Proceedings of the Madras Government, Revenue Department, 3rd July 1871.

No. 23. Read the following Proceedings of the Court of Wards, dated 22nd May 1871, No. 2,104:—

Read the following letter from the Honourable J. D. MAYNE, Acting Advocate-General, to the Acting Sub-Secretary to the Court of Wards, dated Madras, 16th May 1871.

In reply to your letter of the 24th April, No. 1,691, I beg to send you my opinion. I have conferred with Mr. J. W. Handley and given him a copy.

2. Although the Court of Wards only asked my opinion upon the Salur case, yet as they sent me the papers in the Pachipenta case, and as the questions in each are closely connected, I have embraced the subject-matter of both cases in my opinion.

3. In case the Court of Wards print my opinion in their Proceedings, I should feel obliged by your sending me two copies for record in the Office and for private use.

OPINION.

The alienations in the Salur case and in the Pachipenta case are different in their character, the former being an absolute transfer, the latter being in the nature of a lease, and each gives rise to different considerations. I shall state what in my opinion is the law in reference to each class of cases, and then point out the application of the law to the individual instances.

2. As regards absolute alienations, the questions for discussion appear to be three, first, what power of alienation is possessed by a Zemindar; secondly, how far is that power affected by the provisions of Regulation XXV. of 1802, Section 8; thirdly, when does the Statute of Limitations bar the right of his successor to set aside such alienations so far as they are invalid.

See per Holloway, J., III., Mad. H. C., 13.

3. The right of a Zemindar to alien the whole or any part of his Zemindary, provided he complies with the formalities laid down by the Legislature, is neither given nor restricted by Regulation XXV. of 1802. Such alienations are, by Section 8, to be recognized so far as they are "not repugnant to the Mahomedan or Hindoo Law, or to the Regulations of the British Government." There are no Regulations which restrict the right of a Zemindar to alien as apart from the formalities evidencing such alienation, and therefore in each case it becomes a question, what does the Hindoo Law permit him to do?

4. It is constantly asserted that a Zemindar has only a life-estate, and Holloway, J., lays it down (II., H. C., 128) "that the Zemindar has really an estate analogous to an estate tail, as it stood originally upon the Statute *De Donis*. He is the owner, but he can neither encumber nor alienate beyond the period of his own life." But in this respect he occupies a position exactly the same in principle as that of any other Hindoo father with male heirs. Those heirs become, from their birth, coparceners with him, and he cannot without their consent, or unless under circumstances of necessity, alien more than his own interest in the estate. But the application of this rule differs in the case of a Zemindar, on account of the difference of the coparcenery held by the heirs in a Zemindary and in an ordinary

Hindoo estate. In the latter case the father and sons are actual joint owners in possession, each can assert his claim to his aliquot share by a division, and each can alienate his own undivided interest in perpetuity, though his alienation of anything beyond his own interest would be invalid for the excess—(V., H. C., 166). But although a Zemindary is part of the joint family-estate, for instance, as a fund on which maintenance is chargeable (V., H. C., 405), it is impartible. Neither the land nor the annually accruing income (V., H. C., 31) is divisible, and the joint interest of the heir does not vest in enjoyment till the death of the holder. The consequence therefore is, that the father has a complete estate for life, and the next heir has a complete estate after his death. In fact, the position of a Zemindar with a son is exactly the same as that of a widow with a daughter's son. The estate is hers for life, and she can alienate for her life, but no act of hers, unless under circumstances of necessity, can affect the interests of her successor. If the Zemindar had no son, he could dispose of the whole or any part of his Zemindary as he liked. Having a son, he cannot affect that son's right which is to receive the Zemindary intact at his father's death.

5. Next, as to the effect of Regulation XXV. of 1802, Section 8. It is clear that nothing in that Section extends the rights of a Hindoo Zemindar. Consequently, even if he were to register his alienation, and to procure an apportionment of the kist, the only result would be, that in the event of a sale for arrears of revenue, the portion on which the arrear arose could alone be made liable. The transaction as against the heir would be just as invalid as ever. Supposing, however, that the formalities of Section 8 were not complied with, the question would then arise which was decided in III., H. C., 5. Up to the date of that decision it had always been supposed that an unregistered grant was valid against the grantor for life, but invalid as against the heir. As far as this Court is concerned, that decision, being one of a full bench, must be taken as conclusively settling that the unregistered grant is void not only against the heirs but also against the grantor himself. Should a case occur which could go on appeal to the Privy Council, that decision would of course be open to discussion. My own opinion is that the judgment of Holloway, J., dissenting from that of the other two Judges, is the sounder of the two. It is also in accordance with the express opinion of their Lordships of the Privy Council, in VIII., Moore's I. A., 338, and with the argument of the same tribunal in X., Moore's I. A., 144.

6. The real importance of this point would be felt in reference to the third question, namely, the effect of the Statute of Limitation. Under Act XIV. of 1859, Section 1, Clause 14, the limitation is, "to suits by the proprietor of any land or by any person claiming under him for the resumption or assessment of any lakheraj or rent free land, the period of twelve years from the time when the title of the person claiming the right to resume and assess such lands, or of some person under whom he claims, first accrued." Apply this rule to the above cases. If the alienation were duly registered, it would certainly be valid as against the grantor. During his life it would be no injury to the heir, who would for the first time be affected by it at the death of the grantor. The cause of action would therefore first arise at the death, and the statute would run from that date. Again, supposing the grant to be unregistered, then, if the old cases and Mr. Justice Holloway

are right, no right to resume would accrue to the grantor, and the statute would run as before from the death. But if the opinion of the majority is right, then the grantor could at once resume, and therefore the statute would run from the date of the grant (III., H. C., 67.) It certainly does seem an anomaly that this should be so. The heir could certainly not sue for possession of the property during the life of his father, nor could he sue to undo the act of his father, except so far as it might injure himself, and the injury to himself would not arise till his father's death. He might of course sue for a declaration that the grant was invalid as against his own rights, but the failure to bring a declaratory suit does not in general bar a reversioner (IV., Beng. L. R. F. B., 3.) On the other hand, the words of the statute are express, and it has been held by a Full Court in Bengal that when the statute of limitation has run against a widow, it will also bar a reversioner (IX., Weekly Rep., 505), which is exactly a parallel case. On the whole, therefore, assuming the decision in III., H. C., 5 to be right, I think that in III., H. C., 67 is also right. The operation of Act IX. of 1871, would be exactly the same as that of Act XIV. of 1859, (Section 2 Schedule Section 180).

7. Supposing the statute to have once run against the grantor and his successor, I take it to be clear that no fresh right of action could accrue to the heir next in succession. The point has been expressly ruled by the High Court (III., H. C., 153), and their decision has been recently affirmed by the Privy Council, (V., Mad. Jur., 389) on principle it seems plain, that such last-named successor would have no right in respect of which he could sue. He could only claim what descended to him from the grantor and his heir. But the grantor had lost the right by his grant, and the heir by the statute. Any doubt there might ever have been upon this point seems to be removed by Act IX. of 1871, Section 29, which declares, in opposition to the ruling in I., H. C., 85, that "at the determination of the period hereby limited to any person for instituting a suit for possession of any land, his right to such land shall be extinguished."

8. Applying these observations to the case of the Salur Zemindary, I may say generally that I quite agree with the opinion of the Government Pleader. The present minor is the grandson of the original grantor, and the son of the heir who was declared in R. A. 23 of 1865 (III., H. C., 5) to be himself barred. He therefore comes directly within the ruling in III., H. C., 153, of the correctness of which I entertain no doubt. Of course, the Collector, as agent of the Court of Wards, can do nothing in the way of getting back the property, which the minor could not do, if he were of full age.

9. The second class of alienations are those in the nature of a lease. I use the term not in a technical sense, but as denoting any arrangement whereby the property and the reversionary right thereto is recognized as remaining in the Zemindar; but the possession either permanently or temporarily is vested in another for some recurring consideration. These cases resolve themselves into (*a*) service tenures, (*b*) leases at full assessment, (*c*) leases at a favourable assessment, (*d*) possession at a favourable assessment on mere sufferance, but without any express contract:—

10. (*a*)—The law as to Service Inams, or lands held on what is known in this Presidency as *amarum* tenure, is laid down in four Privy Council cases (VII., Moore's

I. A., 128; VIII., Moore's I. A., 327; X., Moore's I. A., 16; and V., Beng. L. R., 429). The result of these decisions seems to be "that in every case the right to resume must depend, in a great measure, upon the nature of the particular tenure, or the terms of the particular grant" (V., Beng. L. R., 544). Lands held on pure *amarum* tenure, that is, for the performance of services to the Zemindar himself, are resumable at pleasure, as soon as he chooses to dispense with the services (VII., Moore's I. A., 128). But it is otherwise where the services are such as the Zemindar is bound to continue and provide for the public or the Government having an interest in them (X., Moore's I. A., 16). And where an estate is granted, burdened with a certain office, the grant will not be resumable on the ceasing of the duties, unless the continued performance of the service was the whole motive to, and consideration for, the grant, or unless the instrument by express words declared that (the service ceasing) the tenure should determine (V., Beng. L. R., 544; VIII Moore's I. A., 327). Of course, where the Zemindar himself can resume, his heir can also resume. But there may perhaps be cases where the grantor could not resume, but where his successor could. These will be spoken of under head (*c*).

(*b*)—Leases at full assessment, for whatever duration, are equally binding on the Zemindar and his successors.

(*c*)—Leases at a favourable rent, that is, one below the full assessment, are binding on the grantor, but not upon the successor, unless the lease has been granted for some of the purposes named in Mad. Act VIII. of 1865, Section 11, Clause IV.—On the same principle, that is to say, that the Zemindar cannot prejudice his heirs by diminishing their property, leases granted on favourable terms in consideration of past services would, I think, be bad as against the successor, at all events where the Zemindary was ancestral. In IV., H. C., 463 a favourable lease was held binding on the heirs of the grantor, but there the Zemindary was self-acquisition, and the grant was prior to the passing of Act VIII. of 1865, whose wording (Section 11, Clause IV.) goes beyond the terms of Regulation XXX. of 1802, Section 15 (Mad. Dec. 19 of 1862).

(*d*)—Where the case is merely that the tenant has been allowed to hold possession for any period, however long, on payment of no rent or of a favourable rent, there is nothing to prevent the Zemindar or his heirs from assessing to the full amount whenever they choose—(Mad. Dec. 1869 of 1861; II H. C., 22. III H. C., 1.)

11. Regulation XXV. of 1802, Section 8, has no application to leases, whether temporary or permanent (VIII., Moore's I. A., 327; IV., H. C., 396, overruling I., H. C., 141).

12. Lastly, as to the effect of the statute of limitations upon cases of leases created by the grantor and resumable by his heirs. This will always depend upon whether the resumption is in accordance with the terms of the lease or holding, or is in violation of those terms. In the first case, the possession of the tenant, however long it may continue, is never hostile to the claim to resume. In the latter case it is hostile, and therefore the statute will run from the time when the right to resume or exact the full assessment accrues (Act XIV. of 1859, Section 1, Clause 1st; Act IX. of 1871, Schedule II., Section 130); therefore in case (*a*)

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the statute would not begin till the services were discontinued, or perhaps not till the grantor or his heir notified his resumption of the *amarum* grant. In case (*c*) the grant would be good for the life of the grantor, and the statute would begin to run from his death (IV., H. C., 463; VIII., Moore's I. A., 327; X., Moore's I. A., 214). For the reasons given *ante* Section 7, I am of opinion that if the statute once ran against the heir, no new right of action would arise in favour of the successor of that heir. In case (*d*) the statute of limitations would never begin to run until a demand for full rent and a refusal, for till then the possession of the tenant was as tenant-at-will, and there was no hostile right set up (II., H. C., 22; III., H. C., 1).

13. I find a difficulty in applying these principles to the Pachipenta Zemindary, as the papers before me do not clearly state the nature of the Inams, beyond a loose statement that they are Service Inams. Nor is it stated when they were created, or to what degree possession under them has been adverse, and for what length of time. It is, however, quite clear that if these Inams have been created since the permanent settlement, so as to diminish the assets of the Zemindary, they are not binding on the Government; and the Collector, when he enters as attaching creditor, may claim full assessment so long as he is in possession (Madras Act II. of 1864, Section 32). But such leases are only void as against him, and as soon as he goes out of possession, they will resume their validity as against the Zemindar to exactly the same extent as they were valid before attachment. Supposing the Zemindar to have lost the right to resume, the only way to raise the assessment to its full amount would be to sell the portion of the Zemindary so under-assessed for arrears of revenue. The purchaser would then be able at once to resume the Inam and impose full assessment (Madras Act II. of 1864, Section 41).

14-15. In conclusion, I may remark that Government has no ground for the alarm expressed in Section 4 of its Proceedings of the 18th March 1871, No. 476. No act of the Zemindar in alienating his assets by lease or otherwise can in any degree diminish the security for the public revenue. Until there is a valid apportionment of kist, the whole and every part of the Zemindary is pledged as a security for the public demand. That demand takes precedence of all other encumbrances, and in the event of either attachment or sale, the Collector in the former case and the purchaser in the latter case are in no way bound by any alienation or diminution of the assets of the Zemindary.

(Signed) JOHN D. MAYNE,
Acting Advocate-General.

17*th May* 1871.

THE Board resolve to submit this opinion to Government with reference to G. O. dated 18th March 1871, No. 476, and to direct the Collector to act in accordance with it so far as regards the Pachipenta Estate.

2. Its effect in the case of Salur will be considered separately.

No. 24. Proceedings of the Court of Wards, dated 14th June 1871, No. 2,395.
Read again Proceedings of the Court of Wards, dated 22nd May 1871, No. 2,104.

THE Court of Wards acquiesce in the opinion expressed by Mr. Mayne that the alienation of the village of Karasavalsa in the Salur Zemindary is valid as

against the heir to the estate, and therefore against the Court of Wards as his representatives.

2. With regard, however, to the liability of the alienated village as security for payment of the peishcush due to Government from the Zemindary, it is clear that the joint liability of the grantee is in no way diminished by the recognition of the validity of the grant. The alienated village along with the rest of the Zemindary is security for payment of the peishcush due from the Zemindary to Government.

3. The Collector will accordingly inform the grantee that in the event of the Zemindar falling into arrears of payment of peishcush the Government are entitled to attach the whole or any part of the estate including the alienated village.

No. 25. ORDER THEREON, 3rd July 1871, No. 1,150.

Miscellaneous.

THIS view of the grantee's liability was, it is observed, clearly expressed in paragraph 14 of the Advocate-General's opinion referred to by the Court of Wards.

2. But another question arises, namely, whether, although the minor Zemindar in this case is debarred by the policy of the law in creating limitations from suing for recovery of possession, he and his successors are to be burthened in perpetuity by paying the public demand on the alienated lands? Can he not, through his guardian, require the Collector to register and sub-assess the alienation as a separate estate, seeing it is of not less extent than a village (Regulation I. of 1819)?

3. This question will be submitted for the opinion of the Advocate-General by the Court of Wards.

(True Extract.)

(Signed) D. F. CARMICHAEL,

Acting Secretary to Government.

To the Court of Wards.

No. 1150

Rev. 3rd July 1871

2104

Pro. Ct. Wards No. 2395

d/ 16 June 71 &

22nd May 1871

This view of the Grantee's liability was, it is observed, clearly expressed in Para 14 of the Advocate General's opinion, referred to by the Ct of Wards.

2. But another question arises - viz - whether, although the minor Zamindar in this case is debarred by the policy of the Law in creating limitations from suing for recovery of possession - he and his successors are to be burthened in perpetuity by paying the public demand on the alienated Lands - Can he not, through his Guardian, require the Collector to register & sub-assess the alienation as a separate Estate, seeing it is of not less extent than a village. (Reg I of 1819).

3. This question will be submitted for the opinion of the advocate Genl by the Ct of Wards.

D.F. 23/6/71

To Fort Court of Wards Dept

Govt. of (1871) Madras.

REVENUE.

TO

THE COURT OF WARDS.

Dated July 3rd.

Read Dec.

G. O., 3rd July 1871. No. 1,150.

JULY
Nos. 23—25.

Salur Zemindary in Vizagapatam District.—The question raised with reference to the alienation of a village lease ordered to be submitted for the opinion of the Advocate-General by the Court of Wards.