the witness whom he called. The Judge appears to have relied to some extent on a suggested practice or usage that, the return of the presents

indicated that the parties did not intend that the agreement should be carried out. This practice or usage was not pleaded and was not proved. On the evidence I do not think it can be held that the agreement was abandoned.

There remains the question: was the contract enforceable? It was argued that this was a family agreement, lawful in itself, and this being so, an agreement that the party who declined to fulfil his share of the bargain should compensate the other party was not contrary to public policy. The conclusion at which I have arrived is that the contract is not enforceable. It is true, as the Judge puts it, that no money is payable as "bride-price" to anybody. But it is a case in which third parties have a pecuniary interest in a marriage being brought about. If an agreement between A and B that B's daughter shall marry A's son on payment of a sum of money by A to B is contrary to public policy, it seems difficult on principle to say that an agreement between A and B that B's daughter shall marry A's son and that if she fails to do so, B shall pay a sum of money to A, is not equally contrary to public policy. In each case B has a pecuniary interest in bringing about the marriage. In one case if the event takes place, he receives money. In the other case, if the event does not take place, he has to pay money. A contract to marry between parties who are each *sui generis* of course stands upon a different footing; but here the contract is between third parties. The effect of the contract, as I have said, is to give the parties a pecuniary interest in the marriage taking place. The contract as my learned brother put it in the course of the argument, is a trafficking in marriage. There appears to be no case, English or Indian, where a contract like this has been held to be void; but as it seems to me to fall within the mischief of the rule, I am prepared to hold that the contract is not enforceable and I think the rule applies none the less in a state of society where the marriage of children is a contract made by their parents and the children themselves have no volition in the matter. The decision of the Court of Appeal in *Hermann v. Charlesworth* (1), shows that in England the Courts are prepared to extend rather than to restrict the class of cases to which the rule is applicable. It is now well established, at any rate in this Presidency, that a

(1) (1905) 2 K.B., 128.

DEVARAYAN v. MUTTURAMAN WHITE, C.J. contract to make a payment to a father in consideration of his giving his daughter in marriage is opposed to public policy within the meaning of section 23 of the Contract Act. (*Venkata Krishnayya v. Lakshmi Narayana*(1). In *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas*(2) it was not suggested that the contract was against public policy; but there the plaintiff was himself a party to the contract of marriage. *Irene Fanny Colquhoun v. Fanny Smither*(3) has very little bearing on the question before us. There it was held that the principle of *Quinn v. Leathem*(4) was applicable in the case of a contract to marry and that an action was maintainable against a person for inducing a party to a contract of marriage to break that contract.

On the ground that the contract is not enforceable I think this appeal should be dismissed with costs.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1912.
December,
2, 8 and 13.

MEENAKSHI AMMAL (WIDOW OF KRISHNA AYYAR—PLAINTIFF),
APPELLANT,

v.

P. RAMA AIYAR (FAMILY MANAGER, DECEASED) AND FOUR OTHERS
(DEFENDANTS), RESPONDENTS.*

Hindu Law—Maintenance—Daughter-in-law, whether entitled to be maintained, in the absence of ancestral property—Rules of Hindu Law, when binding on Courts—Rule of equity, justice and good conscience.

A Hindu is under no legal obligation to maintain his widowed daughter-in-law, when he has no ancestral assets in his hands.

The rules of Hindu Law are binding on the Court only where it is necessary to decide any question regarding succession, inheritance, marriage, or caste or any religious usage or institution. Where maintenance is claimed against a person not on the ground that the property coming by inheritance to him is burdened with the maintenance of the person claiming it, but on the ground that the Hindu Law-givers have placed such a duty on him, the Hindu Law, as such, has no obligatory force, and the Court would have to decide the question in accordance with equity, justice and good conscience. Though the rules and

(1) (1909) I.L.R., 32 Mad., 185.

(2) (1909) I.L.R., 21 Bom., 23.

(3) (1910) I.L.R., 38 Mad., 417.

(4) (1901) A.C., 495.

* Second Appeal No. 2065 of 1910.

precepts of Hindu Law-givers might often be entitled to great respect in deciding the rule of justice in such cases, the weight due to them would depend upon the circumstances of each case including the conditions of modern society, and the conceptions of equity and justice which the Court considers it right to give effect to.

Semple: There may be special circumstances which may make it equitable and just in a particular case to uphold a claim for maintenance, in the absence of ancestral property.

Khetramani Dasi v. Kashinath Das (1869) 2 B.L.R. (A.C.J.), 15, applied.

Rangammal v. Echammal (1899) I.L.R., 22 Mad., 305, explained.

SECOND APPEAL against the decree of K. IMBICHUNNI NAYAR, the Subordinate Judge of South Malabar at Calicut, in Appeal No. 351 of 1909 preferred against the decree of P. S. SETHA AYYAR, the Principal District Munsif of Calicut, in Original Suit No. 153 of 1908.

The facts appear sufficiently from the judgment.

T. R. Ramachandra Ayyar for the appellant.

C. V. Ananthakrishna Ayyar for the second respondent.

JUDGMENT.—This is a suit by a Hindu widow for arrears of maintenance against her father-in-law and his sons. The plaintiff was married to a deceased son of the first defendant, the father-in-law. The first defendant originally had some ancestral property along with a brother, but he relinquished it at the partition between himself and his brother's sons, reserving to himself only a waste building site. This relinquishment was before the plaintiff's marriage; and his sons including the plaintiff's husband never took exception to it. The Lower Courts have dismissed the suit on the ground that the first defendant was not in possession of any ancestral property although he was possessed of considerable property acquired by himself as an officer in the service of Government.

It has been contended on plaintiff's behalf in Second Appeal that the partition deed contained a clause that the first defendant's brothers and sons should thereafter make no claim to the properties in the first defendant's possession which they admitted by the terms of the deed to be his self-acquired properties, that it must therefore be taken that the release of their right or claim of right to those properties was the consideration for the first defendant's relinquishment of the rights of himself and his sons to a half share of the ancestral properties, that in effect the first defendant exchanged with his brother's sons a half right in the ancestral property for their claim of a half share in the

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properties which he asserted to be his self-acquisition and that she is therefore entitled to maintenance out of his self-acquired property. But on a reference to the partition deed we are unable to give any such effect to it. It does not appear from it that the first defendant's brother's sons laid any claim to his self-acquisitions. On the other hand it merely records an admission on their part that the properties in his possession were his own acquisitions and that they had no right to them. The reason for his not enforcing his right to an equal share of the ancestral property is stated to be his sympathy towards them. There is no clause in the document that could be construed as a release or relinquishment in the first defendant's favour of any claim which his nephews had in the properties which he alleged to be his own. We cannot therefore see any equitable consideration for fastening on the first defendant's private acquisitions an obligation which would attach to ancestral property in his hands.

It is next contended that the first defendant had realised the amount due to the plaintiff's husband on a mortgage bond executed by a third party; but both the Lower Courts have found that though the bond stood in the name of the plaintiff's husband he was only a benamidar for the first defendant and had no beneficial interest in it. And this finding we see no reason not to accept in Second Appeal.

The next point urged is that the plaintiff would be entitled to some maintenance, at any rate, as the first defendant was still in possession of an ancestral paramba. Admittedly no income was derived from it. This is the ground on which no maintenance was allowed to the plaintiff as derivable from it. It is argued on the plaintiff's behalf that she is entitled to make the paramba profitable and to derive maintenance out of it or to have the paramba sold to provide for her maintenance. It is not necessary to consider the exact manner in which her right with respect to the paramba could be legally enforced against the first defendant as the learned vakil for the respondent is willing that the plaintiff should have a decree for Rs. 50 in lieu of a fifth share of the paramba to which her husband would have been entitled if a partition had taken place between him and the defendants before his death.

The main contention in Second Appeal is that the plaintiff was entitled to maintenance against the first defendant as her husband died in commensality with him even though he was not

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in possession of any ancestral property. According to Hindu Law, it is argued, a person is bound to maintain his daughter-in-law even if possessed only of property acquired by himself. It is not denied that the established principle according to the decisions of all the High Courts is that ordinarily a widow is entitled to maintenance from the survivors of her husband's undivided family only if the family possessed joint ancestral property during her husband's life-time. The contention is that there are some exceptions to this rule which proceed on the special obligation to maintain one's very close relations. We may at once observe that even if there were such a rule according to the Hindu Law we would not be bound to give effect to it. The rules of Hindu Law are binding on the Court only where it is necessary to decide "any question regarding succession, inheritance, marriage or caste or any religious usage or institution." In so far as a right to maintenance is a charge on the inheritance of any person according to the Hindu Law, the rules laid down by it would be enforceable. But where maintenance is claimed against a person not on the ground that the property coming by inheritance to him is burdened with the maintenance of the person claiming it, but on the ground that the Hindu Law-givers have placed such a duty on the defendant, the Hindu Law, as such, has no obligatory force. The Court would have to decide the question in accordance with equity, justice and good conscience. The rules and precepts of Hindu Law-givers might often be entitled to great respect in deciding the rule of justice in such cases. But the weight due to them would depend on the circumstances of each case including the conditions of modern society and the conceptions of equity and justice which the Court considers it right to give effect to. We do not find, however, that according to Hindu Law-givers a person is bound to maintain his daughter-in-law even though he has no ancestral property in his hands. Our attention has been drawn to some observations of SUBRAMANIA AYYAR, J., in *Rangammal v. Echammal* (1). This question did not arise for decision there as the suit was by a daughter-in-law against her mother-in-law who had inherited the property of the father-in-law and the property itself was found to be ancestral property in the father-in-law's hands while he was alive, having been inherited by him from his maternal grand-father. The learned Judge observed, "In

(1) (1899) I.L.R., 22 Mad., 305 at p. 308.

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regard to such property the female would have been entitled to claim maintenance even in the lifetime of the person inheriting it. This view seems to be warranted, especially as the theory that the right of a widowed female to maintenance is dependent on the possession by the party called upon to provide the maintenance of assets derived from the husband of the female claiming the maintenance appears to have had little or no foundation in the Smritis or commentaries, according to Messrs. West and Buhler (Digest of Hindu Law, 3rd edition, pages 245—252) and Dr. Jolly (History of the Hindu Law, pages 184 and 185). The latter learned author refers to a passage from the writings of Kamalakara to show that it is incumbent on sons and grandsons to maintain indigent widows and daughters-in-law, though no wealth of the father may be in existence. He also explains that the passage in the Smriti Chandrika relied on in support of the contrary view does not really touch the point. He further points out that in the Saraswati Vilasa, section 522, the duty of a father to provide for his son's widow is stated unconditionally." The passage in the digest of Messrs. West and Buhler referred to is as follows:—" Looking then to the constitution of the Hindu family, to the restrictions placed on a woman's activity to the prohibition in a united family against her making a hoard, and the maledictions pronounced on those who fail to provide for the helpless members of their family, the conclusion may be hazarded that Colebrook and others had sufficient grounds for opinions to which the actual practice of the people generally conforms in the Bombay Presidency. In a united family it would seem that in some form maintenance may be claimed by the widow of a deceased member as a right not dependent on property though in a measure regulated by it, but on the capacity only of her relatives in the order of nearness to her husband." The learned authors also say that, according to Vyavahara Mayukha, the widow's right to subsistence does not depend on the possession of ancestral wealth; and Nilakanta's interpretation of a text from Kathiayana is referred to by them. It will be observed that the passage refers to the rights of all widows generally and not to the special claim of a son's widow against the father-in-law. But the law is now fully established to the contrary by the decisions of all the High Courts. Dr. Jolly also lays down the same general rule as West and Buhler with regard to maintenance of widows generally. The passage from Kamalakara is also cited

in support of this general proposition, although a daughter-in-law is specifically mentioned in the text. The learned author refers to a text of Sankha in favour of a daughter-in-law and to Nandapanditha's commentary on a text of Vishnu which also relates to widows generally. On the other hand, in a text ascribed to Manu by the author of the Smriti Chandrika it is stated that "a mother and a father in their old age, a virtuous wife and an infant son must be maintained even though doing a hundred times that which ought not to be done." See Smriti Chandrika, Ch. XI—1, verse 34. The Mithakshara lays down "where there may be no property but what has been acquired the only persons whose maintenance out of such property is imperative are aged parents, wife and minor children." The correctness of Dr. Jolly's interpretation of the Smriti Chandrika, Ch. XI—1, verse 34, seems to be doubtful.

The question was fully considered by a Full Bench of the Calcutta High Court in *Khetramani Dasi v. Kashinath Das* (1), and the majority came to the conclusion that according to the Hindu Law there was no legal obligation on the part of a father-in-law having no ancestral assets to give maintenance to his daughter-in-law. Even supposing that some ancient sacred texts could be found in support of a contrary conclusion the authority of the Mithakshara is almost paramount in this province. As already observed, the question has to be decided according to equity, justice and good conscience. Would it then be right to uphold the appellant's contention as in accordance with the sound equitable rule to be laid down in this case? An adult son has no right to maintenance against his father. How can his wife's right be regarded as standing on a higher footing? The son's marriage may have been performed after he attained his majority. It may have been performed by him of his own will and perhaps without the father's advice and consent. How could it be held that his widow is entitled to maintenance against his father in such cases?

Again it can hardly be contended that the widow of a son divided from his father in his life-time would have any claim against her father-in-law. A brother has no right to maintenance against a Hindu out of his individual property, at any rate, if he is not an infant and under the guardianship of his brother. The considerations in favour of the appellant's contention have

(1) (1869) 2 B.L.R., (A.C.J.) 15.

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been summarised in the passage cited above from West and Buhler. But the difficulties in upholding the contention in favour of the liability of the father-in-law or any other member of the undivided family of a widow are equally, if not more, serious. We cannot but have grave doubts, about the desirability of fettering the inducement to acquire property by burdening the acquirer with the maintenance of persons who take no part in the labour of acquiring. It is natural that we should find conflicting views taken on the question by Hindu Law-givers. It may also be that in practice many Hindus take the responsibility of maintaining widows whom they may not be bound in law to support. But when we find that so early as the time of Vijnaneswara the view prevailed that there should be no obligation on a person to support any one except his closest relatives, namely, parents, wife and infant children out of his own self-acquisitions or by his own labour, we do not think it will be right to lay down any broad rule that a Hindu is bound to give maintenance to his daughter-in-law out of the fruits of his own industry. There may be special circumstances which may make it equitable and just in a particular case to uphold such a claim, but, in the present case our attention has not been drawn to any such circumstances. It does not appear that the plaintiff's husband was a minor when he was married to her. It is not shewn that the circumstances under which the marriage took place were such as to justify us in holding that the first defendant is responsible for the plaintiff's maintenance. The partition between him and his brother's sons was before the plaintiff's marriage. The plaintiff herself is not a minor and is not shown to have been a minor at the time of her husband's death. She left her father-in-law's house soon after her husband's death and did not try to establish a claim upon the first defendant by living with him as a member of his family. We must hold that, in the circumstances, the Lower Courts were right in refusing to make first defendant liable to give her maintenance out of his self-acquisitions.

We modify the decrees of the Courts below by directing defendants Nos. 2 to 4 (the first defendant having died pending the appeal) to pay Rs. 50 to the appellant out of the assets of the deceased first defendant with interest at 6 per cent. from this date till the date of payment. We further modify them by directing that the parties do bear their own costs throughout.

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APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

GOVINDA NAICKEN AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

APATHSAHAYA IYER *alias* AYAWAIYER
(DEFENDANT), RESPONDENT.*

1912.
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8 and 5.

Specific Relief Act (I of 1877), ss. 15 and 17—Contract by one co-owner to sell property belonging to him in common with another—Not enforceable—Delay, effect of.

Where one of two divided brothers of a Hindu family agreed to sell immovable property held by them in common, and a suit was brought for specific performance of the contract by compelling the vendor to execute a deed of sale in respect of the whole of the property agreed to be sold,

Held, that no specific performance could be granted, as the execution of a sale deed by the defendant would be ineffectual in respect of the moiety not belonging to him; the Court would not lend its sanction to a transaction devoid of legal effect and improper in itself as calculated to throw a cloud on the title of a third person which would give him a cause of action for a declaratory suit.

Poraka Subbarami Reddy v. Vadlamudi Seshachalam Chetty (1910) I.L.R., 33 Mad., 359, referred to.

Kosuri Ramuraju v. Ivalury Ramalingam (1908) I.L.R., 26 Mad., 74, *Srinivasa Reddi v. Sivarama Reddi* (1909) I.L.R., 32 Mad., 320 and *Barrett v. Ring* (1854) 2 Sm.&G., 48; s.c. 65 E.R., 294, distinguished.

Section 17 of the Specific Relief Act prohibits the Court from directing specific performance of a part of a contract except in accordance with the preceding sections. Even in a case falling within section 15, the relief by way of a decree for part performance is discretionary and will not be granted where there has been great delay, and a consequent change of circumstances.

SECOND APPEAL against the decree of J. G. BURN, the Acting District Judge of Tanjore, in Appeal No. 614 of 1909, presented against the decree of P. VENKATARAMA AYYAR, the District Munsif of Tiruvalur, in Original Suit No. 174 of 1908.

The necessary facts appear from the judgment.

The Honourable Mr. P. S. Sivaswamy Ayyar, Advocate-General and T. Narasimha Ayyangar for the appellants.

T. R. Ramachandra Ayyar and M. Subrahmanya Ayyar for the respondent.

JUDGMENT.—This suit was brought for specific performance of a contract to sell certain lands. Although the agreement to sell

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was executed by the defendant alone, it was stated in the document that the lands were being enjoyed in equal shares by the defendant and the defendant's divided elder brother, and that they had been purchased out of money belonging to them severally. The defendant agreed to have the proposed sale deed executed by himself and by his brother on his own account and as guardian of his minor son.

The District Munsif found: (1) that both parties knew full well at the time of execution of the agreement to sell (Exhibit A) that one-half of the land belonged to Ramasamier and his son, and (2) that the agreement fell through owing to the default of both parties. Referring to illustration (a) to section 15 of the Specific Relief Act and to section 17, he decided that this was not a case in which specific performance of a part of the contract could be enforced, inasmuch as the defendant was not competent to transfer the half to which he did not possess a title, and as the plaintiff made no offer to purchase the defendant's own half paying the price agreed upon and waiving all right to compensation for deficiency or for loss. The District Judge did not agree with the District Munsif upon this point. He was unable to see that there was anything to debar the plaintiff from asking for a sale deed for the whole land to be executed in his favour by the defendant as stipulated in Exhibit A, the plaintiff being allowed to take the document for what it was worth. The District Judge further remarked that he found no reason for declaring the agreement unenforceable on general grounds. He declined however to give the plaintiff a decree on account of his delay of three years in instituting the suit.

In a case of minors, when a suit was brought for specific performance of a contract of sale and the contract was found to be not binding on the minors, this Court, in *Poraka Subbarami Reddy v. Vadlamudi Seshachalam Chetty*(1) observed: "If the contract is indivisible under section 17 of the Act what then is the relief to which the plaintiff is entitled? We are asked by the appellant to give him a decree for the whole against the first and fourth defendants on the authority of *Srinivasa Reddi v. Sivarama Reddi*(2). This we are unable to do."

In that case the appellant expressed his willingness to take a conveyance from the first and fourth defendants of all their

(1) (1910) I.L.R., 33 Mad., 359 at p. 391. (2) (1909) I.L.R., 32 Mad., 320.

interests in the suit properties for the purchase money agreed upon without abatement or compensation, and a decree for that relief was granted accordingly. This course is not open in the present case as the appellant does not ask for it.

Kosuri Ramaraju v. Ivalury Ramalingam(1) and *Srinivasa Reddi v. Sivarama Reddi*(2) were both cases in which a managing member of an undivided family contracted to sell undivided property without the concurrence of other members. Without determining whether the sale by the manager would bind the other members, it was considered that the plaintiff was entitled to a decree for specific performance. Section 15 of the Specific Relief Act was not applied for the reason given in the later decision, viz., that an undivided father has an interest in every portion of the undivided property. But when the family is divided as here, section 17 distinctly prohibits a Court from directing the specific performance of a part of a contract except in accordance with the preceding sections. Even in cases where the conditions of section 15 are fulfilled the use of the word "may" indicates that the granting of a decree for part performance is discretionary with the Court, and we should hold that when there has been great delay in attempting to enforce a contract and circumstances have greatly changed either from a rise of prices or other causes in the interval, the Courts would be justified in refusing to give legal effect to an inequitable arrangement.

Now the plaintiff in the present case wants the Court to compel the defendant to execute a deed of sale for the whole property and if he refuses, to issue one in his name under the seal of the Court, and to allow him to make what he can out of the title thus conveyed. Such a request is quite inadmissible. A sale is a transfer of ownership in exchange for a price (section 54, Transfer of Property Act). The defendant has nothing which he is capable of transferring in the moiety of the property of which he is not the owner and is not in possession. It is impossible to sever the execution of the deed from the transfer to be effected thereby and to treat them as separate acts of the same person. The Court will not lend its sanction to a transaction devoid of legal effect. See Darts' "Vendors and Purchasers," pages 1072-'3; "Fry on Specific Performance," paragraphs 1000 and 1001; "Banerjee on

(1) (1903) I.L.R., 28 Mad., 74. (2) (1909) I.L.R., 32 Mad., 320.

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Specific Relief," pages 457 to 467. *Barrett v. Ring*(1) referred to for the appellants is not in point as then the vendor was not without any title at all to the property agreed to be conveyed. Moreover the execution of a sale deed by the first defendant over property which does not belong to him would be an act improper in itself as it is calculated to throw a cloud over the title of his brother which would be sufficient to give him a cause of action for a declaratory suit. The Court will not compel him to do such an act.

The Second Appeal is therefore dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1912.
January 16.

K. CHINA VEERAYYA (DIED) (PLAINTIFF), APPELLANT,
v.

R. LAKSHMINARASAMMA AND FOUR OTHERS (DEFENDANTS
Nos. 1 AND 3 TO 6), RESPONDENTS.*

Abatement of suit—Hindu Law—Reversioner's suit to set aside an alienation by widow, whether survives to his legal representatives.

A suit by a reversioner to declare that a deed of relinquishment executed by a widow is invalid as against his reversionary rights abates on the death of the plaintiff, and cannot be continued by his legal representatives.

Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib (1904) I.L.R., 27 Mad., 588, followed.

Muthusami Mudaliyar v. Masilamani (1910) I.L.R., 33 Mad., 342, distinguished.

Chiruvolu Punnammah v. Chiruvolu Perrazu (1906) I.L.R., 29 Mad., 390 (F.B.)
Umar Khan v. Niaz-ud-din Khan (1912) 22 M.L.J., 240 and *Tirbhuvan Bahadur Singh v. Rameshar Bakhsh Singh* (1906) I.L.R., 28 All., 727 (P.C.); L.R. 33 I.A., 156, referred to.

SECOND APPEAL against the decree of V. SUBRAMANIAM PANTULU, the temporary Subordinate Judge of Guntur, in Appeal No. 154 of 1906 presented against the decree of N. SOMAYAJULU SASTRULU, the District Munsif of Guntur, in Original Suit No. 54 of 1905.

The facts of the case appear from the judgment.

P. Nagabhushanam for appellant.

(1) (1854) 2 Sm.&G., 43; s.c., 65 E.R. 294.
* Second Appeal No. 1519 of 1910.
(Civil Miscellaneous Petition No. 2053 of 1911.)

The Honourable Mr. L. A. Govindaraghava Ayyar for the respondents.

JUDGMENT.—The prayer in the plaint according to its terms is for a declaration that the third defendant is not the *illatom* son of the first defendant's father-in-law as well as for a declaration that the first defendant's deed of relinquishment in favour of the third defendant and fourth defendant cannot affect the plaintiff's rights as reversioner. The third defendant raised various legal objections to the maintainability of the suit for a declaration that the third defendant was not the *illatom* son of the first defendant's father-in-law. To overcome these objections the plaintiff contended that his suit was really only one to declare the deed of relinquishment invalid as against his reversionary rights. This contention was upheld and the suit was allowed to go on as one relating merely to the validity of the relinquishment. We cannot therefore now regard it as one relating to the third defendant's rights as an *illatom* son. This Court decided in *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib*(1), that a suit by a reversioner for a declaration that a deed of alienation or other instrument executed by a widow will not affect his reversionary rights, abates on the death of the plaintiff and that the cause of action does not survive to the next reversioner. In *Muthusami Mudaliyar v. Masilamani*(2), the cause of action was held to survive but that was on the ground that the plaintiff in the suit asked for a declaration on behalf of himself and other reversioners. We are bound by *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib*(1), which was not overruled by *Chiruvolu Punnammah v. Chiruvolu Perrazu*(3). The Privy Council has held in *Umar Khan v. Niaz-ud-din Khan*(4), that article 118 of the Limitation Act is not applicable to suits for possession [see the judgment of the Privy Council, dated the 14th December 1911, which refers to and explains *Tirbhuvan Bahadur Singh v. Rameshar Bakhsh Singh*(4)]. The right of the present petitioners, who wish to prosecute the Second Appeal as legal representatives of the original plaintiff, to recover the property on the death of the first defendant will not therefore be affected

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(1) (1904) I.L.R., 27 Mad., 588. (2) (1910) I.L.R., 33 Mad., 342.
(3) (1906) I.L.R., 29 Mad., 390 (F.B.). (4) (1912) 22 M.L.J., 240 (P.C.).
(5) (1906) I.L.R., 28 All., 727 (P.C.); L.R., 33 I.A., 156.

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by their not being admitted as plaintiff's representatives. We must reject their application to be permitted to continue the appeal. The Second Appeal abates. We make no order as to costs of the Civil Miscellaneous Petition. The respondents will be entitled to their costs of the Second Appeal out of the estate of the deceased plaintiff.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sundara Ayyar.

1912,
January 31
and
February 8.

UNDE RAJAH RAJA SIR RAJA VELUGOTI SRI RAJA
GOPALAKRISHNA YACHENDRA BAHADUR, K.C.I.E.,
PANCHAHABAR, MUNSUBDAR,
RAJA OF VENKATAGIRI (PLAINTIFF), PETITIONER,

v.

V. CHINTA REDDY AND FOUR OTHERS (DEFENDANTS),
RESPONDENTS.*

Agreement interfering with the course of legal proceedings—Agreement that suit should be decided in accordance with the result of another suit, whether a bar to its trial on the merits—Compromise.

An agreement by a party that a suit may be decided in a manner different from that prescribed by law is void and does not debar him from subsequently claiming a trial of the suit on its merits.

Rukhambhai v. Adamji (1909) 1 L.R., 33 Bom., 69 and *Moyan v. Pathukutti* (1906) 1 L.R., 81 Mad., 1, referred to.

Pending an original suit in the Court of a District Munsif, by the maker of a promissory-note, for a declaration that it was unenforceable, the payee instituted a suit on the promissory-note for recovery of the amount due, in the Small Cause Court. The parties agreed that the small cause suit should be decided in accordance with the result of the original suit, and the former suit was finally dismissed without a trial, following the decision of the Munsif in the original suit.

Held, that the agreement in question did not disentitle the plaintiff from claiming a trial of the small cause suit independently on its merits, and the suit must consequently be remanded.

Subject to certain well-known exceptions, when the Court is seized of a case, it has jurisdiction to decide it in the manner prescribed by law, and the parties have no right to interfere with its authority to do so.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the decree

of T. M. RANGACHARIAR, the District Judge of Nellore in Small Cause Suit No. 97 of 1907, dated the 17th day of January 1908.

The facts are fully set out in the Judgment.

S. Subramania Ayyar for the petitioner.

Dr. S. Swaminathan for the respondents.

JUDGMENT.—This is an application by the plaintiff in Small Cause Suit No. 97 of 1907 in the District Court of Nellore to revise the judgment of the District Judge. The suit is to recover from the defendants a sum of Rs. 849-8-0 on a promissory-note executed by them in favour of the plaintiff in 1906. The defendants pleaded that there was no consideration for the note, that they had instituted a suit, Original Suit No. 281 of 1907, in the District Munsif's Court of Nellore, for the cancellation of the note, and that the suit was therefore not maintainable. It appears from the B Form Diary that the suit was adjourned pending the decision of the Munsif in Original Suit No. 281 of 1907, and that after the Munsif's decision of the suit declaring the promissory-note not enforceable against the defendants, this suit was dismissed. The judgment of the District Judge states: "Both parties represented in this Court that they would abide by the decree of the District Munsif of Nellore in Original Suit No. 281 of 1907 on his file in regard to the question raised in this case." The question referred to in this sentence seems to be whether the promissory-note was unenforceable on the ground that it was not supported by any consideration. Unfortunately, there is no written record of the representation by the parties except what appears in the judgment. Nor are the parties agreed as to what exactly the representation was. The plaintiff says that the agreement between the parties was that the question in dispute should be decided in accordance with the final judgment of the matter in Original Suit No. 281 of 1907 on the file of the District Munsif of Nellore which was capable of being carried up on appeal to the District Court and finally to this Court. The defendants, on the other hand, contend that the decision of the District Munsif in Original Suit No. 281 of 1907 was to be accepted as binding between the parties in the Small Cause Court. In the view we take of the case we think it unnecessary to decide which of these statements is correct. It may be noted that the decision of the Munsif in Original Suit No. 281 of 1907 was reversed by the District Court on appeal and

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* Civil Revision Petition No. 740 of 1910.

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the promissory-note was held to be binding on the defendants; and the Second Appeal against the District Judge's judgment was dismissed by this Court.

The question argued in this revision petition at the hearing was, assuming that the plaintiff had originally represented that the case might be decided in accordance with the decision of the Munsif in Original Suit No. 281 of 1907, he thereby disentitled himself to ask subsequently and that it should be decided by the District Judge on the merits. We are not at present concerned with the question, what legal effect, apart from any agreement between the parties, the judgment of the Munsif in Original Suit No. 281 of 1907 or the final appellate judgment in that case would have upon the controversy in the small cause suit. We have come to the conclusion that the defendants were not entitled to insist on the representation originally made by the parties as a bar to the plaintiff's right to the trial of the small cause suit. The agreement in question cannot be regarded as an adjustment of the subject-matter of the suit by a lawful agreement or compromise. The agreement did not settle the dispute but postponed the settlement and purported to authorize the Court to settle it in a certain manner. A compromise has been defined as a mutual agreement between two or more persons at difference to put an end to such difference upon certain terms agreed upon. (Burrill's Dictionary, quoted in 8 American Cyclopædia of Law and Procedure, page 501.) It must be an agreement which one of the parties can insist on the Court enforcing against the will of the other.

Can it be said in this case that one of the parties could insist on the Court postponing the small cause suit till the District Munsif's decision in Original Suit No. 281 of 1907? We think not. The ordinary rule is that, when the Court is "seized" of a case, it has jurisdiction to decide it in the manner prescribed by law, and that parties have no right to interfere with its authority to do so. There are, no doubt, well understood exceptions to this rule, but where the exceptions do not apply, the rule must prevail. Notwithstanding the pendency of a suit, the parties may settle their disputes as they like by any lawful arrangement, and the Court is then bound to give effect to the settlement. Again, they may ask the Court to refer the questions in dispute to an arbitrator, in which case though the decision of the cause is primarily

transferred to another tribunal, the Court still retains some control over the proceedings. The parties may also enter into an agreement making the oath of one of them conclusive evidence of all or any of the facts in issue between them. This again is subject to the control of the Court.

The present case does not fall within any of these exceptions. Our attention is not drawn to any rule or principle which would compel a party to adhere to any agreement by him that the suit may be decided in a manner different from that prescribed by law. For instance, we do not think that if a litigant agreed that the Judge might decide the suit in the manner that a certain individual might advise, such an agreement would bind him. In *Rukhanbhai v. Adamji*(1), BEAMAN, J., held that an agreement that certain disputes relating to the accounts between the parties in the case should be decided by the Assistant Commissioner in a summary manner without going into formal evidence beyond the accounts, objections and surcharges filed before him, was not binding. The learned Judge observes that it did not amount to an adjustment or compromise and that the agreement not being in writing would not constitute a binding reference to arbitration. He elaborately discusses the question whether an agreement to refer to arbitration and to be bound by the award passed by an arbitrator can be treated as amounting to a compromise, and expresses his disinclination to accept as sound the decisions cited before him in support of the position that such an agreement would amount to an adjustment or compromise when an award has been passed by the arbitrator. We consider it unnecessary to express any opinion on this question, as it is clear that the agreement in the present case cannot be treated as a reference of the dispute in the small cause suit to the arbitration of the Munsif who was trying Original Suit No. 281 of 1907. In *Moyan v. Pathukutti*(2), an agreement by the plaintiff to take a certain oath and to have his suit dismissed, if he failed to do so, was regarded as not binding on him. We hold that the agreement in question in this case did not deprive the plaintiff of his right to have the suit decided on the merits.

We therefore reverse the decision of the Judge and remand the suit to the District Munsif of Nellore to be disposed of by him according to law as a regular Original Suit. The costs of this petition will abide the result.

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(1) (1909) I.L.R., 38 Bom., 69. (2) (1908) I.L.R., 31 Mad., 1.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice,
and Mr. Justice Ayling.

MUTTHAYA MANIAGARAN (DEFENDANT), PETITIONER,

v.

LEKKU REDDIAR AND TWO OTHERS (PLAINTIFFS),
RESPONDENTS.*

1912.
February
22, 23
and 26.

Indian Contract Act (IX of 1872), ss. 39, 55, 68 and 78—Breach of contract to deliver goods at a particular time—Damages, measure of—Time at which damages should be computed.

A contract to deliver goods within a certain period is broken by non-delivery before its expiry, in the absence of an agreement between the parties to extend the time for performance. The measure of damages in such a case is the difference between the contract rate and the market rate at the expiry of the period agreed upon as the time for delivery in the contract.

Per WHITE, C.J.—Section 68 of the Contract Act does not entitle a promisee for his own purposes and without the consent of the promisor to extend the time for performance which had been agreed to by the parties to the contract. Nor does section 55 enable him to keep alive a broken contract in the hope of being able to recover heavier damages for its breach.

Ogle v. Earl Fane (1867) L.R., 2 Q.B., 275 at p. 284 and *Ashmore & Co. v. Cos & Co.* (1899) 1 Q.B., 48, explained.

Nicholl & Knight v. Ashton, Edridge & Co. (1900) 2 Q.B., 228 and *Roth v. Tysen* (1896) 1 Com. Cas., 308; a.c., 78 L.T., 628, referred to.

Per AYLING, J.—Section 68 deals only with concessions on the part of the promisee advantageous to the promisor, and cannot be invoked to support an extension of time by the promisee for his own benefit.

Section 55 read with section 2 (5) means nothing more than this: on the promisor's failure to perform within the contract time, the promisor loses the power to enforce the contract, that is to claim any advantage due to himself thereunder. The promisee has the option of enforcing it or not as it may suit him, and if he elects to enforce the contract he can, under section 73, obtain only such damages as naturally arose in the usual course of things from the breach or the parties knew, when they made the contract, to be likely to result, which cannot include any aggravation of damages caused by the promisee's action or inaction subsequent to the breach.

PETITION under section 25 of the Provincial Small Cause Court's Act (IX of 1887), praying the High Court to revise the decree of A. S. BALASUBRAMANIAM AYYAR, the acting Subordinate Judge of Tuticorin, dated 26th October 1910, in Small Cause Suit No. 713 of 1910.

* Civil Revision Petition No. 894 of 1910.

The facts appear sufficiently from the judgments.

T. R. Venkatarama Sastriar for the petitioner.

T. V. Seshagiri Ayyar for the respondents.

WHITE, C.J.—The question raised on this petition is as to the date with reference to which damages should be assessed in an action for breach of contract. The facts are these. On the 12th of May 1909, the plaintiffs and the defendant entered into a contract for the delivery by the defendant of 6 candies of cotton at an agreed rate within 60 days of the date of the contract. The defendant failed to deliver within the 60 days which expired on or about the 12th of July. On the 4th of September the plaintiffs wrote a letter to the defendant in which they referred to the agreement and intimated that if the defendant failed to deliver the cotton within one week after the date of the letter he would be liable for the loss that might befall the plaintiffs according to the market rate at the date of the letter. The defendant took no notice of this letter. On the 3rd October the plaintiffs wrote to the defendant another letter in which they referred to their previous communication and gave notice to the defendant that as he had failed to deliver the cotton after the notice given, he was liable to the plaintiffs on the footing of the market rate at the date of this second letter and they demanded payment on that footing. They then sued the defendant. The Subordinate Judge by way of damages gave the plaintiffs the difference between the market rate prevailing in October, that is at the time the second notice was given, and the contract rate.

I am unable to agree with the Subordinate Judge that the plaintiffs are entitled to damages on this footing. The Judge refers to section 68 of the Contract Act which empowers a promisee to extend the time for the performance of the promise. Of course it would have been open to the parties to extend the time by agreement, but there is no evidence of any consent by the defendant to any extension of the time and this is not a case in which it can be said that silence gives consent. In my opinion, it is clear that section 68 does not entitle a promisee, for his own purposes and without the consent of the promisor to extend the time for performance which had been agreed to by the parties to the contract. The view of the learned Subordinate Judge was that at the time the suit was instituted the contract of May the 12th was a subsisting contract. In support of this view

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Mr. Seshagiri Ayyar relied strongly on the terms of section 55 of the Contract Act. He contended that under that section the contract was voidable at the option of the promisee that is the plaintiffs, and as they had not avoided the contract, they were entitled to treat it as a subsisting contract at the date of the institution of the suit.

Now, in my opinion, section 55 entitles a party to a contract, where time (as in this case) is of the essence of the contract, to say if he is sued upon the contract: "Time is of the essence of this contract, you have failed to comply with the stipulation as to time, I repudiate the contract." It does not enable the promisee to say: "I elect to keep alive this broken contract in the hopes that I may hereafter recover heavier damages for the breach of the contract than I should be entitled to recover at the time of the breach of the contract." Mr. Seshagiri Ayyar contended that the only way by which a promisor who had broken his stipulation as to time could protect himself if the promisee did not avoid the contract would be to give notice that the contract was at an end. It seems altogether unreasonable to place any such obligation on a promisee when *ex-consensus* the contract has been broken with reference to a matter which goes to the root of the contract. The object of section 55 is to protect the promisee and is analogous to section 39, as shown by the illustration to section 39. This illustration is the statement of a case in which the promisee would be at liberty to put an end to the contract; so, under section 55, where a stipulation entered into by the promisor as to time, which is of the essence of the contract, is broken, the promisee is entitled to repudiate or put an end to, or avoid the contract. No doubt section 55 deals with the effect of a breach of a stipulation which is of the essence of the contract and does not deal with the question of damages; but the plaintiffs would only be entitled to damages on the footing of the market rate in October on the assumption that the contract was a subsisting contract in October. The contract in this case was broken in July and, in my opinion, came to an end in July and there is no evidence of any agreement to extend by the parties.

The cases to which Mr. Seshagiri Ayyar refers are clearly distinguishable. *Ogle v. Earl Vane*(1) turned on the question

(1) (1887) L.R., 2 Q.B., 275 at p. 284.

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whether there was a new contract to which the Statute of Frauds applied. The Court held there was no new Contract but an extension of time by agreement. LUSH, J., said: "I see no reason why, after a breach of contract by non-delivery at the proper time, the buyer should not wait at the express or implied request of the seller, with an understanding between the parties that if the buyer should wait, he would still be entitled, if the seller turned out ultimately unable to deliver, to do that which he was entitled to do in the first instance, namely, go into the market and buy at the then price." Here the right of the buyer to go into the market and buy at the "then price" is based on the express or supplied consent of the seller.

In *Ashmore & Co. v. Cox & Co.*(1) there was an agreement by the defendant to sell hemp to the plaintiffs, the shipment to be made between certain dates. The agreement contained a provision that if the goods did not arrive from loss of the vessel or other unavoidable cause, the contract was to be avoided. It became impossible (in a business sense) for the defendants to ship the hemp between the specified dates. They shipped hemp on a later date (in September) and on October the 27th declared against the contract. The plaintiffs refused to accept this declaration and returned it to the defendants who in November wrote that it was the only declaration they were in a position to make. The plaintiffs brought an action and it was held that they were entitled to damages with reference to the market price in November when the defendants notified their inability to make a declaration in accordance with the contract. In this case the defendants by making the shipment in September and by declaring that shipment against the contract intimated that they treated the contract as a subsisting contract and having done that they could not be heard to say they were not liable for damages on the basis of the market price when they finally notified their inability to make a declaration in accordance with the contract.

In *Nikoll & Knight v. Ashton, Edridge & Co.*(2), where the defendants had failed to perform their contract within the time agreed upon, the Court held that they were protected, by the terms of the contract and were not liable. MATTHEW, J.,

(1) (1899) 1 Q.B., 486.

(2) (1900) 2 Q.B., 298 at p. 305.

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however dealt with the question of the measure of damages as if the plaintiff had been entitled to recover. In that case the event which rendered the contract impossible of performance occurred in December 1899 and in that month notice of the fact was given to the plaintiff. The contract was for the delivery of goods during January 1900. With reference to the question of damages, MATTHEW, J., observed: "It appeared that towards the end of December the plaintiffs might have obtained another cargo at the then market price which was much lower than the price at the end of January. But it was insisted for the plaintiffs that they were entitled to wait and watch the rising market until the end of January, and then claim their damages on the footing of the then market price. In my opinion that contention was wholly untenable. Having regard to the decision in *Roth v. Taysen* (1), I think the plaintiffs were bound to endeavour to mitigate the loss by acting as ordinary men of business would have acted, that is to say, by determining the liability at the earliest date at which they were able to obtain another cargo." In the case before us I think damages should be assessed with reference to the market rate at the expiry of the 60 days agreed upon as the time for delivery in the contract. We must set aside the decree of the Subordinate Court. The case must go back to the Subordinate Judge to be dealt with on this footing. The plaintiffs must pay the costs in this Court, the other costs to be dealt with by the Judge.

AYLING, J. The facts of the case out of which this revision petition arises are simple. Defendant contracted on 12th May 1909 to deliver to plaintiffs, 6 candies of cotton at Rs. 147 a candy within 60 days. He failed to deliver. Neither party took any action on the expiry of the term allowed (12th July 1909). On 4th September 1909, plaintiffs wrote a letter (Exhibit B) demanding delivery of the cotton within a week. To this defendant made no reply. On 8th October 1909, plaintiff wrote (Exhibit C) rescinding the contract and claiming Rs. 228 as damages, being the difference between the contract price on that date.

He subsequently brought this suit for the recovery of this amount, and the Sub-Judge has given him a decree as sued for.

(1) (1895) 1 Opn. Cas., 306; s.c., 78 L.T., 628.

Defendant (petitioner) contends that plaintiffs are only entitled to damages on the basis of the difference between the contract price and the price on 12th July 1909, when the contract was broken by his failure to deliver. This is the only point argued.

The view of the learned Sub-Judge, that the power to extend the time of delivery which plaintiff claims is conferred by section 63 of the Contract Act seems to be untenable and is not seriously put forward before us. Section 63 deals only with concessions on the part of the promisee advantageous to the promisor. As stated in Cunningham and Shephard on the Contract Act: "It is clear, however, that as the act of the promisor must be in the nature of a concession advantageous to the promisee rather than to the promisee so the consequence of the act must be the relieving of the promisee wholly or in part from his liability under the contract." The section cannot be invoked to support an extension of time by the promisee for his own benefit.

The only possible basis for plaintiff's claim is, in fact, section 55 which makes the contract, on failure of performance within the fixed time, "voidable at the option of the promisor." It is contended by Mr. Seshagiri Iyer that this section confers on the promisee the discretionary right, although the promisor may have broken the contract by non-fulfilment within the time allowed of tacitly treating the contract as subsisting for as long as he likes until it suits him to formally rescind it, that damages should be assessed with reference to price at date of rescission and that the promisee may defer rescission to such a date as will enable him to secure the largest amount in the shape of damages.

As some sort of safeguard against this being pushed to obviously unreasonable lengths, he admits that the promisor may put an end to the contract on the expiry of the fixed term or afterwards by specifically stating his unwillingness to perform. Section 55 contains no suggestion of such a proviso and one is *prima facie* inclined to hold that a reading of that section which requires such an unauthorised modification to make it reasonable and workable is not the correct one.

It appears to me that section 55 read with section 2 (i), means nothing more than this. On the promisor's failure to perform within the contract time, he (the promisor) loses the powers to

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enforce the contract, that is, to claim any advantage due to himself thereunder. The promisee on the other hand, has the option of enforcing it or not as may suit him. He may drop it altogether, and in some cases it would be to his interest to do so. If he elects to "enforce" it he can only do so by suing under section 78 for damages for breach; for the contract itself, being for performance within a date which is past, is impossible of execution in terms. The damages for which he can obtain compensation under section 78 are those "which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it," which cannot include any aggravation of damages caused by the promisee's action or inaction subsequent to the breach.

This appears to be the natural and equitable meaning of the act: and applying it to the present case, I think the damages should be reduced to the difference between the contract price and the price on 12th July 1909. I concur in the order proposed by the learned Chief Justice.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

1913.
April 23.

T. VENKATA SEETHARAMAYYA (PLAINTIFF), APPELLANT,

v.

V. VENKATARAMAYYA AND ANOTHER (DEFENDANTS NOS. 1 AND 2),
RESPONDENTS.*

*Transfer of Property Act (IV of 1882), ss. 85 and 91—Mortgage suit—Parties
—Non-joinder of attaching money decree-holder—Sale, validity of.*

Where after attachment by a money decree-holder of certain property previously mortgaged by the judgment-debtor, the mortgagee brought a suit on the mortgage, without impleading the attaching decree-holder as a party, obtained a decree for sale, and himself bought the property in execution of his decree,

Held, that the order for sale, and the sale held thereunder were not binding on the attaching decree-holder, and that the latter was entitled to bring the properties to sale under his attachment.

* Second Appeal No. 2123 of 1910.

An attaching decree-holder has, under section 91, Transfer of Property Act, an interest in the mortgaged property entitling him to redeem the mortgage, and is a necessary party in a suit on the mortgage.

Ghulam Hussain v. Dina Nath (1901) I.L.R., 23 All., 487, referred to.

SECOND APPEAL against the decree of T. GOPALAKRISHNA PILLAI, the Subordinate Judge of Kistna at Ellore, in Appeal No. 384 of 1909 presented, against the decree of T. VARADARAJULU, the Principal District Munsif of Tanuku, in Original Suit No. 259 of 1908.

The necessary facts appear from the judgment.

P. Narayanamurti for the appellant.

P. Nagabhushanam for the respondents.

JUDGMENT.—In this case the plaintiff is a person holding a mortgage from the third defendant over some property belonging to him; the first and second defendants obtained a money decree against the third defendant and attached the mortgaged property. After the attachment the plaintiff instituted a suit for sale on his mortgage but impleaded only the third defendant as a party and obtained a decree for sale. The defendants Nos. 1 and 2 then made an application to bring the property to sale in pursuance of their attachment. The plaintiff then put in a claim petition stating that the third defendant had no longer any saleable interest in the property as he had brought it to sale in pursuance of his mortgage decree. The claim was disallowed and he instituted the present suit for a declaration that the first and second defendants are no longer entitled to bring the property to sale. An attaching creditor is one of the classes of persons that are entitled to redeem a mortgage under section 91 of the Transfer of Property Act. A private alienation by the mortgagor after attachment would admittedly be invalid as against an attaching creditor's claims to bring the property to sale in pursuance of his attachment. Section 85 of the Transfer of Property Act requires all parties interested in the property to be made parties to a suit for sale. Section 91 recognises an attaching creditor as one who by virtue of his interest in the property is entitled to redeem the mortgage. There can be no doubt that the plaintiff ought to have made the attaching creditors, defendants Nos. 1 and 2, parties to his suit for sale and as he failed to do so, the sale is not binding on them, and they are entitled to bring the properties to sale under their attachment. The decision

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in *Ghulam Hussain v. Dina Nath*(1) is in accordance with this view. The fact that there was an order for sale in that case made no difference in the rights of the attaching creditor. A mere order for sale does not increase the interest in the property which the attaching creditor has by virtue of his attachment.

The Second Appeal must be dismissed with costs.

APPELLATE CIVIL.

*Before Sir Charles Arnold White, Kt., Chief Justice
and Mr. Justice Sankaran Nair.*

M. V. CHAPPAN (PLAINTIFF), APPELLANT,

v.

P. RABU AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Mortgage—Suit for redemption—Valuation—Jurisdiction—Malabar Law—Mortgage by karnavan, whether a junior member is bound to sue to set aside.

The proper valuation of a suit to redeem a mortgage is the amount of the mortgage admitted by the plaintiff to be binding on him, and not that of the mortgages set up by the defendant. In such a suit the question of jurisdiction has to be decided on the averments in the plaint, and not with reference to the pleas of the defendant.

Chandu v. Kombi (1886) I.L.R., 9 Mad., 208, followed.

Unni v. Kunchi Amma (1891) I.L.R., 14 Mad., 26 at p. 28, referred to.

When a karnavan of a Malabar tarward makes an alienation which is not binding on the other members, the latter need not sue to set it aside, but can recover possession on the strength of their title, in the absence of proof of the validity of the alienation.

Issue: where the plaintiff has himself executed the instrument under which the defendant claims.

The trustee of a Malabar devasom first executed an otti for Rs. 50, and subsequently renewed the same in a consolidated otti for Rs. 1,650 and further granted a *parambadam* for Rs. 1,500, on the same property. His successor sued to redeem the otti for Rs. 50 treating the other mortgages as invalid.

Held: that the suit as framed was maintainable, and the plaintiff was not bound to sue to set aside the later mortgages created by his predecessor.

SECOND APPEAL against the decree of M. J. MURPHY, the District Judge of North Malabar, in Appeal No. 801 of 1909 presented

(1) (1887) I.L.R., 28 AL., 467.

* Second Appeal No. 2548 of 1910.

against the decree of T. G. RAMASWAMI AYYAR, the Acting District Munsif of Quilandy, in Original Suit No. 408 of 1908.

The facts appear sufficiently from the judgment.

C. V. Ananthakrishna Ayyar for the appellant.

K. R. Subramania Sastri for the respondents Nos. 1 and 2.

JUDGMENT.—The plaintiff, the trustee of a *devasom*, sues to redeem a mortgage of Rs. 50 created by the plaintiff's karnavan on the 21st January 1891. It is admitted that on the 21st February 1905, the same karnavan mortgaged the lands included in the mortgage instrument aforesaid with certain other lands for Rs. 1,650. On the same day he also mortgaged the equity of redemption for Rs. 1,500. It is conceded this mortgage for Rs. 1,650 was a consolidation of three previous mortgages, due for Rs. 900, dated 25th March 1890 and the other for Rs. 700 on the 13th February 1890 and the mortgage for Rs. 50 which the plaintiff seeks to redeem. The mortgage for Rs. 900 has been already declared to be binding on the property.

The District Judge held that the mortgage of Rs. 50 is now no longer in force as it is merged in the mortgage for Rs. 1,650 and that the plaintiff is bound to sue to set aside the mortgages of the 21st February 1905; and as a suit to redeem on those mortgages or set them aside will not lie in the Munsif's Court he dismissed the suit.

The question in dispute is concluded by authority. The proper valuation of a suit to redeem a mortgage is the amount of the mortgage or mortgages admitted by the plaintiff to be binding on him not the mortgages set up by the defendant. Otherwise if the plaintiff files this suit in a Court of higher jurisdiction and succeeds in proving that the mortgages binding on him are less than Rs. 2,500, his plaint may be returned to him to be filed in the Munsif's Court. In a suit of this nature the question of jurisdiction has to be decided upon the averments in the plaint not with reference to the pleas of the defendant, see *Chandu v. Kombi*(1) which is directly in point.

It was then argued that the plaintiff is bound to set aside the subsequent mortgages created by his karnavan and the present suit treated as one to set them aside is not maintainable

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as three years from the date of the mortgages had expired before its institution and as the amount of the mortgage exceeds the jurisdiction of the Munsif's Court.

It may be doubted whether the plaintiff is in the position of a junior member of a tarwad seeking to set aside an alienation by his karnavan. He is a trustee impeaching the conduct of his predecessor in office.

But treating the case as that of a member of a tarwad seeking to recover possession of properties mortgaged by his karnavan, we do not think it is necessary for him to set aside the mortgage granted by the karnavan. The same contention was put forward and disallowed in *Chandu v. Kombi*(1), by KEENAN and MUTHUSAMI AYYAR, JJ., SHEPARD and WEIR, JJ., in *Unni v. Kunchi Amma*(2) following the judgment in an earlier case *Ramen v. Valin Amah*(3) by TURNER, C.J. and KEENAN, J. [See the judgment extracted in *Unni v. Kunchi Amma*(2).]

The property of the tarwad is vested in the members of the tarwad. The karnavan can alienate the property only when the interests of the tarwad require such alienation. When he makes therefore an alienation which is not binding on the other members, it is unnecessary for the other members to set it aside.

They may sue to recover possession on their title and they would be entitled to recover such possession if the defendant does not prove the validity and binding effect of the alienation on the other members of the tarwad. The case may be different where the plaintiffs themselves have executed the instrument under which the defendant claims.

Certain cases were relied upon by the respondent's pleader in which it was held that a minor was bound to set aside an alienation by his guardian. The case of a guardian and a minor is governed by a separate article in the Limitation Act. Those cases may be distinguished on the ground that in such cases a guardian executes the instrument solely on behalf of a minor and if it is not binding on the minor it ceases to have any legal effect, whereas an alienation by a karnavan though not binding on the other members of a family may continue to be binding on the karnavan.

(1) (1886) I.L.R., 9 Mad., 208 at p. 212. (2) (1891) I.L.R., 14 Mad., 26 at p. 28
(3) Second Appeal No. 270 of 1880.

We therefore reverse the decree of the lower Appellate Court and direct the appeal to be restored to the file and disposed of in accordance with law. Costs will abide the result.

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APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

ARIYAPUTHIRA PADAYACHI AND TWO OTHERS
(DEFENDANTS NOS. 2, 3 AND 4), APPELLANTS,

v.

MUTHUKOMARASWAMI PADAYACHI AND TWO OTHERS
(PLAINTIFFS AND FIRST DEFENDANT).*

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Transfer of Property Act (IV of 1882), ss. 54 and 118—Mortgage, usufructuary—Oral arrangement that mortgagee should give up possession of the mortgaged property in part, and receive the equity of redemption in part—Sale or Exchange—Price, meaning of—Evidence Act (I of 1872), sec. 92—Adverse possession by mortgagees.

A usufructuary mortgagee of items A and B sued to redeem item A, alleging that item B had been previously redeemed by him. The defendant pleaded that more than 12 years prior to suit the mortgage had been extinguished by an oral arrangement by which the mortgagor orally sold item A to the mortgagee in consideration for the latter surrendering item B to the mortgagor freed from the mortgage lien. The defendant also contended that the possession of the mortgagee became adverse from the date of the arrangement, and that the suit was barred by limitation.

Per curiam.—Held, that the transaction pleaded was not merely a compromise in acknowledgment of existing rights, but amounted to an exchange of property within section 118 of the Transfer of Property Act if it was not a sale, and was invalid for want of a registered instrument.

Per MILLER, J.—The transaction could not be proved for showing the change of the mortgagee's possession into adverse possession, since the intention to discharge the mortgage involved the intention to make certain transfers, and it could not be said that if those transfers failed, both the parties nevertheless intended to discharge the mortgage.

Per SADASIYA AYYAR, J.—All transfers by conveyance, if they are not settlements or declarations of trust were intended by the legislature to come within one of the headings 'sale,' 'exchange' or 'gift' in the Transfer of Property Act.

Thiruvengidachariar v. Ranganatha Ayyangar (1908) 18 M.L.J., 500, assented from.

Price means not only money in current coin, but includes money due on a prior debt, and the words 'price paid' will cover cases where the vendor's claim

* Second Appeal No. 2044 of 1910.

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for the receipt of the price is satisfied by giving him what he accepts as tantamount to such payment.

A mortgagee in possession, as such, cannot by merely asserting possession as owner under an invalid sale convert his possession into adverse possession so as to prescribe for a title under the Limitation Act.

Byari v. Puttanna (1891) I.L.R., 14 Ma. 1., 38, *Bhagvant Govind v. Kandi valad Ishade* (1890) I.L.R., 14 Bom., 279, *Ramunni v. Kerala Varma Valia Raja* (1898) I.L.R., 15 Mad., 166 and *Khierajmal v. Daim* (1905) I.L.R., 32 Calc., 96, (P.C.) applied.

A mortgage created by a registered instrument may be proved to have been discharged by admissible evidence, (including oral evidence) of payment of the mortgage amount, or by admissible evidence of any other transaction which operates as a mode of payment.

Ramavatar v. Tulsi Prasad Singh (1911) 14 C.L.J., 517, *Kuttika Bapanamma v. Kattika Krishnamma* (1907) I.L.R., 30 Mad., 231, *Karampalki Unni Kurup v. Thekku Pithi Muthorasutti* (1908) I.L.R., 26 Mad., 195 and *Goseti Subba Row v. Varigonda Narasimham* (1904) I.L.R., 27 Mad., 368 referred to.

But oral evidence of an invalid oral conveyance (of which evidence is legally inadmissible) of the equity of redemption in a portion of the mortgaged property as discharge of the mortgage debt is inadmissible.

SECOND APPEAL against the decree of H. MOBERLY, the District Judge of South Arcot, in Appeal No. 359 of 1909 presented against the decree of A. SRINIVASA AYYANGAR, the District Munsif of Chidambaram, in Original Suit No. 751 of 1908.

The facts of the case are fully set out in the judgment of SADASIYA AYYAR, J.

K. S. Krishnaswami Aiyangar for T. Narasimha Ayyangar for the appellants.

G. V. Ananthakrishna Ayyar and C. Narasimhachariar for the respondents Nos. 1 and 2.

MILLER, J.—I think the transaction alleged in this case to have taken place in 1892 may properly be held to be an exchange of property within the meaning of section 118 of the Transfer of Property Act, if it is not sale. By it the mortgagee gave up his right to possession in part of the land mortgaged and the mortgage money due to him and received the equity of redemption in another part of the land. Even if this transaction was made by way of a compromise of disputes it is not suggested that it amounted merely to an acknowledgment or adjustment of existing rights and the operations amounted, I think, to transfers of ownership in immoveable property. The arrangement was therefore invalid for want of a registered instrument and could not affect the title.

It is, however, contended that it may be proved as showing the intention of the parties to discharge this mortgage at that time and so, as showing charge in the nature of the mortgagee's possession after the date of the arrangements, so as to make it adverse to the mortgagor. The intention to discharge the mortgage involves the intention to make certain transfers and it is impossible to say that if those transfers failed both parties nevertheless intended to discharge the mortgage. The mortgagor therefore had 60 years for his suit under Article 148 of the 2nd schedule of the Limitation Act and he has come within that time.

The appeal therefore fails, and is dismissed with costs.

SADASIYA AYYAR, J.—I entirely agree in the conclusion of my learned brother and in the reasons given by him for the said conclusion. But out of respect for the strenuous arguments advanced with great acuteness by the appellant's learned vakil, I have thought it not improper to pronounce a judgment in my own words.

The facts and pleadings necessary to understand the contentions on both sides are shortly as follows: plaintiff sues for redemption of the plaintiff A schedule lands alone, though both A and B schedule lands were usufructually mortgaged in 1885 by a registered instrument for Rs. 380½. The plaintiff's allegation is that the B scheduled lands were redeemed in 1893 by a payment of Rs. 200 and hence, only the A scheduled land remained to be redeemed on payment of the balance of Rs. 180½. The contesting defendants (who represent the original mortgagee) pleaded (a) that the A schedule properties were "orally sold" to the mortgagee in consideration of Rs. 1,600 due to the mortgagee under the mortgage document of 1885 and some other documents (the written statement itself using the word "sold"); (b) that thus the mortgage document of 1885 was discharged and the mortgagee became full owner of the A schedule properties by the oral sale, while the mortgagor got back the B schedule property free of the mortgage charge; and (c) that, as the mortgagee and his assignees have been enjoying the A schedule lands as owners by adverse possession from 1892 for more than 12 years before suit, they have got a good title by prescription under article 144 of the second schedule of the Limitation Act.

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The Lower Appellate Court held that the mortgage contract created by the registered document of 1885 could not be rescinded by the alleged oral agreement or sale of 1892 and that under section 92 of the Indian Evidence Act, oral evidence was inadmissible to prove any such agreement. On this ground, the Lower Appellate Court confirmed the Munsif's decree, allowing in plaintiff's favour the redemption of the A schedule lands. The defendants Nos. 2, 3 and 4 are the special appellants before us.

The contentions of the appellants' learned vakil were as follows :—

(a) The oral sale of 1893 in respect of the A schedule lands set up by the appellants does not come under the definition of "sale" or "exchange" in the Transfer of Property Act, it is a peculiar "transfer" of property not covered by the Transfer of Property Act, section 54, and such a transfer could be effected by oral agreement and does not require a written registered instrument to effect it, though the consideration for such a transfer and the value of the transferred property (roughly) have been Rs. 1,600.

(b) Even if the oral sale of 1892 is invalid to transfer the title to the A scheduled properties to the mortgagee, it operated as a discharge of the mortgage debt of 1885 charged on both A and B schedule properties. Hence the mortgagee's possession of the A schedule properties ceased from 1892 to be the possession of a mortgagee and became the possession of a trespasser. More than 12 years' possession before suit as trespasser has conferred full title as owner on the mortgagee and his assigns, and

(c) Oral evidence can be given, notwithstanding section 92 of the Evidence Act, to prove that the obligation of the mortgagor to pay money under the mortgage has been discharged; such oral evidence need not be restricted to the evidence of the payment of money or its equivalent in moveables or choses in action or other personal property. Oral evidence can be given of an invalid sale (invalid for want of a registered written instrument evidencing it) and such invalid sale could validly operate as a discharge of the mortgage deed, though ineffectual to transfer title.

As regards contention (a), I think it very improbable that the legislature, when enacting by the Transfer of Property Act,

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that a registered instrument is indispensable in the case of a transfer of land by sale (section 54), transfer of land by exchanges (118), transfer of land by gift (123), transfer of interests in land by way of lease (section 107) and transfer of interests in land by way of mortgage (section 59) where the interest transferred in any of these modes is a substantial interest, could have intended to exclude any transfers by act of parties of an interest in immoveable property of over Rs. 100 in value, from the necessity of being evidenced by a registered instrument, or could have intended to allow such transfer to be effected by oral agreement or by other than a registered instrument. I have very little doubt that all such transfers *inter vivos* were intended to be included in the one or other of the transactions coming under the heads of "sale" (chapter III), "mortgage" (chapter IV), "lease" (chapter V), "exchange" (chapter VI) and "gift" (chapter VII). Any "transfers" made in the way of creation of trusts were provided for in the Trusts Act, section 5 of which says, "no trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing . . . registered." Section 9 of Act IV of 1882 allowing "transfer of property" without writing except where a writing is expressly required by law, does not weaken to any appreciable degree the patent conclusion derivable from a study of the Transfer of Property Act as a whole, that the legislature was very anxious that all important transfers of landed property [and even transfers of choses (section 130) in action and transfers of intangible rights (section 54)] should be evidenced by registered instrument, so as to prevent litigants from letting in oral evidence as to alleged transfers, about the truth or falsehood of which oral evidence, it is almost impossible for Courts to come to a satisfactory conclusion in most cases.

So far as transfers of land by conveyance (that is excluding transfers by mortgages and leases) are concerned, I think that if they are not settlements or declarations of trust, they were intended by the legislature to come within one of the headings "sale," "exchange" or "gift" in the Transfer of Property Act. "Sale" is defined in section 54 as a transfer of ownership in exchange for a price paid or promised and partly paid and partly promised, etc. The appellants' vakil ingeniously argued that "price" means tangible money in current coins, it may be

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currency notes, and does not mean any other valuable consideration. Thus according to this contention, if I sell my land to another in satisfaction of Rs. 300 which I owe to him on a promissory-note, the transaction is not a "sale" within the definition of the Transfer of Property Act, because I did not receive nor was I promised in future any current coins as "price." Of course in ordinary parlance it is undoubtedly a "sale," and in this very case, the appellants in their statement talked of the oral sale of 1893 in consideration of moneys *not paid or promised at time of sale* but of moneys due on prior debts. However I find in Bouvier's Law dictionary that the word "price" signifies that "it consists in money to be paid down, or at a future time; for if it be of anything else it will no longer be a price, nor the contract a sale, but exchange or barter"; and SHEPHERD, J., in his commentary on the Transfer of Property Act says "price" includes "money only." The startling result of this technical view is that many so-called sales of land where the consideration is the satisfaction of the old debts due to the vendee as creditor are not "sales" at all under the Transfer of Property Act. Pushing the matter further, suppose the purchaser hands over Government promissory-notes or a cheque on a Government Bank or on the Bank in which both parties have invested their money, or currency notes instead of money, can it be said he does not pay "price" for his purchase. I do not think that such was the intention of the legislature by the mere use of the word "price." If the price is fixed in the conveyance in current coin, I think that the words "price paid" will cover cases where the vendors claim for the receipt of the price is satisfied by giving him what he accepts as tantamount to such payment. For instance, if he says in effect, "Here I owe you three hundred rupees under promissory-note and you now owe me three hundred rupees as the price of the land I sell. Why should we go through the farce of your paying me Rs. 300 in current coin for the purchase money and my handing it back to you to repay your promissory note debt? We shall take it that both processes have taken place." I think that in such a case we must take it that the "price" was paid and the transaction is a "sale" though no coins were actually paid by the purchaser. If two persons mutually exchange two things (neither of which is "money only") it may be an exchange or barter and not a sale. But if they

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mentally fix the values of the exchanged things in current coin and then exchange them as of equal value, I think they might be held to effect "sales," and not to pay "prices" and not merely to effect an exchange or barter.

Even if I am wrong in holding that a conveyance of land in consideration of the moneys already due to the vendee by the vendor do come under the definition of "sale" in section 54 of Act IV of 1882, I think such transactions ought to be brought under the definition of "exchange" under section 118 of Act IV of 1882, which makes all the provisions as to the mode of effecting transfers of land by sales applicable to transfer of land by exchanges also. "Exchange" according to the definition in section 118, is a mutual transfer of ownership of two things, neither of which is "*money only*." It seems to me that if a conveyance of land for a debt due by the vendor to the vendee is not a "sale" it is clearly an "Exchange" as the debtor-vendor transfers his ownership in land (which is not "*money and affortiori not money only*") while the vendee transfers the ownership in his chose in action (the debt due by the vendor) to the debtor-vendor (so as to merge and extinguish the debt the debtor and creditor becoming the same individual by the transfer of the debt to the debtor himself). Here also, the chose in action so transferred in its turn, is not "*money only*." It is argued that the vendee-creditor does not transfer his right as creditor to the vendor-debtor but only treats the debt as discharged. This seems to me to be merely a play upon words for the debt is relinquished *in favour of the debtor*, and the substance of the transaction is a transfer of the debt to the debtor. In fact, where a testator relinquishes, by his will, a debt in favour of the debtor, it is appropriately styled a gift, by way of legacy, of the debt to the debtor, and where a mortgagee relinquishes his mortgage debt he frequently does it by executing a reconveyance of the mortgage interests created under the mortgage deed to the mortgagor.

If such transfers of land do not come under either the head of "sale" or "exchange", the extraordinary result would be that a conveyance of lands worth even a lac of rupees can be legally effected by oral agreement if the purchaser lend the money a few days before the oral conveyance and relinquish his debt a few days afterwards as consideration for the oral

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conveyance. I refuse to believe that such a result could have ever been dreamt by the Legislature. I have no doubt that all conveyances of ownership right in lands were intended to be brought under "sales" or "gifts" or "exchanges", and that a conveyance for a lac of rupees due on a promissory-note to the vendee was not intended to be excluded from the necessity of being evidenced by a registered instrument.

Reliance is placed by the appellants' learned vakil on a case decided by this High Court but not reported in any authorized reports. It is found in *Thiruvengidachariar v. Ranganatha Ayyangar*(1), where it was held that when two brothers orally gave their lands to their sister in satisfaction of some claim of hers against them, "the transaction was not a gift nor a sale nor an exchange under the Transfer of Property Act." With the greatest respect, I am clear in my mind that it was either a sale or a mutual "exchange" of two things, neither of which was "money only" and I am therefore not prepared to follow this case, I know that where a compromise is not intended newly to create or effect a transfer of title, but is only an acknowledgment of existing rights in lands, it is not a sale or exchange [see *Krishna Tanhaji v. Aba Shetti Patik*(2)] and need not comply with the provisions of section 54 of Act IV of 1882 in order to be treated as valid. But neither the present case nor that in *Thiruvengidachariar v. Ranganatha Ayyangar*(1), is such a case of compromise. I therefore overrule the appellant's contention that a registered writing was not necessary to validate the alleged sale of 1892. I might here be permitted to express the wish that the British Indian legislature would pass an enactment making a registered writing indispensable for the validity of all settlements, partition agreements, and wills and authorities to adopt throughout British India, making very few exceptions in special cases (such as soldiers' and sailors' wills), so that the flood of intricate and uncertain litigation on such questions might be brought within bounds and the perjury in connection with wills executed out of the Presidency towns and with partitions and adoptions might be put an end to to some extent.

The next contention of the appellants' vakil based on the Limitation Act is not sustainable, as, if the original mortgagee

(1) (1908) 18 M.L.J., 500.

(2) (1910) I.L.R., 34 Bom., 189.

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continued to hold possession as mortgagee owing to the alleged sale of 1898 being invalid and ineffective to convey to him the ownership in the equity of redemption in the A schedule properties, he cannot by merely asserting possession as owner under the invalid sale convert his possession as mortgagee into possession as owner even granting that the mortgagee knew and acquiesced in his assertion. *Byari v. Puttanna*(1), *Ramunni v. Kerala Varma Valia Raja*(2), *Bhagvant Govind v. Kondi valad Mahadu*(3) and *Khiairajmal v. Daim*(4), clearly lay down that article 144 cannot be invoked in favour of the mortgagee if the mortgagor is not barred by article 148 from redeeming and recovering possession of the mortgaged property.

The last contention about the admissibility of oral evidence to prove the alleged discharge of the mortgage of 1885 might be disposed of shortly. A mortgage might, even if created by a registered instrument, be proved to have been extinguished by letting in admissible evidence (including oral evidence) of payment of the mortgage amount or by letting in admissible evidence of any other transaction which operates as a mode of payment—*Ramavatar v. Tulsi Prosad Singh*(5). It has been similarly held in *Kattika Bapanamma v. Kattika Kristnamma*(6) that while a subsequent oral agreement to modify the terms a registered maintenance deed cannot be proved, the fact that in particular years, the obligee was in possession of certain lands of the obligor and paid herself the maintenance amount out of the profits of the lands can be proved. See also *Karampalli Unni Kurup v. Thekku Vittil Muthorakutti*(7) and *Goseti Subba Row v. Varigonda Narasimham*(8). Here the defendants do not seek to prove that by the payment of any money or by the receipt by the mortgagee of profits of other lands of the mortgagor, the claim of the mortgagee was paid up and thus the mortgage was extinguished, but they wish to prove an invalid oral conveyance (of which evidence is legally inadmissible) of the equity of redemption in a portion of the mortgaged property as having had the effect of the payment of the mortgage money. Oral evidence to prove a conveyance as equivalent

(1) (1891) I.L.R., 14 Mad., 38.

(3) (1890) I.L.R., 14 Bom., 279.

(5) (1911) 14 C.L.J., 507.

(7) (1908) I.L.R., 26 Mad., 195.

(2) (1892) I.L.R., 15 Mad., 166.

(4) (1905) I.L.R., 32 Calc., 296 (P.C.).

(6) (1907) I.L.R., 30 Mad., 231.

(8) (1904) I.L.R., 27 Mad., 368.

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to payment of money has not been allowed in any of the cases cited and could not be allowed. Receipt of mesne profits by possession of lands and receipt of moneys can be proved by oral evidence but not an oral sale of lands worth more than Rs. 100 nor can such oral sale be taken as equivalent to the payment of the value of the land invalidly sold.

In the result, the Second Appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912.
July 24.

MEERA KASIM ROWTHER AND SIX OTHERS (DEFENDANTS),
APPELLANTS,

v.

G. F. F. FOULKES (SON OF THE REV. THOMAS FOULKES)
BY HIS AGENT E. S. B. STEVENSON (PLAINTIFF), RESPONDENTS.*

*Estates Land Act (Madras Act I of 1908), ss. 9, 11, 151, 157 and 187 (g)—
Custom or contract enabling tenant to build on ryoti land, validity of.*

A custom or contract entitling a ryot of agricultural land to erect buildings thereon, is not opposed to the provisions of the Madras Estates Land Act, and can be enforced against the landlord, though such erections may impair the value of the holding for agricultural purposes. The effect of such a custom is simply to make it an implied term of the contract of tenancy.

SECOND APPEAL against the decree of H. O. D. HARDING, the District Judge of Salem in Appeal No. 200 of 1909, preferred against the decree of MUHAMMAD ABDULHIS SAHIB BAHADUR, the Head-quarters Deputy Collector, Salem, in Summary Suit No. 12 of 1908.

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

A. Ramachandra Ayyar for the appellants.

T. Rangachariar for the respondent.

JUDGMENT.—The plaintiff in the suit is a *mittadar* in the Salem district. The defendants are ryots holding certain land under the plaintiff. The object of the suit is to eject the defendants. The right to eject is based in the plaint on the ground that the

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defendants built a house for the purpose of having a skin godown on a portion of the holding which according to the plaintiff the defendants had no right to do. The plaint alleges that "the act was liable to cause damage to the relationship of landlord and tenant prevailing between the two parties and to the rights and reliefs which the plaintiff has under the Madras Estates Land Act" (paragraph 11 of the plaint). In the written statement the defendants pleaded that the ryots, from time immemorial, had been claiming the right to build skin godowns, indigo godowns, bungalows, etc., to live in and let out, on the lands in respect of which assessment was collected in Salem *mitta* and that the plaintiff *mittadar* and his predecessors had accepted such right. The Deputy Collector dismissed the suit.

On appeal, the District Judge has held that the defendants' act in constructing a skin godown or tannery was improper and he granted an injunction against the defendant, directing him to dismantle the tannery and to discontinue tanning in the field. The defendants relied upon a custom in the *mitta*, according to which ryots holding agricultural land were entitled to erect skin godowns and tanneries and relied on the judgment in a previous suit by the *mittadar* against another ryot in Original Suit No. 885 of 1904. In that case it appears that a custom of the sort pleaded by the tenant was upheld by the Courts. The District Judge observes, with respect to the judgment in that suit, that the specific question whether a tannery would render the land unfit for agriculture was not raised and that Act I of 1908 was not then in force. The circumstance, however, that the question whether a tannery would render the land unfit for agriculture was not raised would not render the judgment inadmissible in evidence or deprive it of all weight, as the effect of the custom would be to render the defendants' act proper even if the tannery rendered the land on which it was erected unfit for agriculture. The effect of the defendants' plea in fact is to make it a part of the contract between the parties, that a skin godown or tannery might be erected, although no express provision to that effect be made in the contract between the parties. With respect to Act I of 1908 we are unable to find any provision in it which would render such a contract or custom invalid. Section 151 enacts that "A landholder may institute a suit before the Collector to eject an occupancy ryot from his holding

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* Second Appeal No. 1440 of 1911.

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only on the ground that the ryot has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes."

Reading it with clause (g) of section 187, which lays down that "Nothing in any contract between a landholder and a ryot made before or after the passing of this Act, shall entitle a landholder to eject a ryot otherwise than in accordance with the provisions of this Act," and also along with section 9, which provides that "No landholder shall as such be entitled to eject a ryot from his holding or any part thereof otherwise than in accordance with the provisions of this Act," section 151 appears only to restrict the right of the landholder to eject the ryot by limiting it to a case where a ryot has materially impaired the value of the holding for agricultural purposes.

Section 11 has been relied on by the learned vakil for the respondent. It states that "a ryot may use the land in his holding in any manner which does not materially impair the value of the land or render it unfit for agricultural purposes." But this section does not deprive him of the benefit of a contract or usage which would entitle him to use it in a manner which might impair the value of the land for agricultural purposes. After all, the contract or usage would simply amount to a permission to the ryot to use the land for other than agricultural purposes. It would, no doubt, probably have the effect, in case of relinquishment of the land by him, of depriving the landlord of the benefit of letting it out again for agricultural purposes. There is, however, nothing in the Act which renders such a contract or custom unenforceable against the landholder.

The District Judge has not considered the evidence of custom as a whole before recording a finding on the question. The respondent contends that there was no definite issue on the question of custom, although the defendants' right to erect a skin godown or tannery was generally put in issue. It is, we think, desirable that a specific issue should be raised on the question and decided. It will be necessary to find the limits of any customary right which the ryot may possess to erect a tannery. The appellants' pleader is hardly prepared to go the length of contending that the whole of a holding could be used for such a purpose.

We shall therefore reverse the decree of both Courts and remand the suit to the Court of First Instance for fresh disposal

after framing a specific issue on the question, whether the defendant was justified by any legal and valid custom in erecting a skin godown or tannery and what are the exact incidents of such a custom. Both parties will be entitled to adduce fresh evidence. All costs up to date will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

VADIVELAM PILLAI (DEFENDANT NO. 1), APPELLANT,

v.

NATESAM PILLAI AND ANOTHER (PLAINTIFF AND DEFENDANT NO. 2),
RESPONDENTS.*

Hindu Law—Joint family—Alienation by managing member in part for necessity—Co-parcener's suit to set it aside—Form of decree—Practice.

Where the managing member of a joint Hindu family consisting of himself and his nephew sold family property for a consideration, of which part was found to be binding on the family, and the nephew sued to recover his share of the property from the alienee.

Held, that according to equitable principles, in the absence of anything appearing to the contrary, the whole of the consideration for the sale, the valid as well as the invalid portion thereof, must be distributed over the whole of the property sold in proportion to the value of each part.

Marappa Gaundan v. Rangasami Gaundan [(1900) I.L.R., 23 Mad., 89] dissented from.

The proper decree in such a case is to decree to the plaintiff his share of the property sold after division by metes and bounds, on condition that he pays to the defendant a proportionate share of the consideration found binding, together with mesne profits from the day that he deposits the amount into Court, and gives notice thereof to the defendant.

SECOND APPEAL against the decree of E. L. THORNTON, the District Judge of Trichinopoly, in Appeal No. 34 of 1909, preferred against the decree of K. S. KOTHANDARAMA AYYAR, the District Munsif of Srirangam, in Original Suit No. 402 of 1907.

The necessary facts appear from the judgment.

The Honourable Mr. T. V. Seshagiri Ayyar for the appellant.

* Second Appeal No. 1702 of 1910.

1912,
July 16.

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—
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ATTYAR, JJ.

T. Natesa Ayyar for the first respondent.

JUDGMENT.—A question of Hindu Law of some importance has been raised for decision in this Second Appeal. The necessary facts may be very briefly stated. One Manickam and Chinnappa were two Hindu brothers. They were living separately for a considerable time. The plaintiff is the son of Manickam. He sues to recover one-half of certain lands which were sold by Chinnappa in 1899. Evidently the lands in question as well as other property belonging to the brothers were managed by Chinnappa. The plaintiff's case was that he and Chinnappa were undivided members and that the sale made by Chinnappa was not binding on him. He therefore claimed to recover one-half of the properties sold treating the sale of the other half as valid, as Chinnappa was entitled to alienate his own share for consideration.

Several questions of fact were raised by the defendant which it is unnecessary to refer to for the purpose of this judgment. The Lower Courts found that the family was undivided. The Appellate Court also overruled the contention of the defendant that the plaintiff's right to a share of the family properties was extinguished by the statute of limitations; no good reason has been shown for interfering in Second Appeal with the finding on this latter question.

Mr. Seshagiri Ayyar argued that the plaintiff was estopped by his conduct from disputing the alienation made by Chinnappa but the finding of the Munsif on the question of estoppel was against him and no facts have been brought to our notice which would show that the plaintiff was estopped. The Lower Appellate Court held that out of Rs. 500, the consideration for the sale deed, (Exhibit VIII) executed by Chinnappa, Rs. 250 was borrowed by him for purposes binding on the family consisting of himself and his nephew, the plaintiff, but that the remaining Rs. 250 was not binding on the plaintiff. On these facts he had to decide what decree the plaintiff was entitled to. He came to the conclusion that the plaintiff was entitled to a decree for the half share claimed by him without making any payments to the defendant. In doing so he considered himself supported by the authority of the decision in *Marappa Gaundan v. Rangasami Gaundan*(1). In Second Appeal it is contended

(1) (1900) I.L.R., 28 Mad., 89.

by the learned vakil for the appellant that the view taken by the Judge is wrong. Mr. Seshagiri Ayyar asks us to proceed on the basis that the amount Rs. 250 which is found to have been borrowed for family purposes must be regarded as a charge on the plaintiff's share of the property; he argues that the family having benefited to the extent of Rs. 250 by the sale the plaintiff cannot recover his share without paying that amount. In effect, he asks us to treat Chinnappa as having sold his own half share for the portion of the consideration which has been held to be not binding on the family and the other half share for the portion held to be binding. Mr. Natesa Ayyar for the respondent asks us to do just the contrary, that is to hold that Chinnappa must be taken to have sold his own half share for the portion of the consideration held binding on the family and the remaining half share for the portion held not to bind the family. We can find no legal principles on which we can adopt either of these courses. According to accepted equitable principles, in the absence of anything appearing to the contrary the consideration for the sale must be distributed over the whole of the property sold in proportion to the value of each part. On this principle the whole of the Rs. 500 must be distributed over the shares belonging to the plaintiff and Chinnappa respectively. There is no ground for supposing that one portion of the consideration was allocated to a particular half share and the other portion to the other half share. The valid portion of the consideration as well as the invalid portion must be distributed over each of the half shares of the plaintiff and Chinnappa respectively.

The result would be that the plaintiff would be bound to pay one-half of the Rs. 250 held binding on the family, that is Rs. 125, before he can recover possession of the half share claimed by him.

Only one decided case—*Marappa Gaundan v. Rangasami Gaundan*(1) bearing on the point has been brought to our notice, namely the case relied on by the District Judge. That case was in its facts similar to the present one. A Hindu father sold certain property. The sale was held to be invalid but portion of the consideration was found to have been used for the benefit of the family, namely for the discharge of a mortgage of

(1) (1900) I.L.R., 23 Mad., 89.

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the family property. The sale was impeached by the alienor's son. SUBRAHMANYA AYYAR, J., held that the son was entitled to recover his half share without repaying any portion of the consideration which was used for the benefit of the family. With great deference to the learned Judge we find it difficult to accept the reasoning on which his judgment is based. He was much influenced by the practical inconvenience which, according to him, was likely to arise if the alienor was allowed in such a case to claim reimbursement of a portion of the consideration found to be binding on the family. The learned Judge observes, "now a sale of joint property by a co-parcener, though made without legal necessity, is in this presidency valid to the extent of the vendor's share. Suppose that that share is really worth the whole of the amount paid by the vendee as the price, why should he get anything more. Next, suppose that that share is really worth less than the price paid. The vendee cannot, in such a case, reasonably ask for a charge for more than the difference between "the real value of the share which he gets and the price he has actually paid. It is scarcely necessary to say that questions as to such valuation are often not capable of easy or satisfactory settlement." The whole of this reasoning proceeds on the assumption that when a co-parcener sells his share as well as the shares of other members the other co-parceners are entitled to raise the question as to what is the real value of the share of the alienor. It cannot be doubted that a co-parcener is entitled to part with his own share in any family property for any consideration he pleases. It is equally clear that as between the vendor and the vendee in the absence of any contract to the contrary the consideration for a sale will be apportioned between all the items of the property sold in case of dispute. There seems to be no reason for allowing the alienor's co-parceners to ask the court to adopt any other principle. It may be, as observed by the learned Judge, that questions as to valuation are often not capable of 'easy or satisfactory settlement,' but assuming it to be so, the right of a co-parcener to sell his own property being now well recognized, the equities as between the vendee and the other co-parceners have to be adjusted by the court in the best manner possible; nor does such adjustment seem to present any insuperable difficulties. No question is raised in this case of any collusion between the vendee and

Chinnappa, and it is difficult to find any reason for proceeding on any other view than the principle already enunciated of apportioning the consideration on the whole of the property sold. The learned Judge proceeds to say: "The simpler and the better view undoubtedly is that if the vendee wishes to stand by a sale which is valid only partially, such as the present, he must be content with the vendor's share but that if he wishes to repudiate the transaction altogether, his remedy is only against the vendor in a suit for the return of the price paid, on the ground that the consideration for the payment failed." It is hardly necessary to say that the remedy proposed might be altogether useless in many cases. On the whole, the proper course in this case appears to be to direct that the decree of the Lower Appellate Court be modified by decreeing to the plaintiff a half share in the properties sold by Chinnappa, after division by metes and bounds, on condition that he pays to the defendants Rs. 125, with mesne profits from the day that he deposits the said amount of Rs. 125 into Court and gives notice thereof to the defendants.

The memorandum of objections relates only to the form of the decree and as we have already dealt with it no further order is necessary. The defendants will pay two-thirds of the plaintiff's costs throughout.

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APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

1912.
July 30.

B. VEERAMMA (PLAINTIFF), APPELLANT,

v.

G. CHENNA REDDI AND TWO OTHERS (DEFENDANTS),
RESPONDENTS.*

*Indian Evidence Act (I of 1872), ss. 107 and 108—Nature of presumption —
Adverse possession, tacking of.*

There is no presumption in law that a person was alive for seven years from the time when he was last heard of. Sections 107 and 108 of the Evidence Act deal with the procedure to be followed when a question is raised before a Court, as to whether a person is alive or dead, but do not lay down any presumption as to how long a man was alive or at what time he died.

Narki v. Lal Sahu [(1910) I.L.R., 37 Cal., 103] and *Muhammad Sharif v. Bande Ali* [(1912) I.L.R., 34 All., 36], followed.

Assuming that the Court could make a presumption that a person was alive for seven years after he was last heard of, it depends on the circumstances of each case, whether the Court would draw such a presumption or not.

A person in possession without title cannot tack his possession to that of another, if he did not enter on possession as the heir of that other.

SECOND APPEAL against the decree of M. GHOSE, the District Judge of Cuddapah in Appeal No. 127 of 1909, presented against the decree of G. SUBBIAH SASTRY, the District Munsif of Proddatur in Original Suit No. 666 of 1908.

The facts of the case appear fully from the judgment.

P. R. Ganapathi Ayyar for the appellant.

S. Gopalaswami Ayyangar for the respondents.

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JUDGMENT.—This is a suit for possession of a house-site. The plaintiff stated in her plaint that the house was purchased by her elders, that her husband left the place and went away to foreign places, that she and her father-in-law lived in it subsequently for five or six years, that the father-in-law, then died, that she then continued to live in the house for sometime till it fell down, that she then went to live with her brother in another village and that when she returned to the village in 1908, she found that the defendants had trespassed on it.

* Second Appeal No. 32 of 1911.

The defendants put the plaintiff to the proof of her title and possession. The case that the plaintiff attempted to make out at the hearing was that she succeeded to the house as the heir of her husband. No positive evidence was adduced to show that her husband survived her father-in-law. She could not succeed unless the Court found that she did so. It is argued by the learned vakil for the appellant that the Appellate Court was bound to presume that her husband lived for a period of seven years after he left the village and that as the father-in-law died before the expiration of the seven years the husband must be taken to have survived him. Reliance is placed on the combined effect of sections 107 and 108 of the Indian Evidence Act. The former section states that if a person is proved to have lived within a period of 30 years and the question is whether he is alive or dead the onus is on the party who asserts that he is dead. This is qualified by section 108 which lays down that when it is proved that a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is on the person who affirms it. It is argued that inasmuch as under section 107 it is enough to prove that a man was alive within 30 years to throw the onus of proving his death on the party who asserts it there is a presumption that he lived during the 30 years and that section 108 modifies it only where it is proved that the person was not heard of for seven years. We are unable to agree with the appellant's vakil as to the meaning to be put on section 107. Both sections 107 and 108 deal with the procedure to be followed when a question is raised before a Court as to whether a person is alive or dead. Neither of these sections in our opinion lays down any presumption as to how long a man was alive or at what time he died. The contention for the appellant is not supported by any Indian authority cited before us. On the other hand, the view we take is supported by the pronouncement of the Calcutta High Court in *Narki v. Lal Sahu*(1) and of the Allahabad High Court in a recent Full Bench decision in *Muhammad Sharif v. Bande Ali*(2). A passage from Lawson on Presumptive Evidence has been read to us which goes to show that in America there is a presumption that a man was alive until the expiration of the period of seven

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(1) (1910) I.L.R., 37 Cal., 103. (2) (1912) I.L.R., 34 All., 36. (F.B.)

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years from the time that he was last heard of. That in our opinion is not the Indian Law.

Then it is argued that there is at least a presumption of fact that the husband was alive for seven years after he was heard of. Assuming that a Court may make a presumption that a man was alive during some period after he was heard of, it would depend entirely on the circumstances whether the Court would make such presumption or not. We are unable to say that on the facts placed before us, the Court should have inferred as a presumption of fact that plaintiff's husband was alive when his father died even if we would be justified in interfering in Second Appeal on the ground that a presumption of fact has not been made. We are therefore unable to interfere with the finding on the question of title.

Then it is contended that the finding on the question of plaintiff's possession cannot legally be upheld. The finding perhaps is not quite satisfactory. But the plaintiff's own case was that though she lived in the house for some time after her father-in-law died she left it as the house fell down 20 years before the suit. It is not shown how her possession could be taken to continue during the period of her absence. Nor is it shown that she had acquired a title by prescription before she left the place. We cannot agree that the plaintiff would be entitled to tack her own possession on to that of her father-in-law. A person who has been found to have no title cannot rely on the possession of another, if he did not enter on possession as his heir. Here the plaintiff's case was that she entered on possession as heir of her husband, not of her father-in-law. On the whole we do not think that we would be justified in interfering in this case in Second Appeal. We therefore dismiss it with costs.

PRIVY COUNCIL.*

RAVI VEERARAGHAVULU AND OTHERS (DEFENDANTS).

v.

VENKATA NARASIMHA NAIDU BAHADUR (PLAINTIFF).

[On appeal from the High Court of Judicature at
Madras.]

Special or Second Appeal—Second Appeal in cases under Madras Rent Recovery Act (Madras Act VIII of 1865), sec. 69—Civil Procedure Code (Act VIII of 1859), sec. 379—Civil Procedure Code (Act XIV of 1882), sec. 584—Concurrent findings of fact—High Court ignoring concurrent findings and deciding contrary to it on Second Appeal.

Although section 69 of the Madras Rent Recovery Act (Madras Act VIII of 1865) only provides for a regular appeal (on law and fact), and there is no further appeal to the High Court from the decision of the District Judge on appeal from the Collector given by the terms of the Act itself, yet under section 372 of Act VIII of 1859 which was the Civil Procedure Code in force when Madras Act VIII of 1865 was passed, and which regulated the procedure of the Civil Courts in India outside the Presidency towns, a special appeal lay "to the Sudder Court from all decisions passed in regular appeal by the courts subordinate to the Sudder Court"; and when the District Court was substituted for the Zillah Court and the High Court for the Sudder Court a special appeal lay from the District Court to the High Court. The terms of the later Civil Procedure Code (Act XIV of 1882) which was the Code in force when the suits out of which the present appeals arose were instituted, are clear on the point that an appeal lies from the order of the District Judge to the High Court unless that right is taken away by express legislation or some express provision of law. And a second or special appeal to the High Court in cases arising under Madras Act VIII of 1865 has been held to lie in *Veeraswamy v. Manager, Pittapur Estate* (1). The practice has been ever since the passing of the Act for such appeals to be preferred to the High Court, and their Lordships would not be disposed to interfere with such a longstanding practice even if they thought there was an implied rule against second appeals lying from the decisions of the District Judge with respect to adjudications under the Act by the Collector.

Section 584 of the Code of Civil Procedure, 1882, distinctly prohibits second appeals on questions of fact, and confines the competency of the High Court to deal with law and procedure. Where, therefore, in a suit by a landlord under section 9 of the Madras Act VIII of 1865, to enforce acceptance of a patta by his tenants, and the sole question was whether on the evidence an

1914.
April 20, 21
and
June 8.

* Present :—Lord DUNEDIN, Lord MOULTON, Sir JOHN EDER, and Mr. AMER ATTL.

(1) (1903) I.L.R., 26 Mad., 518.

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arrangement which had been previously come to between the parties was permanent, and the Collector and the District Judge concurrently found in the defendants' favour that it was permanent, but the High Court on second appeal ignored that finding and held that the landlord was entitled to revert to a system of rates which had existed prior to such arrangement.

Held, that the High Court had acted in inadvertence of section 584 of the Code, and had thereby assumed a jurisdiction which it did not possess, and its decision was set aside and the case remitted to India.

Durga Chowdhrami v. Jawahar Singh Chowdhri (1), followed.

APPEAL No. 92 of 1912 from a judgment and decree (18th December 1908) of the High Court at Madras, which reversed a judgment and decree (18th March 1907) of the Court of the District Judge of Kistna, Masulipatam, which had affirmed a judgment and decree (24th August 1906) of the Head Assistant Collector, Bezvada division, Kistna district.

The main questions for determination in these appeals were whether under the provisions of the Madras Rent Recovery Act (Madras Act VIII of 1865) there is any right of appeal to the High Court from a judgment of the District Judge passed on appeal in a summary suit under the Act before a Collector; whether the High Court was right in setting aside on second appeal a finding of fact arrived at by the lower Appellate Court; and if so whether the appellants (defendants) were bound to accept the pattas tendered to them respectively by the respondent (plaintiff) whereby he purported to raise the rents on certain of his lands cultivated by his tenants (the appellants), and to alter the condition of the tenure which had been in force for more than 25 years, that the rents should be paid by the tenants in money.

The appellants and their ancestors had respectively occupied the lands in question in the villages of Maddur and Chowdavararam, which are part of the respondent's zamindari, for a long period of time. Up to the end of the fasli year 1283 the *asara* system was in force under which the tenants paid the zamindar by way of rent in kind a share of the crops raised by them. For fasli 1284 a change was made, and pattas and muchilikas were exchanged between the zamindar and the tenants in which a money rent (*veesabadi*) was stipulated for. The holdings were therein described as "dry" or unirrigated lands, as in fact they

were, and were rented accordingly, but clauses were inserted to the effect that if "wet" or garden crops were raised on dry lands the tenant should pay the excess cist "which you (the zamindar) may fix therefor." This continued until, as the result of the extension of Government irrigation works, part of each holding was brought under irrigation, and wet cultivation began. Pattas were then tendered on behalf of the zamindar which provided that in respect of the "wet" or irrigated lands rent should be paid "according to asara," as therein stated, that is, that the rent should be a fixed proportion of the crop in kind. The tenants refused to pay anything except what they had been previously paying for the land as dry lands.

The present suits were accordingly instituted by the respondent under section 9 of Madras Act VIII of 1865; and the pleadings in them are sufficiently set out in the judgment of the Judicial Committee.

The issues fixed were: (1) "Whether commutation rates arrived at in 1283 are not binding with respect to lands subsequently converted into (*babut*) wet? and (2) If any alteration is found to be permissible, whether the *asara* system can be introduced with regard to (*babut*) wet?"

The Assistant Collector on the first issue found, "that the rates settled in 1283 are not binding; they subsequently underwent alterations, and the rates fixed in 1292 are those which I hold to be binding with respect to lands subsequently converted into 'babut' wet." He answered the second issue in the negative; and in the result decrees were made dismissing the suits.

The respondent appealed under section 69 of the Act of 1865 to the District Judge, who said—

"The point for consideration between the parties is that while the plaintiff wants to revert to the *asara* rate on lands cultivated with wet crops, the defendants contend that they are only liable to pay fixed money rents on all lands whether wet or dry. The admitted facts are these: The *asara* system was in force on all lands until fasli 1283. In fasli 1284 the money rent system was introduced and rates fixed. The system remained in force until fasli 1314 when plaintiff wanted to raise the rents on lands where wet crops were raised. The defendants demurred to this and refused to pay anything more than the rates settled in 1292. The plaintiff then tendered the *asara* pattas which are the subject of the present suits.

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(1) (1891) I.L.R., 18 Cal., 38 (P.C.); s.c., L.R., 17 I.A., 122.

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"The appellant's contention is that when the money rents were fixed in faslis 1284 and 1292 they were only intended to apply to dry crops inasmuch as there were no wet crops then in existence and the question of wet rates was left open until the contingency should arise. Now that the contingency has arisen, he is entitled to a wet rate for wet crops and failing to arrive at a settlement with the ryots, he is entitled in the last resort to *asara* rates without obtaining the sanction of the Collector.

"In support of this contention appellant relies mainly on clauses (9) and (16) of the *muchilikas* which have been executed by the defendants up to the present time. These clauses are to the effect that if wet or garden crops are raised on dry lands a wet rate to be fixed at the discretion of the zamindar is to be paid.

"I am of opinion that these clauses are far too vague and indefinite to be given effect to. No definite rate is fixed and it seems to me preposterous to suppose that the ryots would contract to pay any rate which the zamindar might choose to impose. Moreover the defendants contend that wet rate was only to be paid if facilities for irrigation were provided by the zamindar. The plaintiff admits that he has done nothing in this direction. The water is provided by Government and a water-rate is paid by the defendants to Government. It is difficult to understand on what grounds the zamindar can claim remuneration in return for nothing; for, that is what his present demand practically amounts to.

"I concur with the Head Assistant Collector and dismiss these appeals with costs."

Although there was no provision in Madras Act VIII of 1865 for an appeal from the decision of a District Judge, the respondent filed second appeals in all the suits against his decision which were heard by a Divisional Bench (MUNRO and PINHEY, JJ. who while agreeing with the Courts below that it was clear from the *muchilikas* that there was "no contract as to rates of rent payable for wet cultivation," came to the conclusion that inasmuch as there was no such contract the respondent was entitled under clause (3) of section 11 of the Act to claim *asara* rates in respect of lands cultivated with wet crops; and held that the pattas tendered by the respondent were proper pattas, and that the appellants were bound to accept them. The High Court therefore decreed the suits.

The appellants after applying for review of the decision of the High Court which application was dismissed, obtained leave to bring the present appeal in which—

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De Gruyther, K.C. and *J. M. Parikh* for the appellants contended that under the Madras Rent Recovery Act (Madras Act VIII of 1865) there was no appeal from the judgment and decree of a District Judge passed on appeal in a summary suit filed under the Act before a Collector; and the decision of the District Judge was therefore final. The High Court had consequently no power to entertain the second appeals which had been decided without jurisdiction. The Act contained no provision for any appeal after the regular appeal, on law and fact, to the District Judge. Reference was made to sections 22, 50, 58, 65, 69 and 87 of the Act. In other Acts there was a provision for a second appeal. See United Provinces Land Revenue Act (III of 1901), section 212. Unless there is such a provision given by Statute there was, it was submitted, no right of appeal; and reference was made to *Minakshi v. Subramanya*(1) and *Rangoon Botatoung Co., Ltd. v. The Collector, Rangoon*(2) per Lord MACNAGHTEN, a case under the Land Acquisition Act, 1894.

Sir Erle Richards, K.C. and *Kenworthy Brown* for the respondent (called on by their Lordships) contended that appeals to the High Court had been constantly brought; many of such cases were unreported and therefore not known. The Civil Procedure Code in force at the time Madras Act VIII of 1865 was passed was Act VIII of 1859, section 372 of which provided an appeal to the Sudder Court (which was then in place of what is now the High Court) from a "regular appeal" which are the words used in the Madras Act VIII of 1865. [Lord DUNEDIN.—The contention for the appellants is that there is no provision in the Madras Act VIII of 1865 for an appeal to the High Court; and I am much impressed by the passage in Lord MACNAGHTEN's judgment in *Rangoon Botatoung Co., Ltd. v. The Collector, Rangoon*(2) that where a right of appeal is not expressly given by Statute, it cannot be implied.] Section 69 of Madras Act VIII of 1865 enacts that a regular appeal shall lie to the Zillah Judge; and to show that a second appeal lay to the High Court reference was made to *Ganne Kotappa v. Venkataramiah*(3) a second appeal from the District Court of Kistna; and

(1) (1888) I.L.R., 11 Mad., 26 at p. 34 (P.C.); s.c., L.R., 14 I.A., 160 at p. 165.

(2) (1913) I.L.R., 40 Cal., 21 (P.C.); s.c., L.R., 39 I.A., 197.

(3) (1900) 10 M.L.J., 398.

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Veeraswamy v. Manager, Pittapur Estate(1). Under the later Civil Procedure Code of 1882 a second appeal to the High Court is given.

Their Lordships on the next day intimated that they would hear the appeal on the merits.

De Gruyther, K.C. and *J. M. Parikh* contended that under section 584 of the Civil Procedure Code (Act XIV of 1882) a second or special appeal must be entirely on a question of law, the finding on fact of the two Courts below being final. Here the Collector's Court decided on the facts that the money rates fixed in fasli 1892 were binding with respect to lands subsequently converted to "wet" cultivation; a finding with which the District Judge concurred. The High Court, it was submitted, had no power to set aside those concurrent findings as it had done; and reference was made to *Durga Chowdhri v. Jewahir Singh Chowdhri*(2). On the merits of the case it was contended that the High Court was wrong in holding that there was no contract between the parties, for the appellants had, it was submitted, proved that there was a contract, either express or implied, or both, that the money rents fixed in fasli 1892 were to be permanent, and in respect of all kinds of crops: the respondent was therefore not entitled to revert to the *asara* rates of rent; and the clauses in the muchilikas to which the appellants objected were invalid and could not be enforced. Reference was made to Madras Act VIII of 1865, sections 9 and 11, clauses (1) and (2); *Narasimha v. Ramasami*(3) and *Apparau v. Narasanna*(4). Here there was a contract within the meaning of section 11 of the Act.

Sir Erle Richards, K.C. and *Kenworthy Brown* contended that the pattas, tendered on behalf of the respondent, were proper pattas, and the rates mentioned in them were admittedly correct rates if the rent was payable in kind, as it was submitted the respondent was entitled to demand. Special rates for particular kinds of crops were not an enhancement of rent, and were not invalid under section 11 of the Act; *Suppa Pillai v. Nagasami Thumbichi Naicker*(5). Under section 11 of the Act the *varam* rate is the proper system to be followed, unless there

(1) (1903) I.L.R., 30 Mad., 518.

(2) (1891) I.L.R., 18 Cal., 23 at p. 30 (P.C.); s.c., L.R., 17 I.A., 123 at p. 127.

(3) (1891) I.L.R., 14 Mad., 44. (4) (1892) I.L.R., 15 Mad., 47.

(5) (1906) I.L.R., 31 Mad., 19.

is a contract for other rates; and the pattas were in accordance with the *varam* which is the established rate for division of the crop between the landlord, and the cultivators. Reference was made to *Parthasarathi Appa Row v. Chevandra Venkata Narasayya*(1). [Lord DUNEDIN.—The point of the judgment is at page 122 of 37 I.A.] The Act says the muchilikas are to contain all the terms by which the parties are to be bound. The High Court judgment was right as to there being no contract. It turned on the proper construction of the muchilikas; and the construction of a document is a question of law: see *Fateh Chand v. Kishen Kunwar*(2). Moreover if on facts, concurrent findings must be on the same grounds. [Sir JOHN EDGE.—Are there not cases where the same conclusions may be arrived at on different grounds? Lord DUNEDIN.—So long as there is concurrence it is all right.] Concurrence with conclusions of fact does not amount to concurrent findings; there should be, it was submitted, concurrence with all the items of fact that go to make up the conclusions.

De Gruyther, K.C., replied, pointing out that Madras Act VIII of 1865 was repealed by Madras Act I of 1908, and these questions could not arise again.

JUDGMENT was delivered by the Right Honourable SYED AMER ALI.—These consolidated appeals from certain decrees of the High Court of Madras arise out of a number of suits brought by the plaintiff-respondent in the Court of the Head Assistant Collector of the Bezwada division, under the provisions of section 9 of the Madras Rent Recovery Act (VIII of 1865). The object of all the actions was to enforce by legal process the acceptance by the defendants of the pattas or leases he had tendered to them.

The scope of the material sections of Madras Act VIII of 1865 was considered by their Lordships in *Parthasarathi Appa Row v. Chevandra Venkata Narasayya*(1); it is sufficient, therefore, to say in this case that under this Act the landlords are required to enter into written engagements with their tenants, in default of which no suit is maintainable to enforce the terms

(1) (1910) I.L.R., 33 Mad., 177 at p. 186 (P.C.); s.c., L.R., 37 I.A., 110 at p. 122.

(2) (1912) I.L.R., 34 All., 579 at p. 585 (P.C.); s.c., L.R., 39 I.A., 247 at pp. 253 and 255.

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of the tenancy and that in case of the refusal by the tenant to accept a patta "such as the landlord is entitled to impose," the landlord can proceed under section 9 to enforce the acceptance by a summary suit before the Collector.

It has to be remarked that in the Madras Presidency, or certain parts thereof, irrigated lands on which are grown what are called "wet crops," are generally subject to a higher rate of rent, either in kind or in cash, than those which yield only "dry crops," and that it is usual for the zamindars to enter into yearly engagements by tendering pattas from year to year and obtaining muchilikas or counter-parts executed by the tenants evidencing the acceptance of the terms of the lease.

Shortly stated, the respondent's case as made in his plaint, is that the ryots, the defendants in the suits, prior to fasli 1288 (approximately corresponding to 1876), paid rent for the lands in their occupation on the *asara* or produce-sharing system, that in that year an arrangement was come to between them and the zamindar by which a money payment "was substituted for the share of the produce," that this arrangement, however, was subject to the condition that whenever "the lands were fit for wet cultivation the wet rates would be settled." And he went on to add in paragraph 3 of the plaint—

"The lands mentioned in the tendered patta hereunto annexed having been newly brought under wet cultivation, and on the plaintiff's officials demanding defendant to accept the agreement as in the surrounding villages in respect of wet crop sist, he (the defendant) having refused to do so, the *asara* patta with the rates prevailing under the immemorial system of sharing the grain heap (*palambaram* system) was tendered for the wet land cultivated by him (defendant) for this year. As the defendant taking advantage of this, refused to come to any agreement in respect of the dry land also for which there was no dispute at all, the rates and *babuts* in respect not only of the said wet land, but also of the remaining dry land, were as usual entered in the said patta. All the terms of the tendered patta so far as they are connected with the *asara* system are applicable to the *asara* system, and the remaining ones to the *veesabadi* system."

The ryots in their defence alleged that the arrangement introducing the *veesabadi* or cash system into their villages was intended to be and was in fact permanent in character; that

some years later (fasli 1292) when the money rates were revised, the *veesabadi* system was accepted as the basis of the new settlement; that recently they had been able, without any assistance or contribution from the plaintiff, to make their lands irrigable and fit for wet cultivation, and that the plaintiff was not entitled to revert to the sharing-system and thus indirectly to enhance their rents without the interposition of the Collector's Court.

On these allegations of fact the parties went to trial. The issues framed by the Head Assistant Collector are not very clearly worded, but they sufficiently indicate the main points for determination, viz., whether the substitution of the *veesabadi* for the *asara* system in the defendant's villages was permanent in its character or, in other words, was the plaintiff zamindar entitled to revert to the sharing-system on the lands being made irrigable by the tenants.

The Collector on the evidence held in substance that the conversion of the *asara* rates into cash payment in 1288, which was confirmed in 1292, and had been acted upon ever since, was a permanent arrangement, and that the plaintiff was not entitled to impose on the tenants pattas on the *asara* basis. He accordingly dismissed the plaintiff's suits without entering into the questions raised in the latter part of paragraph 3 of his plaint.

On appeal by the zamindar the District Judge affirmed the decrees of the Collector in respect of the finding of fact relative to the character of the arrangement of 1288, and upheld the orders dismissing the suits.

From the decrees of the District Judge the plaintiff preferred second appeals to the High Court of Madras. It is necessary to set out that portion of the High Court judgment which forms, in their Lordships' opinion, the key to the decision of the learned Judges. They say :—

"Till fasli 1283 the *asara* system was in force. In fasli 1284 money rents were introduced and the rates of such rents were permanently fixed in fasli 1292. At that time all the lands were dry. Wet cultivation began in fasli 1314, and the pattas now in dispute were then tendered, as the tenants refused to pay more than the rates fixed in 1292 which they had previously been paying for the lands as dry. Nothing had been done by the plaintiff to provide

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facilities for irrigation. In the muchilikas executed by the tenants for faslis prior to 1314 there are clauses to the effect that the plaintiff may make an extra charge if wet or garden crops are raised on dry lands. The amount of such extra charges is not however stated. If the plaintiff is entitled to demand *asara* rates, the rates mentioned in the pattas tendered are correct. The Courts below have taken the view that the plaintiff has tendered *asara* pattas as a means of enhancing the rent and that as he has not done anything to justify an enhancement of the rent, and has not obtained the sanction of the Collector for the enhancement, he is only entitled to the rents fixed in fasli 1292.

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

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

They accordingly set aside the orders of the District Judge, and holding that "the pattas tendered by the plaintiff were proper pattas and that the defendants must accept them," they decreed the second appeals with costs in all the courts.

On an application for review of judgment, the learned Judges appear, however, to have thought that "the contract between the parties is contained in the admitted muchilikas and must be gathered from the construction of those muchilikas." They therefore rejected the application for review.

The ryot defendants have appealed to His Majesty in Council and two points have been urged on their behalf against the validity of the judgment of the High Court.

It is contended in the first place that no appeal lay to the High Court under section 69 of the Act which provides for one appeal only from the order of the Collector to the Zillah Judge. This contention however, ignores the provision of section 372 of Act VIII of 1859, which, at the time the Madras Rent Recovery Act of 1865 was enacted, was the law regulating the procedure of the Civil Courts in India outside the Presidency towns.

Under that section a special appeal lay to the Sadder Court from all decisions passed in regular appeal by the Courts subordinate to the Sadder Court. It is not disputed that the Zillah Judge's Court was subordinate to the Sadder Court, nor that the appeal to the Zillah Judge from the Collector's Court was a "regular appeal"—an appeal on law and facts. Later legislation substituted the High Court for the Sadder Court, and the District Judge for the Zillah Judge, but the subordination of the one to the other was maintained. The provisions of Act XIV of 1882, the law in force at the time when these suits were instituted, are clear on the point that an appeal lies from the order of the District Judge to the High Court, unless that right is taken away by express legislation or by some express provision of law.

The point that a second appeal lies to the High Court in cases arising under Act VIII of 1865, has been expressly decided in *Veeraswamy v. Manager, Pittapur Estate*(1), and the practice appears to have been ever since the passing of the Act for such appeals to be preferred to the High Court. Their Lordships would not be disposed to interfere with such a long-standing practice, even if they thought there was an implied rule against second appeals lying from the decisions of the District Judge with respect to adjudications under the Act by the Collector. Their Lordships must, therefore, overrule the first objection.

In the second place, it is contended for the appellants that the High Court was not competent under section 584 of the Civil Procedure Code (Act XIV of 1882) to set aside a finding of fact which had been concurrently arrived at by the two inferior Courts.

Sections 584 and 585 of the Civil Procedure Code are in these terms :—

"584. Unless when otherwise provided by this Code or by any other law, from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court on any of the following grounds, namely :—

"(a) The decision being contrary to some specified law or usage having the force of law ;

(1) (1903) I.L.R., 26 Mad., 518.

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"(b) The decision having failed to determine some material issue of law or usage having the force of law ;

"(c) A substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits.

"585. No second appeal shall lie except on the grounds mentioned in section 584."

This distinctly prohibits second appeals on questions of fact and confines the competency of the High Court to deal with questions of law and procedure.

In the present case the sole question for determination was whether the arrangement entered into in 1283, and confirmed in 1292, was permanent. The plaintiff's allegation was that he was entitled under the circumstances to revert to the system that existed prior to 1283. The Collector and the first Appellate Court who alone were competent to deal with the facts, came to the conclusion that the arrangement was permanent. The muchilikas were only a part of the evidence on which they acted. It seems to their Lordships that the learned Judges, acting in inadvertence of section 584 of the Code, assumed a jurisdiction which they did not possess. The rule relative to second appeals which was laid down by this Board in *Durga Chowdhri v. Jeevahir Singh Ohaudhri*(1) is clearly applicable to the present cases.

On the whole their Lordships are of opinion that the judgments and decrees of the High Court cannot stand. Sir Erle Richards has, however, submitted that the simple dismissal of the suits would seriously prejudice the rights of the zamindar with regard to the matters referred to in paragraph 3 of the plaint which were not dealt with by the Collector.

Their Lordships are of opinion that the best course under the circumstances would be to set aside the judgment and decrees of the High Court with a declaration that the plaintiff is not entitled to enforce the acceptance by the tenants of the pattas tendered by him, and that the cases should be sent back to be remitted to the Collector's Court for the drawing up of proper decrees and dealing with any other questions that may be

(1) (1891) I.L.R., 18 Cal., 23 (P.C.) ; s.c., L.R., 17 I.A., 128.

outstanding in these actions between the parties. And their Lordships will humbly advise his Majesty accordingly.

The plaintiff-respondent will pay the costs of this appeal and of the proceedings in the Courts of India.

Appeals allowed.

Solicitor for the appellants : *Edward Dalgado.*

Solicitor for the respondent : *Douglas Grant.*

J.V.W.

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APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Spencer.

RAMUVIEN (PLAINTIFF), APPELLANT,

v.

VEERAPPUDAYAN AND NINE OTHERS (DEFENDANTS),
RESPONDENTS.*

1912.
January 2.

(*Indian Evidence Act* (I of 1872), ss. 4 and 90—*Ancient document—Practice as to mode of proof—Whether document presumed to be genuine by the First Court, can be rejected in appeal—Practice—Appeal from preliminary decree after passing of final decree.*

According to the practice prevailing in this Presidency, when *prima facie* evidence of custody and of the date of a document purporting to be 30 years old is given, the Court generally marks the document on the footing that there is sufficient evidence to justify its being marked as an exhibit at that stage. It is only subsequently that the opponent exercises his right of adducing evidence of circumstances which entitle him to say that the presumption under section 90 of the Evidence Act should not be drawn with respect to the document. The Court generally arrives at its conclusion on the matter after the evidence on both sides has been given.

An Appellate Court is entitled to reject a document presumed to be genuine by the Original Court under section 90 of the Evidence Act, without calling for further proof.

Shafiq-un-nissa v. Shaban Ali Khan (1904) I.L.R., 26 All., 581 (P.C.) and *Srinath Patra v. Kuloda Prosad Banerjee* (1905) 2 C.L.J., 592, referred to.

It is competent to a party to prefer an appeal against the preliminary decree in a redemption suit, though before the appeal is presented the final decree has been passed.

Lakshmi v. Mani Devi (1911) 21 M.L.J., 1063, followed.

* Second Appeal No. 1480 of 1910.

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Janaki Nath Ray Chowdhury v. Promotha Nath Roy Chowdhury (1911) 15 C.W.N., 880, referred to.

SECOND APPEAL against the decree of J. G. BURN, the acting District Judge of Tanjore in Appeal No. 624 of 1909 presented against the decree of N. KAILASAM, the acting District Munsif of Tanjore in Original Suit No. 142 of 1908.

The suit from which this Second Appeal arose, was brought by the plaintiff for redemption of a usufructuary mortgage, dated the 28th May 1875, and executed in favour of the plaintiff's predecessors in title, by the predecessors in title of the defendants who denied the mortgage and claimed the property as their ancestral property. The plaintiff relied on a counterpart of the mortgage-deed alleged to have been executed on 28th May 1875, by the predecessors in title of the defendants simultaneously with the mortgage.

The said counterpart was filed and marked as Exhibit A, the District Munsif who tried the suit, presuming it to be genuine under section 90 of the Evidence Act. The suit was filed on 4th April 1908, the preliminary decree for redemption was passed on 1st May 1909, the final decree on 18th June 1909, and the appeal from the preliminary decree was filed afterwards. The District Judge on appeal held on a consideration of the evidence in the case, that it would be unsafe to act on Exhibit A as evidence of the mortgage, and dismissed the suit.

The plaintiff preferred this Second Appeal.

G. S. Ramachandra Ayyar for the appellant.

Dr. S. Swaminathan for the respondents.

JUDGMENT.—Two points are argued in this Second Appeal. The first point is that, as the District Munsif presumed the genuineness of Exhibit A, the Appellate Court had no power in law to hold that it should not be presumed to be genuine and to reject it. Reliance is placed in support of this argument on section 4 of the Evidence Act, which lays down that, when the Court may presume a fact, it may either do so or call for proof of it. The contention apparently is that the Appellate Court was bound either to hold Exhibit A to be genuine until it was disproved, or at least, to call for proof. This argument entirely ignores the practice prevailing in the Courts of this Presidency in the trial of suits. When *prima facie* evidence of custody and of the date of a document purporting to be 80 years old is

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given, the Court generally marks the document on the footing that there is sufficient evidence to justify its being marked as an Exhibit at that stage. It is only subsequently that the opponent exercises his right of adducing evidence of circumstances which entitle him to say that the presumption under section 90 of the Evidence Act should not be drawn with respect to the document. And the Court generally arrives at its conclusion on the matter after the evidence on both sides has been given. It is not shown that in this case the District Munsif ever recorded a judicial opinion as to whether he would presume Exhibit A to be genuine before he wrote his judgment in the case. Nor is it urged that the plaintiff asked for a ruling as to whether the Munsif was prepared to presume the document to be genuine, or whether he would require it to be proved. It is therefore not correct to say that the plaintiff was prejudiced by any ruling on the part of the District Munsif, or prevented from adducing all the evidence that he could to prove the document or to ask the Court to presume its genuineness. There is no foundation for the argument that in such circumstances the Appellate Court has not got the same power to decide whether the document should be presumed to be genuine or not as the court of first instance has. The plaintiff could not require an opportunity of adducing further evidence unless he was prevented by anything done by the Court from adducing all the evidence he could. *Shafiq-un-nissa v. Shaban Ali Khan*(1) and *Srinath Patra v. Kuloda Prosad Banerjee*(2), cited for the appellant, do not give him any real support. In the former case the Judicial Committee of the Privy Council merely drew attention to the provisions of section 90 and section 4 of the Evidence Act. And the second case goes no further. We are of opinion that there is no substance in this contention.

The second point urged is that as the final decree for redemption was passed by the District Munsif before the appeal against the preliminary decree was presented in the District Court, the appeal was not competent and that the defendant was entitled to appeal only against the final decree or, at any rate the appeal against the preliminary decree was not sustainable without an

(1) (1904) I.L.R., 26 All., 581 (P.C.).

(2) (1905) 2 C.L.J., 592

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appeal against the final decree also. This question has been fully considered by this Court in *Lakshmi v. Mani Devi*(1), where it was held that the right of a party to appeal against a preliminary decree is not affected by the subsequent passing of a final decree. A later decision of the Calcutta High Court has now been brought to our notice. *Janaki Nath Ray Chowdhury v. Promotha Nath Roy Chowdhury*(2). But this case does not carry the question further than the previous decisions already considered in the Madras case did. And we see no reason to depart from the view adopted in *Lakshmi v. Mani Devi*(1). This contention must also be overruled.

In the result the Second Appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sadasiva Ayyar.

1912.
March 26, 27
and 28.

VENUGOPALA NAIDU AND FOUR OTHER MINORS THROUGH THEIR
GUARDIAN THE FIRST APPELLANT (DEFENDANTS NO. 3 AND
NOS. 11 TO 14), APPELLANTS,

v.

A. RAMANADHAN CHETTY AND ANOTHER (PLAINTIFF AND
DEFENDANT NO. 10), RESPONDENTS.*

*Hindu Law—Debt—Pious obligation—Decree debt incurred by father as devastanam
committee member—‘Ayyavaharika,’ meaning of.*

The liability of a Hindu father, who as a member of a devastanam committee unauthorisedly spends the devastanam funds for expenses of a litigation, and is afterwards directed by the Court to pay the costs out of his own private funds, constitutes a debt which his sons and grandsons are under a pious obligation to discharge.

The expression ‘Ayyavaharika’ debt means a debt which is not supportable as valid by legal arguments, and on which no right could be established by the creditor in a Court of Justice.

Durbar Khachar v. Khachar Harsur (1908) I.L.R., 32 Bom., 848, dissented from.

Chakouri Mahton v. Ganga Pershad (1912) 15 C.L.J., 228, followed.

(1) (1911) 21 M.L.J., 1083.

(2) (1911) 15 C.W.N., 830

* Second Appeal No. 1023 of 1910.

Natasayyan v. Ponnusami (1898) I.L.R., 16 Mad., 90 and *Khalidul Rahman v. Gobind Pershad* (1898) I.L.R., 20 Cal., 328, referred to.
Ramatengar v. Secretary of State (1910) 20 M.L.J., 89, distinguished.

SECOND APPEAL against the decree of S. RAMASWAMI AYYANGAR the Subordinate Judge of Madura (East) in Appeal No. 5289 of 1909 presented against the decree of N. A. SRINIVASA CHARIAR the additional District Munsif, Madura, in Original Suit No. 44 of 1908.

The facts appear sufficiently from the judgment.

C. S. Venkatachariar for the appellants.

K. Srinivasa Ayyangar for the respondents.

SADASIVA AYYAR, J.—The defendants Nos. 8 and 11 to 14 (5 of the legal representatives of the third defendant who died pending the suit) are the appellants in the above Second Appeal. The suit was brought by plaintiff, one of the five members of a temple committee for contribution from the other four committee members in respect of money which had been recovered from plaintiff alone in execution of the decree obtained by the trustee of the Madura Minakshi temple against the members of the committee (inclusive of plaintiff and third defendant) for moneys which they had spent out of the temple funds in previous litigation carried on by them in the High Court, the High Court, having in that previous litigation, directed that the committee members should pay such costs out of their private funds, and not out of the devastanam fund. See the last sentence of the judgment in *Alagirisami Naickar v. Sundareswara Ayyar*(1).

The lower Courts decided that the third defendant's legal representatives (sons and grandsons) are liable to discharge third defendant's debt to plaintiff, the debt being based on third defendant's liability to contribute his quota of the amount paid by plaintiff alone to discharge the joint decree against plaintiff and his fellow-committee members in the temple manager's suit. The only ground argued before us in this Second Appeal is the fourth ground in the special appeal memorandum. That ground is to the effect that third defendant's sons and grandsons are not legally bound to discharge the debt incurred by third defendant to the devastanam whose funds were spent without

(1) (1898) I.L.R., 21 Mad., 278 at p. 287.

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due authority by third defendant and the other members of the committee, as third defendant's descendants are not under a pious obligation to discharge such a debt.

Reliance is strongly placed by the learned vakil for the appellants on *Durbar Khachar v. Khachar Harsur*(1) where it was held that under the Hindu law texts, a son is not liable for his father's "Avyavaharika" debts, the term being interpreted by the learned Judges who decided that case, as meaning "unusual" or not sanctioned by law or custom." The learned Judges ruled in effect that the son is not liable for debts which the father ought not, "as a decent and respectable man," to have incurred. That very learned Judge, MUKHERJEE, J., of the Calcutta High Court has elaborately considered the whole question in *Chakouri Mahton v. Ganga Pershad*(2) and I cannot usefully add anything to the observations found in the lucid judgment in that case. The learned Judge virtually dissents from the decision in *Durbar Khachar v. Khachar Harsur*(1). Learned Sanskrit scholars have differed from one another as to the meaning of the expression "Avyavaharika debt"; [see the first paragraph in page 231, of the judgment in *Chakouri Mahton v. Ganga Pershad*(2)]. I am inclined to adopt Colebrooke's paraphrase, namely, "debt incurred for a cause repugnant to good morals" as more nearly approaching the true import of the expression than any of the meanings given by the other authorities. If I might venture upon giving my own translation of the expression "Avyavaharika" I would paraphrase an Avyavaharika debt as a debt which is not supportable as valid by legal arguments and on which no right could be established in the creditor's favour in a Court of Justice. (Compare the use of the word "Vyavahara" in such expressions as Vyavahara Mayukha, Vyavahara Darpana, etc.)

The third defendant clearly owed a legally valid debt to the devastanam even if he had really misappropriated the moneys which he had taken from the devastanam funds (instead of having merely sanctioned their expenditure *bonâ fide* on inappropriate objects) and his descendants are bound to repay that debt according to the decision in *Natasayyan v. Ponnusami*(3),

(1) (1908) I.L.R., 33 Bom., 343. (2) (1912) 15 O.L.J., 223.
(3) (1898) I.L.R., 16 Mad., 99.

where it is observed "upon any intelligible principle of morality, a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation and for the non-discharge of which, punishment in a future state might be expected to be inflicted, if in any."

As regards the case in *Ramaiengar v. Secretary of State*(1) (also relied on strongly by the appellant's learned vakil, that decision rested "on its own special circumstances", for, the learned Judges found in that case that the father knowingly brought a false case as a pauper. When he lost the suit and was made liable for the Government costs, it was held that his sons were not liable to Government for such costs so incurred. Without saying that I agree with the reasons given in the said decision, that decision is easily distinguishable from the present case. The judgment in *Alagirisami Naickar v. Sundareswara Ayyar*(2) does not establish that the committee members (three of whom joined in the appeal to the High Court with the concurrence of the remaining two) dishonestly preferred the appeal to the High Court which appeal costs they were directed to bear out of their private funds. Imprudent and even "unconscientiously" imprudent debts of the father are not in my opinion, immoral, illegal or "Avyavaharika" debts [see *Khalilul Rahman v. Gobind Pershad*(3)] and the sons cannot, in Hindu Law, escape liability for such debts of their father.

This Second Appeal consequently fails and is dismissed with the costs of first respondent (plaintiff).

BENSON, J.—I agree that the sons are liable and that the Second Appeal should be dismissed with costs.

(1) (1910) 20 M.L.J., 89. (2) (1898) I.L.R., 21 Mad., 278.
(3) (1893) I.L.R., 20 Calc., 328.

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APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

SUBBIAH NAICKER (SECOND COUNTER-PETITIONER),
APPELLANT,

v.

RAMANATHAN CHETTIAR (PETITIONER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), ss. 37, 38, and 150—Jurisdiction to execute decrees—Pending execution proceedings—Transfer of property sought to be sold to the jurisdiction of another Court—Res Judicata in execution proceedings—Ex parte order passed after notice, effect of—Objection petition, when, can be treated as application to set aside ex parte order—Order IX, rule 18, application of.

Where after attachment of property in execution of a decree for money and an order for sale made by the Court which passed the decree, the property was transferred to the local limits of the jurisdiction of another Court newly established.

Held, that the Court which passed the decree ceased to have jurisdiction to continue the execution proceedings, and that the new Court having territorial jurisdiction over the property attached, was the proper Court to entertain an application for execution, by sale of the property, and pass orders thereon.

In such a case no formal order of transfer of a particular case or of all pending cases is necessary. On principle unless the authority which changes the venue reserves the right to the Court which has lost the jurisdiction to continue pending proceedings affecting the property so transferred to another jurisdiction, such proceedings are also *ipso facto* transferred by the change of venue to the new Court, the records relating to that action becoming part of the records of the new Court.

Section 150, Civil Procedure Code, implies that the whole business of a Court might be transferred to another Court without any order of transfer by a superior Court under section 24, or any other section of the Code, thereby adopting the Calcutta view, that by changes of venue made by a local Government, the business of a Court which loses jurisdiction over a certain area, so far as such area is concerned, will be *ipso facto* transferred to the new Court.

The case law on the question considered.

An *ex parte* order in execution proceedings passed after issue of notice and after the Court has held that the service of the notice was duly effected, is on general principles binding as *res judicata*.

Mungal Pershad Ditch v. Grija Kant Lahiri (1892) I.L.R., 8 Calc., 51, followed.

Order IX, rule 18, Civil Procedure Code, applies to *ex parte* orders in execution, and unless they are set aside by application under Order IX, rule 18, or by appeal, they cannot be questioned in the further stages of execution proceedings.

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An objection statement which is not stamped, which contains no prayer to set aside the order, and which does not show when the objector had notice of the order, cannot be treated as an application to set aside the *ex parte* order.

Mochai Mandal v. Mesuruddin Mollah (1911) 18 C.L.J., 26, distinguished.

APPEAL against the decree of F. D. P. OLDFIELD, the District Judge of Tinnevely, in Appeal No. 399 of 1911 preferred against the order of T. MUNRO FRENCH, the Additional District Munsif, Tinnevely, in Civil Miscellaneous Petition No. 238 of 1911 in Original Suit No. 74 of 1897.

The facts appear fully from the judgment.

The Honourable Mr. L. A. Govindaraghava Ayyar for the appellant.

B. Sitharama Rao for the respondent.

JUDGMENT.—The second defendant, one of the three judgment-debtors, is the appellant before this Court. This appeal has arisen out of an execution petition put in by the decree-holder. The facts are a little complicated, and though it is not necessary to retail all the facts, it is necessary to set out the following for understanding the contentions on both sides:—

The decree in this case was passed so long ago as March 1898 in favour of one Arunachallam Chettiyar. There were several execution petitions by the said decree-holder himself. The decree is then alleged to have fallen, in a partition between two members of the decree-holder's family and a partner of the family firm, to the share of the said partner who also held a power of attorney from the decree-holder. This partner filed execution petitions in 1905 and 1907. Finally on the 21st April 1909, Execution Petition No. 389 of 1909 was filed by a next friend on behalf of the minor son of the said partner after the death of the latter.

We must here state that the decree was passed by the District Munsif's Court of Srivilliputtur and all these applications including the Execution Petition No. 38 of 1909 of 21st April 1909 were instituted in that Court. On this application No. 389 of 1909, notice was ordered to be issued to defendants to show cause why the decree should not be executed by sale of properties which had been attached long ago and which attachment was still subsisting. For the purpose of this appeal, it is necessary only to consider the notice issued to the second defendant, that notice having been issued in July 1909 by the Srivilliputtur Munsif's Court for second defendant's appearance on 10th August 1909 to show cause against execution.

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The process-server took the notice to the second defendant's village on 31st July 1909 for service on the second defendant. What took place there appears from the endorsement of the Village Munsif on the process-server's return and that endorsement is as follows:—"On enquiry made on 31st July 1909 at 9 A.M., regarding the second defendant, the females in the second defendant's house and the inmates of the adjoining house state that it is two days since he went to Sankaranayinarkoil, that the date of his return is not known and that no proper male heir is present on the spot; the duplicate of the notice to the said second defendant is affixed to the front door of his house." With a return to this effect, the process-server returned the notice to the Court on the 6th August 1909, on the 10th August 1909 (which was the date fixed in the notice for the second defendant to appear to show cause), the District Munsif made a record to this effect "Notice affixed, defendant absent, adjourned to 14th instant for batta for proclamation." (The learned District Judge seems to have thought that the 10th August 1909 was a mistake for the 10th December 1909 but it seems that there is no such mistake and the order was really passed on 10th August 1909 by the Munsif. On 18th October 1909, the proclamation was settled and the sale date was fixed for 10th December 1909. The sale fixed for 10th December 1909 seems to have been again adjourned to some other date in 1910 on account of certain other proceedings which it is unnecessary to detail.

In May 1910, the Ramnad district was newly constituted by the Local Government and the Srivilliputtur District Munsif's Court was placed under the Ramnad District Judge. The properties which had been attached by the Srivilliputtur District Munsif in execution of the decree of 1897 came under the jurisdiction of the Additional District Munsif of Tinnevely, having been taken away from the Srivilliputtur District Munsif's jurisdiction. On these facts, the next friend of the minor who claims to be the decree-holder (we shall call him "Respondent") and who had put in the Execution Petition No. 389 of 1909 in April 1909 in the Srivilliputtur District Munsif's Court put in Miscellaneous Petition No. 388 of 1911 in the Additional Munsif's Court of Tinnevely praying among other things that the execution proceedings instituted in the Srivilliputtur Munsif's Court in April 1909 might be continued in the

Additional District Munsif's Court of Tinnevely after obtaining all the records from the Srivilliputtur Court. The seventh and eighth paragraphs of the affidavit accompanying this petition of February 1911 are as follow:—

"As the properties which are mentioned in the said sale proclamation and which are applied for for being sold in this suit are situate in Kurivikulam Katukuthagai, Kurinjakulam village in Sankaranayinarkoil taluk, within the jurisdiction of this Court, as the Srivilliputtur Munsif's Court in which steps had been taken before this, has been abolished in so far as this district is concerned, as the said Court has lost its jurisdiction in matters of execution in respect of the decrees of this district and as this Court itself has now jurisdiction to execute the decrees connected with this district, it is necessary and reasonable to continue and execute through this Court itself the petition pending in the said Srivilliputtur Munsif's Court."

"Moreover, this plaintiff made an application to the said Srivilliputtur Munsif's Court; but the said application has been returned with an endorsement stating *that the entire records aforesaid have been sent to this Court*, with reference to matters stated in paragraph 6 above. The application so returned is herewith filed." The Additional District Munsif dismissed this application. The conclusions he came to are (as we understand them):—

(a) the decree of the Srivilliputtur District Munsif's Court was not transferred to the Additional District Munsif's Court for execution though a portion of the records were sent to the Tinnevely Additional District Munsif's Court on the transfer of the territorial jurisdiction by the District Munsif of Srivilliputtur himself.

(b) The District Munsif's Court of Srivilliputtur has not ceased to exist nor has it ceased to have jurisdiction to execute its own decree on the transfer of territory from its jurisdiction as such transfer did not take away the jurisdiction to entertain applications for execution and to pass orders thereon which it had under section 223 of the Civil Procedure Code.

(c) The Additional District Munsif's Court of Tinnevely did not acquire the jurisdiction to execute the decree under section 649 of the old Civil Procedure Code, or section 150 of Act V

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of 1908 because the Additional District Munsif's Court of Tinnevely could acquire the jurisdiction, *only* if the Court of the District Munsif of Srivilliputtur ceased to exist or to have jurisdiction to execute the decree.

(d) The *ex-parte* order passed by the Srivilliputtur District Munsif's Court on the 10th August 1909 allowing execution to proceed against the second defendant because he did not appear though held to have been duly served could not be treated as estopping the second defendant so as to preclude him from objecting to the minor respondent executing the decree (the objection being based on the ground that execution is barred by limitation and that his right to execute had not been satisfactorily proved). The reason for second defendant's not being so estopped is that the notice issued under section 248, Civil Procedure Code, in July 1909, was not personally served upon him and he was not otherwise aware of such notice. See *Mochai Mandal v. Meseruddin Mollah* (1).

(e) The said applications of 1905 and 1907 are however in accordance with law and hence the execution petition of April 1909 was not barred by limitation.

These were the conclusions of the Additional District Munsif of Tinnevely and he rejected the decree-holder's petition to continue proceedings in his Court on the ground that his Court had no jurisdiction to so continue the proceedings. The minor respondent then appealed to the District Judge against this order of the Additional District Munsif of Tinnevely refusing to continue the execution proceedings inaugurated in April 1909. The learned District Judge's conclusions may be stated thus:—

(a) Section 150, Civil Procedure Code, provides that, when the business of any Court is transferred to any other Court, the latter shall have the same powers and duties as the former had in respect of it. But (according to the learned District Judge) the Execution Petition of 1909 was a pending business in the Srivilliputtur Munsif's Court when it lost its jurisdiction over the territory (in which the attached properties were situated) on 1st June 1910 and such pending business was not legally transferred to the Additional District Munsif of Tinnevely. So the minor petitioner

could not take advantage of section 150, Civil Procedure Code, and contend that the Additional District Munsif of Tinnevely was a Court to which the business of the Srivilliputtur Munsif's Court was transferred.

(b) But the Srivilliputtur Munsif's Court, though it continued to exist and to be held in the same station and continued to have jurisdiction over a portion of its former territorial jurisdiction must be deemed to have "ceased to exist" within the meaning of section 37, clause (b), of the Civil Procedure Code; because the territories within its jurisdiction had been transferred to the newly created Ramnad district by the Local Government and appeals from its decrees and orders lay thereafter to the Ramnad District Court and not to the District Court of Tinnevely. Hence the Court which passed the decree had now become the Additional District Munsif's Court of Tinnevely. In other words, the learned District Judge's view was that as the Srivilliputtur Munsif's Court ceased to exist, the Court which originally passed the decree ceased to exist and the additional District Munsif's Court of Tinnevely became the Court which passed the decree within the meaning of section 37, clause (b) and hence it ought to continue the execution proceedings.

(c) The second defendant could not raise the question of limitation by reason of the alleged legal invalidity of the execution petitions of 1905 and 1907 as the order of the Srivilliputtur Munsif's Court of the 10th August 1909 allowing execution after declaring the service on second defendant to have been duly effected cannot be questioned by the second defendant now as he has not had that *ex-parte* order (allowing execution) set aside by proceedings in appeal or by any other legal means open to him. On the basis of the conclusions (b) and (c) above, the learned District Judge set aside the Additional District Munsif's order and remanded the petition for disposal of Execution Petition No. 389 of 1909 by that Court from the point it had reached on 23rd February 1910. It is against this appellate (District Judge's) order of remand that the present Civil Miscellaneous Appeal No. 61 of 1913 has been filed before us. The arguments of the learned vakil for the appellant before us might be shortly stated thus:—

(a) The learned District Judge was right in saying that section 150, Civil Procedure Code, refers to the transfer of business owing to an order of transfer by a superior Court as

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under section 24 or any such similar order and that mere alteration of jurisdiction through the Local Government's notifications does not transfer any business within the meaning of section 150 ; but the learned District Judge was in error in holding that the Srivilliputtur District Munsif's Court ceased to exist within the meaning of section 37, clause (b) merely by reason of the fact that the territory over which the said Court had to exercise jurisdiction was included in a new district, the portion in dispute in these execution proceedings and which also formed the basis of the venue of the suit having been transferred to the Tinnevely Additional Munsif's Court's jurisdiction.

(b) The Srivilliputtur District Munsif's Court not having ceased to exist, it also did not cease to have power to exercise jurisdiction within the meaning of section 37, clause (b) because as the Court which passed the decree, it continued to have jurisdiction under section 38, Civil Procedure Code (old section 228) even though the property attached in execution of the decree had been transferred to the jurisdiction of the Additional District Munsif of Tinnevely.

(c) As the Srivilliputtur District Munsif's Court continued to have jurisdiction to execute the decree, the Additional District Munsif's Court did not obtain jurisdiction either to execute the decree or to continue the execution began in the Srivilliputtur Munsif's Court, only one of the two Courts being capable of executing the decree.

We shall consider briefly each of these three contentions. Before the new Code was passed, there was a conflict between the decisions of the Calcutta High Court and the decisions of the Madras High Court in respect of the question whether a Court which passed the decree which directed the sale of immoveable property had jurisdiction to order the sale of that property if after the decree and before the application for sale, the said property had been transferred by the Local Government's notification from its jurisdiction to the jurisdiction of another Court. The principal decisions of the Calcutta High Court on this question are *Latchman Pundeh v. Maddan Mohun Shye*(1), *Kartie Nath Panday v. Tilukdhari Lall*(2), *Prem Chand Day v.*

(1) (1881) I.L.R., 6 Cal., 518.

(2) (1888) I.L.R., 15 Cal., 667.

Mokhoda Debi(1), *Kali Pado Mukerjee v. Dino Nath Mukerjee*(2), *Jahar v. Kamini Debi*(3) and *Udit Narain Chaudhuri v. Mathura Prasad*(4). We do not think it necessary to deal in detail with every one of these cases. *Kartie Nath Panday v. Tilukdhari Lall*(5) was virtually overruled by the Full Bench decision in *Prem Chand Day v. Mokhoda Debi*(1). The result of all these cases is that though under Order XXI, rule 10 (old section 230), the application for execution by sale of properties which had passed out of the territorial jurisdiction of the Court which passed the decree, might be made to the Court which passed the decree, it may also be made to the Court which had acquired jurisdiction over the said properties as it is also included in the definition of the Court which passed the decree by the strength of section 37, clause (b) as the Court which passed the decree had ceased to have jurisdiction to sell the properties decreed to be sold. Hence according to the result of these decisions of the Calcutta High Court both the Courts which passed the decree and the Court which had since obtained jurisdiction over the property could entertain an application for execution of the decree.

(d) Though both Courts could entertain the application, the Court which passed the decree had ceased to have jurisdiction to order the sale of properties and hence could not itself order a sale and if the execution application is made to it, it must transfer it to the Court which had now obtained jurisdiction over the properties for passing and executing the order for sale.

Thus the Calcutta High Court decisions make a distinction between the jurisdiction to entertain the execution application and the jurisdiction to order sale of properties in execution and while it gives jurisdiction to both the Courts which originally passed the decree and the Court which has since obtained jurisdiction over the territory to entertain applications, the said decisions give jurisdiction only to the latter Court to order the sale of the properties.

As regards the Madras High Court, the principal cases are *Gomatham Alamelu v. Komandur Krishnamachari*(6), *Panduranga Mudaliar v. Vythilinga Reddi*(7), *Subbaraya Mudaliar v. Rakki*(8)

(1) (1890) I.L.R., 17 Cal., 699 (F.B.). (2) (1898) I.L.R., 25 Cal., 315.
(3) (1901) I.L.R., 28 Cal., 238. (4) (1908) I.L.R., 35 Cal., 974.
(5) (1888) I.L.R., 15 Cal., 667. (6) (1904) I.L.R., 27 Mad., 118.
(7) (1907) I.L.R., 30 Mad., 537. (8) (1909) I.L.R., 32 Mad., 140.

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and *Alagappa Mudaliyar v. Thiyagaraja Mudaliyar*(1). In *Gomatham Alamelu v. Komandur Krishnamacharlu*(2) it was merely held that if a Court which had not got jurisdiction had passed a decree for sale of the properties outside its jurisdiction without objection by the defendant, such a decree is not a nullity and the judgment-debtor could not object to the validity of such a decree in execution proceedings. In *Panduranga Mudaliar v. Vythilinga Reddi*(3), it was held that the Court which passed the decree for sale had jurisdiction to entertain an execution application for sale of that property even though the property had been transferred to the jurisdiction of some other Court. Apart from the question of its jurisdiction to entertain the application, whether it could itself order the sale of that property was not and need not have been considered in that case, because the decree-holder in his application for execution, also prayed for the transfer of the decree to the Court which had since obtained jurisdiction over the properties directed to be sold. The decision in *Panduranga Mudaliar v. Vythilinga Reddi*(3) seems therefore, to be not in conflict with the Calcutta decisions which only negative the right of the Court which passed the decree to order the sale of the properties which had passed out of its jurisdiction, but do not negative the right of that Court to entertain the application for execution. *Subbaraya Mudaliar v. Rakki*(4) depended upon the meaning of section 189 of the Madras Estates Land Act though there is a general observation that even when a statute takes away the jurisdiction of a class of Courts to hear suits of a certain nature and transfers the jurisdiction to hear such suits to another class of Courts, the first class of Courts does not lose the jurisdiction over the suits pending at the time of the passing of the Act which so transfers the jurisdiction. In *Alagappa Mudaliyar v. Thiyagaraja Mudaliyar*(1) doubt was thrown upon this decision in *Panduranga Mudaliar v. Vythilinga Reddi*(3) and the learned Judges (WALLIS and KRISHNASWAMI AYYAR, JJ.) say that the question whether the transfer of a local area from the jurisdiction of one Court to another Court would not divest the original Court of

(1) (1910) M.W.N., 477.

(3) (1907) I.L.R. 30 Mad., 587.

(2) (1904) I.L.R., 27 Mad., 118.

(4) (1909) I.L.R., 32 Mad., 140.

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jurisdiction over even pending suits was a question of "considerable difficulty". The learned judges, therefore without deciding that question disposed of the case on the assumption that the notification of the Local Government deprived the Subordinate Judge's Court of Tuticorin from trying the pending suit and they got over the difficulty by transferring the case to his file from that of the new Court (Ramanad Court) to whose file it had been transferred (*ex hypothesi*) by the notification. We are inclined to think that the Calcutta decisions in making a distinction between the jurisdiction to entertain applications and the jurisdiction to pass orders on such applications are not strictly logical; and that the Court which passed the decree for sale of a property cannot even entertain an application in execution for sale of such properties. However the really important question is now settled in Calcutta, namely, that the new Court which has since obtained territorial jurisdiction over the property ordered to be sold or sought to be attached and sold in execution has jurisdiction both to entertain an application in execution for such sale as also to pass orders on such applications. In volume 11, Encyclopædia of Law and Procedure, pages 713 and 714, the following passages occur: "A proper and lawful exercise of delegated legislative authority, or the direct exercise of constitutional power, will operate to abolish a court or not, according to the intent expressed or lawfully to be implied within the principles heretofore stated. This intent governs in determining the effect of the adoption of a new constitution, of the creation, alteration, and reorganization of new districts, circuits or other judicial sub-divisions, of the detaching, attaching, annexation and consolidation of districts and the transfer of jurisdiction in general." "And it has been held that in the absence of a constitutional or statutory provision to the contrary, causes pending in the abolished Courts" (the same principle must apply by analogy where a portion of the jurisdiction is transferred) "are transferred by operation of law to the new courts, no certificate or order transferring them being necessary. . . . The new Court will obtain and may proceed to exercise jurisdiction over causes lawfully transferred. . . . This rule includes authority to hold the remainder of a term which was in session when the statute took effect; the right to amend records relating to the judicial action of the superseded court." In volume 40

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Encyclopædia, page 129, it is said : " Where, pending an action a new county or district is created or existing lines are altered, so that the subject-matter of the action or the residence of defendant is thrown into a different county or district from what it was when the action was instituted, there is some conflict of authority as to whether the venue should be changed accordingly, or whether the action should proceed where it was instituted without a change of venue. The question depends largely upon the provisions of the statutes." In the American Digest, volume 13, at page 1943, a decision is referred to in which it was held that a statute giving exclusive jurisdiction to justices, in certain cases and containing no clause saving pending suits, deprived the Circuit Courts (which till then had jurisdiction over such cases) to try even pending suits. Another case is quoted in which a decree rendered by a probate Court in a suit after the Court was deprived of its jurisdiction by an Act (which came into force while the suit was pending) was reversed in appeal as passed without jurisdiction: *Remington v. Smith*(1). It seems to us on principle that unless the authority which changes the venue reserves the right to the Court which has lost the jurisdiction to continue pending proceedings (affecting the property so transferred to another jurisdiction), such proceedings are also *ipso facto* transferred by the change of venue to the new Court, the records relating to that action becoming part of the records of the new Court. In the present case, it appears that since the change of venue was made from the Srivilliputhur Munsif to the Additional District Munsif of Tinnevely, the Srivilliputhur District Munsif sent all the records remaining in his Court in Execution Petition No. 389 of 1909 to the Additional District Munsif's Court of Tinnevely, thus washing his hands completely of that affair. We think he was right in doing so. As stated in *Prem Chand Dey v. Mokhoda Debi*(2), " so far as the Procedure Code is concerned, execution of a decree is only a continuation of the suit, and there appears no legitimate reason why a Court in the later stage of a suit should have greater powers than it possessed at its institution. But however that may be, a comparison of section 223 with the last paragraph of section 649 seems to us to indicate that

(1) 1 Colo., 53. (2) (1890) I.L.R., 17 Cal., 699 at p. 708 (F.B.).

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territorial jurisdiction is a condition precedent to a Court executing a decree." We might add that the new section 150 introduced by the new Code seems to clearly imply that the whole business of a Court might be transferred to another Court without any order of transfer being passed by a superior Court under section 24 or any other section of the Code, either as regards a particular case or as regards all the cases pending in a particular Court. The introduction of this new section indicates, in our opinion, that the Calcutta view which held that by the change of venue made by a local Government, the business of a Court which loses jurisdiction over a certain area so far as it relates to cases affecting the lands in the transferred area will be *ipso facto* transferred to the new Court has been adopted by the Legislature. We are unable to agree with the learned District Judge that the word "transfer" of business under section 150 covers only transfers made under special provisions of the Civil Procedure Code and we have found it difficult to follow the reasoning of the learned District Judge who relies on sections 8 (1), 13 (2) and (3) and 17 (1) of the Bengal Civil Courts Act. Those provisions appear to us to have little bearing on the decision of this question. In the result we hold that the learned District Judge was right in his conclusion that the Additional District Munsif's Court of Tinnevely has jurisdiction to continue the proceedings in execution initiated in the Srivilliputhur Munsif's Court in 1909. Our reason for that conclusion is that the Srivilliputhur Munsif's Court ceased to have jurisdiction to continue the proceedings in execution, whereas the reason given by the learned District Judge is that the Srivilliputhur Munsif's Court ceased to exist. Even if we are wrong in the above view, we are prepared to get over the difficulty sought to be raised on the question of jurisdiction by transferring the Execution Petition No. 389 of 1909 from the Srivilliputhur Munsif's Court for disposal to the file of the Additional District Munsif of Tinnevely, a similar expedient having been resorted to by the learned judges who decided *Alagappa Mudaliyar v. Thiyagaraja Mudaliyar*(1).

The next point sought to be argued by the appellant was whether the execution application of 1909 was barred by limitation. The question of limitation depends upon certain facts

(1) (1910) M.W.N., 477.

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alleged by the judgment-debtor, the truth of which facts has not been gone into by the lower Appellate Court as it was contended by the decree-holder that those facts cannot be gone into, the second defendant being bound by the *ex-parte* order of August 1909 allowing execution of the decree in the respondent's favour. On the other hand, the appellant's contention is that the order of August 1909 being an *ex-parte* order is not legally binding on him and has not the legal effect of estopping him from questioning its validity at later stages of the execution proceedings if he proves that he had no notice of the date fixed for the hearing of the execution petition of 1909. The respondent's rejoinder to this is that till the appellant has that order of August 1909 set aside by proceedings under section 108, Civil Procedure Code (new Order IX, rule 13) or by proceedings in appeal, it is binding on the appellant and estops him from denying the respondent's right to execute the decree. Now the order of August 1909 was no doubt an *ex-parte* order but it was passed after notice was issued to the second defendant (appellant) to show cause why such an order should not be passed and after the Court had satisfied itself on the affidavit and the return of the process-server that the notice had been only served, though by affixture to the outer door of second defendant's house. An *ex-parte* order passed after issue of notice and after the Court had held that the service of the notice was duly effected is, it seems to us, on general principles binding as *res judicata* on the defendant just as much as a contested order or decree. It has now been settled—see *Hara Chandra Bairagi v. Bepin Behari Das*(1)—that an *ex-parte* decree does operate as *res judicata*. See also *Raja Kumara Venkata Perumal Raja Bahadur v. Thatha Ramasamy Chetty*(2) where BENSON and SUNDARA AYYAR, JJ., express the view that an *ex-parte* decree does estop the parties to the suit from disputing its validity afterwards. This effect of an *ex-parte* decree or order passed after notice (declared to be duly served on the respondent) does not rest merely upon the provisions of the Civil Procedure Code, section 11, but upon general principles of jurisprudence. Though as pointed out by the Privy Council in *Thakur Prasad v. Fakir-ullah*(3) the special

(1) (1911) 13 C.L.J., 38. (2) (1912) I.L.R., 35 Mad., 75 at pp. 84 and 85.
(3) (1895) I.L.R., 17 All., 106 (P.C.).

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provisions of the Civil Procedure Code like the old sections 43 or 73, or 103 which preclude a litigant from bringing a fresh suit in respect of certain claims though they had not been actually heard and decided in the first suit, could not apply to execution proceedings, the general principles of jurisprudence which govern the Courts as regards *res judicata* or estoppel by record do apply to execution proceedings and have been so applied following the well-known case of *Mungal Pershad Ditchit v. Grija Kant Lahiri*(1) by all the Indian Courts.

There is, again, no hardship in treating an order passed *ex-parte* in execution proceedings as binding on the judgment-debtor provided that notice had been issued to him and had been declared duly effected by the Court. For, if he was really ignorant of the notice, he is entitled under section 108, Civil Procedure Code (Order IX, rule 13 of the new Code) to have the *ex-parte* order set aside by putting in his application within one month of his knowledge of the order under article 164 of the Limitation Act. It is contended by the appellant's learned vakil, Mr. L. A. Govindaraghava Ayyar, that Order IX, rule 13, Civil Procedure Code, does not apply to *ex-parte* orders passed in execution but only to *ex-parte* decrees in suits. We think that that argument cannot be accepted. Orders in execution which come under section 47, Civil Procedure Code, are decrees as defined in section 2 of the Code and hence *ex-parte* orders passed in execution are *ex-parte* decrees and Order IX, rule 13, provides generally for the setting aside of *ex-parte* decrees and not only for the setting aside of those classes of *ex-parte* decrees which are not also orders passed under section 47 in execution proceedings. We are fortified in this view by the decision in *Krishna Chandra Pal v. Protap Chandra Pal*(2).

As regards the *obiter dictum* of MOOKERJEE, J., in *Sreepati Tharan Chowdhury v. Shamaldhone Dutt*(3) that the whole of the rules in Order IX do not apply to execution proceedings, we need only say that the learned judge was not directing his attention to every one of the 14 rules in Order IX when he pronounced that dictum, but was generally considering the question whether the bar of fresh proceedings in suits enacted in rules 9, 12 and

(1) (1882) I.L.R., 8 Calc., 51. (2) (1906) 3 C.L.J., 276.
(3) (1912) 15 C.L.J., 123 at p. 126.

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so on will apply to execution proceedings. There is no allusion in the learned judge's decision to *Krishna Chandra Pal v. Protap Chandra Pal*(1) which directly held that section 108 (Order IX, rule 13), applied to execution proceedings. The argument of the appellant's learned vakil based on the fact that in article 164 of the Limitation Act, the general expression "Summons" is used instead of "Summons or notice," does not convince us that article 164 was intended to apply only to decrees strictly so called and not to orders in execution which come under the definition of decrees in the Civil Procedure Code. Besides the remedy under section 108, the defendant could also have sought the remedy by way of appeal against the *ex-parte* order. We are therefore reasonably clear that the *ex-parte* order of August 1909 allowing execution in favour of the respondent cannot be questioned in the further stages of the execution proceedings by the appellant. The learned District judge was therefore right in refusing to go into the question whether the respondent was barred by limitation or any other cause from prosecuting the Execution Petition No. 389 of 1909.

It is next contended that the unstamped objection statement, dated 27th July 1911, put in by the second defendant might be treated as an application (under Order IX, rule 13) to set aside the *ex-parte* order passed in August 1909 in the respondent's favour and that an opportunity should be given to the appellant to prove as such applicant that he was not duly served with notice of the execution petition before that order of August 1909 was passed and that he had no knowledge of the passing of that order till within one month of his filing this statement in July 1911. No doubt, in *Mochai Mandal v. Meseruddin Mollah*(2), an objection by the judgment-debtor that no notice had been really served upon him and that he had no knowledge of an order passed against him (allowing execution of the decree) was treated as of the same effect as an application to set aside the *ex-parte* order allowing execution and on its being not denied by the decree-holder that the judgment-debtor had not been duly served and did not have knowledge of the previous order allowing execution till 8 days before the judgment-debtor preferred

(1) (1908) 3 C.L.J., 276.

(2) (1912) 13 C.L.J., 28.

his objections, that order was treated as not binding upon him. But we think in the present case, the objection statement of July 1911 cannot be treated as an objection to set aside the *ex-parte* order of August 1909 (a) as it is not stamped as an application (b) as there is no prayer in that statement to set aside the order of August 1909 and (c) as it does not appear from it when the second defendant had notice of the order of 2nd December 1909, that is, whether he had notice only within one month of the filing of this memorandum of objections and whether if the objection statement be treated as an application to set aside the order of August 1909, such an application is not barred by limitation. If second defendant had knowledge (as seems probable from the other proceedings in the case) of the order of August 1909 more than a month before the filing of the statement of objections in July 1911, he was barred from applying to set aside the *ex-parte* order of 1909.

In the result we dismiss the appeal with costs.

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APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar.

M. SUBBAYYA (DEFENDANT), PETITIONER,

v.

M. RACHAYYA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Jurisdiction—Transfer of venue from one court to another after decree—Appellate forum.

The District Munsif of Madanapalle having jurisdiction over Kadiri, passed a decree on 30th March 1911 in respect of a cause of action which arose in Kadiri. On 1st April 1911, Kadiri was transferred to the territorial jurisdiction of the District Munsif's Court at Penukonda, from which appeals lay to the District Court at Bellary, whereas appeals from the District Munsif's Court at Madanapalle lay to the District Court at Cuddapah.

Held, on the question as to the proper appellate forum in the case, that the appeal from the decree lay to the District Court at Bellary, as the transfer of territorial jurisdiction *ipso facto* effected a transfer of venue.

* Civil Revision Petition No. 926 of 1912.

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February
18 and 24.

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v.
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PETITION under section 115, Civil Procedure Code (Act V of 1908), praying the High Court to revise the order of V. SUBRAHMANYAM PANTULU in Appeal No. 72 of 1902 preferred against the decree of B. RAMA Rao, the District Munsif of Madanapalle, in Original Suit No. 299 of 1910.

The necessary facts appear from the judgment.

Dr. S. Swaminadham for the petitioner.

Respondents unrepresented.

SESHAGIRI
AYYAR, J.

ORDER.—The District Munsif of Madanapalle passed a decree in favour of the plaintiff in Original Suit No. 299 of 1910 on the 30th of March 1911. The contract which gave rise to the litigation was made in Kadiri which was at the time of the suit within the jurisdiction of the Madanapalle District Munsif. The scheme for the redistribution of districts came into force on the 1st of April 1911, by which Kadiri was added to the jurisdiction of the District Munsif of Penukonda. From Madanapalle appeals lie to the District Judge of Cuddapah; from Penukonda to the District Judge of Bellary. The defendant filed the appeal in the District Court of Bellary on the 26th of June 1911 against the decision in Original Suit No. 299 of 1910. The District Judge held that the appeal lay to the Cuddapah District Court, and returned it for presentation accordingly. The District Judge of Cuddapah on the appeal being presented to him came to the conclusion that he had no jurisdiction. This revision petition is against the said order.

There is no Madras decision directly bearing on the matter. Section 13 of the Madras Civil Court Act gives no indication regarding the appellate forum; section 96 of the Code of Civil Procedure says that an appeal "shall lie to the Court authorised to hear appeals." The question is whether that Appellate Court is one which had jurisdiction when the suit was decided or at the time when the appeal came to be presented. Two cases relating to execution of decrees in which the question was whether the Court which passed the decree or the Court to which territorial jurisdiction was assigned subsequently should entertain applications came up for consideration before the High Court. In *Subbiah Naicker v. Ramanathan Chettiar*(1), the learned Judges were of opinion that loss of territorial jurisdiction *ipso facto*

affected a transfer of venue. This view derives support from the actual order that was made in *Alagappa Mudaliyar v. Thiyagaraja Mudaliyar*(1). There are only two cases in the other High Courts. The decision in *Allah Dai Begam v. Kesri Mal*(2), which is to the effect that appeals lie to the Court to which the territory is added is based on the construction of the language of section 17 of the North-Western Provinces Civil Courts Act. The learned Judges of the Calcutta High Court in *Harabati v. Satyabadi Behara*(3), came to a similar conclusion on the interpretation of the language of the special statute and of the notification of the Government bearing on it. I do not find any direct English decision on the point. But in the American Encyclopædia, volume II, page 965, it is stated that the "jurisdiction of the cause is not transferred to the appellate tribunal until, under the particular laws prevailing, the appeal is perfected." The above discussion shows that the Legislature in India favours the view that the Original Court should have no jurisdiction when the place where the contract was made is taken away from its limits. The law in America is in consonance with this principle. I must hold on the authorities referred to by me that the appeal lay to the District Court of Bellary. I am aware that the convenience of the litigants will not be advanced by this conclusion. In case the Appellate Court should either remand the case for fresh disposal or ask for a finding upon new issues, it is desirable that the case should go back to the Munsif who heard it originally. If the appeal is heard by the Bellary District Judge in this case, he will have no power to send the case down to the District Munsif of Madanapalle. But in matters of procedure uniformity is of the essence of the administration of justice and as it has been held already that in regard to applications for execution the Court which decided the suit ceases to have jurisdiction by the transfer of territory, the decision in this case should be that the appeal lies to the District Judge of Bellary as Kadiri is part of the Bellary district.

The appeal will be sent to that Court to be disposed of according to law.

(1) (1910) M.W.N., 477.

(2) (1906) I.L.R., 23 All., 93.

(3) (1907) I.L.R., 34 Cal., 636.

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APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.

P. MANGAMMA (PLAINTIFF), APPELLANT,

v.

P. RAMAMMA AND TWO OTHERS (DEFENDANTS NOS. 1 TO 3),
RESPONDENTS.*

Construction of documents—Sale or agreement to sell—Intention is the test—Want of registration—Indian Registration Act (III of 1877), section 17—Admissibility—Evidence.

Whether a document operates by way of a present conveyance of property or only as an agreement to create a future right depends upon the intention of the parties as expressed in the instrument.

Even if a present right is created, the instrument, though unregistered, is admissible in evidence in a suit for specific performance.

Nagappa v. Deva (1891) 1 L.R., 14 Mad., 55 and *Upendra Nath Banerjee v. Umesh Chandra Banerjee* (1910) 15 C.W.N., 375, followed.

The instrument in this case was construed as an agreement to sell notwithstanding that it contained certain words showing a present transfer.

SECOND APPEAL against the decree of A. RAGHUNATHA RAO Pantulu, the Subordinate Judge of Cocanada, in Appeal No. 58 of 1910 preferred against the decree of S. NARASINGA RAO PANTULU, the District Munsif of Peddapur, in Original Suit No. 557 of 1908.

The suit was brought for specific performance of a contract to sell land contained in Exhibit A, the terms of which are set out below :—

This is an agreement for the execution of the sale-deed in respect of jeroity lands executed, on 25th April 1906, in favour of Mangamma, wife of Pichikalarapadu, by Muneyya, son of Panni Amman and resident of the aforesaid place. For the sum of Rs. 500 (Rupees five hundred) out of the total amount due up to this day in respect of the principal and interest of the registered deed of mortgage without possession executed formerly, that is, on 19th March 1896, to meet my family expenses, etc., jointly by me and by my brother-in-law Lingampalli Venkataswami who was my guardian during my minority, I have sold to you, and put you now alone in the possession of the jeroity land, consisting of

* Second Appeal No. 842 of 1911.

the wet land of the total extent of 3 acres and 37 cents as per particulars noted hereinbelow and bearing a settlement cist of Rs. 12 and the several fruit trees therein out of the immoveable property which forms my ancestral property in the aforesaid place which has been entered in my name in accounts and which has been mortgaged to you as per the deed executed in your favour. Therefore I have executed this agreement in your favour, having agreed to your enjoying the same freely, hereditarily from son to grandson with power to alienate the same by sale or gift. So I shall execute a sale-deed on a proper stamp paper within three months from this date, get the same registered and present it to you. I shall present the agreement necessary for getting the land registered in accounts in your name, in the Sub-Registrar's office at the time of the registration of the document. After executing the sale-deed in your favour I shall cause the payment with respect to sale money of five hundred rupees to be endorsed on the original mortgage bond and I shall execute again a document in your favour for the balance.

This is the agreement for the execution of a sale-deed in respect of jeroity lands executed with consent.

(Mark of) Pamu Muneyya.

The District Munsif decreed the suit, but on appeal by the defendant the Subordinate Judge held that Exhibit A was in effect not merely an agreement to sell, but a sale-deed itself, and dismissed the suit finding that Exhibit A was compulsorily registrable and that owing to its being unregistered, it was invalid as affecting the property comprised therein, and inadmissible in evidence under section 17 of the Registration Act.

The plaintiff preferred this Second Appeal.

P. Narayanamurthi for the appellant.

P. Nagabhushanam for the respondents Nos. 1 and 2.

JUDGMENT.—The decision of the point argued in Second Appeal is not free from difficulty. That point is whether Exhibit A in this case is inadmissible in evidence on the ground that it was not registered. The suit is for specific performance. The document purports to be an agreement for sale and it says, "I shall execute a sale-deed on proper stamp paper." The difficulty arises from other clauses in the instrument which, it is contended, show that Exhibit A itself was intended to pass the

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property. After setting out the receipt of the consideration for the sale (viz.), the discharge of part of the debt due to the intended vendee on a mortgage it says, "I have sold to you and put you now alone in the possession of the jeroity land." Before the clause agreeing to execute the conveyance we have this clause, "Therefore I have executed this agreement in your favour having agreed to your enjoying the same freely, hereditarily from son to grandson with power to alienate the same by sale or gift." This clause is immediately followed by the covenant to execute a sale deed. Having given our best consideration to the construction of this document, we have come to the conclusion that the latter clause was put in only to indicate the terms of the conveyance to be thereafter executed. The vendor agreed to execute a conveyance having already agreed under Exhibit A that by that conveyance the vendee should enjoy the property hereditarily. The first clause "I have sold to you," in our opinion, really means "I have entered into a binding agreement to sell to you." Possession was given at once, but possession was to be held under the conveyance to be executed subsequently.

As already stated, what the parties purported to enter into was an agreement to sell. In our opinion this document was not intended to be the record of any conveyance *in presenti* by the vendor to the vendee, but merely embodies the terms of the conveyance to be executed subsequently.

In this view it is unnecessary to consider the cases that have been cited. The test is whether, according to the intention of the parties as expressed in the instrument, there is a present conveyance of the property, or only an agreement to create a future right.

There is authority for the position that even if a present right is created, the instrument would be admissible as evidence in a suit for specific performance. See *Nagappa v. Devu* (1) and *Upendra Nath Banerjee v. Umesh Chandra Banerjee* (2).

We hold, therefore, that this document should not have been rejected by the lower Appellate Court. We reverse the decree of the Subordinate Judge and remand the appeal for fresh disposal according to law.

Costs will abide the result.

(1) (1891) I.L.R., 14 Mad., 55.

(2) (1910) 15 C.W.N., 1875.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Arnold' White, Kt., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Tyalji.

P. BALAMBA (DEFENDANT No. 1), APPELLANT,

v.

K. KRISHNAYYA AND THREE OTHERS (PLAINTIFF, DEFENDANTS Nos. 2 AND 3, AND LEGAL REPRESENTATIVES OF PLAINTIFF),
RESPONDENTS.*

Married Women's Property Act (III of 1874), sec. 6.—Applicability to Hindu—Insurance—Policy for the benefit of wife and children, if creates a trust—Policy amount payable to the executors, administrators and assigns of the assured—Right of beneficiary to enforce—Presumption of advancement.

Where a Hindu male effected a policy of insurance on his own life expressed on the face of it to be for the benefit of his wife, or his wife and children or any of them, but payable to his executors, administrators and assigns, and died leaving a daughter.

Held, by the Full Bench that section 6 of the Married Women's Property Act (III of 1874) applied to the case, and by virtue thereof a trust was created in favour of the daughter, in regard to the policy amount, against which the creditors of the assured have no right to proceed.

Oriental Government Security Life Assurance, Ltd., v. Vanteddu Ammiraju (1912) I.L.R., 35 Mad., 162 overruled.

Per WHITE, C. J. (SANKARAN NAIR, J., concurring).—Sections 4, 5, 6, 7, 8 and 9 of Act III of 1874 do not apply where either of the spouses, at the time of the marriage, professed the Hindu religion. The primary object of section 6 is to enable a man (though a Hindu male) to make provision for his wife and children by insuring his life for their benefit without executing a separate deed of trust, though the result may be that a Hindu woman derives a benefit thereby.

Per WHITE, C. J.—Section 6 does not affect the law of contract or the law of trust as regards the persons entitled to enforce the contract under the policy. The person entitled to enforce the rights of the beneficiary is the trustee, if a trustee has been appointed, and if no special trustee has been appointed, the official trustee, to whom the money is payable, and not the daughter, the beneficiary.

Held also, that the daughter was not entitled to enforce her claim against the Insurance Company or as against a creditor as (i) the company was under a contractual obligation to pay the amount to the executor or administrator of the assured (ii) the presumption of advancement of a daughter was rebutted by the words "for the benefit of his wife and children" the policy not being for the benefit of such of the children as were daughters.

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Per TYABJI, J.—The daughter's right under the insurance policies are affected by section 6 of Act III of 1874, and the operation of section 6 is not prevented by section 2. For the daughter is not a married woman within the meaning of sections 2 and 6 though she may be married, as the expression 'married woman' cannot refer to any woman other than one who is married to the assured.

SECOND APPEAL against the decree of F. A. COLERIDGE, the Acting District Judge of Kistna, at Masulipatam in Appeal No. 824 of 1910 presented against the decree of S. NILAKANTAM PANTULU, the Additional District Munsif of Masulipatam, in Original Suit No. 315 of 1909.

One Venkataratnam insured his life for Rs. 2,000 with the Oriental Government Security Life Assurance Company, Limited, for the benefit of his wife and children. According to the terms of the policy in question the amount secured thereby was not payable to the parties for whose benefit it was taken out but to the executors, administrators or assigns of the assured. The plaintiff obtained a decree against the assured, Venkataratnam, and after his death attached the amount of the policy in the hands of the Insurance Company. The first defendant, the daughter of the deceased Venkataratnam, preferred a claim for her share of the insurance money Rs. 400. The claim having been allowed and the attachment of her interest having been withdrawn, the plaintiff instituted a regular suit to establish his right to the money in the hands of the Company against the daughter and the two sons of the assured. The District Munsif found that the *premia* had been paid out of his self-acquisitions, that by virtue of the policy having been taken for the benefit of his wife and children, Venkataratnam had no interest in the policy amount, and that the Insurance Company held the said amount in trust for the wife and children and consequently dismissed the suit. The District Judge on appeal by the plaintiff, following *Oriental Government Security Life Assurance, Ltd., v. Vanteddu Ammiraju*(1), held that there was no trust created in favour of the wife and children, that the Married Women's Property Act did not apply to the parties who were Hindus and that the *premia* having been paid out of ancestral funds, the policy amount was part of the estate of the deceased. The District Judge accordingly reversed the Munsif's decree, and decreed the plaintiff's suit.

(1) (1912) I.L.R., 35 Mad., 162.

The first defendant, the daughter of the assured, preferred the Second Appeal.

The Second Appeal first came on for hearing before SANKARAN NAIR and SADASIYA AYYAR, JJ., who made the following orders of reference to the Full Bench:—

SANKARAN NAIR, J.—The first defendant is the daughter, and defendants Nos. 2 and 3 are the sons, of one deceased Venkataratnam, who insured his life for Rs. 2,000 which the Insurance Office agreed to pay to his wife and children. The plaintiff got a decree against Venkataratnam and he claims the insurance money towards the decree, including the Rs. 400 that fell to the first defendant.

The first question for decision is whether the money insured is protected by the Married Women's Property Act (III of 1874) or whether it is a part of the estate of the deceased. The Judge, following the decision in *Oriental Government Security Life Assurance, Ltd., v. Vanteddu Ammiraju*(1) as he was bound to do, held that the Act did not apply. This is an appeal from that decision.

It is argued before us that that judgment ought not to be followed, and that the Act is applicable to cases like the one before us. Section 6 of Act III of 1874 runs thus:—

"A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, as long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate." The Act applies to the whole of British India. Now, the words of the section seem to be clear, and according to it, the policy of insurance effected by the deceased Venkataratnam should enure for the benefit of the first defendant and others. But it is argued that section 2 shows that this section 6 does not apply to Hindus. The clause relied upon runs thus:—

"But nothing herein contained applies to any married woman who at the time of her marriage professed the Hindu,

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Muhammadan, Buddhist, Sikh or Jaina religion, or whose husband, at the time of such marriage professed any of those religions." Now, it is obvious that this clause applies only to a married woman who professed any of the religions referred to in the section, or who may be a follower of any other religion, say Christianity, but whose husband professed any one of those religions. The proviso, therefore, does not apply to all Hindus and it applies to others than Hindus. It does not apply to males who profess those religions. That this is so, appears to be clear to me from the next clause which enables the Governor-General in Council to exempt from the operation of the Act members of any race. If, therefore, males who follow those religions have to be excluded, it must be by an order of the Governor-General in Council. This appears to be superfluous if the exemption clause applied to them also. The last clause of that section only states that the section 4 of the Indian Succession Act shall not apply, and shall be deemed never to have applied, to any marriage one or both parties to which professed any of the above religions, and is confined solely to that provision of the Indian Succession Act. It appears to me, therefore, that section 6 does clearly apply, and I am confirmed in this view by a consideration of the general scheme of Act III of 1874, which shows also why the clause in section 2 is confined to the married women referred to therein. In order to understand it, it is necessary to make a brief reference to Act X of 1865. That Act, with the exception of section 4, dealt with property which was taken by succession, either under a will or under intestacy, and it was provided by section 831 that, with reference to such property, the Act should not extend to Hindus, Muhammadans or Buddhists. But section 4 provided that "no person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried." This section applied also to property taken otherwise than by succession, and as this provision was deemed to be a proper one with regard to property taken by way of succession, and as it affected the property relations of married people, it was deemed more convenient to affirm the broad principle than to have the property taken by succession alone regulated by that law. This clause, therefore, went further than the rest and

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enacted the law which was peculiar to marriage and had nothing to do with succession while the rest of the law dealt with matters peculiar to succession and had nothing to do with marriage. Part VI which is headed "On the effect of marriage" does not touch this question. Now, there was no restriction as regards the communities affected by section 4; Hindus and Buddhists were not excluded. This Act was passed in 1865, and in 1870 the Married Women's Property Act was passed in England (38 and 34 Vic., c. 98), and it was deemed advisable to enact some provisions of that Act in India which was done by Act III of 1874. The legislature then proceeded on the view that, as the Hindus, etc., had their own marriage law and their own succession law, it was undesirable to interfere with them, and that the new provisions to be enacted need be made applicable only to those whose law of succession was governed by the Indian Succession Act. Accordingly, it was provided by the last clause in section 2 that section 4 of the Indian Succession Act shall not apply, and shall be deemed never to have applied, to any marriage one or both parties to which professed at the time of marriage any of those religions. The Sikh and Jaina religions were added as a doubt was entertained whether the Sikhs were Hindus and the Jains were Buddhists, as was thought at the time when the Indian Succession Act was passed. Now, it will be noticed that all the sections except section 6 referred to laws which were peculiar to English marriage. Section 4 of Act III of 1874, which was section 1 of the English Act of 1870, was intended to get rid of the right of the husband acquired by marriage under English law to strip his wife of her wages and earnings. Section 5 also, which is the first paragraph of section 10 of the English Married Women's Property Act, also had reference to the peculiar marriage law of England. Under that law, as it then stood, if a wife effected a policy of insurance on her own life or on her husband's life otherwise than by separate property and died in her husband's life-time, the husband in the capacity of her administrator became the absolute owner of the property. If a married woman had already separate property and if she chose to make any arrangement by means of that separate property in any suit that may be instituted by her to enforce it, the husband must be a party, might raise any questions he liked and could rip up a good deal of domestic life to decide the question whether she had

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private property. The section avoided any such question as to what is separate property and laid down a rule that, if the wife contracts with an Insurance Office and provides the money by which the insurance is effected, the Insurance Office shall ask no questions as to whether the property in question was her separate property or not. But the Insurance Office should be liable to the wife and to the wife alone. Section 7 of the Act referred to legal proceedings by and against a married woman. It also was intended to place beyond doubt the difficulties which arose on account of the English marriage law. So, too, sections 8 and 9. Now, all those sections with the exception of section 9 which were taken from the Married Women's Property Act of 1870 had reference to the disabilities of married women under the English law. Section 9 was intended to get rid of the husband's liability and was consequential on the removal of the wife's liabilities and deprivation of his rights by marriage. These sections had no reference whatever to the disabilities of married women under the Hindu law, and therefore, section 2 distinctly declared that these provisions shall not apply to any married woman who professed the Hindu or any other of the religions referred to therein.

Now, section 6 stands on a different footing. It had nothing to do with any marriage law, but dealt with the question of contract or of trust. Shortly before this Act III of 1874 was passed, the legislature had passed the Indian Contract Act, by which it is enacted, following the English law, that the parties to a contract alone shall be entitled, save in exceptional cases, to enforce the contract. A third party to a contract to whom the Insurance Office may have promised the money due under a policy of life insurance, cannot therefore enforce it. But it was deemed desirable for obvious reasons that there should be an exception in favour of wife and children, and that part of section 10 of the English Women's Property Act which refers to this matter was enacted as section 6 of Act III of 1874. It will be noticed that section 10 of the English Act was split into two separate sections 5 and 6 in Act III of 1874 consistent with the intention to make section 6 generally applicable and section 5 inapplicable to Hindus. The reason is clear. The rule that debarred the wife from enforcing the provision in the contract between the husband and the Insurance Office in her favour is

not a rule that depended upon any marriage law. Unlike the other sections of the Act, it dealt with a question which had reference not only to the Christians but also to the Hindus and Muhammadans. The section did not interfere with the Hindu or Muhammadan Marriage Laws and did not contravene the general policy disclosed by the other provisions not to interfere with such laws.

I am not at all sure that the legislature in enacting the Contract Act did not depart from the Hindu Law, under which it is not at all clear that the wife and children were not entitled to claim the insurance money. I can therefore easily perceive the distinction between section 6 which relates to married men and the other sections of the Code which refer to the disabilities of married women under the English law and changes consequent thereon. For these reasons I think the legislature advisedly exempted only married women from the provisions of the Act.

I am also of opinion that the premiums paid by the deceased Venkataratnam were his own self-acquired property. The Judge states that Venkataratnam "received a house from his brothers as his share of the family property and that in due course he sold it," that it is therefore for the defence to show that he did not use this property and the sale-proceeds and that otherwise the presumption is that all property in the hands of Venkataratnam was family property. But it was apparently not brought to the notice of the Judge that the insurance policy was taken out in 1888 and that the sale of the house was only in the year 1904. The presumption therefore raised by the Judge does not apply. *Primâ facie* what is paid as premium is a man's own property. I am accordingly of opinion that the plaintiff has not succeeded in proving that this is joint family property.

It has also been further urged before us that, even if the Act does not apply, the first defendant and the others named in the policy must be treated as beneficiaries for whose benefit the policy was taken out by the deceased Venkataratnam. According to English law, if a man purchase real property or an annuity, stock or other chattel interest or take a bond in the name of a stranger, the equitable ownership results to the person who advanced the purchase money. But an exception has always been recognised to this doctrine; that is, that if the person from whom the consideration moved stands *in loco parentis* to the

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person in whose name the purchase is made then a gift or advancement is presumed. This is what is stated by Lord ROMILLY in *Garrick v. Taylor*(1) which was confirmed in appeal: "If a purchase be made by one in the name of another, the presumption is that the latter is a trustee for the person who pays the money, unless the parties stand in the relation of parent and child."

The same principle has been applied to policies of life insurance in *Pfleger v. Browne*(2) which was a case where an insurance office issued a policy on Pfleger's life the premiums of which were paid by Pfleger but the amount was payable to Browne. It was held that the onus of proof when the benefit of it was claimed by Browne lay on the latter even though the policy stood in his name.

The exception in favour of the children was recognised in *Re Richardson; Weston v. Richardson*(3). In that case the question was whether a policy of life insurance effected by a man on his own life but in his daughter's name was for his benefit or for that of his daughter. He retained the policy in his own possession and he paid all the premiums himself from time to time except the last which on account of his want of money his son paid. KAY, J. held that "the legal right to call upon the office to pay the sum assured was clearly in the daughter, and not in the executor, the contract of the insurance company having been to pay her. That she was a daughter was sufficient to raise a presumption that there had been an advancement to her." He further held that the mere retention by the father of the policy in his own hands did not show that the beneficial interest was not intended to pass to her.

On the other hand the decision of *In re a Policy No. 6402 of the Scottish Equitable Life Assurance Society*(4), in which many of these cases are referred to and principles explained is an instance where the Court refused to draw such presumption, though the policy was taken on a man's life "for the behoof of" a lady who was his deceased wife's sister and with whom he had gone through the ceremony of marriage. The question therefore is whether the relationship of the parties is such that we should

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presume a gift or an advancement in favour of the person in whose name the policy stands. In India section 82 of the Indian Trusts Act states that where property is transferred to A for a consideration paid or provided by B, the property is presumed to belong to A unless it appears that B did not intend to pay or provide such consideration for the benefit of A. In the Madras Presidency, at any rate, there is an increasing disposition to make provision for the benefit of a person's wife and children including daughters as against his joint family, to whom his property would survive at his death, or as against the male heirs. Accordingly TURNER, C.J., and MUTHUSAMI AYYAR, J., decided that where notes were purchased in the name of a wife out of funds belonging to the husband "the presumption is that he intended that the notes transferred to his wife should become her property."—*Narayana v. Krishna*(1). This view has been accepted in Madras in the case of Hindu females. I have very little doubt that, when persons in the position of Venkataratnam take the policy in the name of either the wife or daughters, they intend it for their benefit and they must be deemed to be the beneficiaries under the policy.

Various insurance offices in Southern India issue policies under which the moneys are to be paid to the daughters on their marriage. The consideration in such cases is not only the health, etc., of the person who pays the premiums but also considerations affecting the daughter. I have no doubt that all these persons who have been effecting these insurance policies always treated the policy money as the property of the daughter payable to her at a certain fixed period. It is not open to the father or husband to revoke that disposition without the consent of either the wife or the daughter. I would accordingly hold that in this case there was a gift or advancement in favour of the daughter and that the plaintiff is not entitled therefore to claim the share due to her.

As a beneficiary there is no doubt that the first defendant would be entitled to bring a suit against the insurance company for the recovery of the amount. No doubt in England it has been held that, if she is not the beneficiary and the amount is only payable to the daughter on the father's death, then the

(1) (1880) 29 Beav., 79 at p. 83, s.c., 54 E.R. 556 at p. 557.

(2) (1880) 28 Beav., 301; s.c., 54 E.R., 416.

(3) (1882) 47 L. T. (N.S.), 514.

(4) (1902) 1 Ch., 383.

(1) (1885) I.L.R., 8 Mad., 214.

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daughter is not entitled to sue. It is probable that in India this question may require further consideration on account of the ruling of the Privy Council in *Khuraja Muhammad Khan v. Husaini Begam*(1). The facts in this case show this was a settlement similar to the one in that case. But it is unnecessary to consider this question further in this case as the daughter is not the claimant. In *Oriental Government Security Life Assurance, Ltd. v. Vanteddu Ammiraju*(2) the conclusions are no doubt opposed to mine in this case but there the question was not considered. It was assumed that the Married Women's Property Act in its entirety did not apply to Hindus. There the counsel for the insurance office conceded in appeal the rights of the plaintiffs to recover the money. The question of advancement or gift or trust was not raised in that case.

I doubt therefore whether that is an authority to be followed. But as the question is of general importance it is desirable that it should be decided by a Full Bench. We accordingly refer to the Full Bench the questions involved for decision :—

- (1) Whether Act III of 1874 applies to Hindu married males or not.
- (2) Whether in cases similar to the one before us, the daughter is not entitled to enforce her claim against the insurance office or a creditor.

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SADASIVA AYYAR, J.—I agree with my learned brother in the finding of fact that the deceased paid his *premia* out of his self-acquired moneys, and it is unnecessary to repeat the reasons given by him for arriving at that conclusion. The further question arising in the case and which we have resolved to refer for the opinion of a Full Bench is of great importance. That question is whether, when a Hindu male has insured his life with a company by an agreement under which the insurance company undertook to pay the insurance money on the death of the insured to his wife and children, the said wife and children or, at least, the children are entitled to that money or whether such money is part of the estate of the deceased to which his male children who are his heirs are alone entitled. This question has been answered in favour of the second alternative in *Oriental Government Security Life Assurance, Ltd. v.*

(1) (1910) I.L.R., 32 All., 410 (P.C.)

(2) (1912) I.L.R., 35 Mad., 162.

Vanteddu Ammiraju(1). As at present advised and with the greatest respect I feel grave doubts as to whether that decision does not require re-consideration. The question involved might be considered under four heads :—

(a) Whether under the Contract Act the wife and children can enforce a promise made by the insurance company as if the wife and children were promisees under the Contract Act.

(b) Whether the wife and children can take advantage of section 6 of the Married Women's Property Act III of 1874 and claim that a trust for their benefit was created when the policy of insurance was effected.

(c) Whether even if the Contract Act and the Married Women's Property Act did not apply, the wife and children could sue under the common law prevailing in India as near relations of the insured intended to be benefited by the insured.

(d) Whether under the Trusts Act, the wife and children became the *cestui que trustent* and the company became trustees and thus the trust could be enforced by the wife and children.

As regards the first point it was held in *Chinnaya Rau v. Ramaya*(2) that a third person who was not a party to a contract could sue the promisor though the consideration proceeded from the third person's step-mother and not from the third person himself. INNES, J., held that the consideration moved indirectly from the third person and hence the third person himself became a promisee under the Contract Act. He relied upon the old case of *Dutton v. Poole*(3) decided in 1868. KINDERSLY, J., held that under section 2 (d) of the Contract Act the consideration need not flow from the promisee and hence even a third person could sue as promisee though no consideration flowed from him. *Dutton v. Poole*(3) went upon the ground that, having regard to the near relationship between the plaintiff and the party from whom the consideration moved, the plaintiff might be considered to be a party to the consideration and that was also the ground on which INNES, J., based his decision. According to the argument of KINDERSLY, J., near relationship between the brother and the person from whom the consideration moved was not important under the Contract Act. This case of *Chinnaya Rau v. Ramaya*(2) seems to have been approved

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(1) (1912) I.L.R., 35 Mad., 162.

(2) (1882) I.L.R., 4 Mad., 137.

(3) (1868) 2 Lev. 210; s.o., 83 E.R., 528.

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of in *Samuel v. Ananthanatha*(1). If *Chinnaya Rau v. Ramaya*(2) decided in 1881 is good law, then the wife and children of the insured are entitled to sue as if they were parties to the contract itself between the insured and the insurance company. But Pollock and Mulla point out (see their notes to section 2, page 17) that in the two cases *Chinnaya Rau v. Ramaya*(2) and *Samuel v. Ananthanatha*, clauses (3) (a), (b) and (c) of section 2 of the Contract Act have been overlooked and clause (d) alone has been considered. Though under clause (d), the consideration may move from the promisee or *any other person*, under clauses (a), (b) and (c) no man could be called a promisee and no man could therefore become entitled to bring a suit as promisee *unless he has accepted the proposal of the promisor* and thus comes under the definition of promisee in section 2 (c). Here the wife and children were not asked by the promisor whether they assented to the proposal to benefit them and they did not accept any such proposal and hence cannot come under the Contract Act definition of promisee. So also in *Chinnaya Rau v. Ramaya*(2) the beneficiary under the agreement was not a party to the agreement as he had not accepted any proposal and hence cannot be called a "promisee" under the Contract Act. However, I am willing to follow *Chinnaya Rau v. Ramaya*(2), as it was decided so far back as 1881 and its authority has not been expressly overruled, though if I were to construe the sections of the contract itself I am inclined to agree with the criticisms of Pollock and Mulla.

The next branch of the question relates to section 6 of the Married Women's Property Act. In *Oriental Government Security Life Assurance, Ltd. v. Vanteddu Ammiraju*(3) it was held that no person following the Hindu law can take advantage of that section because section 2, paragraph 2, provided that that Act should not apply to any married woman who or whose husband at the time of her marriage professed the Hindu religion. It seems to me there are three answers to the argument based on section 2.

In the first place, section 6 speaks of a policy of insurance effected by any married man and hence the words in section 2

which exclude the applicability of the Act to a Hindu married woman cannot have any bearing upon the provisions of section 6 which relate to a policy of insurance effected by any married man and not by any married woman, whether Hindu or otherwise.

In the second place, even if section 2 will exclude a married Hindu woman from the benefit of a policy effected by her husband, his children cannot come under the phrase "married woman" in section 2; and if the insurance was in favour of the children also, section 6 must apply because section 6 says that the insurance shall be deemed to be a trust for the benefit of his wife and children or any of them according to the interests so expressed. Because the wife cannot take, I do not see why the children should not take.

In the third place, the title of the Act III of 1874 says that it is an Act, not only "to explain and amend the law relating to certain married woman" but also an Act "for other purposes," referring evidently to the beneficent insurance provision laid down in section 6. The preamble says that it is expedient to make provision for insurance on lives by persons married before or after that date. It does not say that the provision is restricted to insurances on lives of other than those of the Hindu, Muhammadan, Buddhist, Sikh or Jain religions. Though the Act is called the Married Women's Property Act, this question of insurance was also considered as an important matter falling to be dealt with by the Act and the provisions under section 6 have nothing to do with the religion of the parties but are beneficent provisions, the reasons for enacting which are applicable whether the husband who insures his life belongs to one religion or to another. It is clear from the history of the legislation that that provision, as Mr. Hobhouse says, was necessitated by the old doctrine of the English Courts that a husband as such had no insurable interest in his wife's life and similar doctrines. It was also necessitated by the view of English Courts, that such a policy, even when allowed by statutes overriding the common law would only be in the nature of a voluntary settlement and hence would be liable to the dangers to which such settlements are exposed. It is well known that the legislature wanted to encourage those life insurance policies which make provisions for wife and children and not to subject such policies to the dangers to which they were subjected under

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(1) (1883) I.L.R., 6 Mad., 351.

(2) (1882) I.L.R., 4 Mad., 137.

(3) (1912) I.L.R., 35 Mad., 162.

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the English decisions, the Judges of English Courts being too much bound down by technicalities and precedents. In introducing the Bill (see extra supplement of 2nd August 1873 of the *Gazette of India*) Mr. Hobhouse said "some gentlemen connected with insurance offices in this country applied to the Government a short time ago stating that those provisions," i.e., the provisions of the English Statute which overruled the English decisions, "were found exceedingly beneficial and they did not see why they should not be applied to India. We now propose therefore to introduce an Act which should embody for India the same provisions as those which had been thought fit for the people of England." It will be found from this quotation that the religion of the parties had nothing to do with the introduction of these provisions in the Act; just as the "people of England" were sought to be benefited by the English Act, and protected against the English decisions, so the people of India were sought to be protected by the introduction of this section 6 in the Married Women's Property Act. Mr. Hobhouse in another speech said (see extra supplement, dated 6th September 1873, page 12 of the *Gazette of India*) "We must remember that a wife's contributions to the family wealth did not usually consist in payments of money. She may bring to her husband no money at all and yet may be a very treasure to him even if measured by a mere pecuniary standard. If the wife kept the household together, brought up the children, governed his servants, conducted all his petty dealings with tradesmen, and performed other similar domestic duties, the husband might be a far richer man for her services, although he might provide all the actual money that comes into the family. Then, if he chose that his wife should take every year so much out of the common stock, or out of his stock, and spend it in an insurance for herself or her children, why should she not do so. If the husband chose that that should be done with his property from time to time, Mr. Hobhouse did not see it was a matter for legal question, or that there should be any legal difficulty placed in the way of the wife's enforcing the contracts. It might be the most prudent, the most wise, and the most beneficial arrangement for the whole family, the very best mode of making a provision for them. and it also might be, and often was, a matter of absolute justice, as between husband and wife, which he or his creditors ought not

to dispute at any future time." Mr. Hobhouse, therefore, thought that we ought not to import nice legal questions into such transactions; the broad intelligible mode of treating them was that, if the wife contracted independently with the Insurance Office, and paid the money, the Insurance Office should ask no questions, but should be liable to the wife and to the wife alone.

Section 6 provided that :—"A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interests so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate."

"Mr. Hobhouse could not say that he attached a great deal of importance to that section. In the first place, such transactions were not very often effected, because people did not like putting their property beyond their control. *In the second place the thing could be done as the law now stood. The effect of the section would be to place such an arrangement on a safer basis. At present, it would be in the nature of what lawyers call a 'voluntary settlement'; and without leading the council into technicalities relating to voluntary settlements, he would only state that in contests with the creditors of the settler, those settlements stood on a less favourable footing than settlements made for valuable consideration. We propose to follow the example of the English legislature in enacting that settlements effected in this particular way should be good as against creditors, but at the end of the section there was an express reservation of the rights of creditors in the case of fraud. He did not attach much importance to that; for fraud would vitiate any transaction whether it was expressly so provided or not. And he did not believe in those foresighted, longheaded arrangements for the purposes of defrauding creditors, and in practice, had never known a single instance in which people deliberately plotted beforehand to defraud their creditors in this kind of way. At the same time, those who opposed alterations of the law of property in the case of husband and wife, always insisted on the possibility of frauds being facilitated thereby and we followed*

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the English statute in putting on the face of our bill a warning that such things could not be done more easily than now."

I have quoted thus at length in order to show that the religion of the insured had nothing to do with the introduction of the beneficent provision contained in section 6 of the Act. It seems to me, therefore, that section 6 of the Married Women's Property Act does apply to a policy of insurance effected by a Hindu married man on his own life and expressed on the face of it to be for the benefit of his wife or of his wife and children or any of them and that section 2 does not prevent the application of the provisions of section 6 to any such policy. Having regard however to *Oriental Government Security Life Assurance, Ltd. v. Vanteddu Ammiraju*(1), I do not wish to treat this as my final considered opinion till I have heard further arguments on this point.

Then the third branch of this question concerns the argument that under the common law of India, a person who is the near relation of the party from whom the consideration has proceeded is entitled to sue the promisor, though he may not come within the strict definition of a promisee under the Contract Act. I think this is a very tenable position having regard to *Dutton v. Poole*(2). The *ratio decidendi* of that case appeals to me as valid, and though that case is usually treated as overruled by *Tweedle v. Atkinson*(3), that fact (namely that the later English case has overruled the earlier English case) need not prevent Indian courts from adopting and following the overruled case if it lays down that rule of law which appeals to the Indian courts as the more equitable rule. "Consideration" in the Indian law under the Contract Act need not be given the restricted meaning given by later English decisions and, as SHEPARD, J., points out in his notes to sections 2 and 25 of the Contract Act, the word "consideration" in Indian law comes nearer to the notion of "*causa*" as understood in the Roman law. A motive based on near relationship or upon the moral obligation to provide for dependent relations must surely be treated as a very lawful consideration indirectly proceeding from the relative so as to

enable such relative to bring a suit against the promisor though, if the person intended to be benefited was not such a dependent relative, the law might hesitate to allow that stranger to sue upon the promise made for his benefit. *Chinnaya Rau v. Ramaya*(1) and *Samuel v. Ananthanatha*(2) already referred to might be treated as authorities on this basis, though the observations therein in respect of the provisions of the Contract Act may be of doubtful validity. The Privy Council case of *Khuraga Muhammad Khan v. Husaini Begam*(3), seems to me to lend very great support to the above conclusion. Their Lordships say, "First, it is contended, on the authority of *Tweedle v. Atkinson*(4), that as the plaintiff was no party to the agreement, she cannot take advantage of its provisions. With reference to this it is enough to say that the case relied upon was an action of assumpsit, and that the rule of (English) Common Law on the basis of which it was dismissed is not, in their Lordships' opinion, applicable to the facts and circumstances of the present case In their Lordships' judgment, although no party to the document, she is clearly entitled to proceed in equity to enforce her claim. Their Lordships desire to observe that in India and among communities circumstanced as the Muhammadans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common-law doctrine was applied to agreements or arrangements entered into in connection with such contracts." On analogous principles, it seems to me that cases decided under the English law about consideration having to flow from the promisee or about persons having insurable interests only in the lives of particular persons and all such technicalities of English law should not be applied in India so as to defeat plain equities favouring the wife and children of an insured person.

The fourth branch of the argument is based on the doctrine of trusts. I have gone through sections 3 to 11 of the Trusts Act with some care, and I am unable to see any difficulty in holding that a married man who insures his life for the benefit of his wife and children in a company which promises to pay the

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(1) (1912) I.L.R., 35 Mad., 162. (2) (1868) 2 Lev., 210; s.c., 33 E.R. 523.
(3) (1921) 30 L.J., Q.B., 265; s.c. 1 B. & S., 398.

(1) (1882) I.L.R., 4 Mad., 137. (2) (1883) I.L.R., 6 Mad., 351.
(3) (1910) I.L.R., 32 All. 410 (P.C.).
(4) (1861) 30 L.J., Q.B., 265; s.c. 1 B. & S., 398.

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insurance money at his death to the said wife and children creates a "trust," that he becomes the author of the trust, that the company becomes the trustee, and that the wife and children are beneficiaries. It seems to me that the cases—*Shuppu Ammal v. Subramaniam*(1), *Arumuga Goundan v. Chinnammal*(2), *Rakhamabai v. Gorind*(3), and *Protap Narain Mukerjee v. Sarat Kumari Debi*(4), have been decided on analogous principles. As SUNDARA AYYAR, J., points out in *Rajagopala Raju v. Radhayya*(5), marriage settlements are included in trusts, and Pollock points out as follows:—"Closely connected with the cases covered by the doctrine of trusts, but extending beyond them, we have the rules of equity by which special favour is extended to provisions made by parents for their children." A policy of insurance effected by the father of a family for his children should therefore be looked upon with great favour by Courts of equity and I see no reason why the children should not directly claim rights against the promisor or trustee who has undertaken to act for their benefit. For all the above four reasons, I concur in referring the question for the decision of a Full Bench.

This Second Appeal again came on for hearing in due course before the Full Bench constituted as above.

V. Ramadas for the appellant. The first point for consideration is whether the Married Women's Property Act, III of 1874, applies to Hindus. The Act applies to cases where a Hindu male insures his life for the benefit of his wife and children or of any of them. The exclusion contained in section 2 relates exclusively to a married woman who herself or whose husband professed the Hindu faith at the time of the marriage. This exclusion prevents the application of the Act to cases of insurance by Hindu women which fall under section 5. There is nothing in section 2 to control the operation of section 6 in favour of the beneficiaries under a policy taken out by a Hindu male on his own life for the benefit of his wife and children or any of them. The short title of the Act is not to be considered in determining the scope and extent of the Act. The Act deals with subjects other than married women's property. The Act is rightly

(1) (1910) I.L.R., 33 Mad., 238.

(3) (1934) 6 Bom. L.R., 421.

(2) (1911) 10 M.L.T., 214.

(4) (1910) 6 C.W.N., 388.

(5) (1912) 24 M.L.J., 169.

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described in the heading as an Act to explain and amend the law relating to certain married women and to certain other purposes. There is no indication in the Act to justify the view that section 6 is not applicable to Hindus. Sections 5 and 6 are to be read as relating to two distinct subjects. Section 10 of the English Act of 1874 was split up into sections 5 and 6 of the Act, so they do not go together for the purpose of deciding whether they apply to Hindus. *Oriental Government Security Life Assurance, Ltd. v. Vanteddu Ammiraju*(1) is not correctly decided. The decision gives no reason. It seems to have been conceded at the bar in that case that the Act did not apply.

The next point for consideration is whether, assuming that the Act does not apply to Hindus, the daughter cannot take the benefit of the contract between her father and the Insurance Company. According to the decisions, third parties can take the benefit of the contract; *Chinnaya Rau v. Ramaya*(2), *Kawaja Muhammed Khan v. Husaini Begum*(3), *Shuppu Ammal v. Subramaniam*(4) and *Arumuga Goundan v. Chinnammal*(5); then again though the daughter was not the promisee there may be a presumption of advancement in her favour as the consideration for the promise proceeded from her father: *Dutton v. Poole*(6). Courts in India are not bound to apply *Tweedle v. Atkinson*(7). Lastly the transaction created a valid trust in favour of the daughter. There is nothing in the Indian Trusts Act to prevent the creation of a valid trust in circumstances like these.

T. Ramachandra Rao for the fourth respondent.

Oriental Government Security Life Assurance, Ltd. v. Vanteddu Ammiraju(1) is rightly decided. The Married Women's Property Act does not apply to Hindus. The short title makes this clear. The exception in section 2 is very general and applies even in cases falling under section 6. 'Wife' in section 6 being a married woman must be subject to the exception in section 2 and therefore the 'husband' referred to in section 6 must be one who is not a Hindu, Buddhist, Sikh or Jain. If the wife is excluded

(1) (1912) I.L.R., 35 Mad., 162.

(3) (1910) I.L.R., 32 All., 410 (P.C.).

(6) (1911) 2 M.W.N., 524.

(2) (1882) I.L.R., 4 Mad., 137.

(4) (1910) I.L.R., 33 Mad., 308.

(6) (1868) 2 Lev., 210.

(7) (1661) 30 L.J., Q.B., 265; ac., 1 H. & B., 308.

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as being a married woman it would follow that the section cannot be limited to the case of children alone. Again the words "or any of them" in section 6 only apply to children and do not refer to the wife; therefore a policy for the benefit of one or more children to the exclusion of the wife does not come within the terms of the section.

There is no promise to pay the money to the daughter. She is not a beneficiary at all. So there can be no question of advancement in this case. Nor can the daughter sue in the absence of an assignment in her favour. The cases relied on in support of the right of third parties to sue have no application to the facts of this case. Nor is there a trust in favour of the daughter. The provisions of the Trusts Act are against the creation of a trust in such cases.

WHITE, C.J.—The first question which has been referred to us is whether the Married Women's Property Act, 1874 (Act III of 1874) applies to Hindu males.

I feel a difficulty in answering this question in the form in which it has been framed. A general answer might possibly cover a case not contemplated in the order of reference, and not argued before us. The argument before us was confined to the question whether, where a Hindu male effected a policy of insurance on his own life which expressed on the face of it that it was for the benefit of his wife, or his wife and children, or any of them, section 6 of the Act applied. This is the question I propose to deal with.

Under section 2 of the Act nothing in the Act applies to a married woman, who at the time of her marriage professed the Hindu religion, or whose husband at the time of marriage professed the Hindu religion.

I am of opinion that sections 4, 5, 7 and 8 do not apply where either of the spouses professed the Hindu religion at the time of the marriage. These sections contain the words "married woman" and therefore section 2 applies to them in terms. They were intended to confer rights on a married woman which, under the law of England, she did not possess, and to remove disabilities imposed on her by the law of England. These enactments, if not in conflict with, are entirely foreign to, Hindu law. The words "married woman" do not occur in section 6, but the subject-matter of the section is foreign to Hindu law, and in my

opinion this section also does not apply where either of the spouses was, at the time of the marriage, a Hindu.

Then as to section 6. The words "married woman" do not occur in the section. The section no doubt is in the interest of the wife and children, but its primary object is to enable a man to make provision for his wife and children by insuring his life for their benefit, without executing a separate deed of trust. The section enables a Hindu male to do something which, but for the section, he would not be able to do. The result may be that a Hindu woman derives a benefit, but I do not feel bound to hold that she is shut out from this benefit by reason of the general enactment that the Act shall not apply to Hindu women. As SANKARAN NAIR, J., points out in the order of reference, section 10 of the English Act of 1874 was split into two sections in the Indian Act, sections 5 and 6, which is consistent with an intention to make section 6 applicable and section 5 inapplicable to Hindus.

Section 2 only excludes the operation of the act as regards married women. There is no exclusion as regards children. If a Hindu male can take the benefit of the section for the purpose of providing for his children but is precluded from taking the benefit of the section in order to make provision for his wife, a curious anomaly arises, and a state of things is brought about which can scarcely have been intended by the legislature.

This suggested anomaly was met by the contention that a similar anomaly arose under the language of section 6 itself since the words "or any of them" only applied to children, and that a policy for the benefit of one or more children, to the exclusion of the wife, did not come within the terms of the section. The words of the Indian Act are the same as those of section 10 of the English Act of 1874 (except that the English Act says "be deemed to be a trust for the benefit of his wife and of his children or any of them" whilst the Indian Act says "be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them").

These words may be ambiguous, but in section 11 of the English Act of 1882 we have the words "for the benefit of his wife or of his children, or of his wife and children, or any of them." This makes the matter quite clear, and in my opinion this is the sense in which we should construe the words in section 6 of the Indian Act of 1874. This seems to dispose of the

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WHITE, C.J. There are three possible views, as it seems to me:—

(1) That the section does not apply to a policy of insurance effected by a Hindu male.

(2) That it applies to a policy effected by a Hindu male for the benefit of his children, but not to a policy effected for the benefit of his wife, and

(3) That it applies to a policy effected for the benefit of his wife or of his children, or of his wife and children, or any of them.

In my opinion the third view is the right one.

Section 6 dispenses with the necessity for a separate deed of trust. It does not affect the law of contract or the law of trusts as regards the persons entitled to enforce the contract under the policy. When by virtue of the section a trust is created, the person entitled to enforce the rights of the beneficiary is the trustee, if a trustee has been appointed, and if no special trustee has been appointed, the official trustee to whom the money is payable under the second paragraph of the section.

Limiting my answer to the first question, to the question whether section 6 of the Act applies, I would answer it in the affirmative.

The second question is, "Whether in cases similar to the one before us, the daughter is not entitled to enforce her claim against the insurance officer or a creditor." The first point to be considered is, assuming section 6 (in accordance with the view I have already expressed) would apply if the facts brought the case within the section, whether this particular policy enures as a trust for the wife and children, or forms part of the estate of the assured.

In the case before us the insurance company contracted to pay, not the parties for whose benefit the policy purports to have been taken out, but the executors, administrators or assigns of the assured, whereas in *Oriental Government Security Life Assurance, Ltd v Vanteddu Ammiraju*(1) and in the Maybrick case *Cleaver v. Mutual Reserve Fund Life Association*(2), the company contracted to pay the parties for whose benefit the

policy purported to be taken out. In the Maybrick case the contract was to pay to the beneficiary.

In *Oriental Government Security Life Assurance, Ltd. v. Vanteddu Ammiraju*(1), the contract was to pay to the trustees who might be appointed under the Married Women's Property Act and failing trustees to the beneficiaries. There is nothing on the face of the policy in the present case to indicate that it was for the benefit of wife and children except the words "for the benefit of his wife and children," which are written in, in ink, in the printed form. There is no evidence as to how, or when these words came to be written. For all we know they may have been written in by the assured after the policy had been taken out. I will assume, however, that the words "for the benefit of his wife and children" were part of the policy when the contract was made. How would the matter stand then? I do not think there would be a trust if the section did not apply. The legal interest in the policy money could not be said to vest in the executors in trust for the wife and children or in the company in trust for the wife and children, because the trust, if any, would, in my opinion, be by reason of the operation of the section, and under the section itself, if no trustee is appointed, the legal interest vests in the Public Trustee. Further, so far as the company are concerned, they are under contractual obligation to pay the executors.

If the policy had been in the same terms as the policy in *Oriental Government Security Life Assurance, Ltd. v. Vanteddu Ammiraju*(1) and the company had contracted to pay the parties for whose benefit the policy was taken out (and this is the assumption on which the order of reference was made) I think there would have been a trust under the section, but the person entitled to enforce the claim as against the company would have been, not the daughter, the beneficiary, but, if no trustee had been appointed the party in whom, under the section, the legal interest vests, viz., the Public Trustee.

As regards *Oriental Government Security Life Assurance, Ltd. v. Vanteddu Ammiraju*(1), the question whether a male Hindu could take the benefit of section 6 of the Married Women's Property Act does not appear to have been argued. All that

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(1) (1912) L.L.R., 35 Mad., 162.

(2) (1892) 1 Q.B., 147.

(1) (1912) L.L.R. 35 Mad., 162.

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the learned Judges say upon the point is, "We may point out that the Married Women's Property Act is not applicable to Hindus." With all respect to the learned Judges I cannot accept this proposition in its entirety. For the reasons I have stated I think a male Hindu can take the benefit of section 6.

If the view taken by the learned Judges as to the Married Women's Property Act was right, I should agree with their conclusion in that case that no cause of action arose to the beneficiaries and that the policy moneys formed part of the estate of the assured, notwithstanding that under the contract the money was payable to the beneficiaries in default of trustees. In the Maybrick case—*Cleaver v. Mutual Reserve Fund Life Association*(1)—on the facts, the trust created by the Act ceased to exist. The policy moneys therefore formed part of the estate of the assured and were payable to his executors. In *Oriental Government Security Life Assurance, Ltd. v. Vantaddu Ammiraju*(2) in the view taken by the Judges with regard to the Married Women's Property Act section 6 did not apply, and no trust, in my opinion was created apart from the Act. The moneys, therefore, as it seems to me, were payable to the executors, since the wife was no party to the contract with the company. The decision of the Privy Council in *Khawaja Muhammad Khan v. Husaini Begam*(3) has been relied upon as an authority in support of the contention that the daughter in the present case can enforce the contract, and in the Privy Council case the facts were of a special character, and the agreement on which the plaintiff was held entitled to sue, though not a party thereto, gave her a charge on immoveable property. I do not think the present case, on the facts, comes within the principle of the decision in *Khawaja Muhammad Khan v. Husaini Begam*(3).

There is no doubt a special class of cases of which *Weston v. Richardson*(4) is an example. If a man insures his own life in his daughter's name, this may amount to a complete gift to the daughter so as to entitle her on her father's death to sue for the policy moneys. But the daughter can sue in this class of cases because the fact that she is a daughter raises the presumption that there was an advancement to her by way of gift.

(1) (1897) 1 Q.B., 147.

(2) (1912) I.L.R., 35 Mad., 163.

(3) (1910) I.L.R., 32 All., 410 (P.C.).

(4) (1883) L.R., 47 L.T., (N.S.) 514.

In the case before us it seems to me that any presumption that an advancement to a daughter is intended is rebutted by the words "for the benefit of his wife and children." I do not think we can hold that, although there is no gift to the wife under the doctrine of "advancement," there is a gift to such of the children as may be daughters.

My answer to the second question, therefore, is that the daughter is not entitled to enforce her claim as against the insurance office, or as against a creditor.

SANKARAN NAIR, J.—I agree with the Chief Justice that section 6 of the Act applies to a policy of insurance effected by a Hindu male for the benefit of his wife or his children or of his wife and children or any of them. I adopt the reasons given in his judgment.

The question whether there was an advancement by way of gift, as held by me in the order of reference, does not arise on the facts of the case. It is pointed out that the insurance office did not agree to pay the money to the daughter.

TYABJI, J.—I agree with the learned Chief Justice, that the first defendant's rights are affected by section 6 of the Married Women's Property Act, notwithstanding section 2. On some of the points mentioned by him I wish to express no opinion.

The first question referred to us is "whether Act III of 1874 applies to any Hindu married males or not."

Section 2 of the Act so far as material is as follows:—

"Nothing herein contained applies to any married woman who at the time of her marriage professed the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion, or whose husband at the time of such marriage, professed any of those religions." This clause (to which I shall hereinafter refer as the "saving clause") *prima facie* implies the rights and liabilities of any such married woman as is mentioned in the clause. It is however not easy to determine with precision what is meant by "anything contained in the Act applying to a person," within the meaning of the saving clause. I wish to express no opinion, in any part of this judgment, on the point whether there may be provisions in the Act, altering the rights or liabilities of a married woman, which provisions, by reason of their nature, or form, or otherwise, cannot be described as applying to a married woman within the meaning of the saving clause; in any case, provisions which do not alter the rights or liabilities of a person, cannot,

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in my opinion, be said so to apply to that person. Hence, it would seem to follow that if any provisions contained in the Act affect the rights or liabilities only of a male, whether Hindu or otherwise and whether married or not, then those provisions are not prevented from having full effect by reason of the saving clause,—so long at least as those provisions do not come into operation by affecting in the first instance the rights of any such married woman.

If the first question referred to us is meant to raise the point whether any provisions of Act III of 1874 are operative (in spite of the saving clause) in case a Hindu married male effects a policy of insurance—and the referring judgments contain indications to that effect, the main arguments before us also being based on the same interpretation of the question—then, in my opinion, the answer to the question is, that the Act operates at least in so far as it does not purport to affect the rights or liabilities of any such married woman as is referred to in the saving clause; as to whether or not the saving clause prevents the Act from operating in so far as it affects the rights or liabilities of any married woman under a policy of insurance effected by her husband, that question, obviously, does not arise on the facts now before us, because we have to deal with the rights of the daughter of the person effecting the policy of insurance, and not with the rights of his wife, and I express no opinion on the rights of the wife. The point that does arise is more definitely referred to us under the second question that we are asked to answer, and I will deal with it in answering that question.

The second question referred to us is as follows:—"Whether, in cases similar to the one before us, the daughter is not entitled to enforce her claim against the insurance office or a creditor."

Section 6 of the Act lays down that "a policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife or his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate."

The second question, as I understand it, is framed for the purpose of having it determined whether these provisions of section 6 can be said to *apply* to the first defendant in this case within the terms of the saving clause above referred to. That question, it seems to me, must be determined in the following manner: If, under the facts of this case, the rights or liabilities of the first defendant would become altered on the supposition that those rights or liabilities are governed by section 6, in that case alone and not otherwise may section 6 be said to *apply* to the first defendant. In that case the further question would have to be determined, whether the first defendant is a married woman within the terms of the saving clause in respect of section 6: for, if she is such, then her rights or liabilities are not to be altered by reason of the said section, but must continue to be the same as they would have been had the said section not been enacted.

The facts of the case now before us, in so far as this Court is concerned, are as follows:—One Venkataratnam (to whom I shall hereafter refer as the "assured") insured his life for Rs. 1,000, under each of two policies of insurance [Exhibit 1 and 1(a)] which are in identical terms, and are dated the 5th June 1888. The policies commence with a recital that the assured "hath proposed to effect an insurance for the benefit of his wife and children" with the insurance company. The latter portion of the insurance policy is not printed, but the arguments addressed to us were on the basis that each of the policies of insurance in question was "expressed on the face of it to be for the benefit of his (the assured's) wife, or of his wife and children, or any of them" within the terms of section 6, and my judgment is on the same basis. It seems to me to be beyond our province to deal with the question whether the first defendant acquires any interest and, if so, what interest, under the insurance policy. I confine myself to the question whether, assuming that the policy is such as is referred to in section 6 of the Married Women's Property Act, the first defendant's rights and liabilities, if any, are affected by section 6, notwithstanding the saving clause—leaving it to the Bench who have referred the case to determine the rights of the first defendant on a construction of the policy. The assured died leaving one daughter and two sons, being respectively the first, second and

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third defendants. The question arose whether, if it be a fact that some portion of the insurance money was payable to the first defendant on the death of the assured, that portion formed part of the estate of the deceased and was thus payable to the creditors of the deceased, or whether it belonged absolutely to the first defendant, and, as such, was not liable to be attached in execution of the debts of the deceased. If section 6 governs the rights of the parties, then (if the provisions of the policies be as is above mentioned) the legal result will be that the policies "shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest expressed (in the policies of insurance) and shall not, so long as any object of the trust remains, be subject to the control of the husband (the assured), or to his creditors, or form part of his estate." Speaking with reference to the facts of this particular case, if section 6 governs them, then assuming that the policies in question are of the nature referred to in section 6, the interest of the first defendant under the policies or the moneys payable to the first defendant by reason of them, will not be capable of being attached in execution of the plaintiff's decree; otherwise the interest of the first defendant under the policies will form part of the estate of the assured, and be subject to attachment by his creditors.

Therefore, it seems to me, that we must hold that the operation of section 6 would affect the rights or liabilities of the first defendant if it governs the facts of this case; or—to use the expression contained in the saving clause—it would, in that case (subject to the saving clause) apply to the first defendant.

Is then the operation of section 6 on the rights of the first defendant prevented by the saving clause? I think not. In order that the saving clause should have any bearing upon the operation of a provision contained in the Act and affecting any person's rights or liabilities, it is necessary, not only that (1) that person's rights or liabilities should be affected by that provision of the Act, but it is also necessary that (2) that person should be such a married woman as is referred to in the clause. It seems to me that the first defendant cannot (for the purposes of section 6) be taken to be included within the description of a "married woman" within that clause. It is true that the first defendant may, as a matter of fact, be married, but I think that,

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for the purposes of the question before us, the expression "married woman" cannot refer to any woman other than one who is married to the assured. The first defendant in connection with section 6 is included in the expression "children". If any married woman is referred to in section 6, it is the person mentioned as his wife, i.e., the wife of the assured. I need express no opinion on the point whether the expression would refer to the woman married to the assured. All I hold is that it does not refer to the daughter of the assured, even if she is married: it is obvious that the rights of the first defendant do not arise in any way out of the application of section 6 to a married woman, unless the first defendant is herself a married woman within the section.

Hence in answer to the second question referred to us I would say that the daughter's rights under the insurance policies are affected by section 6 of the Married Women's Property Act and that the operation of that section on her rights is not prevented by the saving clause.

The second question referred to us apparently involves not only the point with which I have dealt, viz., whether or not section 6 of the Act operates on the incidents of a policy of insurance effected by a Hindu married man and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them; but it also involves the further point whether, in either alternative, on the construction of the particular policies before us the first defendant is or is not entitled to enforce her claim against the insurance office or a creditor. This latter point does not seem to me to have been alluded to in the referring judgments. The operative portion of the policies has not, as I have already said, even been printed; and I have not had an opportunity of considering it. For these reasons I desire, with deference, to express no opinion on the construction to be placed upon them, except in so far as appears from my judgment.

What I have stated above is enough in my opinion for furnishing answers to the questions referred to us so far as those questions are really contemplated by the order of reference. If the mode of dealing with the matter which I have adopted is correct, then the allusions to the policy underlying the Act, which were made by the learned judges who referred the case to us, need not be considered. According to the opinion expressed in

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those judgments, it would appear that, if the first defendant, instead of being the daughter of the assured, had been his wife, her rights would equally have been governed by section 6 of the Married Women's Property Act, as the operation of that section on the wife's rights would equally have been unaffected by the saving clause. I am conscious that, if the reasoning on which I have proceeded in this judgment is correct, and the results arrived at on the basis of that reasoning are not to be modified by any other considerations, then the rights of the widow of the assured might have to be held to be different from the rights of his daughter; inasmuch as the rights of the daughter have been determined by me on the basis that section 6 of the Act governs them, whereas the rights of the widow might have to be determined on the basis that the effect on them of section 6 of the Act is excluded by the saving clause; because the reasons which I have referred to as being sufficient to prevent the operation of the saving clause on the rights of the daughter may have no bearing in a case where the rights of a widow are in question. This result would no doubt be anomalous, but it would be so only if I had expressed the opinion that the Act should be construed solely on the principles adopted in this judgment, even where the rights in question are those of the widow under section 6, and that there is nothing in the policy of the legislature or otherwise to show that the saving clause was not intended to interfere with the operation of section 6 upon the rights of even the widow. If a construction can be put upon the Act which would bring about the result of giving to the widow the same rights, as, according to my view, the daughter has under the Act, it would not necessarily be opposed to the reasoning adopted in this judgment. But I do not feel called upon to express any opinion on that point at present; I allude to it as, in the first place, I wish to guard myself from appearing to lay down that, because I have pursued a particular mode of interpreting this Act in order to arrive at a decision on the questions now before us, that mode of interpreting the Act may not have to be modified by taking into consideration other matters when the question relates to the rights of the widow. I have construed the Act in accordance with the strict meaning of its terms, because I find that it would do violence to the language of the Act to hold that the saving clause prevents the daughter's

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rights from being governed by section 6 of the Act. I do not base any part of my judgment on the considerations on which my learned brothers rely in the referring judgments, viz., the general policy of the legislature, because, for the purposes of the questions now before us, it is unnecessary to rely on those considerations; and I find that, on a strict construction of the Act, the result at which I arrive is the same as would be arrived at on a consideration of what my learned brothers have stated to be the underlying policy of the Act. It is unnecessary to express any opinion on the point whether those considerations would require or permit of the same result being arrived at, when the person whose rights are in question is not the daughter, but the widow, of the assured.

This second appeal came on for hearing on 25th August 1913, after the expression of the opinion of the Full Bench, before SANKARAN NAIR and SADASIYA AYYAR, JJ., who delivered the following judgment:—

In accordance with the opinion of the Full Bench we reverse the decree of the Lower Appellate Court and restore that of the Munsif with costs in this and in the Lower Appellate Court.

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SADASIYA
AYYAR, JJ.

[NOTE.—The Reporter was kind enough to send me a proof of my judgment and it has been approved of as above. F.B.T.]

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Ayling.

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April 1, 2, 3
and 20.

AYDERMAN KUTTI (SON OF THANDAN VALAPPIL EASUP)
AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

SYED ALI (SON OF KOTUSFRI VALAPPIL KOYA) AND ANOTHER
(PLAINTIFFS AND DEFENDANT NO. 8), *

R. CHIDAMBARAM PILLAI *alias* SUBBAYYAN PILLAI
(DEFENDANT NO. 3), APPELLANT,

v.

S. KADERSA ROWTHER AND NINE OTHERS (PLAINTIFFS AND
DEFENDANTS NOS. 1, 2, 4 AND 5 TO 10), RESPONDENTS) †

Muhammedan Law—Minor—De facto guardian's powers over minor's properties—Sale by mother for expenses of minor's sister's marriage, or for the discharge of proper family debt, not binding.

Under the Muhammadan Law, the general rule is that the dealings of a *de facto* guardian of a minor with the minor's properties do not *ipso facto* bind the minor. The rule is however subject to exceptions.

In cases of urgent and imperative necessity, or where the transaction from its nature must necessarily be beneficial to the minor, a *de facto* guardian can alienate the property of the minor, whether moveable or immovable. According to Muhammadan Law, sale of a minor's property by an unauthorised guardian even if it was not made for a valid cause, is neither void nor voidable in the ordinary sense of the terms, but is regarded as *manqus* or dependent, that is, in a state of suspense, its validity or invalidity being determined by the minor adopting or not adopting it after he has attained majority, though the effect of his decision will relate back to the date of inception of the transaction.

A person who chooses to buy a minor's property from a person who has no power to deal with it, however bona fide his action may have been cannot invoke any principles of justice and good conscience to support the transaction itself, though such consideration may be a good ground for the Court refusing to give relief to the minor except on condition of his restituting whatever benefit he has derived from the transaction.

A sale by a mother of the minor's property for finding money for the marriage expenses of the minor's sister or for the discharge of family debts and for other family purposes is not binding on the minor.

SECOND APPEALS against the decrees of T. V. ANANTHA NAIR, the Subordinate Judge of South Malabar at Palghat, in Appeals

* Second Appeal No. 1416 of 1910. † 1639 of 1910.

Nos. 1030 of 1909 and 53 of 1910 presented against the decrees of A. NARAYANAN NAMPIAR, the District Munsif of Palghat in Original Suits Nos. 4 and 248 of 1909.

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The necessary facts appear from the judgment.

Second Appeal No. 1416 of 1910.

T. R. Ramachandra Ayyar and T. R. Krishnaswami Ayyar
for the appellants.

Second Appeal No. 1639 of 1910.

A. Nilakanta Ayyar for the appellants.

C. V. Ananthakrishna Ayyar for the first respondent in both.

ABDUR RAHIM, J.—In both these appeals one common question arises, whether the sale of a minor's property by his mother acting as *de facto* guardian is valid under the Muhammadan law and if so, under what conditions. In one case [Second] Appeal No. 1416, the deed of sale alleges that the shop which was sold had been vacant as the Municipality prohibited the selling of fish and flesh in that shop, that it was in a dilapidated condition, and the mother of the minor who is the eighth defendant, was unable to execute repairs. The sale-proceeds, it is alleged, were applied to the discharge of certain debts contracted for the marriage of a sister of the minor and for other purposes. It was to meet the expenses of this marriage that money was required and the other facts mentioned, apparently furnished the reason for electing this particular property for sale. In Original Suit No. 4 of 1909 which has given rise to Second Appeal No. 1639 of 1910 the allegation in the plaint is that the minor's mother who was managing the family affairs and maintained the children, utilised the money obtained by sale of certain mortgage rights belonging to the minor for the discharge of proper family debts and for other family necessity. The Court of First Instance and the Appellate Court relying on the authority of *Pathumabi v. Vitil Unmachabi* (1), *Durguzi Row v. Pakeer Sahib* (2) and *Abdul Kader v. Chidambaram Chelthiyar* (3), have held in both the suits that the sales even if the allegations as to the purpose be true would not be binding on the minor in Muhammadan law.

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(1) (1903) I.L.R., 28 Mal., 734. (2) (1907) I.L.R., 30 Mad., 197.

(3) (1909) I.L.R., 32 Mad., 276.

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The decisions of the Courts on the question how far the mother or other near relative of a minor who is not a guardian of the minor according to Muhammadan Law with respect to his property but has the custody and upbringing of the minor, is authorised to alienate the minor's property are more or less conflicting. There are two decisions of the Privy Council bearing on the question which must be noticed first; one of these is *Kali Dutt Jha v. Abdul Ali*(1). That was the case of a guardian and with respect to his power their Lordships of the Judicial Committee approved of the statement of the law as contained in Macnaughten's Principles of Muhammadan Law, chapter VIII, clause 14, but they upheld the transaction in question in that case on the ground that there was dispute as to the title of the minor to the property and therefore the rule laid down in Macnaughten did not apply, and also on the ground that the sale was for the benefit of the minor. In *Mata Din v. Sheikh Ahmad Ali*(2) the sale was effected by the minor's mother who had custody of the minor's person and was in possession of his property, in order to pay certain debts binding on the minor and their Lordships held that a person by *de facto* guardianship may assume important responsibilities towards the minor though he cannot clothe himself with legal power to deal with the estate. They declared the sale to be not binding although it was made for the payment of an ancestral debt as it was not made of necessity, nor was beneficial to the minor inasmuch as the facts of the case showed that the sale of the property was unnecessary. It is not clear what their Lordships' decision would have been if the sale was made of necessity or was for the benefit of the minor. Another question was raised before the Judicial Committee in that case whether a sale under the circumstances found there would be void or voidable. Their Lordships refrained from deciding that question. It should also be noted that one of the members of the committee, Mr. SYED AMER ALI observed with some emphasis during the argument that there was no warrant in the Muhammadan Law for sale by the mother of minor sons of immoveable property even for necessity; but though much weight must of course be attached to this observation it cannot be said that the decision of their

(1) (1889) I.L.R., 16 Calc., 627 (P.C.).

(2) (1912) M.W.N., 183 (P.C.).

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Lordships was based on such broad and general grounds. In this Court it was held in *Pathummabi v. Vittil Ummachabi*(1) that the principles of Hindu law relating to alienation by a Hindu widow are not applicable to alienations by the mother of a Muhammadan minor although a sale for the purpose of paying ancestral debts by a co-heir in possession of all the effects of the deceased, if *bonâ fide*, would be binding on the other co-heirs. The principle of this ruling has been followed in *Dugrozi Row v. Fakeer Sahib*(2) and *Abdul Khater v. Chidambaram Chettiyar*(3). In none of these cases was any definite opinion expressed on the general question how far an alienation by a *de facto* guardian which is made for necessity or for the benefit of the minor is valid. Nor was this question decided in *Tati Reddi v. Yaravalli Sahib*(4), an unreported judgment of BENSON, J., and one of us. It was held in *Aliyumma v. Kunhammed*(5) that a guardian's powers in respect of the immoveable property of the ward are very restricted in Muhammadan Law and that urgent necessity or clear benefit to the ward must be shown before an alienation by the guardian could be upheld. In laying down this proposition the learned Judges followed the Privy Council ruling already mentioned, *Kali Dutt Jha v. Abdul Ali*(6) and certain decisions of the Bombay and Calcutta High Courts.

In the Calcutta High Court the law seems to be in a somewhat uncertain state. The earlier decisions confined within very narrow limits the powers of the *de facto* or *de jure* guardian in dealing with a Muhammadan minor's property while in more recent decisions this view has undergone considerable modification. In *Mussamut Bukshun v. Mussamut Doolhin*(7) a sale by a guardian of a minor's property was held not to be permitted by the Muhammadan law except for urgent necessity. In *Bhutnath Dey v. Ahmed Hosain*(8) a mortgage by a person purporting to act as guardian was held to be void as it was not shown that the money raised by the mortgage and utilised for paying arrears of rent could not have been raised otherwise than by mortgaging the

(1) (1903) I.L.R., 26 Mad., 734.

(3) (1909) I.L.R., 32 Mad., 276.

(5) (1911) I.L.R., 34 Mad., 527.

(7) (1869) 12 W.R., 337.

(2) (1907) I.L.R., 30 Mad., 197.

(4) Second Appeal No. 1443 of 1907.

(6) (1889) I.L.R., 16 Calc., 627 (P.C.).

(8) (1885) I.L.R., 11 Calc., 417.

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minor's property. Similarly in *Moyna Bibi v. Banku Bihari Biswas*(1), RAMPINI and PRATT, JJ., set aside a sale by a *de facto* guardian because such a person has no authority to deal with the minor's estate, doubting whether even if the sale was for the manifest advantage of the minor it could be upheld under the Muhammadan law. In *Mafazzal Hosain v. Basid Sheikh*(3) however RAMPINI and WOODROFFE, JJ., decided that a sale for urgent necessity in order to pay the debts due by the deceased and for the maintenance of the minor was valid in Muhammadan Law. WOODROFFE, J., was inclined to place the validity of such a transaction also on grounds of justice, equity and good conscience inasmuch as it was not made out that it was prohibited by Muhammadan Law. It should be noted that the learned Judges distinguished *Moyna Bibi v. Banku Bihari Biswas*(1) on the ground that in that case it was not shown that the transaction was for the benefit of the minor. MACLEAN, C. J. and CARPERAZ, J., in *Ram Charan Sanyal v. Anukul Chandra Acharyya*(3) followed the ruling of RAMPINI and WOODROFFE, JJ., in the last mentioned case and held that a sale by the mother as *de facto* guardian of her minor son is good and valid if it is found to have been made *bonâ fide* for the benefit of the minor. Referring to *Moyna Bibi v. Banku Bihari Biswas*(1) they point out that the effect of that ruling is considerably modified by the ruling in *Mafazzal Hosain v. Basid Sheikh*(2) and have laid down a broader proposition than what forms the basis of RAMPINI and WOODROFFE JJ.'s judgment in *Mafazzal Hosain v. Basid Sheikh*(2) placing the ruling on general grounds of justice, equity and good conscience. But with all deference to the learned Judges there can be no doubt that the question must be determined in accordance with the provisions of Muhammadan Law. Moreover it is difficult to see how a man who chooses to buy a minor's property from a person who has no power to deal with it, however *bonâ fide* his action may have been, can invoke any principles of justice and good conscience to support the transaction itself though no doubt such considerations may be a good ground for the Court refusing to render any help to the minor when he seeks to recover

(1) (1902) I.L.R., 29 Cal., 473. (2) (1907) I.L.R., 34 Cal., 36.
(3) (1907) I.L.R., 34 Cal., 65.

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the property except on condition of his restituting whatever benefit he has derived from the transaction. The other principle indicated in the decision of RAMPINI and WOODROFFE, JJ. and in other rulings, viz., that in Muhammadan law urgent necessity and benefit of the minor is a justifying cause of such a transaction though the person who acted on behalf of the minor had no legal authority of a guardian seems to be a more intelligible ground and requires careful consideration.

In the Allahabad High Court, in *Hasan Ali v. Mehdi Husain*(1), a sale by the mother was upheld on the ground that it was made for necessary purposes, namely the payment of ancestral debts and the charge of maintaining the minor. In *Hamir Singh v. Zakia* (2), a Full Bench of that Court held that a decree duly obtained against one heir who is in possession of the entire estate of the deceased is binding on the minor. In *Sita Ram v. Amir Begum* (3), there are certain general observations of MAHMOOD, J., to the effect that the powers of alienation such as those enjoyed by a Hindu widow are not known to the Muhammadan law, a Muhammadan widow being merely a co-heir with her children and has not the authority of a guardian with respect to their property; and ENGE, C.J., in *Nizam-ud-din Shah v. Anandi Prasad* (4) set aside a mortgage executed by a Muhammadan minor's uncle, which was apparently not created for necessity, on the ground that he had no power of alienation over the property.

Two decisions of the Bombay High Court were brought to our notice: *Baba v. Shivappa* (5) and *Hurbai v. Hiraji Byramji Shanja* (6). In the first case a sale by the mother professing to act as guardian of her minor son was set aside although it was made to discharge certain debts of the minor's deceased ancestor; and in the other case a mortgage by the mother was declared not to be binding as it was made neither for absolute necessity nor for the benefit of the minor. Both the rulings enunciated the general principle that a mother not a legal guardian, cannot bind the estate of the minor by any act of hers.

(1) (1877) I.L.R., 1 All., 533. (2) (1875) I.L.R., 1 All., 57 (F.B.)
(3) (1886) I.L.R., 8 All., 324 at p. 338. (4) (1896) I.L.R., 18 All., 873.
(5) (1896) I.L.R., 20 Bom., 199. (6) (1896) I.L.R., 20 Bom., 116.

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In this state of the rulings it becomes necessary to examine the text books on Muhammadan law to ascertain how a transaction which is entered into by a person who is not the legal guardian but is in fact acting as guardian is regarded in Muhammadan law.

We may take it that the powers of such a person cannot be greater than those of a guardian recognized by the law. The question is whether they have any power at all to bind the minor's estate, or rather in what circumstances, if any, the dealings of a *de facto* guardian with the minor's estate will be upheld? It seems to us to be quite clear from the authoritative pronouncement of Muhammadan jurists as well as upon principles of Muhammadan jurisprudence that while the general rule is that the dealings by such a person do not *ipso facto* bind the minor's estate the law recognizes certain exceptions to this rule. The exceptions are mainly based on the general principles of Muhammadan jurisprudence that necessity is a valid ground for relaxing a strict rule of law and the application of the principle in cases where a minor has no legally appointed guardian seems to be well recognized. The author of Hedaya (see Hamilton Grady's Edition), in laying down that a person who has the protection of an orphan may lawfully take possession of a gift made to the orphan in order to make the gift valid, observes: "Acts in regard to infant orphans are of three descriptions: I.‡ Acts of guardianship, such as contracting an infant in marriage, or selling or buying goods for him [—here, we may point out that the proper translation of the word in the original, namely, * *اموال الغنيمة* *amwel il qinia* which is translated as 'goods' should be animals for breeding purposes]; ‡ a power which belongs solely to the *walee* or natural guardian whom the law has constituted the infant's substitute in those points. II.‡ Acts arising from the wants of an infant, such as buying or selling for him on occasions of need (strictly speaking the translation of the passage in the original Hedaya, viz., * *هراء مالا يد للمغير منه* ought to be 'purchase of what the minor cannot do without and sale of it') or hiring a nurse for him or the like; which power belongs to the maintainer of the infant, whether he be the brother, uncle or (in the case of a foundling) the *Mooltakit* or take-up, or the mother, provided she be maintainer of the infant; and as these are empowered with

respect to such acts, the *walee* or natural guardian, is also empowered with respect to them in a still superior degree; nor is it requisite, with respect to the guardian that the infant be in his immediate protection. III.‡ Acts which are purely advantageous to the minor such as accepting presents or gifts and keeping them for him: a power which may be exercised either by a *Mooltakit*, brother or uncle, and also by the infant himself, provided he be possessed of discretion, the intention being only to open a door to the infant's receiving benefactions, of an advantageous nature. The infant therefore is empowered in regard to these acts (provided he be discreet) or any person under whose protection he may happen to be." It should be observed that the sale and purchase mentioned as belonging to the first category of enumerated transactions which are stated to be within the power of a lawful guardian but not of a person who is not such a guardian but has in fact the custody of the minor are in the nature of transactions entered into for purposes of profit. This text however, be it also noted here, does not deal with the question under what conditions such sales and purchases by the guardian will be binding on the minor. Stated in plain language the law according to the Hedaya is this: A person who is in actual charge of the property and person of the minor is empowered to do acts which are of imperative necessity having regard to the wants of the infant and acts which by their nature are necessarily advantageous to the infant. Such acts are not confined to dealings with any particular form of property of the minor so far as it can be gathered from the language of the Hedaya and the other text books which will be presently noticed and the very principle upon which the validity of such acts is based precludes the idea of any such limitation. The rule enunciated by the Hedaya is accepted as good law by other jurists of the Hanafi school. Imaun Zailai in his well-known commentary on Kanz, viz., *Tahinul Haqaiq*, volume VI, at page 34 in the chapter on sales also states the law in similar terms. He says that the power which the law allows to be exercised over a minor is of three kinds:—"(1) what must be advantageous to the minor and such power exists in all who have charge of the minor, whether guardians or not, for example the acceptance of a gift or alms, and such acts can be done by the infant himself if he is

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of the age of discretion; (2) what is absolutely injurious such as divorcing the minor's wife or emancipating a slave, such authority is not recognized in any one; (3) what is midway between the two, that is what may be advantageous or hurtful to the minor such as sale or hiring of property for purposes of profit such power is possessed only by the father, the grandfather and their executors, whether they have the actual custody of the minor or not, because their power to deal in this manner with the minor's property is by reason of their guardianship. Therefore it is not a necessary condition of the exercise of such power by them that the minor should be in their actual custody. This is how it is stated in *Alkafi*. The hiring of a nurse belongs to the first category; and (4) giving the minor in marriage—this is a power possessed by all *Asha*, or paternal kindred as it is usually translated, and also by *Zavilarham* or distant kindred, in the absence of paternal kindred. None others possess this power."

In *Majuna-ul-Auhar* which is a commentary of *Mooltakan-l-Abhar* it is pointed out that, according to *Ashshafi* and *Malik* the *de facto* guardian can buy or sell for the minor only with the permission of the Judge but the author does not doubt, that the Hanafi law, which is the law governing the parties in this suit is, as stated in the text of *Mooltaga* in the same terms as in the *Hedaya* and *Kave*. It is not necessary to refer to the other Arabic text books on this point, as there seems to be no difference of opinion so far as the Hanafi jurists are concerned, and all the text books repeat the statement of the law as cited above. The principle of the rule is also forcibly illustrated in the provisions of Muhammadan law regarding the powers of an executor in connection with the question whether where more than one executor have been appointed by the testator one of them can act singly. The general rule is that one of two joint executors cannot act alone but an exception is recognized in such matters as are of urgent necessity and purely for the benefit of the estate. Thus in the *Hedaya* (See Hamilton's translation, Grady's edition, volume IV, chapter VII, page 699) the matters in which one of two joint executors can act singly are thus enumerated—payments of funeral charges or for purchasing the victuals or cloths for the infant children of the testator, restoring a depo-it, preserving the estate, discharging the debts, acceptance of a gift for

an infant, the hiring of a nurse, the selling of goods of a perishable nature, preserving the property of the deceased. In all such matters one of the joint executors is permitted to act alone on two grounds; urgent necessity or clear benefit and advantage to the estate. We may also point out here that according to the general principles of Muhammadan law, sale of a minor's property by an unauthorised guardian even if it was not made for a valid cause, *i.e.*, of necessity or in circumstances which would make the transaction purely advantageous to the minor, would strictly speaking be neither void nor voidable in the ordinary sense of the terms. An alienation of the minor's property without any justifying cause is regarded as *Manquf* or dependent, that is to say, its validity will depend upon the minor accepting the transaction on attaining majority. It cannot be said to be operative until it is avoided nor can it be said to be invalid unless and until it is ratified. It is a transaction in a state of suspense, its validity or invalidity is only determined by the minor adopting or not adopting it after he has attained majority though the effect of his decision will relate back to the date of inception of the transaction. If he accedes to adopt the transaction it becomes valid from the inception; otherwise it will be treated as void and of no effect from the very commencement. Some Hanafi jurists are inclined to classify such transactions under the head of *Sahiba* or legally correct transactions on the ground that the subject-matter dealt with being fit for the purpose and the parties to the transaction being majors the contract is validly constituted and that is all that is required to make a transaction *Sahiba* or legally correct, though it will not be operative until the minor on whose behalf the transaction was entered into notifies his assent on attaining majority. But the question as to the exact nomenclature applied to such a transaction in Muhammadan jurisprudence is of no substantial importance, all that we are concerned with its legal effect. (See *Bahrurraiq*, volume VI, page 75). The law as regards the effect of dealings with a minor's property by a *de facto* guardian otherwise than in a case of absolute necessity or clear advantage to the minor is but a corollary of the general rule relating to *Salisly*, a person professing to deal with another's property, but without having legal authority so to do, *i.e.*, by a

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Fazuli as he is technically called ; such sales generally are treated as *Manquf* or dependent. The subject is discussed in Hedaya, volume II, chapter X, section 'of *Fazooaba Bea* or the sale of the property of another without his consent,' Grady's edition of Hamilla, page 296, Bailliea on the Muhammadan Law of Sale, pages 218, 220, 221, 249, Qadi Khan, volume II, page 172 (original); *Tabi' nul-haqaiq*, volume IV, page 44 (original); *Raddul Moohtar* (original), volume IV, page 110; *Bahrurraiq* (original), volume VI, pages 75 and 76; *Alimajallah* (original), page 53; *Fatus Alagamiri* (original), volume II, Calcutta edition, page 235. The result of the above discussion is that according to Muhammadan jurists, in cases of urgent and imperative necessity, such as those mentioned, the *de facto* guardian can alienate the property of the minor, no distinction being made between moveable and immoveable property. Also such a person can do acts on behalf of the minor which from their nature must necessarily be beneficial to the minor. In either class of cases there seems to be no substantial difference between the power of such a person who has assumed the duties of a guardian without lawful authority and of a legal guardian. But there are other powers which a lawful guardian can exercise which are not within the competence of other persons. It may be observed here that an act by which the wants of the minor are met must to that extent be also advantageous to the minor, and that is apparently why some of the text writers regard acts done of necessity in the same light as acts which are purely for the benefit of the minor (See Fathul Moyeen, volume III, chapter on Abominations, section, sale, page 410).

It should be pointed out that in Macnaghten's Precedents of Muhammadan law it is stated in case 6 at page 171 that a mother who has assumed the guardianship of her minor son cannot exercise any right over the property of the minor. This, as a statement of the general rule, is undoubtedly correct, but the leading authorities as we have shown, recognize certain exceptions to this rule. The case cited by Macnaghten in which a mother sells a small portion of her minor son's property for resuming the estate and recovers judgment in the suit would seem to be a case of absolute necessity and pure advantage to the minor. Such

a sale is however stated to be totally illegal and inadmissible. This would seem to be in conflict with the case in chapter VII, page 305, where it is laid down that where the uncle of a minor, jointly interested in the property, sells both his own share and the share of the minor, such a sale may be valid under certain circumstances such as when the minor's share is sold for double its value, or where there is no means of supporting him without recourse to sale of his property, or where the land is in danger of being lost, or with a view to save the minor's property from usurpation or when some similar emergency has arisen. At all events, according to authoritative Hanafi jurists there can be little doubt that the law is as we have stated it and the general trend of the decisions of the courts seems to be substantially to the same effect.

In the present cases the sales were clearly not of the character which would be upheld on the ground either of their being made of necessity or being by their nature necessarily beneficial to the minor. The sale which is in question in Second Appeal 1416 was really made to find money for the expenses of the minor's sister's marriage and neither this nor the grounds on which the sale which is in dispute in Second Appeal 1639 are justified, viz., the discharge of family debts and other family purposes, can be said to be justifying causes according to the rule of Muhammadan law.

In Second Appeal No. 1416 an objection was taken to the decree which directs the division of the shop in as many as 54 shares on the ground that it does not make any provision for the sale of the shop in case such a division cannot be conveniently effected. But the objection was not taken in the lower courts and we are not prepared to hold that such an order, if found to be necessary, cannot subsequently be made by the court which passed the decree. See *Bai Hirakore v. Trikamdas* (1). In Second Appeal No. 1639 it was argued by the pleader for the appellant that the suit was barred on two grounds : firstly, even if the findings of the court be accepted that Jamal Muhammad Pulavar, the tenth defendant attained majority in January 1906, the suit which was instituted on the 3rd January 1909 was time

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(1) (1908) I.L.R., 32 Bom., 103.

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barred. We find that the verification of the plaint is dated the 23rd December 1908 but the plaintiff did not apparently file the plaint until 4th January 1909. If the court re-opened after the Christmas vacation on the 4th of January 1909, the suit would be within time and if the objection now taken had been taken in the lower court this apparently would have been the answer. The question not having been raised before the lower courts and being one involving an investigation of facts cannot be entertained for the first time in Second Appeal.

The second ground on which it is contended that the suit is barred is, that although the tenth defendant could avail himself of three years' time after the attainment of majority, the plaintiff as his assignee cannot be allowed such execution of time. This question again was not raised in the lower courts and in the circumstances which are stated in paragraphs Nos. 15 and 16 of the judgment of the District Munsif in (Original) Suit No. 248, we do not think we should allow the objection to be raised for the first time here.

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The result is both the appeals are dismissed with costs.

AYLING, J. :— I agree.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

N. RAMAKRISHNA AYYAR (DEFENDANT), APPELLANT,

v.

V. SETHARAMA AYYAR (PLAINTIFF), RESPONDENT.*

1912.
April 26
and May 2.

Easement—Right of support—Disturbance—Actual damage when necessary, to support action—Temporary structure, whether an easement of support acquirable in respect of.

No actual damage is necessary to support an action for the disturbance of an easement of support for a building :

Contra, where the disturbance is of a natural right of support.

Buckhouse v. Bonomi (1861) 9 H.L.C., 503, referred to.

The rule requiring actual damage is applicable only to an action for damages, but actual damage is not necessary to entitle a person having a right of support, to relief by way of injunction.

Corporation of Birmingham v. Allen (1877) 6 Ch. D., 284, followed.

Quære : Whether a right of support can be claimed for a temporary structure, which has been in existence for the statutory period ?

Maberley v. Dawson, 5 L.J. (Common Law) K.B., 261, referred to.

SECOND APPEAL against the decree of A. F. PINHEY the District Judge of Trichinopoly, in Appeal No. 256 of 1909, presented against the decree of S. MAHADEVA SASTRIYAR the District Munsif of Trichinopoly, in Original Suit No. 2384 of 1908.

The necessary facts appear from the judgment.

V. C. Seshachariar for the appellant.

T. R. Venkatarama Sastriar for the respondent.

The Judgment of the Court was delivered by

SUNDARA AYYAR, J.—In this case the plaintiff and defendant purchased adjacent houses. The wall between the two houses belongs to the defendant. The plaintiff has an upstairs shed in his house which is supported on one side by the defendant's parapet wall CD. The suit is *inter alia* to restrain the defendant from interfering with his right of support. Both the lower Courts have found that the plaintiff has been in enjoyment of the right of support for more than the period prescribed in section 15 of the Easements Act. The plaintiff has been given

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a decree restraining the defendant from interfering with the plaintiff's right of support.

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Two points have been argued in this Second Appeal. The first is that the shed is only a temporary one and not permanently attached to plaintiff's house and that no right of support can be claimed for such a structure. But this contention was not raised in the Lower Courts. The point of contest there was as to how long the shed had been in existence and not the nature of the shed. It was not contended there that the shed should not be regarded as a permanent one from its very nature. *Maberley v. Dowson*(1) relied on for the appellant is really of no use to him. In that case which related to the right to light and air it was found that the structure in question was only of a temporary nature. But here as already pointed out no such contention was raised. As a matter of fact the shed seems to be of a permanent character with walls on three sides. It is however unnecessary to decide that point as it was not properly raised in the lower Courts.

The next contention is that as the defendant has not deprived the plaintiff of his support and as the plaintiff has sustained no damage by any act done by the defendant, the plaintiff has no cause of action and the decision in *Backhouse v. Bonomi*(2) is relied on. That case related to interference with the natural right of support but not to disturbance of a right to support as an easement. The distinction between the two classes of cases is pointed out in *Backhouse v. Bonomi*(2) by Lord WENSLEYDALE; see also *Goddard on Easements*, fourth edition, page 401. Moreover it was held in *Corporation of Birmingham v. Allen*(3), that actual damage is not necessary to entitle a person having the right to support to an injunction and the rule requiring damage was applicable only to an action for damages. The reason for holding that actual damage is necessary to sustain a suit for damages where a natural right of support from the soil of an adjoining owner has been infringed does not seem to be applicable where the disturbance is of a right by easement to superficial support.

The next question raised is whether the plaintiff is entitled to an injunction requiring the defendant to rebuild the cornice

(1) 5 L.J. (Common Law) K.B., 261. (2) (1861) 9 H.L.C., 503 at p. 513.
(3) (1877) 8 Ch. D., 284.

pulled down by him in FA marked in the plan. The cornice was admittedly on the defendant's side and an appurtenance to his wall. The District Munsif disallowed the injunction on the ground that plaintiff failed to prove that any damage was caused to him. The District Judge has not really reversed that finding. He merely says that "it is defendant's wall that is likely to suffer, but if it does, it will cause much harm to plaintiff's house and little to defendant." It is admitted that there is no evidence on record that the wall is likely to suffer by the removal of the cornice. We set aside the District Judge's decree in so far as it modified that of the Munsif and restore the Munsif's decree. The parties will bear their respective costs in this and in the lower Appellate Court.

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APPELLATE CIVIL.

*Before Sir Charles Arnold White, Kt., Chief Justice and
Mr. Justice Benson.*

VAITHILINGAM MUDALI (FIRST PLAINTIFF), APPELLANT,

v.

MURUGAIAN alias NATESA MUDALI (MINOR, SON OF
AKSHAYALINGA MUDALI REPRESENTED BY ANJALAI ANNI, GUARDIAN
ad litem (DEFENDANT), RESPONDENT.*

1912.
April
18 and 28
and May 2.

*Hindu Law—Adoption—Adoption of an orphan—Estoppel—Presumption in favour
of adoption, when arises—Practice—Conversion of suit in ejectment into one
for partition.*

Only the parents of a child can give him in adoption and therefore an orphan cannot be validly given in adoption either by himself or by any one else.

Subbaliuammal v. Ammakutti Ammal (1864) 2 M.H.C.R., 129, *Balvantrav
Bhaskar v. Bayabhai et al* (1869) 6 B.H.C.R. (O.C.J.), 83 and *Bashetiappa v.
Shivalingappa* (1878) 10 B.H.C.R., 268, applied.

An invalid adoption does not *per se* destroy the adoptee's rights in his natural family.

Bhavani Sankara Pandit v. Ambabay Ammal (1863) 1 M.H.C.R., 363 and
Lakshmappa v. Ramadai (1875) 12 Bom. H.C.R., 364 at p. 397, followed.

No estoppel arises in such a case unless in consequence of the adoption, the position of the party setting up the estoppel is changed to his disadvantage, so

* Second Appeal No. 1216 of 1903.

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as to render it inequitable that the adoptee should be restored to his place in his natural family.

Gopalayyan v. Raghupatiayyan (1878) 7 M.H.C.R., 250 and *Parvatibayamma v. Ramakrishna Rau* (1895) I.L.R., 18 Mad., 145, followed.

No presumption in favour of an adoption arises in the absence of evidence of the giving or acceptance or of circumstances by which such a presumption can be supported, though the adoption may have taken place long before, and been acquiesced in by all concerned.

Anandráv Shivaji et al v. Ganesh E. Bokil (1870) 7 B.H.C.R., Appx. xxxiii at p. xxxiv, distinguished.

A suit in ejectment cannot be converted into a suit for partition.

SECOND APPEAL against the decree of F. D. P. OLDFIELD the Acting District Judge of Tanjore, in Appeal No. 565 of 1907 presented against the decree of A. S. KRISHNASWAMI AYYAR the District Munsif of Tirutturaippundi, in Original Suit No. 75 of 1905.

The necessary facts appear from the judgment.

S. Muthia Mudaliyar for the appellant.

T. V. Gopalaswami Mudaliyar for the respondent.

The Judgment of the Court was delivered by

WHITE, C.J.
AND
BENSON, J.

BENSON, J.—The facts out of which this Second Appeal arises may be stated as follows:—

There were four divided brothers in a Hindu family. The plaintiffs are two of these. Another was Akshayalinga, who was apparently adopted by one Subba Mudaliar in 1873; but in the course of the suit it was found that the adoption was invalid because both the father and mother of Akshayalinga were dead at the time of his apparent adoption. The fourth brother was Viswalinga, who died in 1892. The dispute is in regard to his property. The plaintiffs claimed it as his reversionary heirs, and their suit was to recover it from the defendant, who is the son of Akshayalinga, and who is said to have trespassed upon it in 1901. The defendant originally claimed the property as the self-acquisition of Akshayalinga, purchased *benami* in the name of Viswalinga, but both the Courts below found against that plea. In the alternative defendant resisted the plaintiff's suit on the ground that, as the adoption of Akshayalinga was invalid, he (defendant) had not lost his rights in his natural family, and was therefore entitled to one-third of the property, and plaintiff could not recover even the remaining two-thirds in this suit as it is framed as a suit in ejectment against a trespasser, and cannot be converted into a suit for partition. The

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BENSON, J.

District Judge accepted this alternative defence and dismissed the plaintiff's suit.

The plaintiffs appeal. They contend that the adoption of Akshayalinga having been made so long ago as 1873, and having been treated as a valid adoption by Akshayalinga himself (Exhibit J in 1878) and by Subba Mudaliar (see his will, Exhibit II in 1898) and generally by the family, the defendant cannot now deny the validity of the adoption. It is not, however, shown how any estoppel arises against the defendant's plea. The four brothers were divided before Akshayalinga's apparent adoption, and it is not shown that in consequence of the adoption, the plaintiffs' position has been in any way changed to their disadvantage, so as to render it inequitable that the defendant should be restored to his place in his natural family. This appears to be the test which should be applied in accordance with the principle underlying the decisions in *Gopalayyan v. Raghupatiayyan*(1) and *Parvatibayamma v. Ramakrishna Rau*(2). It is hardly necessary to quote authority for the proposition that an invalid adoption does not *per se* destroy the adoptee's rights in his natural family. *Bhavani Sankara Pandit v. Ambabay Ammal*(3), approved in *Lakshmáppá v. Ramává*(4).

But it is contended for the plaintiffs that the apparent adoption having taken place so long ago as 1873 and having been acquiesced in by all concerned for so long, it ought to be now presumed by the Court that the adoption was made in pursuance of an authority given by some person competent to give away the son in adoption. No doubt that presumption was raised in *Anandráv Shivaji et al v. Ganesh E. Bokil*(5), but no authority for the decision is quoted, and that case was essentially different from the present case, for there the adoptee desired to maintain the adoption, whereas in the present case the adoptee's son disclaims it, the adoptee being dead. No doubt if there was evidence that Akshayalinga's father gave him to Subba Mudali and the latter accepted him with a view to adoption, the adoption though made years afterwards, and after the death of the father, would be valid because there was the essential giving and taking of the child with a view to adoption.

(1) (1878) 7 M.H.C.R., 250.

(2) (1895) I.L.R., 18 Mad., 145.

(3) (1863) 1 M.H.C.R., 363.

(4) (1875) 12 Bom. H.C.R., 364 at p. 397.

(5) (1863) 7 B.H.C.R., App. xxxiii at p. xxxiv.

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Venkata v. Subbadra(1). But there is no such evidence in the present case, nor are there any other circumstances by which the suggested presumption could be supported. There is abundant authority that no one but the parents of a child can give him away in adoption and therefore that an orphan (as Akshaya-linga was at the time of adoption) cannot be given away in adoption either by himself or by any one else. *Subbáluvammál v. Ammakutti Ammál*(2), *Balvantráv Bháskar v. Bayá-bháí et al*(3) and *Báshetiappá v. Shivlingáppá*(4).

We therefore hold that the adoption of Akshayalinga was invalid, and that the defendant has not lost his rights in his natural family.

We think that the District Judge is right in holding that the present suit, which is one in ejectment, cannot be properly converted into a suit for partition so as to give plaintiffs a decree for two-thirds of the plaint property. There may well be other property which would have to be brought into hotchpot if the plaintiffs should sue for partition.

Their right to obtain partition in a suit properly framed for the purpose is apparently not yet barred, and they must be left to that remedy.

We dismiss the Second Appeal with costs.

(1) (1884) I.L.R., 7 Mad., 548.

(2) (1864) 2 M.H.C.R., 129.

(3) (1869) 6 Bom. H.C.R. (O.C.J.), 83.

(4) (1873) 10 B.H.C.R., 268.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice
Sadasiva Ayyar.

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

v.

A. RAMABRAHMAM (PLAINTIFF), RESPONDENT.*

Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 3—Failure to perform a contract, whether, 'an act' within article 3—Suit to recover money under a contract with Government, whether of a small cause nature—Second appeal.

Failure by an officer of Government to carry out a contract under which the plaintiff was entitled to a sum of money on account of certain constructions made by him, is not 'an act' purporting to be done by an officer of Government in his official capacity within the meaning of article 3, schedule II of the Provincial Small Cause Courts Act (IX of 1887). The article applies only to a suit relating to some distinct act done by an officer of Government.

Rajmal Manikchand v. Hanmant Anyaba (1896) I.L.R., 20 Bom., 697 and *Chhaganlal Kishoredas v. The Collector of Kaira* (1911) I.L.R., 35 Bom., 42, applied.

Bunwari Lal Mookerjee v. The Secretary of State for India (1890) I.L.R., 17 Calo., 290 and *Mothi Rungaya Chetty v. The Secretary of State for India in Council* (1905) I.L.R., 28 Mad., 213 referred to.

A suit to recover a sum of money less than Rs. 500 under such a contract is a suit of a small cause nature, and no Second Appeal lies.

SECOND APPEAL against the decree of T. GOPALAKRISHNA PILLAI, the Subordinate Judge of Kistna at Ellore, in Appeal No. 470 of 1909 preferred against the decree of S. RAGHAVA AYYANGAR, the District Munsif of Ellore, in Original Suit No. 354 of 1907.

The necessary facts appear from the judgment.

G. S. Ramachandra Ayyar for the Government Pleader for the appellant.

B. Somayya for P. Narayanamurthi for the respondent.

JUDGMENT.—The suit in this case was for recovering the amount due to the plaintiff under a contract entered into by him with the Government whereby he undertook to repair a tank and build a pipe sluice. The plaintiff's case was that the plain-

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* Second Appeal No. 99 of 1911.

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—
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plaintiff had performed his part of the contract and was entitled to the amount due to him under it. The defendant pleaded that the plaintiff had not carried out the work undertaken by him. The District Munsif dismissed the suit, but on appeal the plaintiff got a decree in the Subordinate Judge's Court. Defendant appeals to this Court.

A preliminary objection is taken that no Second Appeal lies in this case as the amount sought to be recovered is less than Rs. 500 and the suit is of a small cause nature. It is contended for the defendant that a suit of this kind is exempted from the cognizance of the small cause court by article 8 of the second schedule to the Provincial Small Cause Courts Act. That article is in these terms:—"A suit concerning an act or order purporting to be done or made by any other officer of Government in his official capacity or by a Court of Wards, or by an officer of a Court of Wards in the execution of his office." The question is whether this can be regarded as a suit concerning an act purporting to be done by an officer of Government in his official capacity. We are of opinion that it cannot. The article applies to a suit relating to some distinct act done by an officer of Government. We do not think that a mere failure to carry out a contract can be regarded as such an act. In *Rajmal Manikchand v. Hanmant Anyaba* (1), it was held that the expression 'an act purporting to be done' in section 80 of the Civil Procedure Code was not applicable to the failure to perform a contract. *Chhaganlal Kishoredas v. The Collector of Kaira* (2) merely held that section 80 was not confined in its operation to torts but was applicable wherever there was a distinct act done by an officer of Government. In that case there was a declaration made by an officer in virtue of a power vested in him under a statute and that was held to amount to an act. In *Bunwari Lal Mookerjee v. The Secretary of State for India* (3) the Calcutta High Court held that a suit for compensation for damages for injury done to an article of the plaintiff carried by a State Railway did not come within the purview of article 8 and was cognizable by a Small Cause Court. In *Mothi Rungaya Chetty v. The Secretary of State for India in Council* (4) this Court held that a suit for damages sustained by the plaintiff in consequence of the Postal Department

(1) (1896) I.L.R., 20 Bom., 697.

(3) (1890) I.L.R., 17 Cal., 290.

(2) (1911) I.L.R., 35 Bom., 42.

(4) (1905) I.L.R., 28 Mad., 123.

delivering an article without collecting the value of it due from the addressee (the article being sent by value payable post) was not a suit which could be held to relate to an act done by the Postal officer concerned in his official capacity.

We must uphold the preliminary objection and dismiss the Second Appeal with costs.

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APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice
Sadasiva Ayyar.

MARUTHAMALAI GOUNDAN (DEFENDANT), APPELLANT,

v.

PALANI GOUNDAN [(DIED) BY GUARDIAN NANJAKKAL]
(PLAINTIFF), RESPONDENT.*

1912.
August 9.

Minor—Guardian ad litem, appointment of, procured by suppression of the existence of near relation—Whether decree liable to be set aside—Fraud.

In a suit for the recovery of money against a father and his minor son, the father refused to act as guardian *ad litem* of his minor, whereupon the Court appointed its Head Clerk as guardian on the affidavit of the plaintiff that there was no fit and proper person alive to act as the guardian of the minor, while as a matter of fact the plaintiff knew that the minor was living under the protection of his maternal grandfather. The decree passed in the suit was sought to be set aside by the minor on the ground of fraud abovementioned.

Held, that the statement in the affidavit could not be held to be deliberately false so as to constitute fraud, in the absence of any allegation of collusion between the plaintiff and the Head Clerk, and the decree could not be set aside unless there was no appointment of a guardian *ad litem* or the appointment was induced by fraud or what the Court would regard as tantamount to fraud.

Hanuman Prasad v. Muhammad Ishaq (1906) I.L.R., 28 All., 137, *Ram Chandra Das v. Joti Prasad* (1907) I.L.R., 29 All., 675 and *Babaji bin Kusaji v. Maruti* (1874) 11 Bom. H.C.R. 182, distinguished.

SECOND APPEAL against the decree of K. SREENIVASA RAO, the Subordinate Judge of Coimbatore, in Appeal No. 204 of 1910, presented against the decree of T. R. KUPPUSAMI AYYANGAR, the District Munsif of Coimbatore, in Original Suit No. 39 of 1909.

The facts are fully set out in the judgment.

* Second Appeal No. 845 of 1911.

MARUTHA-
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v.
PALANI.
—
SUNDARA
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ATTAR, JJ.

T. Rangachariar and V. Narasimha Ayyangar for the appellant.

O. K. Mahadeva Ayyar for the respondent.

JUDGMENT.—This is a suit by a minor to set aside the decree passed against him in Original Suit No. 1165 of 1906 on the ground of fraud. That decree was passed both against the plaintiff and his father. The suit was for a debt due by the father in connection with a certain partnership transaction. The plaintiff in that suit, that is the defendant here, asked that the father should be appointed as guardian *ad litem*. The father refused to act as guardian. Then on the defendant's application the Head Clerk of the Court was appointed as guardian *ad litem*. The fraud charged in the plaint is that the defendant knew very well that the plaintiff was living with his mother under the protection of his maternal grandfather and that the maternal grandfather was a person fit and willing to act as guardian for the minor. In other words the charge is that the defendant was guilty of fraud by suppressing information which he had. The District Munsif dismissed the suit. On appeal the Subordinate Judge reversed his judgment and set aside his decree. The Subordinate Judge's judgment proceeds on the ground that there was a deliberate false statement in the affidavit put in by the defendant in support of his application to appoint the Head Clerk as guardian *ad litem*. The statement referred to is that there was no fit and proper person alive who could be appointed guardian *ad litem* for the minor appellant in Original Suit No. 1165. This affidavit had not been put in evidence before the District Munsif but it was admitted by the Subordinate Judge. It is difficult to see how the statement that there was no fit and proper person who could be appointed as guardian *ad litem* could be regarded as deliberately false. It amounted to no more than a statement that in the view of the defendant there was no one who was fit and proper to be appointed. The Court acted on that affidavit and appointed the Head Clerk as guardian *ad litem*. It may be that the Court should have made further enquiry before acting on that affidavit and called upon the defendant to state what relations the minor had with a view to ascertain whether any of them would be fit and proper to be appointed as guardian *ad litem*. The appointment was the result of a judicial order based on evidence which the Court considered sufficient.

it was really insufficient, that is no justification for holding that the defendant was guilty of fraud. It is not alleged that there was any collusion between the Head Clerk and the defendant in pursuance of which the defendant applied for the appointment of that officer as guardian *ad litem*; nor is it alleged that the defendant induced the Head Clerk not to put in a defence. The proceedings in the suit were regular so far as they went, though it may be that the Court might have taken more care in making the appointment of a guardian *ad litem*. *Hanuman Prasad v. Muhammad Ishag*(1) is not analogous to the present case. There the Court did not appoint any one as guardian *ad litem*. It was the duty of the plaintiff in the suit to get such appointment made. A relation of the minor interfered and conducted the proceedings but it was found by the Court that he acted with gross negligence. Two other cases were relied on for the respondent, viz., *Ram Chandra Das v. Joti Prasad*(2) and *Babaji bin Kusaji v. Maruti*(3). In those cases the question arose in the course of the proceedings in which the guardian *ad litem* was appointed and the point that the Court had to decide was whether the appointment should be upheld. The present is a very different case. The plaintiff cannot by a fresh suit get the decree set aside, unless either there was no appointment of a guardian *ad litem* at all or the appointment was induced by fraud, or what the Court would regard as practically tantamount to fraud.

It is then urged that the Head Clerk who was appointed as guardian *ad litem* did not defend the suit, but the ground on which the plaintiff came to Court was not that there was gross negligence in the conduct of the suit by the guardian *ad litem* such as would justify the Court in setting aside the decree. Consequently no issue was framed on any such question, nor does the Subordinate Judge base his judgment on that ground. We reverse the decree of the Subordinate Judge and restore that of the District Munsif with costs here and in the lower Appellate Court.

(1) (1906) I.L.R., 28 All., 137. (2) (1907) I.L.R., 29 All., 675.
(3) (1874) 11 Bom. H.C.B., 182.

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APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice
Sadasiva Ayyar.

1912.
August 12.

B. CHINNAYYA AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

P. ACHAMMAH (PLAINTIFF), RESPONDENT.*

*Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 28—Suit of a
Small Cause nature—Second Appeal.*

Plaintiff sued for the recovery of certain jewels which she had presented to her son-in-law at the time of his marriage with her daughter, basing her claim on a caste custom by which she was entitled after the death of the pair, to a return of the jewels presented by her.

Held, that the right claimed was a right based as upon a conditional gift and not a right to inherit the jewels as the property of the bridegroom or the bride, and article 28 of schedule II of Act IX of 1887 did not apply to such a case. No Second Appeal lay as the suit (being for the recovery of less than Rs. 500) was within the cognizance of the Small Cause Court.

SECOND APPEAL against the decree of D. RAGHAVENDRA RAO PANTULU, the temporary Subordinate Judge of Vizagapatam in Appeal No. 834 of 1909, presented against the decree of K. SAMBASIVA RAO NAYUDU, the District Munsif of Vizagapatam, in Original Suit No. 325 of 1908.

"The plaintiff alleges that the plaintiff made certain presents to her son-in-law on the occasion of the marriage of her daughter and the son-in-law. Both the son-in-law and the daughter died subsequently. The daughter died after her husband; now the allegation in the plaint is that the 'plaintiff is entitled, after the death of the pair according to the custom of the caste, to those (i.e., presents) presented by the plaintiff's family, and defendants are entitled to those presented by the defendant's family.'" The defendant against whom a decree was passed for the value of the jewels preferred this Second Appeal. The other facts and arguments appear from the judgment.

P. Narayanamurti for the appellants.

V. Ramesam for the respondents.

JUDGMENT.—A preliminary objection is taken in this case that no Second Appeal lies against the decision of the Subordinate Judge as the suit is of a Small Cause nature and as the

amount sought to be recovered by the plaintiff is less than Rs. 500. The learned vakil for the appellants contends that the cognizance of this suit by the Small Cause Court is barred by article 28 of the second schedule to the Provincial Small Cause Courts Act. The question is whether this is a suit for the whole or for a share of the property of an intestate. If the plaintiff seeks to claim the property as heir of any person then apparently article 28 would apply. The maintainability of the Second Appeal therefore depends on the construction to be placed on the plaint. As we read the plaint, the suit is clearly not based on the plaintiff's right to inherit but on her right to the return of jewels presented by her. The claim is rather a curious one.

"The plaint alleges that the plaintiff made certain presents to her son-in-law on the occasion of the marriage of her daughter and the son-in-law. Both the son-in-law and the daughter died subsequently. The daughter died after her husband; now the allegation in the plaint is that the 'plaintiff is entitled, after the death of the pair according to the custom of the caste, to those (i.e., presents) presented by the plaintiff's family, and defendants are entitled to those presented by the defendant's family.'" What was sought to be proved was that on the death of the bride and the bridegroom the plaintiff was entitled to the return of the presents made to the bridegroom. It is not stated in the plaint that the plaintiff was the heir either of the bridegroom or the bride with respect to the property inherited by the latter from her husband. In the case of heirship the property in question is taken from the person whose heir the plaintiff claims to be as his or her property. The claim is, as we understand it, not to inherit the property of the bridegroom or of the bride but to a return of what was presented, the basis of the action being that the right derived under the gift made on the occasion of the marriage determined on death of the bridegroom and the bride, and the property returned to where it was before or rather to the parents of the bride. It is a case of the determination of the right granted and the revival of the original right of ownership and not a case of inheritance from the person to whom the presents were given. Article 28 is therefore not applicable and as no other article bars the cognizance of the suit by the Small Cause Court it must be held to be of a Small Cause nature and the Second Appeal must be held to be incompetent. On this ground we dismiss the Second Appeal with costs.

CHINNAYYA
v.
ACHAMMAH.
—
SUNDARA
AYYAR AND
SADASIVA
AYYAR, JJ.

* Second Appeal No. 810 of 1911.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice
Sadasiva Ayyar.

1912.
August 13.

T. P. KANTHIMATHINATHA PILLAI (PLAINTIFF IN ALL THE
CASES), APPELLANT IN ALL THE CASES,

v.

MUTHUSAMIA PILLAI AND FOUR OTHERS (DEFENDANTS),
RESPONDENTS. *

Madras Estates Land Act (I of 1908)—Tender of patta not necessary to recover
rent though accrued due prior to the Act—Limitation, when begins to run
in respect of claim for rent.

In a suit for recovery of rent, time runs from the time the rent became due
according to the terms of the tenancy and not from the end of the fasli.

Arunachalam Othettiar v. Kadir Rowthen (1906) I.L.R., 23 Mad., 556,
applied.

Rangayya Appa Rao v. Bobba Sriramulu (1904) I.L.R., 27 Mad., 143 (P.O.)
distinguished.

Tender of patta is not a condition precedent to the maintainability of a suit
for the recovery of arrears of rent instituted after the Madras Estates Land
Act came into force, though such rent may have accrued due before that.

Veerabhadra Raju v. Kumari Naidu (1912) 22 M.L.J., 451, followed.

Even under the Rent Recovery Act (VIII of 1865) the tender of patta was
not necessary to complete the landholder's right to rent, but was only a con-
dition to be fulfilled if legal proceedings had to be instituted for the enforce-
ment of the landholder's rights.

Appa Rao v. Rainam (1890) I.L.R., 13 Mad., 249, referred to.

Venkata Narasimha Naidu v. Seethayya (1910) M.L.T., 231 and *Javanmal
Jitmal v. Muktabai* (1890) I.L.R., 14 Bom., 516, distinguished.

Gopalasawmy Mudali v. Mukkes Gopalier (1874) 7 M.H.C.R., 312, referred to

SECOND APPEAL against the decree of F. D. P. O'DFIELD the
District Judge of Tinnevely, in Appeals Nos. 160 of 1910, 202
174, 176 and 169 of 1910, respectively, presented against the
decision of A. RAMACHA NEDUNGADI, the Divisional Officer of
Sermadevi, in Summary Suits Nos. 180, 217, 187, 189 and 18
of 1909.

The plaintiff who was a landholder brought the suits from
which the above Second Appeals have arisen, against the defend-
ants who are tenants, for recovery of arrears of rent due in

respect of faslis 1315 to 1317. The main defences to the suit
are contained in issues 1 to 4 raised in the suit which are as
follow:—

(1) Was there tender of pattas in the faslis in question?

(2) Are the suits barred by limitation so far as the claim
for fasli 1315 is concerned?

(3) Whether terms of the pattas objected to by the defend-
ants . . . are proper and can they be allowed to stand?

(4) Are the rates of cesses claimed proper and can they
be included in the pattas without the Collector's sanction?

Both the Courts below decided all the issues against the
plaintiff. On the second issue the Court held that the suit was
barred for reasons which are set out in paragraph 4 of the first
Court's judgment, which runs as follows:—

Second issue.—In the pattas alleged to have been tendered
by the plaintiff to the defendants for fasli 1315 the money rent
was required to be paid on the 15th of each month in three instal-
ments from November 1905 to January 1906 and the nanja rent
on the 15th of each month in five instalments from February 1906
to June 1906. The last instalment became an arrear on 16th
June 1906 and the suits have been brought on 29th June 1906,
i.e., three years after the arrears became due. This portion of
the plaintiff's claim is therefore barred by limitation—*vide*
Venkatagiri Rajah v. Ramasami(1).

It was also argued that the provisions of the Madras Estates
Land Act (I of 1908) were applicable to these suits and as the
Act did not require tender of pattas for the realization of arrears
by suits, and allowed the landholder to recover arrears of
rent on improper pattas as subsequently amended by Court, the
plaintiff was entitled to recover the arrears for faslis 1316 and
1317, in spite of the findings aforesaid on the four issues. The
District Judge on appeal dealt with this argument and rejected
the same as untenable. His reasons are fully set out in his
judgment from which the following is extracted:—

"The question now arises whether Act I of 1908 or Act
"VIII of 1865 is applicable to plaintiff's claim. If the former,
"it is immaterial whether he tendered pattas and since the terms
"of those tendered, so far as they have been found incorrect, do

(1) (1898) I.L.R., 21 Mad., 413.

* Second Appeals Nos. 1076 to 1080 of 1911.

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MATHINATHA
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"not affect the amount of his claims, whether they are proper or not. His contentions are first that tender of patta is a matter of procedure and next that enactments as to procedure apply from their date to pending suits. As regards the first, tender of patta is no doubt referred to in *Appa Rao v. Ratnam*(1) and *Chinnipakam Rajagopalachari v. Lakshmi Doss*(2) as not the cause of the obligation but only a condition precedent to its enforcement. That description was sufficient for disposal of the issues then before the Court. But when the question was, as it is here, whether tender was necessary in order to make the obligation enforceable, and whether after tender had not been and no longer could be made the obligation became defunct, it was held that it had done so, and that the claim under it could not be pleaded as a set off [*Kulayappa v. Lakshmypathi*(3)]. As regards the second contention, plaintiff's statement is too wide in its terms. The general rule is that Acts are prospective in their operation. To this rule there are two exceptions: (a) when Acts are expressly declared to be retrospective, (b) when they only affect the procedure of the Court—*Javanmal Jitmal v. Muktabai*(4). It is not alleged that Act I of 1908 is declared to be retrospective. Tender of patta is not part of the procedure of the Court. The restriction to matters of Court procedure is recognized also in *Balkrishna v. Bapu*(5). In these circumstances I concur with the lower Court in holding that plaintiff's cause of action became finally extinct, when he failed to tender pattas within the period allowed, and that it has not been revived. It is to be added that plaintiff's case for the application of Act I of 1908 in respect of tender is stronger than in respect of section 53, clause (2), and the conditions since no plea that they are matters of procedure is possible."

In the end both the Courts below concurred in dismissing the suit.

The plaintiff preferred these Second Appeals.

T. R. Venkatarama Sastriar for the appellant.

M. D. Devadoss for the respondent.

JUDGMENT.—With respect to the rent for fasli 1315 we agree with the lower Court that the claim is barred by limitation.

- (1) (1890) I.L.R., 13 Mad., 243. (2) (1904) I.L.R., 27 Mad., 241.
(3) (1899) I.L.R., 12 Mad., 467. (4) (1890) I.L.R., 14 Bom., 516.
(5) (1895) I.L.R., 14 Bom., 204.

Time runs, not from the end of the fasli but from the time that the rent became due according to the terms of the tenancy. Reliance was placed on the decision of the Privy Council in *Rangayya Appa Rao v. Bobba Sriramulu*(1) by the learned vakil for the appellant but that case does not help him. In *Arunachellam Chettiar v. Kadir Rowthen*(2) which was decided after the Privy Council case, the rule laid down in *Chinnipakam Rajagopalachari v. Lakshmidoss*(3) was reaffirmed. The Second Appeal must therefore be dismissed so far as the claim for fasli 1315 is concerned.

With regard to faslis 1316 and 1317 the lower Appellate Court has found that patta was not properly tendered. This finding is binding on us in Second Appeal as we are unable to see any legal objection to it. But it is contended that as the suit was instituted after the Estates Land Act I of 1908 came into force and as tender of patta is not a condition precedent to the maintainability of a suit for rent according to the provisions of that Act, the plaintiff's claim is sustainable notwithstanding the finding of the Appellate Court. This contention, in our opinion, should be upheld. In a case to which one of us was a party—*Veerabhadra Raju v. Kumari Naidu*(4)—the point was expressly decided. That case was subsequently followed in another case. We do not consider it necessary therefore to deal with the question at any length. We may add, to the reasons given in that judgment, that it was laid down in *Appa Rao v. Ratnam*(5) that tender of patta was not necessary to complete the landholder's right to rent but was only a condition to be fulfilled if a suit had to be instituted or legal proceedings taken for the enforcement of the landholder's right. In *Venkata Narasimha Naidu v. Seethayya*(6) the question was, whether a distraint made while Act VIII of 1865 was in force without tender of patta was lawful or not. The lawfulness of a distraint must be judged by the law in force when it is made. What was unlawful then is not made lawful by any provision in the Estates Land Act. In *Archakam Seshachella Dikshutulu v. Kallur Subba Reddy*(7) the suit was one for rent. When the case was tried by the Court of

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- (1) (1904) I.L.R., 27 Mad., 143 (P.C.). (2) (1906) I.L.R., 29 Mad., 556.
(3) (1904) I.L.R., 27 Mad., 241. (4) (1912) 22 M.L.J., 451.
(5) (1890) I.L.R., 13 Mad., 249. (6) (1910) 9 M.L.T., 131.
(7) Civil Revision Petition No. 84 of

KANTHATHI first instance Act VIII of 1865 was in force. When the suit
NATHA was instituted it was not maintainable. There is nothing in Act
v. I of 1908 rendering a suit not maintainable at its institution
MUTTUSAMIA. maintainable subsequently. In *Javanmal Jitmal v. Muktabai*(1)
SUNDARA all that was decided was that a document which for want
ATTAR AND of execution before a village munsif could not be acted on by
SADASIWA the Courts, could not be put in evidence in a suit instituted after
ATTAR, JJ. the provision requiring execution before a village munsif was re-
 moved. That decision has, in our opinion, no application to this
 case. If the document was incompetent to affect the rights of its
 parties at its inception, an express provision of law would be
 required to make it valid subsequently; and there was no such
 provision in the later enactment which was relied on in that case.
 There is nothing in *Gopilasawmy Mudali v. Mukkee Gopalier*(2),
 which supports the respondent's contention. The learned counsel
 for the respondent argues that retrospective effect should not be
 given to section 58 of the Estates Land Act. But the appellant's
 case does not require any such thing being done. When his suit
 was instituted, the law did not require that he should have pre-
 viously tendered a patta to his tenant before suing him for rent.
 It is the respondent that wishes to enforce a condition which
 the law did not impose at the time of the institution of the
 suit. Following the judgment in *Veerabhadra Raju v. Kumari*
Naidu(3) we hold that the suit for the rent of faslis 1316 and
 1317 is maintainable.

The decree of the District Judge will, therefore, be modified
 and the plaintiff will have a decree for the amount claimed as
 rent for the faslis 1316 and 1317, with interest at 6 per cent.
 from the date of plaint up to date of payment. The parties will
 pay and receive proportionate costs in all the Courts.

(1) (1890) I.L.R., 14 Bom., 516. (2) (1874) 7 M.H.C.R., 312.

(3) (1912) 22 M.L.J., 451.

APPELLATE CIVIL.

Before Mr. Justice Sundara Ayyar and Mr. Justice
 Sadasiva Ayyar.

USMAN KHAN (PLAINTIFF), APPELLANT,

v.

N. DASANNA AND NINE OTHERS (DEFENDANTS), RESPONDENTS.*

*Adverse possession—Mortgagor and mortgagee—Validity of agreement that the
 mortgagee's possession should be as absolute owner after a certain date.*

Where a mortgage deed provided that in default of payment of the mortgage
 amount within the stipulated period, the mortgagee should take possession of the
 mortgaged property and enjoy the same as absolute owner, and accordingly the
 mortgagor after the said period, and in consideration of a further payment of
 Rs. 250 by the mortgagee, relinquished the mortgaged property to be held by the
 mortgagee as absolute owner, and had the patta transferred to his name:

Held, that the possession of the mortgagee under the circumstances for over
 twelve years, was adverse to the mortgagor, whose right to redeem consequently
 became barred by limitation.

An unregistered agreement between the mortgagor and the mortgagee, that
 the mortgagee shall hold possession as owner will not confer an immediate
 ownership on the mortgagee, but is valid in so far as it has the effect of chang-
 ing the legal character of the possession of a mortgagee into possession as owner.

A mortgagee cannot by a mere assertion of his own or by any unilateral act on
 his part, convert his possession as mortgagee into possession as absolute owner.

Ali Muhammad v. Lalta Baksh (1878) I.L.R., 1 All., 655, referred to.

Kurri Veerareddi v. Kurri Bapireddi (1908) I.L.R., 29 Mad., 336, *Sri Raja*
Papamma Rao v. Sri Vira Pratapa H. V. Ramashandra Rasu (1893) I.L.R., 19
 Mad., 249 (P.O.) and *Dasharatha v. Nyahalechand* (1892) I.L.R., 16 Bom., 134,
 distinguished.

SECOND APPEAL against the decree of M. GHOSH, the District
 Judge of Cuddapah, in Appeal No. 29 of 1910, preferred
 against the decree of S. SUBBAYYA SASTRI, the District Munsif of
 Proddatur, in Original Suit No. 787 of 1908.

This suit was for redemption of a mortgage of the year 1876
 created by first defendant's husband in favour of the third
 defendant's father. Plaintiff having purchased the equity of
 redemption from first defendant sued to redeem. The third
 defendant contended that by subsequent unregistered agreement
 in 1885 with the first defendant's husband he became the owner of
 the property and that he was not liable to be redeemed. Plain-
 tiff whose suit was dismissed preferred this Second Appeal. The
 other facts and arguments appear from the judgment.

* Second Appeal No. 382 of 1911.

USMAN KHAN v. DASANNA. The Honourable Mr. T. V. Seshagiri Ayyar and S. Gopalaswami Ayyangar for the appellant.

V. Ramessam and J. Janakiramiah for the respondents.

SUNDARA AYYAR AND SADASIVA AYYAR, JJ. JUDGMENT.—This is a suit for redemption. The third defendant's father obtained a mortgage from the first defendant's husband in the year 1876. According to the terms of that mortgage the amount of the debt was to be paid at the expiration of eight years. Then it goes on to say "in case of the interest on the said principal accruing every year or the principal not being paid, you shall immediately on the expiry of the stipulated period of eight years take possession of the said land, etc., and shall happily enjoy the same in succession from son to grandson and as long as the sun and moon last." The mortgagee was not entitled to possession immediately according to the terms of the document, but he was to take possession of the property as owner after the time fixed for payment elapsed. On the 2nd July 1885 the first defendant's husband sent a petition (Exhibit II), to the Tahsildar in order that patta for the land might be transferred to the third defendant's father. The petition stated: "I have put Nagella Vobulakondur in possession for Rs. 1,475 being principal and interest due by me according to the document executed and registered on 26th August 1876 Therefore please remove my name." If Exhibit A is a redeemable mortgage then apparently Exhibit II taken by itself, it might be argued, would not affect the plaintiff's right to redeem. But Exhibit I throws further light on what led to the petition (Exhibit II). Exhibit I is a receipt for a sum of Rs. 250 paid on the date of the document, 20th November 1885. It contains this recital: "As, owing to my inability to pay to you the money due under the deed of mortgage, I have on 2nd July 1885 relinquished the lands (for patta being issued to you), etc." It then acknowledges payment of a sum of Rs. 250 which is stated to be paid out of grace to the executant of the receipt. The language of the recital is in our opinion conclusive that at the time when Exhibit II was put in there was a relinquishment of all right to the property by first defendant's husband. That relinquishment we shall assume for the decision of the case to be invalid to extinguish the right of redemption. But it shows that third defendant's father was to hold possession from its date as owner with full rights to the property. Admittedly the third

defendant has been in possession of the property ever since, i.e., for a period much longer than twelve years. The question is whether that possession has made him the absolute owner of the property by prescription. The argument for the appellant is that his possession must be taken to have been under the rights possessed by him under Exhibit A as mortgagee and it is strenuously argued by Mr. Seshagiri Ayyar, the learned vakils for the appellants, that a mortgagee who is entitled to take possession under the mortgage cannot be permitted to acquire any higher right by virtue of his possession. It is no doubt true that the third defendant was entitled to take possession under Exhibit A, and we shall assume that possession so taken would be held by him as mortgagee. But assuming all this, what was there to prevent both the mortgagor and the mortgagee from agreeing that the mortgagee should from a certain date hold possession as owner? Such an agreement may not be valid to confer immediate title on the mortgagee but as far as we are aware there is no principle of law which prevents both parties from agreeing what the character of the possession to be held by the mortgagee should be from a certain date. It is quite true that a mortgagee cannot by a mere assertion of his own or by any unilateral act of his convert his possession as mortgagee into possession as absolute owner. That is a principle in favour of the mortgagor which prevents the mortgagee from altering the legal character of his possession by his own act or assertion. That has been laid down in several cases, one of the earliest of which is *Ali Muhammad v. Lalta Bakhsh* (1). But they have no bearing on the question of the effect of an agreement between both parties that the mortgagee should hold possession as owner and not as mortgagee.

The cases cited by Mr. Seshagiri Ayyar do not establish the position taken up by him. *Kurri Veerareddi v. Kurri Bapi reddy* (2) merely laid down that where there is an ineffectual sale the vendee cannot set up that he has acquired any title by estoppel. It did not deal with the result of possession in him for more than the statutory period. To allow the defendant to set up a title by estoppel in such a case would be virtually allowing to escape the provision of the Transfer of Property Act which requires a registered conveyance to effect a sale. In the Privy Council case of *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V.*

(1) (1878) I.L.R., 1 All., 655.

(2) (1906) I.L.R., 29 Mad., 336 (F.B.).

USMAN KHAN *Ramachandra Razu*(1), their Lordships held that possession was given to the mortgagee in his character as mortgagee. In that view he was of course liable to be redeemed. In *Dasharatha v. Nyahalchand*(2), the Court held that possession was obtained and held by the defendant as mortgagee. The character of the possession must of course determine what right would he acquire by virtue of possession. In *Byari v. Puttanna*(3), the ineffectual conveyance was executed by one of the members of an Aliasantana tarwad with the consent of two others. Such consent of course could not be binding on the tarwad. The person who executed the conveyance and those who consented to it had no severable interest in the tarwad property. The result therefore was that the former character of the possession which began previously to the conveyance was not altered by the conveyance or by the consent of some members only of the tarwad which could not operate as against the tarwad as a whole. We are of opinion that both parties were entitled to agree in what character the third defendant should hold possession, and that the plaintiff who purchased the equity of redemption from the first defendant cannot now claim to redeem on the footing that the third defendant's possession has throughout been as mortgagee.

We dismiss the Second Appeal with costs.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Arnold White, Kt., the Chief Justice, Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

KANDAPPA ACHARY (FIRST DEFENDANT), APPELLANT,

v.

P. VENGAMA NAIDU (PLAINTIFF), RESPONDENT.*

Madras Hereditary Village Offices Act (III of 1895), sec. 5, applicability of—Emolument of hereditary offices in section 3, clause 4—Statute, construction of.

Section 5 of Madras Act III of 1895 is applicable to emoluments of hereditary offices in proprietary estates of the classes mentioned in section 3, clause 4

Mutyala Bapayya v. Kosuri Muramullu (1912) M.W.N., 7, approved.

Veerabadrachari v. Suppiah Achari (1911) I.L.R., 33 Mad., 488, overruled

(1) (1896) I.L.R., 19 Mad., 249 (P.C.). (2) (1896) I.L.R., 16 Bom., 134.

(3) (1891) I.L.R., 14 Mad., 88.

* Appeal Against Appellate Order No. 63 of 1911.

Per SADASIVA AYYAR, J.—In cases of ambiguity as to the construction of a statute, considerations based on the scheme of the Act, and the previous history of the legislation relating to the matters dealt with in the Act may properly be referred to for deciding which of the two views ought to be taken.

APPEAL against the order, dated the 15th February 1911, of K. C. MANAVEDAN RAJA, the District Judge of North Arcot, in Appeal No. 44 of 1910, presented against the order, dated the 22nd July 1909, of P. AIYASWAMI MUDALIYAR, the District Munsif of Tirupati, in Execution Petition No. 375 of 1909 in Original Suit No. 401 of 1907.

In execution of a decree for money, certain lands held by the judgment-debtors as carpenter's inam in a proprietary estate were attached. The District Munsif held that the lands were not liable to attachment, but the District Judge held that a carpenter's inam is excluded from the operation of section 5 of the Madras Hereditary Village Offices Act (III of 1895), and not free from liability to attachment, and remanded the execution petition for disposal according to law.

The first defendant, the judgment-debtor, appealed.

N. Chandrasekhara Ayyar and *M. Subbaraya Ayyar* for the appellant.

None appeared for the respondent.

JUDGMENT.—The order of the lower Court is unsustainable. The District Judge is wrong in holding that a carpenter's inam is excluded from the operation of section 5 of Act III of 1895. That section applies to all inams coming within the purview of sub-clause (4) as well as sub-clause (3) of section 3. The object of exempting from sub-clause (3) the offices mentioned in sub-clause (4) is explained in *Mutyala Bapayya v. Kosuri Muramullu*(1):

The order of the lower Appellate Court is set aside and that of the Munsif restored with costs here and in the lower Appellate Court.

This appeal coming on for rehearing before the same Bench (*BENSON and SUNDARA AYYAR, JJ.*) the Court made the following

N. Chandrasekhara Ayyar and *M. Subbaraya Ayyar* for the appellant.

Dr. S. Swaminathan for the respondent.

ORDER OF REFERENCE TO A FULL BENCH.—As the case was heard *ex parte* on the 15th instant we have allowed *Dr. Swaminathan*,

(1) (1912) M.W.N., 7.

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the learned counsel for the respondent, to argue the question again. He has brought to our notice a decision of the learned CHIEF JUSTICE and KRISHNASWAMI AYYAR, J., in *Veerabadran Achari v. Suppiah Achari*(1) and *Sandanam v. Sonai Muthan*(2) which are contrary to the decision in *Mutyala Bapayya v. Kosuri Muramullu*(3). The former case, however, was argued only on one side. We have considered the question again carefully and do not see sufficient reason to depart from the opinion formed by us at the previous hearing which we find is in accordance with another case, *Kannam Naidu v. Latchanna Dhora*(4). The scheme of the Act appears to have been to divide the offices coming within its purview into four convenient classes for the purpose of dealing with certain questions relating to different kinds of offices separately. The offices include both those in villages in proprietary estates and in ryotwari tracts; clause (1) for instance would include the offices referred to therein in both classes of villages. If the object of the four clauses was, as we conceive it was, to bring under each clause certain kinds of offices, the effect of the exception in clause (3) would only be not to include certain offices in proprietary estates in that clause so that the rules of succession laid down in section 11 and the provisions of section 7 of the Act might not extend to the excepted offices. There seems to be no reason to suppose that the legislature intended to make any distinction between the same classes of offices in proprietary and non-proprietary villages with regard to the question of the alienability of the emoluments attached to them. Clause (4) itself is perfectly general in its language and would include the offices mentioned therein in both proprietary and non-proprietary villages. Having regard, however, to the judgment in *Veerabadran Achari v. Suppiah Achari*(1) we consider it desirable to have the question authoritatively decided. We refer to a Full Bench the question whether section 5 of Act III of 1895 is applicable to emoluments of hereditary offices in a proprietary estate of the classes mentioned in sub-clause (4) of section 3.

This appeal coming on for hearing in pursuance of the said Order of Reference before the Full Bench constituted as above: upon perusing the Order of Reference and the case having stood over for consideration, the Court expressed the following Opinion.

(1) (1911) I.L.R., 38 Mad., 488.

(3) (1912) M.W.N., 7.

(2) Appeal Against Order No. 226 of 1904.

(4) (1901) I.L.R., 28 Mad., 493.

N. Chandrasekara Ayyar and *M. Subbaraya Ayyar* for the appellant. KANDAPPA
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B. Narasimha Rao for *Dr. Swaminathan* on behalf of the respondent. VENGAMA
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WHITE, C.J.—I have great doubts but as my learned brothers are both of opinion that the question referred to us should be answered in the affirmative, I do not propose to dissent. WHITE, C.J.

MILLER, J.—In this matter I am of opinion that the learned Judges who are responsible for the reference to the Full Bench are right in the conclusion at which they have arrived. MILLER, J.

I think it must be conceded that the construction put upon section 3 of Madras Act III of 1895 by the learned CHIEF JUSTICE and KRISHNASWAMI AYYAR, J., in *Veerabadran Achari v. Suppiah Achari*(1), is that which its language most naturally suggests, but the reasons for holding that it is not that which ought to prevail are, to my mind, very strong; they are stated in the judgment in *Mutyala Bapayya v. Kosuri Muramullu*(2), and I may re-state them.

Artisan offices were governed by Regulation VI of 1881 whether they were situated in proprietary villages or not, and no reason or at any rate no reason worth a moment's consideration has been suggested (and the learned Judges who decided were unable to conceive of any reason) why those situated in proprietary villages should have been deliberately omitted from Act III of 1895 while those in other villages are governed by that Act.

There is, so far as I can see, no difference whatever from the point of view of the necessity of inalienability, or from the point of view of succession to the office, between the one class and the other. I cannot in these circumstances believe that the legislature deliberately retained the one class within the Act and omitted the other. Is it then necessary, by reason of the language of section 3, to hold that that which was not done deliberately was done by inadvertence? We should, I think, before taking this course, do all that reasonably can be done to reconcile the language of the Act with what was beyond reasonable doubt the intention of the Legislature. And this may be done in the way suggested by BENSON and

(1) (1911) I.L.R., 38 Mad., 488.

(2) (1912) M.W.N., 7.

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SUNDARA AYYAR, JJ. The language of section 3 is, I venture to think, singularly unhappy in more than one respect, but I see nothing unreasonable in reading the section as the learned Judges have done. I may paraphrase it somewhat with a view to put more clearly what I think it really means. It may be read as if it ran :

The offices to which the provisions of this Act are applicable are divided into the following four classes :—

- (1) Those offices provided for in the Village Cess Act, where that Act is, or may be, enforced : [this, I think, must be the real, though perhaps it is not the apparent, meaning of section 3 (1)] ;
- (2) those offices provided for by Act II of 1894 ;
- (3) artisans' offices ; and
- (4) other hereditary offices in proprietary estates not being artisans' offices already included in (3) or the karnam's office (provided for elsewhere).

I have transposed classes (3) and (4) as perhaps making the matter slightly clearer, but that of course makes no difference. I have also made the word "artisan" do duty for all the persons described in section 3 (4).

The object of the classification is, I have no doubt, that suggested in the order of reference to enable the draftsman in sections 7, 8, 9, 10, 11 and 12 to refer to the classes by number instead of setting out in each section the offices to which that section was intended to be applicable. The different classes are differently treated both as regards the control of the incumbents by the Collector and the proprietor and as regards the succession to the office in the event of a vacancy. There is no other apparent reason why there should be a division into classes at all.

The exclusion of artisans' offices from class (3) is because they are included in class (4) and are to be dealt with differently from the offices included in (3) and the express exception was necessary because they are hereditary village offices in proprietary estates as are those in (3).

I do not think this construction does violence to the language of section 3, but if it does, I think we ought, at the risk of some straining, to adopt a construction which gives effect to what was so clearly intended rather than a more natural one which frustrates the intention of the Legislature.

The authorities are not numerous. In *Kannam Naidu v. Latchanna Dhora*(1) and *Raja of Vizianagaram v. Dantivada Chelliah*(2), it seems to have been assumed that the artisan offices in Zemindari villages are included in section 3. In *Chinnayya Asari v. Annayappa Mooniappa Mudali*(3) and *Sandanam v. Sonai Muthan*(4) these offices are held to be excluded, but without discussion of the question. The two cases in which the matter has been discussed are *Veerabhadran Achari v. Suppiah Achari*(5), where one view was taken, and *Mutyala Bapayya v. Kosuri Muramullu*(6), to which I have already referred, where the contrary conclusion was arrived at.

For the reasons which I have given, I think the latter decision is correct, and I would answer in the affirmative the question referred to us.

SADASIVA AYYAR, J.—The answer to the question referred to the Full Bench depends on the interpretation of section 3 of Act III of 1895. Section 3 says (omitting immaterial portions) "This Act shall apply to the following classes of village offices :—

- * * * *
- (3) The other hereditary village offices in proprietary estates except the offices forming clause (4) below.

- (4) The hereditary offices of village artisans."

Now if we take clause 3 alone it means that the Act shall not apply to the excepted hereditary offices forming clause 4—if those offices are held in villages situated in proprietary estates, *i.e.*, it shall not apply to village artisans, etc., in proprietary estates but shall apply only to other hereditary village offices (other than village artisans, etc.), in proprietary estates. If we take clause 4 alone it means that the Act shall apply to the hereditary offices of village artisans in all villages, that is proprietary estate villages as well as ryotwari villages. What is the object of the Legislature in excluding the offices of village artisans in proprietary estate villages in clause (3) but again including them in clause (4) of the same section? One very reasonable view is that, though the words of clause (4) include, as it stands, offices of all village artisans whether in proprietary estate villages or in

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(1) (1901) I.L.R., 28 Mad., 493. (2) (1906) I.L.R., 28 Mad., 84.
(3) (1907) 7 M.L.J., 264. (4) Appeal Against Order No. 226 of 1904.
(5) (1911) I.L.R., 33 Mad., 488. (6) (1912) M.W.N., 7.

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non-proprietary estate villages because clause (8) excepted the offices of village artisans in proprietary estates, the wide words of clause (4) must be confined to the offices of village artisans in villages other than proprietary estate villages. Another tenable view is that clause (8) excepted artisans' offices in proprietary estates merely for purposes of defining and limiting a class of village servants who were intended to be brought under that class for convenient reference in subsequent sections of the Act, that clause (4) included those offices for similar convenience of definition and reference, and that so far as the operative opening words of section 8 were concerned, those offices were also intended by clause (4) to be brought under the operation of the Act. The first of the two views was taken in *Veerabhadran Achari v. Suppiah Achari*(1), while the second view was taken in *Mutyala Bapayya v. Kosuri Muramullu*(2). In such cases of ambiguity considerations based on the scheme of the Act and the previous history of the Legislation relating to the matters dealt with in the Act might properly be referred to for deciding which of the two views ought to be taken. See Maxwell on Statutes, Chapter III and section 1 of Chapter IV.

Having in mind such considerations I am inclined to take the second of the above two views. I need not detail the said considerations as they have been set out with sufficient fulness in *Mutyala Bapayya v. Kosuri Muramullu*(2) above referred to, and as I further concur in the views formulated in the judgment just now pronounced by my learned brother MILLER, J.

(1) (1911) I.L.R., 88 Mad., 488.

(2) (1912) M.W.N., 7.

APPELLATE CIVIL.

*Before Sir Charles Arnold White, the Chief Justice,
and Mr. Justice Wallis.*

• MESSRS. G. P. GUNNIS & Co., ADJUDICATING CREDITORS,
v.

T. MAHOMAD AYYUB SAHIB, FOURTH INSOLVENT. *

T. MAHOMAD AYYUB SAHIB (RESIDING AT AMBUR,
NORTH ARCOT), APPELLANT AND PETITIONER,

v.

MESSRS. G. P. GUNNIS & Co. (MERCHANTS AT KARACHI
IN *BOMBAY), RESPONDENTS. †

*Indian Insolvency Act (III of 1909), sec. 9 (d) (iii)—Adjudication, petition for,
what to contain—Leave to amend, when to be given.*

A petition for adjudication in bankruptcy alleged that the debtors "did depart from their place of business and residence and are secreting themselves so as to deprive their creditors of the means of communicating with them whereby your petitioners are advised and believe that the said insolvents are liable to be adjudged to have committed an act of insolvency."

An affidavit in support of this petition alleged the indebtedness of the debtors and that they had left Madras leaving no one in charge of their respective business and "are secreting themselves for the purpose of evading their creditors."

Held, that these allegations were a sufficient compliance with section (8d) (iii) of the Insolvency Act.

The statement of intent to defeat or delay the creditors must appear either in the petition or in the affidavit; otherwise the petition is liable to be dismissed as the omission to state it is a substantial defect incurable by amendment. An omission to state the fact that the petitioning creditor is a secured creditor and the value of his security, as required by section 12 (2) and Rule 21, is one that could be cured by amendment.

WHITE, C.J.—Leave to amend a petition by inserting new causes of action should not be given at a time when by doing so the Court would be depriving the defendant of the plea of limitation.

WALLIS, J. (*dubitante*), whether under peculiar circumstances leave could not be given in such cases.

Per WALLIS, J.—"The passage (in the petition) conveys with sufficient certainty that the debtors committed an act of insolvency by leaving their place of business and residence with intent to defeat and delay their creditors. But if that act of insolvency is not expressed with sufficient certainty we are

* Original Side Appeal No. 4 of 1918.

† Civil Miscellaneous Petition No. 149 of 1918.

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and 4.

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 at liberty to look at the affidavit and after reading the petition with the affidavit to find that the act of insolvency is charged with sufficient certainty." *Es parte Coates, In re Shelton* (1877) 5 Ch. D., 979, distinguished.

APPEAL from the order of BAKEWELL, J., dated 19th December 1912 (in the Insolvency Jurisdiction of this Court in Insolvency Petition No. 68 of 1912) and petition for stay of further proceedings in Insolvent Petition No. 68 of 1912 pending disposal of Original Side Appeal No. 4 of 1913.

D. Chamier for the appellant.

N. Grant for the respondents.

WHITE, C.J. **WHITE, C.J.**—This case comes before us, the appellant being one T. Mahomed Ayyub Sahib, by way of appeal from an order of BAKEWELL, J., sitting in Insolvency, giving leave to the petitioning creditor to amend his petition. The petition was presented in March 1912 against four persons, of whom the appellant is one, and the petitioner alleges that the appellant and three other persons carried on business as partners under the name of T. Noordeen Sahib & Co. and T. Abdul Kareem Sahib & Co. On March 22nd an order of adjudication was made against these four persons. This order was not served upon the appellant and no order for substituted service was applied for or made. On the 4th May the petitioning creditor applied to the Court by motion for an order under rule 18 of the second schedule of the Insolvency Act. That rule relates to the taking of accounts of mortgaged property and their sale. The next step in the proceedings was an application on August 22nd made by the appellant to annul the adjudication and the grounds on which he asked to have the adjudication annulled are stated in the affidavit filed in support of his application. One ground is that no notice of the adjudication had been served upon him. Another ground is that he was never a partner in either the firm of T. Noordeen Sahib & Co. or T. Abdul Kareem Sahib & Co., that he took no part in the management of the business and had no connection with the business. This application came before the learned Judge at the same time as the application made by the petitioning creditor asking for an order under rule 18 of the second schedule. As we are told, after the arguments were concluded and the Judge had taken time to consider, the learned Judge took the point that the petitioning creditors had failed to prove that there was any debt due to them upon which they were entitled to present

a petition. That is how the Judge puts it in his judgment. **GUNNIS & Co.** Mr. Chamier on behalf of the appellant took a further point on his own behalf that the petition was bad, in that in stating the act of insolvency on which the petitioning creditor relied there was no allegation of an intention to defeat or delay creditors. There can be no question that the petition is defective or perhaps I should say informal in two respects. It does not state that the petitioning creditor is a secured creditor. Section 12 (2) provides "if the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors in the event of the debtor being adjudged insolvent or give an estimate of the value of the security. In the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor." Rule 21 says, "If the petitioner is a secured creditor he shall give full particulars of his security and value the same." I do not know whether that carries the matter any further. With regard to the statement of the debt, all that the petition says is "that at the time aforesaid (i.e., at the time of the alleged act of insolvency on which the petitioning creditor relies) the insolvents were and are now indebted to your petitioners in the sum of seven lakhs and upwards for goods sold, and your petitioners are informed and believe that they are indebted to other creditors to the extent of about two lakhs of rupees or thereabouts." It is clear therefore that that statement in the petition with reference to the debts is not in accordance with the Act or rules. BAKEWELL, J., uses the expression "the petitioning creditor failed to prove his debt." By this I take it the learned Judge means he failed to prove the balance of the debt due to him after deducting the value of his security. Then the petition is also informal with regard to the statement of the act of insolvency upon which the petitioning creditor relies. Section 9 says:—

"A debtor commits an act of insolvency in each of the following cases, viz.—

- | | | | | |
|--|---|---|---|---|
| (a) | * | * | * | * |
| (b) | * | * | * | * |
| (c) | * | * | * | * |
| (d) if, with intent to defeat or delay his creditors,— | | | | |
| (i) he departs or remains out of British India, | | | | |

UNNIS & Co. (ii) he departs from his dwelling house or usual place of
 MAHOMAD business or otherwise absents himself,
 YUSUF SAHIB. (iii) he secludes himself so as to deprive his creditors of
 WHITE, C.J. the means of communicating with him."

The petitioning creditor relies on an act of insolvency within section 9 (d) (i), and the petitioner does not expressly allege an intention to defeat or delay creditors. I shall have to refer to the exact words of the petition and of the affidavit filed in support later on. I will content myself with saying now that having regard to the express provisions of section 9 and rule 20, it is clear that the petition is informal. As regards the omission to state the fact that the petitioning creditor is a secured creditor and the value of the security Mr. Chamier has not seriously contended that it could not be cured by amendment; and, speaking for myself I think that is a defect which could be cured by amendment at the time leave to amend was given. The other matter is whether the learned Judge was right in giving leave to amend as regards the statement of the act of insolvency (the petitioning creditor did not ask for leave to amend; in fact, his case was that no amendment was necessary) is one of greater difficulty. Mr. Chamier pressed us very strongly with *Ex parte Coates, In re Skelton*(1). That was a case in which it was held by BACON, V.C., sitting as Chief Judge in bankruptcy, that a petition against a trader which alleges as an act of bankruptcy that he has departed from his dwelling house or otherwise absented himself, must allege that he did so with intent to defeat or delay his creditors, otherwise the petition will be demurrable and must be dismissed and that such a defect was a matter of substance, not a merely formal defect, and it could not be cured by amendment. This case came before the Registrar in the first instance who, I think, gave leave to amend. BACON, V.C., took the view that the amendment could not be made, and his view was confirmed by JAMES, L.J., and Lord Justices BAGGALLAY and COTTON, on appeal. We have also considered *Ex parte Fiddian, Squire & Co.*(2) excepting in one very important particular which I shall have to refer to in a moment, it seems to me that the present case comes nearer to *Ex parte Fiddian, Squire & Co.*(2) than it does to *Ex parte Coates*(1) and for this reason, in

(1) (1877) 5 Ch. D., 979. (2) (1892) 9 Morrell's Bankruptcy Reports, 95.

Ex parte Coates(1) there was a subsisting order of adjudication and the Chief Judge held that so long as there was a subsisting order of adjudication an amendment could not be made by inserting in the petition the words "with intent to defeat or delay creditors." With regard to section 208 of the rules of 1869, which is reproduced in section 105 of the Act of 1883 the Chief Judge held that a petition after an order of adjudication had been made was not a proceeding within the meaning of the rule. Now in the case before us the order of adjudication has been set aside. It was set aside by the learned Judge before he made the order giving leave to amend although it was all done in the same order. There is now therefore no subsisting order of adjudication in this case. That brings the case near to *Ex parte Fiddian, Squire & Co.*(2), where leave to amend was given before the receiving order. I desire to express no opinion as to whether I should feel bound to follow the decision in *Ex parte Coates, In re Skelton*(1), if a case came before us in which the facts were the same as the facts in *Ex parte Coates In re Skelton*(1). The case is cited in Williams on Bankruptcy under section 143 as an authority under the Act of 1883; when it came before a Divisional Court in *Ex parte Fiddian, Squire & Co.*(1) it was not disapproved of, although apparently COLLINS, J., did not like it. But for the reasons I have stated I think the present case is distinguishable from *Ex parte Coates*(1). I said that, in my opinion, the case came near *In re Fiddian Squire & Co.*(2) except in one important respect. That is that the order of amendment in that case was made within three months of the act of bankruptcy upon which the petitioner relied. The order of amendment in this case was made more than three months after the date of the act of insolvency on which the petitioning creditor in this case relies, and that really is the crux of the case. Can we, in view of the well settled principle as to the circumstances in which an amendment ought to be allowed, give the petitioning creditor leave to amend in this case, the effect of which would be to give him rights which he would not have if he sought to file his petition in insolvency in the first instance on the date when the leave to amend was given? LORD ESHER in *Weldon v. Neal*(3),

(1) (1877) 5 Ch. D. 979. (2) (1892) 9 Morrell's Bankruptcy Reports, 95.
 (3) (1887) 19 Q.B.D. 394 at p. 395.

GUNNIS & Co. says that "we must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust." I may also refer to *In re Maund, Ex parte Maund*(1) which, as a bankruptcy case, is perhaps more in point. There it was held that the court would not amend a bankruptcy petition by adding as petitioners, after three months had elapsed from the date of the act of bankruptcy upon which the petition was founded, creditors whose debts are other than those in respect of which the petition was presented; if the petition was bad in the form in which it originally stood; having regard to the fact that the alleged act of insolvency is now more than three months old, the principle laid down in the decisions to which I have referred, I do not think it could, or ought to be, cured by amendment. Then the question is "was the petition bad in the first instance in that it did not comply with the requirements of section 9?" I have come to the conclusion that the petition was not bad with regard to this matter in the first instance.

Although Mr. Chamier has strongly contended to the contrary I think that, for the purposes of this question, we are entitled to take into consideration the language of the affidavit which is filed in support of the petition. The petition says that on or about the 20th March 1912, the appellant (and three other persons who the petitioner alleges are partners of the two firms), "being heavily indebted did depart from their place of business and residence and are secreting themselves so as to deprive their creditors of the means of communicating with them whereby your petitioners are advised and believe that the said insolvents are liable to be adjudged to have committed an act of insolvency." The affidavit in support of the petition alleges in paragraph (1) the indebtedness of the appellant and three others. There is a further statement

in paragraph 8 that on or about the 20th March 1912 these **GUNNIS & Co.** partners in the two firms, of whom the appellant is said to be one, "left Madras leaving no one in charge of their respective business and are secreting themselves for the purposes of evading their creditors." I think it is clear that the draftsman of the petition had before him the words of section 9 although he does not follow the words *verbatim* and adopts the word "secreting" instead of "secluding." But I do not know whether that is very important for the question we have to consider. The question is, taking the petition and the affidavit together, are we able to say that there is a substantial compliance with the requirements of section 9. It is true that there is no express allegation that the act done was done "with intent to defeat or delay creditors." But we have the words in the petition "secreting himself so as to deprive his creditors of the means of communicating whereby the petitioners were advised and believe that the insolvent is liable to be adjudged to have committed an act of insolvency" and we have in the affidavit the expression "for the purpose of evading their creditors." I think the phrase "for the purpose of evading their creditors" which occurs in the affidavit may be read as a statement, in the affidavit at any rate, of an intention to defeat or delay creditors. I think *In re Skelton, Ex parte Coates*(1) on this point also is distinguishable on the facts. In *Ex parte Coates*(1) it seems pretty clear, though I do not find it in the report (because the affidavit is not set out in the report), that there was no statement either express or by implication of an intention to defeat or delay "either in the petition or in the affidavit." The Chief Judge observes "No amendment of the petition can amend the affidavit upon which the adjudication has been made. That affidavit would still remain imperfect." That observation would seem to be meaningless unless it implies that the words "with intent to defeat or delay" did not occur either in the petition or in the affidavit. The present case is, I think, distinguishable at any rate upon the ground (may be on other grounds also) that in the affidavit we have words, though not the words which occur in the section, which may be taken to satisfy the requirements of the section. My view therefore is that the order which the learned Judge made giving leave to amend the petition as regards the statement of the act of insolvency was unnecessary

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(1) (1895) 1 Q.B., 194.

GUNN & Co. and I think the proper course is to set that aside. The order that I would make in this case is that the order of the learned Judge giving leave to amend be modified by setting aside so much of that order as gave leave to amend with reference to this statement of the act of insolvency; subject to this I would dismiss the appeal and make no order as to costs. As regards the question of partnership we do not think it necessary to deal with it in this appeal. The memorandum of objections will be allowed but we make no order as to costs. With regard to the application to stay we make no order and no order as to costs.

WALLIS, J.

WALLIS, J.—I agree and have very little to add. Section 9 d (ii) makes it an act of bankruptcy if the debtor departs from his dwelling house or usual place of business or otherwise absents himself with intent to defeat or delay his creditors. The petition in this case charges that the partners did depart from their place of business and residence and that is a charge of an act of bankruptcy if it is accompanied by a charge that they did it with the intent already mentioned. But the petition goes on to say that they did "depart from their place of business and residence and are secreting themselves so as to deprive their creditors of the means of communicating with them whereby your petitioners are advised and believe that the said insolvents are liable to be adjudged to have committed an act of insolvency." It may be true that these latter words were taken from section 9 d (iii), but reading the passage as a whole it seems to me that it does convey with sufficient certainty that the debtors committed an act of insolvency by leaving their place of business and residence with intent to defeat and delay their creditors. But if that act of insolvency is not expressed with sufficient certainty, I quite agree that we are at liberty to look at the affidavit and after reading the petition with the affidavit to find that the act of insolvency is charged with sufficient certainty. The important thing in this matter seems to me is that there should be proper materials before the Court to justify the exercise of the serious jurisdiction of making an order of adjudication.

For the reasons stated I have come to the conclusion that this petition did not require any amendment in this respect. Therefore the question whether it would be open to us to amend the petition does not really arise for decision. We have been

referred to *Ex parte Coates, In re Skelton*(1) which, as has been pointed out, is distinguishable from this, seeing that there was nothing, apparently, either in the petition or in the affidavit, to show with what intent the debtor left his place of residence. That was the decision in the first place of an eminent Judge whose experience lay very far in the past, the late Vice-Chancellor BACON, and it seems to me that, though it was affirmed on appeal, it was treated by JAMES, L.J., rather as a matter of discretion and that the application refused on the ground that to allow the amendment "would be an encouragement to slovenly procedure" rather than on the ground that the Court was incompetent to allow it on the pleadings: I cannot help feeling some doubt as to whether Sir GEORGE JESSEL would have taken the same course, having regard to his observations in *Ex parte Vander Linden, In re Pogoss*(2) where the ground on which the dismissal of the petition was asked for was the second ground of Mr. Chamier which he did not press before us, viz., that the petition did not state that the petitioner was a secured creditor. Sir GEORGE JESSEL said "I am sorry, very sorry, to see this kind of thing. I thought the day had passed for raising such technical objections. But I am satisfied that the Act enables us to do what is right." Now I may point out that to set aside an order of adjudication is a comparatively small matter, but to set aside a creditor's petition is a very serious thing indeed when there has actually been an act of insolvency. Because the effect of setting aside the petition is to render inapplicable all those safeguards which are enacted by the Insolvency Act against the frauds which so often accompany the commission of an act of insolvency. Although I feel the weight of the observations of Lord ESHER, M.R., in *Weldon v. Neal*(3) as to the inexpediency of making orders of amendment which would interfere with the rights of parties, yet I cannot help feeling some doubt as to whether a case such as this, would not come within the last sentence in his judgment where he says that "under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so." It is unnecessary to express any final opinion about

GUNN & Co.
M. HANOMAN
ATTOR
SANJA.
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(1) (1877) 5 Ch.D., 879.

(2) (1892) 20 Ch.D., 289 at p. 292.

(3) (1887) 19 Q.B.D., 394 at p. 395.

Benson & Co. this part of the case. It is quite sufficient to say that in our opinion the petition sufficiently charged an act of insolvency. I agree with the order proposed by the learned Chief Justice.

Attorneys for the appellant—Messrs. *Ramcontre* and *Tirumalai Pillai*.

Attorneys for the respondents—Messrs. *David, Brightwell and Moresby*.

APPELLATE CRIMINAL.

Before Mr. Justice *Benson* and Mr. Justice *Sundara Ayyar*.

Re NATTAVA PARANKUSAM (PETITIONER IN CRIMINAL MISCELLANEOUS PETITION No. 27 of 1912 ON THE FILE OF THE SESSIONS COURT, GUNTUR), PETITIONER.

Criminal Procedure Code (Act V of 1898), sec. 196—Sanction for perjury, not desirable in public interests.

In granting sanction to prosecute for perjury, Courts should not merely see whether there is a good prospect of conviction but should also consider whether the circumstances are such as to render prosecution desirable in the public interests.

Where the petitioner, a girl of fifteen, in a statement before a Magistrate under section 164, *Criminal Procedure Code*, said that her mother and one *Bushayya* used to talk and fight with each other and as a witness before another Magistrate stated that they never quarrelled with each other,

Held, that a prosecution for perjury was not desirable.

PETITION praying the High Court to set aside the order of J. C. *FERNANDEZ*, the Sessions Judge in Guntur Division, in Criminal Miscellaneous Petition No. 27 of 1912, confirming the sanction granted by N. L. *NARASIMHA RAO*, the Taluk Second-class Magistrate of Tenali, in Criminal Miscellaneous Petition No. 1 of 1911.

P. Narayanamurthi for the petitioner.

C. F. Napier, Public Prosecutor, for the Crown.

Benson and Sundara Ayyar, JJ. ORDER.—We do not think that this is a case in which the interests of justice call for a prosecution for perjury.

The accused is a girl of 15 years, and the perjury alleged is in her having made contradictory statements about her mother having wordy quarrels with the man who was keeping the witness.

* Criminal Miscellaneous Petition No. 28 of 1912.

The materiality of the statements is only remote, as suggesting a motive for the offence.

We often have to notice that Courts exercise little discretion in giving sanction to prosecute for giving false evidence.

They should not merely see that there is a good prospect of conviction, but should also consider whether the circumstances are such as to render a prosecution desirable in the public interests.

We do not think the prosecution in this case is desirable. We revoke the sanction.

APPELLATE CRIMINAL.

Before Mr. Justice *Sankaran Nair*.

A. KRISHNASWAMI AYYAR, PETITIONER,

v.

CHANDRAVADANA, RESPONDENT.*

Criminal Procedure Code (Act V of 1898), sec. 488 (1)—Maintenance—"Child," meaning of—Prostitution not a profession which the law will recognise.

The word "child" in section 488 (1), *Criminal Procedure Code (Act V of 1898)*, means a person who has not attained the age of majority. The attainment of puberty cannot be taken as the age when childhood ceases.

The law will not treat prostitution as a profession by which a girl might earn her livelihood and maintain herself under section 488, *Criminal Procedure Code*. It is against public policy to do so.

PETITION under sections 483 and 489, *Criminal Procedure Code (Act V of 1898)*, praying the High Court to revise the order of *MAHAMED MUNIRKHAH SARIB*, the Deputy Magistrate of Ranipet Division, in proceedings dated 3rd day of April, 1912, in Miscellaneous Case No. 80 of 1908.

This was a Criminal Revision Petition from an order of *MAHAMED MUNIRKHAH SARIB*, the Deputy Magistrate, Ranipet Division (in proceedings dated the 3rd day of April, 1912, in Miscellaneous Case No. 80 of 1908), refusing to alter under section 489, a maintenance order which had been made against

* Criminal Revision Case No. 400 of 1912 (Criminal Revision Petition No. 217 of 1912).

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the petitioner under section 488, Criminal Procedure Code, by which in 1908, he was ordered to pay a maintenance allowance of seven rupees *per mensem* to each of his four children by the respondent so long as they were unable to maintain themselves. Petitioner alleged that one of the daughters had attained her puberty in December 1909, that she was more than sixteen years old, and that she was therefore no longer a 'child unable to maintain herself.' He further alleged that she had been exercising the calling of her mother and ancestors, viz., prostitution. He further pleaded that since the date of the order of maintenance his circumstances had changed and that he could no longer afford to pay so high an amount as seven rupees *per mensem* for each of the children. The Deputy Magistrate held that the evidence as to the daughter following the profession of a prostitute was hearsay and found that she was still a child unable to maintain herself. He further held, that as the income of the petitioner fluctuated he was not entitled to base his income upon the amount he received in a bad month.

T. Narasimha Ayyangar for T. Rangachariar and K. Parthasarathy Ayyangar for the petitioner.

C. Sidney Smith for the Public Prosecutor for the Crown.

SANKARAN
NAIR, J.

ORDER.—An order was passed under section 488, Criminal Procedure Code, directing the petitioner to pay to each of his illegitimate daughters maintenance at the rate of Rs. 7 (seven) a month. He now applies for an alteration of such allowance on account of a change in his and their circumstances.

The petitioner is a pleader and he alleges that his income has been considerably reduced of late. The Magistrate finds that his income might be fluctuating but there has not been such a change as would justify a reduction in the rate of maintenance awarded. In revision I cannot interfere with that finding.

The eldest daughter is now said to be 17 years old, and it is urged that she is no longer a "child unable to maintain itself" under section 488. The word "child" has not been defined in the Criminal Procedure Code. In England it has got apparently various statutory definitions. But in the absence of any definition or anything to the contrary in an Act, I am of opinion that a "child" is a person who has not reached full age. It is only then that she becomes competent to enter into any contract or enforce her claims; as this daughter has not attained

the age of majority, i.e., 18, I think she is a "child" within the section.

Then it is urged that she is able to maintain herself. Her mother is a dancing girl and prostitute. She and her sisters live with her. The petitioner has, the Magistrate finds, failed to prove his allegation that his daughter already follows that profession. But it is said that at that age they become dancing girls and follow that life. But the law will not treat prostitution as a profession by which a girl might earn her livelihood and maintain herself under section 488, Criminal Procedure Code. It is against public policy to do so.

It is also said that this woman might earn a livelihood by honest labour. It is not alleged that she belongs to the labouring class. She has not been married nor has the petitioner made any attempts to get her married. There is no evidence to show that any employment was or is open to her.

For these reasons I must hold that no such change of circumstances has been proved as would entitle the petitioner to any modification of the order.

The petition is therefore dismissed.

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APPELLATE CRIMINAL.

Before Mr. Justice Oldfield.

Re MUTHU IBRAHI AND THREE OTHERS (ACCUSED NOS. 1 TO 4),
PETITIONERS.*

1912,
March 17.

Indian Penal Code (Act XLV of 1860), sec. 363—Kidnapping from lawful guardianship—Minority of Mahomedan, when to cease for the purpose of section 363—Indian Majority Act (IX of 1875), sec. 3.

According to Mahomedan Law the occurrence of puberty determines minority and the mother's right to custody, but for the purpose of section 363, Indian Penal Code, regard must be had only to the definition of minority in section 3, Indian Majority Act (IX of 1875).

In the matter of Khatija Bibi (1870) 5 Beng. L.R., 557, distinguished.

* Criminal Revision Case No. 692 of 1912 (Criminal Revision Petition No. 573 of 1912).

— **MUTRU**
IBRAHI.

Petition under sections 485 and 489 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the judgment of A. C. Durr, the Sessions Judge of Ramnad at Madura, in Criminal Appeal No. 86 of 1912, confirming the conviction and sentence of T. H. Hill, the Sub-divisional First Class Magistrate of Ramnad Division, in Calendar Case No. 46 of 1912.

The facts of the case are stated in the following order :

Dr. S. Swaminathan for the petitioners.

O. F. Napier, Public Prosecutor, for the Crown.

OLDFIELD, J.

ORDER.—The first and the fourth accused were convicted of an offence punishable under section 368 and the second and the third accused of one punishable under sections 368 and 114, Indian Penal Code.

Objection is taken first to the finding that the fourth prosecution witness, the girl alleged to have been kidnapped, was aged less than sixteen. There was evidence to justify the finding, which was purely one of fact, and I cannot interfere with it in revision.

It is urged that the fourth prosecution witness was not a minor and her mother, from whose keeping she was taken, was not her lawful guardian, because she had admittedly attained puberty and her minority and her mother's guardianship ceased under Mahomedan Law, when she did so. The fourth prosecution witness was unmarried, and her father was not living. There is therefore no question of any guardianship other than her mother's, as lawful, and it is necessary to deal only with the question whether the fourth prosecution witness was still a minor. No doubt according to Mahomedan Law the occurrence of puberty determines minority and the mother's right to custody. (Macnaughten's Principles of Mahomedan Law, page 63). But for the present purpose regard must be had only to the definition of minority in section 8, Act IX of 1875. For no argument has been based and nothing turns in this case on the saving clause, section 2, or its references to capacity to act in the matter of marriage and to religious usage. In the cases cited, for instance, *In the matter of Khatija Bibi*(1), the conflict was between the claims of the mother and husband to the custody of the minor, and section 2 was material. Here no such considerations arising, the finding

in favour of the fourth prosecution witness's minority for the purpose of this case is justified by the Statute Law; and her mother's guardianship and right to custody of her person against the accused follow. This objection therefore fails.

It is then said that the offence punishable under section 368 is not a continuing one, and that therefore the accused Nos. 2 and 3 who joined the accused Nos. 1 and 4, only after the kidnapping had been completed, are not liable for abetment of it. It has not been shown that the point was taken in either of the lower Courts. The question at what stage the offence was completed is one of fact and cannot be raised here for the first time.

Though the accused's intention is not shown to have been immoral, the sentences are not excessive. The petition fails and is dismissed.