THE

INDIAN DECISIONS

(NEW SERIES)

Being a re-print of all the Decisions of the Privy Council on appeals from India and of the various High Courts and other Superior Courts in India reported both in the official and non-official reports from 1875

EDITED BY

THE LAWYER'S COMPANION OFFICE
TRICHINOPOLY AND MADRAS

MADRAS, Vol. V
(1891—1893)
I.L.R., 14 to 16 MADRAS

PUBLISHED BY

T. A. VENKASAWMY ROW
AND
T. S. KRISHNASAWMY ROW
Proprietors, The Law Printing House and The Lawyer's Companion Office, Trichinopoly and Madras
1914
[Copyright Registered.]
JUDGES OF THE HIGH COURT OF MADRAS DURING 1891-1893.

Chief Justices:
Hon'ble Sir Arthur J. H. Collins, KT. Q.C.
Sir T. Muttusami Ayyar, C.I.E. (offq.).

Puisne Judges:
Hon'ble Sir T. Muttusami Ayyar, C.I.E.
G. A. Parker.
F. Wilkinson.
H. L. Shephard.
J. W. Handley (offq.).
S. Subramania Ayyar (offq.).
J. W. Best.
J. A. Davies (offq.).

Advocate-General:
Hon'ble J. H. Spring Branson.

Officiating Advocate-General:
Hon'ble H. G. Wedderburn.
DATE SLIP

"This book was issued from the Library on the date last stamped. A fine of 10 Paise will be charged for each day the book is kept over-due".
REFERENCE TABLE FOR FINDING THE PAGES OF THIS VOLUME WHERE THE CASES FROM THE ORIGINAL VOLUMES MAY BE FOUND.

Indian Law Reports, Madras Series, Vol. XIV.

<table>
<thead>
<tr>
<th>Pages of 14 Mad.</th>
<th>Pages of this volume.</th>
<th>Pages of 14 Mad.</th>
<th>Pages of this volume.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1</td>
<td>150</td>
<td>106</td>
</tr>
<tr>
<td>18</td>
<td>13</td>
<td>153</td>
<td>108</td>
</tr>
<tr>
<td>23</td>
<td>16</td>
<td>163</td>
<td>116</td>
</tr>
<tr>
<td>26</td>
<td>19</td>
<td>167</td>
<td>119</td>
</tr>
<tr>
<td>29</td>
<td>21</td>
<td>169</td>
<td>120</td>
</tr>
<tr>
<td>32</td>
<td>23</td>
<td>170</td>
<td>121</td>
</tr>
<tr>
<td>36</td>
<td>26</td>
<td>172</td>
<td>123</td>
</tr>
<tr>
<td>38</td>
<td>27</td>
<td>177</td>
<td>126</td>
</tr>
<tr>
<td>44</td>
<td>31</td>
<td>183</td>
<td>130</td>
</tr>
<tr>
<td>46</td>
<td>33</td>
<td>186</td>
<td>132</td>
</tr>
<tr>
<td>49</td>
<td>35</td>
<td>223</td>
<td>157</td>
</tr>
<tr>
<td>51</td>
<td>36</td>
<td>227</td>
<td>159</td>
</tr>
<tr>
<td>52</td>
<td>37</td>
<td>229</td>
<td>161</td>
</tr>
<tr>
<td>55</td>
<td>39</td>
<td>232</td>
<td>163</td>
</tr>
<tr>
<td>57</td>
<td>41</td>
<td>235</td>
<td>165</td>
</tr>
<tr>
<td>61</td>
<td>44</td>
<td>237 (P.C.)</td>
<td>167</td>
</tr>
<tr>
<td>63</td>
<td>45</td>
<td>247</td>
<td>174</td>
</tr>
<tr>
<td>65</td>
<td>47</td>
<td>252</td>
<td>177</td>
</tr>
<tr>
<td>71</td>
<td>51</td>
<td>255 (F.B.)</td>
<td>179</td>
</tr>
<tr>
<td>74</td>
<td>53</td>
<td>258 (P.C.)</td>
<td>181</td>
</tr>
<tr>
<td>76</td>
<td>55</td>
<td>267</td>
<td>187</td>
</tr>
<tr>
<td>78</td>
<td>56</td>
<td>269</td>
<td>189</td>
</tr>
<tr>
<td>81</td>
<td>58</td>
<td>271</td>
<td>190</td>
</tr>
<tr>
<td>82</td>
<td>59</td>
<td>274</td>
<td>192</td>
</tr>
<tr>
<td>88</td>
<td>63</td>
<td>277</td>
<td>195</td>
</tr>
<tr>
<td>96</td>
<td>69</td>
<td>284</td>
<td>200</td>
</tr>
<tr>
<td>98</td>
<td>70</td>
<td>289</td>
<td>203</td>
</tr>
<tr>
<td>99</td>
<td>71</td>
<td>301 (F.B.)</td>
<td>211</td>
</tr>
<tr>
<td>101</td>
<td>72</td>
<td>312</td>
<td>218</td>
</tr>
<tr>
<td>103</td>
<td>73</td>
<td>316</td>
<td>221</td>
</tr>
<tr>
<td>121</td>
<td>85</td>
<td>324</td>
<td>227</td>
</tr>
<tr>
<td>126</td>
<td>89</td>
<td>328</td>
<td>229</td>
</tr>
<tr>
<td>133</td>
<td>94</td>
<td>334 (F.B.)</td>
<td>234</td>
</tr>
<tr>
<td>140</td>
<td>99</td>
<td>342 (F.B.)</td>
<td>239</td>
</tr>
<tr>
<td>149</td>
<td>105</td>
<td>362</td>
<td>252</td>
</tr>
</tbody>
</table>
I. L. R., MADRAS SERIES, VOL. XIV—(Concluded).

<table>
<thead>
<tr>
<th>Pages of 14 Mad.</th>
<th>Pages of this volume.</th>
<th>Pages of 14 Mad.</th>
<th>Pages of this volume.</th>
</tr>
</thead>
<tbody>
<tr>
<td>363</td>
<td>253</td>
<td>441 (F.B.)</td>
<td>309</td>
</tr>
<tr>
<td>364</td>
<td>254</td>
<td>454</td>
<td>317</td>
</tr>
<tr>
<td>365</td>
<td>255</td>
<td>458</td>
<td>320</td>
</tr>
<tr>
<td>377</td>
<td>264</td>
<td>459</td>
<td>321</td>
</tr>
<tr>
<td>379</td>
<td>265</td>
<td>462</td>
<td>323</td>
</tr>
<tr>
<td>382</td>
<td>267</td>
<td>465</td>
<td>323</td>
</tr>
<tr>
<td>386</td>
<td>270</td>
<td>467</td>
<td>325</td>
</tr>
<tr>
<td>391</td>
<td>274</td>
<td>470</td>
<td>326</td>
</tr>
<tr>
<td>396</td>
<td>277</td>
<td>473</td>
<td>328</td>
</tr>
<tr>
<td>398</td>
<td>279</td>
<td>477</td>
<td>330</td>
</tr>
<tr>
<td>399</td>
<td>280</td>
<td>475</td>
<td>333</td>
</tr>
<tr>
<td>400</td>
<td>280</td>
<td>480</td>
<td>334</td>
</tr>
<tr>
<td>404</td>
<td>283</td>
<td>484</td>
<td>335</td>
</tr>
<tr>
<td>406</td>
<td>284</td>
<td>489</td>
<td>338</td>
</tr>
<tr>
<td>408 (F.B.)</td>
<td>286</td>
<td>491</td>
<td>341</td>
</tr>
<tr>
<td>420</td>
<td>294</td>
<td>494</td>
<td>343</td>
</tr>
<tr>
<td>425</td>
<td>298</td>
<td>495</td>
<td>345</td>
</tr>
<tr>
<td>431</td>
<td>302</td>
<td>498</td>
<td>346</td>
</tr>
<tr>
<td>439 (P.C.)</td>
<td>307</td>
<td></td>
<td>348</td>
</tr>
</tbody>
</table>

Indian Law Reports, Madras Series, Vol. XV.

<table>
<thead>
<tr>
<th>Pages of 15 Mad.</th>
<th>Pages of this volume.</th>
<th>Pages of 15 Mad.</th>
<th>Pages of this volume.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>351</td>
<td>67</td>
<td>396</td>
</tr>
<tr>
<td>6</td>
<td>354</td>
<td>69</td>
<td>397</td>
</tr>
<tr>
<td>12</td>
<td>358</td>
<td>70</td>
<td>398</td>
</tr>
<tr>
<td>15</td>
<td>360</td>
<td>73</td>
<td>400</td>
</tr>
<tr>
<td>19</td>
<td>363</td>
<td>75</td>
<td>401</td>
</tr>
<tr>
<td>29</td>
<td>370</td>
<td>78</td>
<td>403</td>
</tr>
<tr>
<td>35</td>
<td>374</td>
<td>79</td>
<td>404</td>
</tr>
<tr>
<td>36</td>
<td>375</td>
<td>82</td>
<td>406</td>
</tr>
<tr>
<td>39</td>
<td>377</td>
<td>83</td>
<td>407</td>
</tr>
<tr>
<td>41</td>
<td>378</td>
<td>89</td>
<td>411</td>
</tr>
<tr>
<td>44</td>
<td>380</td>
<td>91</td>
<td>412</td>
</tr>
<tr>
<td>47</td>
<td>382</td>
<td>93</td>
<td>414</td>
</tr>
<tr>
<td>50</td>
<td>384</td>
<td>94</td>
<td>414</td>
</tr>
<tr>
<td>54</td>
<td>387</td>
<td>95</td>
<td>415</td>
</tr>
<tr>
<td>57</td>
<td>389</td>
<td>97</td>
<td>416</td>
</tr>
<tr>
<td>60</td>
<td>391</td>
<td>98</td>
<td>417</td>
</tr>
<tr>
<td>63</td>
<td>393</td>
<td>99</td>
<td>418</td>
</tr>
<tr>
<td>65</td>
<td>395</td>
<td>101 (P.C.)</td>
<td>419</td>
</tr>
<tr>
<td>Pages of 15 Mad.</td>
<td>Pages of this volume</td>
<td>Pages of 15 Mad.</td>
<td>Pages of this volume</td>
</tr>
<tr>
<td>-----------------</td>
<td>---------------------</td>
<td>-----------------</td>
<td>---------------------</td>
</tr>
<tr>
<td>111 ...</td>
<td>426</td>
<td>258</td>
<td>... 531</td>
</tr>
<tr>
<td>123</td>
<td>434</td>
<td>259 (F.B.)</td>
<td>... 532</td>
</tr>
<tr>
<td>125</td>
<td>436</td>
<td>261</td>
<td>... 533</td>
</tr>
<tr>
<td>127</td>
<td>437</td>
<td>264</td>
<td>... 535</td>
</tr>
<tr>
<td>131</td>
<td>440</td>
<td>267</td>
<td>... 537</td>
</tr>
<tr>
<td>132</td>
<td>441</td>
<td>268</td>
<td>... 538</td>
</tr>
<tr>
<td>134 (F.B.)</td>
<td>442</td>
<td>281</td>
<td>... 547</td>
</tr>
<tr>
<td>135</td>
<td>443</td>
<td>284</td>
<td>... 549</td>
</tr>
<tr>
<td>137</td>
<td>444</td>
<td>286</td>
<td>... 551</td>
</tr>
<tr>
<td>138 (F.B.)</td>
<td>445</td>
<td>288</td>
<td>... 552</td>
</tr>
<tr>
<td>150</td>
<td>453</td>
<td>290</td>
<td>... 553</td>
</tr>
<tr>
<td>153</td>
<td>455</td>
<td>292</td>
<td>... 555</td>
</tr>
<tr>
<td>155</td>
<td>457</td>
<td>294</td>
<td>... 556</td>
</tr>
<tr>
<td>156</td>
<td>458</td>
<td>296</td>
<td>... 558</td>
</tr>
<tr>
<td>157</td>
<td>458</td>
<td>298</td>
<td>... 559</td>
</tr>
<tr>
<td>161</td>
<td>461</td>
<td>300</td>
<td>... 561</td>
</tr>
<tr>
<td>164 (F.B.)</td>
<td>463</td>
<td>302</td>
<td>... 562</td>
</tr>
<tr>
<td>166</td>
<td>465</td>
<td>303</td>
<td>... 563</td>
</tr>
<tr>
<td>169</td>
<td>467</td>
<td>304</td>
<td>... 563</td>
</tr>
<tr>
<td>170</td>
<td>468</td>
<td>307</td>
<td>... 566</td>
</tr>
<tr>
<td>174</td>
<td>471</td>
<td>315</td>
<td>... 571</td>
</tr>
<tr>
<td>179</td>
<td>474</td>
<td>323</td>
<td>... 577</td>
</tr>
<tr>
<td>181</td>
<td>475</td>
<td>331</td>
<td>... 582</td>
</tr>
<tr>
<td>183</td>
<td>477</td>
<td>333</td>
<td>... 584</td>
</tr>
<tr>
<td>186</td>
<td>479</td>
<td>336</td>
<td>... 586</td>
</tr>
<tr>
<td>193 (F.B.)</td>
<td>484</td>
<td>343</td>
<td>... 591</td>
</tr>
<tr>
<td>199</td>
<td>490</td>
<td>345</td>
<td>... 592</td>
</tr>
<tr>
<td>203</td>
<td>492</td>
<td>348</td>
<td>... 594</td>
</tr>
<tr>
<td>214</td>
<td>500</td>
<td>350</td>
<td>... 596</td>
</tr>
<tr>
<td>219</td>
<td>503</td>
<td>352</td>
<td>... 598</td>
</tr>
<tr>
<td>221</td>
<td>505</td>
<td>355</td>
<td>... 600</td>
</tr>
<tr>
<td>223</td>
<td>506</td>
<td>356</td>
<td>... 601</td>
</tr>
<tr>
<td>224</td>
<td>507</td>
<td>360</td>
<td>... 603</td>
</tr>
<tr>
<td>226</td>
<td>508</td>
<td>362</td>
<td>... 605</td>
</tr>
<tr>
<td>230</td>
<td>511</td>
<td>366</td>
<td>... 607</td>
</tr>
<tr>
<td>233</td>
<td>513</td>
<td>372</td>
<td>... 612</td>
</tr>
<tr>
<td>234</td>
<td>514</td>
<td>378</td>
<td>... 616</td>
</tr>
<tr>
<td>237 (F.B.)</td>
<td>516</td>
<td>380</td>
<td>... 617</td>
</tr>
<tr>
<td>240</td>
<td>518</td>
<td>382</td>
<td>... 618</td>
</tr>
<tr>
<td>241</td>
<td>519</td>
<td>384</td>
<td>... 620</td>
</tr>
<tr>
<td>253</td>
<td>527</td>
<td>386 (F.B.)</td>
<td>... 621</td>
</tr>
<tr>
<td>255</td>
<td>528</td>
<td>389</td>
<td>... 623</td>
</tr>
</tbody>
</table>

M V—II
<table>
<thead>
<tr>
<th>Pages of 15 Mad.</th>
<th>Pages of this volume</th>
<th>Pages of 15 Mad.</th>
<th>Pages of this volume</th>
</tr>
</thead>
<tbody>
<tr>
<td>399 ...</td>
<td>630</td>
<td>477 ...</td>
<td>684</td>
</tr>
<tr>
<td>401 ...</td>
<td>631</td>
<td>480 ...</td>
<td>686</td>
</tr>
<tr>
<td>403 ...</td>
<td>633</td>
<td>483 ...</td>
<td>688</td>
</tr>
<tr>
<td>405 ...</td>
<td>634</td>
<td>484 ...</td>
<td>689</td>
</tr>
<tr>
<td>412 ...</td>
<td>639</td>
<td>486 ...</td>
<td>690</td>
</tr>
<tr>
<td>414 ...</td>
<td>641</td>
<td>487 ...</td>
<td>691</td>
</tr>
<tr>
<td>417 ...</td>
<td>643</td>
<td>489 ...</td>
<td>693</td>
</tr>
<tr>
<td>419 ...</td>
<td>644</td>
<td>491 ...</td>
<td>694</td>
</tr>
<tr>
<td>421 ...</td>
<td>645</td>
<td>492 ...</td>
<td>695</td>
</tr>
<tr>
<td>422 ...</td>
<td>647</td>
<td>494 ...</td>
<td>696</td>
</tr>
<tr>
<td>424 ...</td>
<td>648</td>
<td>498 ...</td>
<td>699</td>
</tr>
<tr>
<td>448 ...</td>
<td>664</td>
<td>501 ...</td>
<td>701</td>
</tr>
<tr>
<td>474 ...</td>
<td>682</td>
<td>503 (P.C.)</td>
<td>702</td>
</tr>
</tbody>
</table>

Indian Law Reports, Madras Series, Vol. XVI.

<table>
<thead>
<tr>
<th>Pages of 16 Mad.</th>
<th>Pages of this volume</th>
<th>Pages of 16 Mad.</th>
<th>Pages of this volume</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 (P.C.)</td>
<td>709</td>
<td>117 ...</td>
<td>789</td>
</tr>
<tr>
<td>11 ...</td>
<td>716</td>
<td>121 ...</td>
<td>792</td>
</tr>
<tr>
<td>20 ...</td>
<td>722</td>
<td>127 ...</td>
<td>796</td>
</tr>
<tr>
<td>23 ...</td>
<td>724</td>
<td>131 ...</td>
<td>799</td>
</tr>
<tr>
<td>31 ...</td>
<td>729</td>
<td>138 ...</td>
<td>804</td>
</tr>
<tr>
<td>34 ...</td>
<td>731</td>
<td>140 ...</td>
<td>805</td>
</tr>
<tr>
<td>40 ...</td>
<td>736</td>
<td>142 ...</td>
<td>807</td>
</tr>
<tr>
<td>43 ...</td>
<td>738</td>
<td>144 ...</td>
<td>808</td>
</tr>
<tr>
<td>54 ...</td>
<td>745</td>
<td>146 ...</td>
<td>809</td>
</tr>
<tr>
<td>61 (F.B.)</td>
<td>750</td>
<td>148 (F.B.)</td>
<td>811</td>
</tr>
<tr>
<td>64 ...</td>
<td>752</td>
<td>182 ...</td>
<td>834</td>
</tr>
<tr>
<td>67 ...</td>
<td>754</td>
<td>194 ...</td>
<td>842</td>
</tr>
<tr>
<td>71 ...</td>
<td>757</td>
<td>198 ...</td>
<td>845</td>
</tr>
<tr>
<td>73 ...</td>
<td>758</td>
<td>201 (F.B.)</td>
<td>847</td>
</tr>
<tr>
<td>76 ...</td>
<td>760</td>
<td>202-N ...</td>
<td>848</td>
</tr>
<tr>
<td>80 ...</td>
<td>763</td>
<td>203-N ...</td>
<td>849</td>
</tr>
<tr>
<td>84 ...</td>
<td>766</td>
<td>207 ...</td>
<td>852</td>
</tr>
<tr>
<td>85 ...</td>
<td>767</td>
<td>214 ...</td>
<td>856</td>
</tr>
<tr>
<td>94 ...</td>
<td>773</td>
<td>220 ...</td>
<td>860</td>
</tr>
<tr>
<td>97 ...</td>
<td>775</td>
<td>229 ...</td>
<td>866</td>
</tr>
<tr>
<td>98 ...</td>
<td>775</td>
<td>230 ...</td>
<td>867</td>
</tr>
<tr>
<td>99 ...</td>
<td>776</td>
<td>234 ...</td>
<td>870</td>
</tr>
<tr>
<td>105 ...</td>
<td>781</td>
<td>235 ...</td>
<td>871</td>
</tr>
<tr>
<td>111-N ...</td>
<td>785</td>
<td>238 ...</td>
<td>873</td>
</tr>
<tr>
<td>Pages of</td>
<td>Pages of this volume</td>
<td>Pages of</td>
<td>Pages of this volume</td>
</tr>
<tr>
<td>-----------</td>
<td>----------------------</td>
<td>-----------</td>
<td>----------------------</td>
</tr>
<tr>
<td>16 Mad.</td>
<td></td>
<td>16 Mad.</td>
<td></td>
</tr>
<tr>
<td>268 (P.C.)</td>
<td>... 893</td>
<td>369 (P.C.)</td>
<td>... 964</td>
</tr>
<tr>
<td>271</td>
<td>... 896</td>
<td>380</td>
<td>... 971</td>
</tr>
<tr>
<td>274</td>
<td>... 898</td>
<td>384</td>
<td>... 974</td>
</tr>
<tr>
<td>278</td>
<td>... 900</td>
<td>397</td>
<td>... 983</td>
</tr>
<tr>
<td>280</td>
<td>... 902</td>
<td>400</td>
<td>... 985</td>
</tr>
<tr>
<td>283</td>
<td>... 904</td>
<td>405</td>
<td>... 988</td>
</tr>
<tr>
<td>285</td>
<td>... 905</td>
<td>407</td>
<td>... 989</td>
</tr>
<tr>
<td>287</td>
<td>... 907</td>
<td>410</td>
<td>... 992</td>
</tr>
<tr>
<td>290</td>
<td>... 909</td>
<td>415</td>
<td>... 995</td>
</tr>
<tr>
<td>293</td>
<td>... 911</td>
<td>419 (F.B.)</td>
<td>... 998</td>
</tr>
<tr>
<td>294</td>
<td>... 912</td>
<td>421</td>
<td>... 1000</td>
</tr>
<tr>
<td>296</td>
<td>... 913</td>
<td>423</td>
<td>... 1001</td>
</tr>
<tr>
<td>299 (P.C.)</td>
<td>... 916</td>
<td>424</td>
<td>... 1002</td>
</tr>
<tr>
<td>301</td>
<td>... 917</td>
<td>429</td>
<td>... 1005</td>
</tr>
<tr>
<td>304</td>
<td>... 919</td>
<td>436</td>
<td>... 1010</td>
</tr>
<tr>
<td>305</td>
<td>... 920</td>
<td>440</td>
<td>... 1013</td>
</tr>
<tr>
<td>308</td>
<td>... 922</td>
<td>443</td>
<td>... 1015</td>
</tr>
<tr>
<td>310</td>
<td>... 923</td>
<td>447</td>
<td>... 1018</td>
</tr>
<tr>
<td>311</td>
<td>... 924</td>
<td>449</td>
<td>... 1019</td>
</tr>
<tr>
<td>317</td>
<td>... 928</td>
<td>451</td>
<td>... 1020</td>
</tr>
<tr>
<td>319</td>
<td>... 929</td>
<td>452</td>
<td>... 1021</td>
</tr>
<tr>
<td>321</td>
<td>... 931</td>
<td>454</td>
<td>... 1022</td>
</tr>
<tr>
<td>323</td>
<td>... 932</td>
<td>455 (F.B.)</td>
<td>... 1024</td>
</tr>
<tr>
<td>325</td>
<td>... 933</td>
<td>456</td>
<td>... 1024</td>
</tr>
<tr>
<td>326</td>
<td>... 934</td>
<td>459 (F.B.)</td>
<td>... 1027</td>
</tr>
<tr>
<td>328</td>
<td>... 936</td>
<td>461</td>
<td>... 1028</td>
</tr>
<tr>
<td>333</td>
<td>... 939</td>
<td>463</td>
<td>... 1029</td>
</tr>
<tr>
<td>335</td>
<td>... 940</td>
<td>464</td>
<td>... 1030</td>
</tr>
<tr>
<td>339</td>
<td>... 943</td>
<td>466</td>
<td>... 1031</td>
</tr>
<tr>
<td>341</td>
<td>... 945</td>
<td>468</td>
<td>... 1033</td>
</tr>
<tr>
<td>344</td>
<td>... 947</td>
<td>474</td>
<td>... 1037</td>
</tr>
<tr>
<td>347</td>
<td>... 949</td>
<td>476</td>
<td>... 1038</td>
</tr>
<tr>
<td>350</td>
<td>... 951</td>
<td>479</td>
<td>... 1040</td>
</tr>
<tr>
<td>353</td>
<td>... 953</td>
<td>481</td>
<td>... 1041</td>
</tr>
<tr>
<td>355</td>
<td>... 955</td>
<td>486</td>
<td>... 1045</td>
</tr>
<tr>
<td>361</td>
<td>... 958</td>
<td>490 (P.C.)</td>
<td>... 1048</td>
</tr>
<tr>
<td>364</td>
<td>... 960</td>
<td>499</td>
<td>... 1054</td>
</tr>
<tr>
<td>366</td>
<td>... 962</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pages of the Reports</td>
<td>Pages of the Reports</td>
<td>Pages of the Reports</td>
<td></td>
</tr>
<tr>
<td>----------------------</td>
<td>----------------------</td>
<td>----------------------</td>
<td></td>
</tr>
<tr>
<td>37 ...</td>
<td>171 ...</td>
<td>9 ...</td>
<td></td>
</tr>
<tr>
<td>45 ...</td>
<td>177 ...</td>
<td>80 ...</td>
<td></td>
</tr>
<tr>
<td>149 ...</td>
<td>220 ...</td>
<td>150 ...</td>
<td></td>
</tr>
<tr>
<td>184 ...</td>
<td>227 ...</td>
<td>9 ...</td>
<td></td>
</tr>
<tr>
<td>702 ...</td>
<td>231 ...</td>
<td>80 ...</td>
<td></td>
</tr>
<tr>
<td>709 ...</td>
<td>240 ...</td>
<td>150 ...</td>
<td></td>
</tr>
<tr>
<td>893 ...</td>
<td>242 ...</td>
<td>1048 ...</td>
<td></td>
</tr>
<tr>
<td>964 ...</td>
<td>321 ...</td>
<td>1048 ...</td>
<td></td>
</tr>
<tr>
<td>1048 ...</td>
<td>338 ...</td>
<td>916 ...</td>
<td></td>
</tr>
<tr>
<td>645 ...</td>
<td>1 ...</td>
<td>222 ...</td>
<td></td>
</tr>
<tr>
<td>167 ...</td>
<td>709 ...</td>
<td>224 ...</td>
<td></td>
</tr>
<tr>
<td>709 ...</td>
<td>181 ...</td>
<td>748 ...</td>
<td></td>
</tr>
<tr>
<td>419 ...</td>
<td>419 ...</td>
<td>419 ...</td>
<td></td>
</tr>
<tr>
<td>702 ...</td>
<td>702 ...</td>
<td>964 ...</td>
<td></td>
</tr>
<tr>
<td>893 ...</td>
<td>893 ...</td>
<td>1048 ...</td>
<td></td>
</tr>
<tr>
<td>964 ...</td>
<td>964 ...</td>
<td>1048 ...</td>
<td></td>
</tr>
<tr>
<td>757-N. ...</td>
<td>757-N. ...</td>
<td>757-N. ...</td>
<td></td>
</tr>
<tr>
<td>1 ...</td>
<td>171 ...</td>
<td>1 ...</td>
<td></td>
</tr>
<tr>
<td>16 ...</td>
<td>177 ...</td>
<td>13 ...</td>
<td></td>
</tr>
<tr>
<td>123 ...</td>
<td>220 ...</td>
<td>19 ...</td>
<td></td>
</tr>
<tr>
<td>105 ...</td>
<td>227 ...</td>
<td>23 ...</td>
<td></td>
</tr>
<tr>
<td>221 ...</td>
<td>231 ...</td>
<td>29 ...</td>
<td></td>
</tr>
<tr>
<td>132 ...</td>
<td>240 ...</td>
<td>39 ...</td>
<td></td>
</tr>
<tr>
<td>280 ...</td>
<td>242 ...</td>
<td>42 ...</td>
<td></td>
</tr>
<tr>
<td>620 ...</td>
<td>321 ...</td>
<td>45 ...</td>
<td></td>
</tr>
<tr>
<td>591 ...</td>
<td>338 ...</td>
<td>50 ...</td>
<td></td>
</tr>
</tbody>
</table>
## OTHER REPORTS—(Continued).

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>54 ... 458</td>
<td>279 ... 939</td>
</tr>
<tr>
<td>64 ... 445</td>
<td>281 ... 792</td>
</tr>
<tr>
<td>81 ... 434</td>
<td>296 ... 724</td>
</tr>
<tr>
<td>86 ... 645</td>
<td></td>
</tr>
<tr>
<td>91 ... 647</td>
<td></td>
</tr>
<tr>
<td>93 ... 587</td>
<td></td>
</tr>
<tr>
<td>95 ... 588*</td>
<td></td>
</tr>
<tr>
<td>109 ... 508</td>
<td></td>
</tr>
<tr>
<td>112 ... 562</td>
<td></td>
</tr>
<tr>
<td>114 ... 630</td>
<td></td>
</tr>
<tr>
<td>116 ... 644</td>
<td></td>
</tr>
<tr>
<td>119 ... 643</td>
<td></td>
</tr>
<tr>
<td>120 ... 505</td>
<td></td>
</tr>
<tr>
<td>122 ... 563</td>
<td></td>
</tr>
<tr>
<td>127 ... 500</td>
<td></td>
</tr>
<tr>
<td>130 ... 586</td>
<td></td>
</tr>
<tr>
<td>139 ... 729</td>
<td></td>
</tr>
<tr>
<td>142 ... 641</td>
<td></td>
</tr>
<tr>
<td>148 ... 507</td>
<td></td>
</tr>
<tr>
<td>153 ... 808</td>
<td></td>
</tr>
<tr>
<td>155 ... 752</td>
<td></td>
</tr>
<tr>
<td>158 ... 571</td>
<td></td>
</tr>
<tr>
<td>173 ... 909</td>
<td></td>
</tr>
<tr>
<td>175 ... 605</td>
<td></td>
</tr>
<tr>
<td>181 ... 1027</td>
<td></td>
</tr>
<tr>
<td>200 ... 750</td>
<td></td>
</tr>
<tr>
<td>212 ... 684</td>
<td></td>
</tr>
<tr>
<td>215 ... 547</td>
<td></td>
</tr>
<tr>
<td>219 ... 689</td>
<td></td>
</tr>
<tr>
<td>226 ... 847</td>
<td></td>
</tr>
<tr>
<td>231 ... 686</td>
<td></td>
</tr>
<tr>
<td>244 ... 760</td>
<td></td>
</tr>
<tr>
<td>247 ... 900</td>
<td></td>
</tr>
<tr>
<td>249 ... 736</td>
<td></td>
</tr>
<tr>
<td>255 ... 701</td>
<td></td>
</tr>
<tr>
<td>257 ... 693</td>
<td></td>
</tr>
<tr>
<td>258 ... 695</td>
<td></td>
</tr>
<tr>
<td>262 ... 696</td>
<td></td>
</tr>
<tr>
<td>265 ... 716</td>
<td></td>
</tr>
<tr>
<td>272 ... 1045</td>
<td></td>
</tr>
<tr>
<td>Pages of the Reports.</td>
<td>Pages of this volume.</td>
</tr>
<tr>
<td>----------------------</td>
<td>----------------------</td>
</tr>
<tr>
<td><strong>Weir's Criminal Rulings, Vol. I:</strong></td>
<td></td>
</tr>
<tr>
<td>59</td>
<td>89</td>
</tr>
<tr>
<td>72</td>
<td>437</td>
</tr>
<tr>
<td>86</td>
<td>1029</td>
</tr>
<tr>
<td>109</td>
<td>338</td>
</tr>
<tr>
<td>131</td>
<td>414</td>
</tr>
<tr>
<td>133</td>
<td>505</td>
</tr>
<tr>
<td>175</td>
<td>1000</td>
</tr>
<tr>
<td>195</td>
<td>280</td>
</tr>
<tr>
<td>241</td>
<td>254</td>
</tr>
<tr>
<td>365</td>
<td>378</td>
</tr>
<tr>
<td>366</td>
<td>577</td>
</tr>
<tr>
<td>372</td>
<td>401</td>
</tr>
<tr>
<td>422</td>
<td>960</td>
</tr>
<tr>
<td>587</td>
<td>871</td>
</tr>
<tr>
<td>588</td>
<td>641</td>
</tr>
<tr>
<td>598</td>
<td>370</td>
</tr>
<tr>
<td>617</td>
<td>500</td>
</tr>
<tr>
<td>672</td>
<td>949</td>
</tr>
<tr>
<td>723</td>
<td>1001</td>
</tr>
<tr>
<td>733</td>
<td>867</td>
</tr>
<tr>
<td>747</td>
<td>412</td>
</tr>
<tr>
<td>763</td>
<td>458</td>
</tr>
<tr>
<td>776</td>
<td>174</td>
</tr>
<tr>
<td>802</td>
<td>239</td>
</tr>
<tr>
<td>817</td>
<td>500</td>
</tr>
<tr>
<td>823</td>
<td>781</td>
</tr>
<tr>
<td>827-N...</td>
<td>785</td>
</tr>
<tr>
<td>848</td>
<td>157</td>
</tr>
<tr>
<td><strong>Weir's Criminal Rulings, Vol. II:</strong></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>85</td>
</tr>
<tr>
<td>36</td>
<td>441</td>
</tr>
<tr>
<td>174</td>
<td>507</td>
</tr>
<tr>
<td>220</td>
<td>1033</td>
</tr>
<tr>
<td>252</td>
<td>870</td>
</tr>
<tr>
<td>326</td>
<td>407</td>
</tr>
<tr>
<td>390</td>
<td>26</td>
</tr>
<tr>
<td>468</td>
<td>444</td>
</tr>
<tr>
<td>557</td>
<td>234</td>
</tr>
<tr>
<td>579</td>
<td>922</td>
</tr>
<tr>
<td>605</td>
<td>440</td>
</tr>
<tr>
<td>688</td>
<td>280</td>
</tr>
<tr>
<td>794</td>
<td>393</td>
</tr>
</tbody>
</table>
### NAMES OF CASES FOUND IN THIS VOLUME

<table>
<thead>
<tr>
<th>Case details</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td></td>
</tr>
<tr>
<td>Abdu v. Koppamal, 16 M 355</td>
<td>955</td>
</tr>
<tr>
<td>Abdool v. Mahomed, 14 M 401</td>
<td>283</td>
</tr>
<tr>
<td>Abdul Kadar v. Mahomed, 15 M 15</td>
<td>360</td>
</tr>
<tr>
<td>—— Kader v. Aishamma, 16 M 61 = 2 M L J 100 (F B)</td>
<td>750</td>
</tr>
<tr>
<td>Achayya v. Hanumanrayudu, 14 M 269</td>
<td>189</td>
</tr>
<tr>
<td>Administrator-General of Madras v. Money, 15 M 448</td>
<td>664</td>
</tr>
<tr>
<td>Agra Bank v. Hamlin, 14 M 235</td>
<td>165</td>
</tr>
<tr>
<td>Alima v. Kutti, 14 M 96</td>
<td>69</td>
</tr>
<tr>
<td>Ambu v. Kettilamma, 14 M 23 = 1 M L J 23</td>
<td>16</td>
</tr>
<tr>
<td>Amirthayyan v. Katharamayan, 14 M 65 = 1 M L J 177</td>
<td>47</td>
</tr>
<tr>
<td>Ammanu v. Gurumurthi, 16 M 64 = 2 M L J 155</td>
<td>752</td>
</tr>
<tr>
<td>Ammayee v. Yalumalai, 15 M 361</td>
<td>533</td>
</tr>
<tr>
<td>Ammottu Haji v. Kunkayen Kutti, 15 M 490 = 2 M L J 231</td>
<td>666</td>
</tr>
<tr>
<td>Ammuni v. Krishna, 16 M 405</td>
<td>988</td>
</tr>
<tr>
<td>Amutha v. Muthayya, 16 M 339</td>
<td>913</td>
</tr>
<tr>
<td>Ananda Razu v. Viyanna, 15 M 492 = 2 M L J 258</td>
<td>695</td>
</tr>
<tr>
<td>Anantan v. Sankaran, 14 M 101</td>
<td>72</td>
</tr>
<tr>
<td>Ananthayya v. Padmaya, 16 M 278 = 2 M L J 247</td>
<td>900</td>
</tr>
<tr>
<td>Anderson v. Pariasami, 15 M 169</td>
<td>467</td>
</tr>
<tr>
<td>Annamalai v. Subramanyan, 15 M 293</td>
<td>559</td>
</tr>
<tr>
<td>Appandai v. Srihari Joisbi, 16 M 451</td>
<td>1020</td>
</tr>
<tr>
<td>Apparau v. Narasanao, 15 M 47</td>
<td>382</td>
</tr>
<tr>
<td>Appavayyar v. Rahimana, 14 M 170</td>
<td>191</td>
</tr>
<tr>
<td>Appu v. Raman, 14 M 425</td>
<td>298</td>
</tr>
<tr>
<td>Arumuga v. Chokalingam, 15 M 331</td>
<td>532</td>
</tr>
<tr>
<td>Arunanbilleram v. Arunachollam, 15 M 203 = 2 M L J 1</td>
<td>492</td>
</tr>
<tr>
<td>Atchayya v. Bangarayya, 16 M 117</td>
<td>789</td>
</tr>
<tr>
<td>—— v. Gangayya, 15 M 138 (F B) = 2 M L J 64</td>
<td>445</td>
</tr>
<tr>
<td>Athakutti v. Govinda, 16 M 97</td>
<td>775</td>
</tr>
<tr>
<td>Augustin v. Modlycott, 15 M 241</td>
<td>519</td>
</tr>
<tr>
<td>Ayanna v. Nagabhoosanam, 16 M 285</td>
<td>905</td>
</tr>
<tr>
<td>Ayyappa v. Venkatakrishnamraja, 15 M 484 = 2 M L J 219</td>
<td>689</td>
</tr>
<tr>
<td>Azimullah Saheb v. Secretary of State for India, 15 M 405</td>
<td>634</td>
</tr>
</tbody>
</table>

### B

<table>
<thead>
<tr>
<th>Case details</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bairagulu v. Bapanna, 15 M 302 = 2 M L J 112</td>
<td>562</td>
</tr>
<tr>
<td>Balakrishna v. Secretary of State for India, 16 M 294 = 3 M L J 98</td>
<td>912</td>
</tr>
<tr>
<td>Bank of Madras v. Subbarayulu, 14 M 32</td>
<td>23</td>
</tr>
<tr>
<td>Bikutti v. Kalendan, 14 M 267 = 1 M L J 227</td>
<td>187</td>
</tr>
<tr>
<td>Brahmayya v. Lakshminarasimham, 16 M 310</td>
<td>923</td>
</tr>
<tr>
<td>Brown v. Fergusson, 16 M 499</td>
<td>1054</td>
</tr>
<tr>
<td>Byari v. Puttanna, 14 M 38</td>
<td>27</td>
</tr>
<tr>
<td>Byathamma v. Avulla, 15 M 19</td>
<td>363</td>
</tr>
<tr>
<td>Page</td>
<td></td>
</tr>
<tr>
<td>------</td>
<td></td>
</tr>
<tr>
<td>116</td>
<td></td>
</tr>
<tr>
<td>227</td>
<td></td>
</tr>
<tr>
<td>633</td>
<td></td>
</tr>
<tr>
<td>694</td>
<td></td>
</tr>
<tr>
<td>265</td>
<td></td>
</tr>
<tr>
<td>370</td>
<td></td>
</tr>
<tr>
<td>901</td>
<td></td>
</tr>
<tr>
<td>566</td>
<td></td>
</tr>
<tr>
<td>144</td>
<td></td>
</tr>
<tr>
<td>270</td>
<td></td>
</tr>
<tr>
<td>380</td>
<td></td>
</tr>
<tr>
<td>684</td>
<td></td>
</tr>
<tr>
<td>597</td>
<td></td>
</tr>
<tr>
<td>983</td>
<td></td>
</tr>
<tr>
<td>796</td>
<td></td>
</tr>
<tr>
<td>563</td>
<td></td>
</tr>
<tr>
<td>418</td>
<td></td>
</tr>
<tr>
<td>58</td>
<td></td>
</tr>
<tr>
<td>584</td>
<td></td>
</tr>
<tr>
<td>200</td>
<td></td>
</tr>
<tr>
<td>400</td>
<td></td>
</tr>
<tr>
<td>195</td>
<td></td>
</tr>
<tr>
<td>551</td>
<td></td>
</tr>
<tr>
<td>641</td>
<td></td>
</tr>
<tr>
<td>701</td>
<td></td>
</tr>
<tr>
<td>868</td>
<td></td>
</tr>
<tr>
<td>985</td>
<td></td>
</tr>
<tr>
<td>167</td>
<td></td>
</tr>
<tr>
<td>563</td>
<td></td>
</tr>
<tr>
<td>317</td>
<td></td>
</tr>
<tr>
<td>Names of Cases</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>K</td>
<td></td>
</tr>
<tr>
<td>Kammath v. Kunhamed, 15 M 288</td>
<td>...</td>
</tr>
<tr>
<td>--- - v. Mangappa, 16 M 454</td>
<td>...</td>
</tr>
<tr>
<td>Kanagappa v. Sokkalinga, 15 M 362 = 2 M L J 175</td>
<td>...</td>
</tr>
<tr>
<td>Kanara Kurup v. Govinda Kurup, 16 M 214 = 3 M L J 69</td>
<td>...</td>
</tr>
<tr>
<td>Kanara v. Komappan, 14 M 169</td>
<td>...</td>
</tr>
<tr>
<td>Kannammal v. Virasami, 15 M 485 = 2 M L J 114</td>
<td>...</td>
</tr>
<tr>
<td>Kannu v. Natesa, 14 M 477</td>
<td>...</td>
</tr>
<tr>
<td>Karunakara Menon v. Secretary of State for India, 14 M 431</td>
<td>...</td>
</tr>
<tr>
<td>Karuppasami v. Pichu, 15 M 419 = 2 M L J 116</td>
<td>...</td>
</tr>
<tr>
<td>Kasi Doss v. Kassim Sait, 16 M 344 = 2 M L J 215</td>
<td>...</td>
</tr>
<tr>
<td>Kasmi v. Ayishamma, 15 M 60 = 1 M L J 754</td>
<td>...</td>
</tr>
<tr>
<td>Kasturi v. Venkatachelapathi, 15 M 412</td>
<td>...</td>
</tr>
<tr>
<td>Kaveri v. Venkamma, 14 M 396</td>
<td>...</td>
</tr>
<tr>
<td>Kelu v. Vikrisha, 15 M 345 = 1 M L J 395</td>
<td>...</td>
</tr>
<tr>
<td>Kerala Varma v. Chadayan Kutti, 15 M 181</td>
<td>...</td>
</tr>
<tr>
<td>--- Rajah Valiya v. Shangaram, 16 M 452</td>
<td>...</td>
</tr>
<tr>
<td>Konna Panikar v. Karunakara, 16 M 328</td>
<td>...</td>
</tr>
<tr>
<td>Kothandapani v. Somasundaram, 15 M 97</td>
<td>...</td>
</tr>
<tr>
<td>Krishna v. Lakshminaranappa, 15 M 67 = 2 M L J 13</td>
<td>...</td>
</tr>
<tr>
<td>Krishnabhopati v. Ramamurti, 16 M 198</td>
<td>...</td>
</tr>
<tr>
<td>Krishnamma v. Suranna, 16 M 148 (F B) = 3 M L J 54</td>
<td>...</td>
</tr>
<tr>
<td>Krishnamcharlu v. Rangacharlu, 16 M 73</td>
<td>...</td>
</tr>
<tr>
<td>Krishnan v. Arunachalam, 16 M 447 = 3 M L J 126</td>
<td>...</td>
</tr>
<tr>
<td>--- v. Perachan, 15 M 382</td>
<td>...</td>
</tr>
<tr>
<td>--- v. Veloo, 14 M 301 (F B)</td>
<td>...</td>
</tr>
<tr>
<td>Krishnassami v. Kanakasabai, 14 M 183 = 1 M L J 234</td>
<td>...</td>
</tr>
<tr>
<td>--- v. Kesava, 14 M 63</td>
<td>...</td>
</tr>
<tr>
<td>Krishna Vijaya Pachaya Naicker v. Marudanayagam Pillai, 15 M, 135</td>
<td>...</td>
</tr>
<tr>
<td>Krishnayya v. Bellary Municipal Council, 15 M 292</td>
<td>...</td>
</tr>
<tr>
<td>--- v. Unissa Begam, 15 M 399</td>
<td>...</td>
</tr>
<tr>
<td>Kunhacha Uma v. Kutti Manni Hajee, 16 M 201 (F B) = 2 M L J, 226</td>
<td>...</td>
</tr>
<tr>
<td>Kunhamed v. Kutti, 14 M 167 = 1 M L J 338</td>
<td>...</td>
</tr>
<tr>
<td>Kunban v. Sankara, 14 M 78</td>
<td>...</td>
</tr>
<tr>
<td>Kunbiamma v. Kunhunni, 16 M 140</td>
<td>...</td>
</tr>
<tr>
<td>Kunbikutti v. Achtoti, 14 M 462</td>
<td>...</td>
</tr>
<tr>
<td>Kunhi Mannan v. Chali Vaduvath, 14 M 494</td>
<td>...</td>
</tr>
<tr>
<td>Kunhi Uma v. Amed, 14 M 491 = 1 M L J, 476</td>
<td>...</td>
</tr>
<tr>
<td>Kunji Amma v. Raman Menon, 15 M 494 = 2 M L J 262</td>
<td>...</td>
</tr>
<tr>
<td>Kuttyassan v. Mayan, 14 M 495</td>
<td>...</td>
</tr>
<tr>
<td>Kyd v. Mahomed, 15 M 150</td>
<td>...</td>
</tr>
<tr>
<td>L</td>
<td></td>
</tr>
<tr>
<td>Lakshmi Narasimha v. Atchanna, 15 M 240 = 1 M L J 750</td>
<td>...</td>
</tr>
<tr>
<td>Lakshminarasimham v. Somasundaram, 15 M 394 = 2 M L J 45</td>
<td>...</td>
</tr>
<tr>
<td>Lakshmipathi v. Kandasami, 16 M 54</td>
<td>...</td>
</tr>
<tr>
<td>Leishman v. Holland, 14 M 51</td>
<td>...</td>
</tr>
<tr>
<td>Lingayya v. Narasimha, 14 M 99</td>
<td>...</td>
</tr>
<tr>
<td>M</td>
<td></td>
</tr>
<tr>
<td>Madavan v. Athi Nangiyar, 15 M 123 = 2 M L J 81</td>
<td>...</td>
</tr>
<tr>
<td>Madhava Sarayachar v. Subba Rau, 15 M 94 = 2 Weir 692</td>
<td>...</td>
</tr>
<tr>
<td>Madhavi v. Kelu, 15 M 264</td>
<td>...</td>
</tr>
<tr>
<td>Madras Railway Company v. Thomas Rust, 14 M 18</td>
<td>...</td>
</tr>
</tbody>
</table>

M V—III
<table>
<thead>
<tr>
<th>Name of Parties</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mahadeva v. Kuppusami</td>
<td>15 M 233</td>
</tr>
<tr>
<td>Mahadevi v. Vikrama</td>
<td>14 M 365</td>
</tr>
<tr>
<td>McMahon v. Ali Koya</td>
<td>14 M 70</td>
</tr>
<tr>
<td>——— v. Sitaramayyar</td>
<td>15 M 50</td>
</tr>
<tr>
<td>Main Emlar v. Islam Amanath</td>
<td>15 M 355</td>
</tr>
<tr>
<td>Mairathodi v. Appu</td>
<td>15 M 296</td>
</tr>
<tr>
<td>Mallikarjuna v. Pullavva</td>
<td>16 M 319</td>
</tr>
<tr>
<td>Manavikraman v. Unnapan</td>
<td>15 M 170 = 2 M L J 23</td>
</tr>
<tr>
<td>Mayan v. Chathappan</td>
<td>14 M 472</td>
</tr>
<tr>
<td>Maven v. Alston</td>
<td>16 M 234</td>
</tr>
<tr>
<td>Michael v. Briggs</td>
<td>14 M 362</td>
</tr>
<tr>
<td>Moidin v. Ambu</td>
<td>16 M 203-N</td>
</tr>
<tr>
<td>Municipal Council of Thoothukudi v. Bank of Madras</td>
<td>15 M 153</td>
</tr>
<tr>
<td>Muthasami v. Muthukumarasami</td>
<td>16 M 23 = 2 M L J 296</td>
</tr>
<tr>
<td>Muttekke v. Thimmappa</td>
<td>15 M 186</td>
</tr>
<tr>
<td>Muttukaruppan v. Sellan</td>
<td>15 M 99</td>
</tr>
<tr>
<td>Muttuvadaganatha Tevar v. Periasami</td>
<td>16 M 112 = 2 M L J 265</td>
</tr>
<tr>
<td>Nagamuthu v. Sivarimuthu</td>
<td>15 M 226 = 2 M L J 109</td>
</tr>
<tr>
<td>Nagappa v. Devu</td>
<td>14 M 55</td>
</tr>
<tr>
<td>——— v. Subba</td>
<td>16 M 304</td>
</tr>
<tr>
<td>Nallana v. Ponnal</td>
<td>14 M 149 = 1 M L J 46</td>
</tr>
<tr>
<td>Nanu v. Manchu</td>
<td>14 M 49</td>
</tr>
<tr>
<td>——— v. Raman</td>
<td>16 M 335 = 3 M L J 141</td>
</tr>
<tr>
<td>Narasimha Naidu v. Ramasami</td>
<td>14 M 44</td>
</tr>
<tr>
<td>Narasayya v. Ramabhadra</td>
<td>15 M 474</td>
</tr>
<tr>
<td>Narasimha v. Suriyaranayana</td>
<td>16 M 144 = 2 M L J 153</td>
</tr>
<tr>
<td>Narasimmulu v. Gulam Hussain Saif</td>
<td>16 M 71</td>
</tr>
<tr>
<td>Narasinga Rao v. Venkatanareswara</td>
<td>16 M 481</td>
</tr>
<tr>
<td>Narayan v. Narayan</td>
<td>15 M 69</td>
</tr>
<tr>
<td>Narayana v. Chandra</td>
<td>15 M 1</td>
</tr>
<tr>
<td>——— v. Ranga</td>
<td>15 M 163 = 2 M L J 19</td>
</tr>
<tr>
<td>——— v. Shankarao</td>
<td>15 M 255 = 2 M L J 29</td>
</tr>
<tr>
<td>Narayanachariar v. Ranga Ayyangar</td>
<td>15 M 223</td>
</tr>
<tr>
<td>Narayanaswami v. Natesa</td>
<td>16 M 424</td>
</tr>
<tr>
<td>——— v. Ramasami</td>
<td>14 M 172 = 1 M L J 39</td>
</tr>
<tr>
<td>Natesa v. Ganapati</td>
<td>14 M 103</td>
</tr>
<tr>
<td>Natesayyan v. Ponnuasam</td>
<td>16 M 99 = 3 M L J 1</td>
</tr>
<tr>
<td>Neelamegan v. Govindan</td>
<td>14 M 71</td>
</tr>
<tr>
<td>Nilakandam v. Padmanabha</td>
<td>14 M 153</td>
</tr>
<tr>
<td>Nilakanta v. Imamsahib</td>
<td>16 M 361 = 3 M L J 134</td>
</tr>
<tr>
<td>Nunu Meah v. Krishnasami</td>
<td>14 M 274</td>
</tr>
<tr>
<td>Oakshott v. British India Steam Navigation Co. Ltd.</td>
<td>15 M 179</td>
</tr>
<tr>
<td>Palaniappa v. Lakshmanan</td>
<td>16 M 429</td>
</tr>
<tr>
<td>Papamama v. Appa Rao</td>
<td>16 M 384 = 3 M L J 80</td>
</tr>
<tr>
<td>Papireddy v. Narasareddi</td>
<td>16 M 464</td>
</tr>
<tr>
<td>Paramasiva v. Krishna</td>
<td>14 M 498 = 1 M L J 752</td>
</tr>
<tr>
<td>Parameswaran v. Shangaran</td>
<td>14 M 489</td>
</tr>
<tr>
<td>Parathayi v. Sankumani</td>
<td>15 M 394</td>
</tr>
<tr>
<td>Parvathi v. Koran</td>
<td>16 M 202-N.</td>
</tr>
<tr>
<td>Names of Cases</td>
<td>Page</td>
</tr>
<tr>
<td>---------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Patcha v. Mobidin, 15 M 57 = 1 M L J 757-N.</td>
<td>389</td>
</tr>
<tr>
<td>Patcha Sahdeb v. Sub-Collector of North Arcot, 15 M 78</td>
<td>403</td>
</tr>
<tr>
<td>Peria Amman v. Krishnasami, 16 M 182 = 3 M L J 109</td>
<td>844</td>
</tr>
<tr>
<td>Perianayakam v. Pottakaneni, 14 M 392</td>
<td>267</td>
</tr>
<tr>
<td>Perumal v. Kaveri, 16 M 121 = 2 M L J 281</td>
<td>792</td>
</tr>
<tr>
<td>Puchayee v. Sivagami, 15 M 237 (F B)</td>
<td>546</td>
</tr>
<tr>
<td>Polu v. Ragavammal, 14 M 52</td>
<td>37</td>
</tr>
<tr>
<td>Ponnammal, In re, 16 M 234 = 2 Weir 252</td>
<td>870</td>
</tr>
<tr>
<td>President of the Taluk Board, Sivagami v. Narayanan, 16 M 317 = 3 M L J 12</td>
<td>928</td>
</tr>
<tr>
<td>Price v. Browne, 14 M 420 = 1 M L J 549</td>
<td>294</td>
</tr>
<tr>
<td>Purakken v. Parvatibhi, 16 M 138</td>
<td>804</td>
</tr>
<tr>
<td>Purushottama v. Municipal Council of Bellary, 14 M 165</td>
<td>326</td>
</tr>
<tr>
<td>Pydel v. Chathappan, 14 M 150</td>
<td>106</td>
</tr>
</tbody>
</table>

Q

| Queen-Empress v. Alagu Kone, 16 M 421 = 1 Weir 175 | 1000 |

<p>| v. Appayya, 14 M 484 = 1 M L J 741 = 1 Weir 109 | 338  |
| v. Arivappan, 15 M 137 = 2 Weir 468              | 444  |
| v. Balasimmatambi, 14 M 334 (F B) = 1 M L J 343 = 2 Weir 557 | 234  |
| v. Bartlett, 16 M 309 = 2 Weir 579               | 922  |
| v. Basava, 15 M 75 = 1 Weir 372                  | 401  |
| v. Budara Janni, 14 M 121 = 2 Weir 7             | 85   |
| v. Chinnna Tevan, 14 M 36 = 2 Weir 390           | 26   |
| v. Erugadu, 15 M 83 = 2 Weir 326                 | 407  |
| v. Fischer, 14 M 342 (F B) = 1 M L J 458 = 1 Weir 502 | 239  |
| v. Govinda Pillai, 16 M 235 = 1 Weir 587         | 871  |
| v. Hari Shenoy, 16 M 443 = 3 M L J 201 = 1 Weir 962 | 1015 |
| v. Jangam Reddi, 14 M 247 = 1 Weir 776           | 174  |
| v. Khajabhoob, 16 M 425 = 1 Weir 723             | 1001 |
| v. Konda, 15 M 347 = 3 M L J 180 = 1 Weir 672    | 949  |
| v. Krishnayyana, 15 M 156 = 1 Weir 763           | 458  |
| v. Muniyami, 15 M 39 = 2 Weir 255 = 2 Weir 542   | 877  |
| v. Muthia, 16 M 410 = 2 Weir 14                   | 992  |
| v. Nagappa, 15 M 461 = 2 Weir 590                 | 1028 |
| v. Parangam, 16 M 463 = 1 Weir 86                 | 1029 |
| v. Perumal, 16 M 111-N = 1 Weir 827-N            | 795  |
| v. Ramasami, 16 M 364 = 3 M L J 178 = 1 Weir 432 | 960  |
| v. Rama Tevan, 15 M 352 = 2 Weir 153 and 376 and 394 | 599  |
| v. Ranga Rau, 15 M 36 = 2 Weir 218                | 375  |
| v. Samavier, 16 M 468 = 3 M L J 227 = 2 Weir 220 | 1033 |
| v. Samiappa, 15 M 63 = 2 Weir 794                 | 839  |
| v. Sainath, 14 M 400 = 1 M L J 163 = 1 Weir 199   | 280  |
| v. Sivadappayyar, 15 M 91 = 1 Weir 747            | 412  |
| v. Sommannu, 15 M 291 = 2 M L J 120 = 1 Weir 133  | 505  |
| v. Suka Singh, 14 M 225 = 1 Weir 648              | 157  |
| v. Thandavarayudu, 14 M 364 = 1 Weir 241          | 254  |
| v. Thimmachi, 15 M 93 = 1 Weir 131                | 414  |
| v. Tirukadu, 14 M 126 = 1 Weir 59                 | 89   |
| v. Venkatasami, 14 M 239 = 1 Weir 860             | 161  |
| v. Venkat, 15 M 131 = 2 Weir 605                  | 440  |
| v. Veenammal, 16 M 230 = 1 Weir 733               | 869  |
| v. Viranna, 15 M 132 = 2 Weir 36                  | 441  |
| v. Viraperumal, 16 M 105 = 1 Weir 823             | 781  |</p>
<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>R. v. B., 14 M 98</td>
<td>63</td>
</tr>
<tr>
<td>Ragava v. Rajaratnam, 14 M 57</td>
<td>41</td>
</tr>
<tr>
<td>Ragavaloo Chetti, Ex parte; In re Rangiah Chetti, 15 M 356</td>
<td>601</td>
</tr>
<tr>
<td>Raghupati v. Tirumalai, 15 M 422=2 M L J 91</td>
<td>647</td>
</tr>
<tr>
<td>Rajah of Venkatagiri v. Yerra Reddi, 16 M 323=3 M L J 131</td>
<td>932</td>
</tr>
<tr>
<td>Rajaram v. Krishnasami, 16 M 301</td>
<td>917</td>
</tr>
<tr>
<td>—— v. Narsing, 15 M 199</td>
<td>490</td>
</tr>
<tr>
<td>Rakken v. Alagappudayan, 16 M 80</td>
<td>763</td>
</tr>
<tr>
<td>Rama v. Varada, 16 M 142</td>
<td>807</td>
</tr>
<tr>
<td>Ramabhadr u. Jagannatha, 14 M 328=1 M L J 171</td>
<td>239</td>
</tr>
<tr>
<td>Ramachandra v. Narayanasami, 16 M 333=2 M L J 279</td>
<td>939</td>
</tr>
<tr>
<td>—— Joishu v. Hazi Kassim, 16 M 207</td>
<td>852</td>
</tr>
<tr>
<td>Ramakrishna v. Unni Check, 16 M 280=3 M L J 27</td>
<td>902</td>
</tr>
<tr>
<td>Rama Kurup v. Sridevi, 16 M 290=2 M L J 173</td>
<td>909</td>
</tr>
<tr>
<td>Ramalakshmi v. Collector of Kistna, 16 M 321=3 M L J 188</td>
<td>931</td>
</tr>
<tr>
<td>Ramalingam Pillai v. Vythilingam Pillai, 16 M 490 (F.C.)=20 I A 150=17 Ind Jur 578=6 Sar</td>
<td>1048</td>
</tr>
<tr>
<td>P C J 351</td>
<td></td>
</tr>
<tr>
<td>Raman v. Chandan, 15 M 219</td>
<td>503</td>
</tr>
<tr>
<td>—— v. Muppil Nayar, 14 M 479</td>
<td>334</td>
</tr>
<tr>
<td>—— v. Shathanathan, 14 M 312</td>
<td>218</td>
</tr>
<tr>
<td>—— v. Sridharan, 16 M 449</td>
<td>1019</td>
</tr>
<tr>
<td>Ramanadhan v. Zemindar of Ramnad, 16 M 407=3 M L J 185</td>
<td>989</td>
</tr>
<tr>
<td>Rama Rau v. Chellayamma, 14 M 458=1 M L J 602</td>
<td>320</td>
</tr>
<tr>
<td>Ramasami v. Anda Pillai, 14 M 253=1 M L J 240</td>
<td>177</td>
</tr>
<tr>
<td>—— v. Basavappa, 16 M 325</td>
<td>933</td>
</tr>
<tr>
<td>—— v. Muttusami, 15 M 380=2 M L J 42</td>
<td>617</td>
</tr>
<tr>
<td>—— v. Pappayya, 16 M 466=3 M L J 205</td>
<td>1031</td>
</tr>
<tr>
<td>—— v. Venkatesam, 16 M 440=3 M L J 107</td>
<td>1013</td>
</tr>
<tr>
<td>Rama Varma Rajah v. Kadar, 16 M 415</td>
<td>995</td>
</tr>
<tr>
<td>Ramayee, In re, 14 M 398=2 Weir 651</td>
<td>279</td>
</tr>
<tr>
<td>Ramayya v. Guruva, 14 M 289</td>
<td>163</td>
</tr>
<tr>
<td>Ramayya v. Shunmugam, 15 M 70=2 M L J 39</td>
<td>398</td>
</tr>
<tr>
<td>—— v. Vedachalla, 14 M 441 (F B)=1 M L J 661</td>
<td>309</td>
</tr>
<tr>
<td>Ramchiandra v. Jaganmohan, 15 M 161</td>
<td>461</td>
</tr>
<tr>
<td>Ramunni v. Bram Datton, 15 M 366</td>
<td>607</td>
</tr>
<tr>
<td>—— v. Kerala Varma Vallia Raja, 15 M 166</td>
<td>465</td>
</tr>
<tr>
<td>Ranga Reddi v. Chinna Reddi, 14 M 465=1 M L J 483</td>
<td>325</td>
</tr>
<tr>
<td>Rangasami v. Krishnasamy, 14 M 409 (F B)=1 M L J 603</td>
<td>286</td>
</tr>
<tr>
<td>—— v. Ranga, 16 M 146</td>
<td>509</td>
</tr>
<tr>
<td>Rangasayi v. Mahalakshmamma, 14 M 391</td>
<td>274</td>
</tr>
<tr>
<td>Rarichan v. Perachi, 15 M 281</td>
<td>547</td>
</tr>
<tr>
<td>Rathnam v. Sivasubramania, 16 M 353=3 M L J 139</td>
<td>953</td>
</tr>
<tr>
<td>Rathnammal v. Manikkan, 16 M 455 (F B)</td>
<td>1024</td>
</tr>
<tr>
<td>Ratnasabapathi v. Venkatasabalam, 14 M 271</td>
<td>190</td>
</tr>
<tr>
<td>Rayakkal v. Subbanna, 16 M 84</td>
<td>766</td>
</tr>
<tr>
<td>Reference under Court Fees Act, s. 5, 14 M 480</td>
<td>335</td>
</tr>
<tr>
<td>—— Stamp Act, s. 46, 14 M 255 (F B)</td>
<td>179</td>
</tr>
<tr>
<td>——, 15 M 134 (F B)</td>
<td>442</td>
</tr>
<tr>
<td>——, 15 M 164 (F B)</td>
<td>463</td>
</tr>
<tr>
<td>——, 15 M 193 (F B)</td>
<td>484</td>
</tr>
<tr>
<td>——, 15 M 386 (F B)</td>
<td>691</td>
</tr>
<tr>
<td>——, 16 M 419 (F B)</td>
<td>998</td>
</tr>
</tbody>
</table>
Reference under Stamp Act, S. 16, 16 M 159 (F B) = 2 M L J 131

--- S. 50, 15 M 250 (F B) .......................... 532

--- S. 70, 16 M 271 (F B) .......................... 760

--- S. 70, 16 M 272 (F B) .......................... 722

--- S. 70, 16 M 274 (F B) .......................... 471

--- S. 70, 16 M 275 (F B) .......................... 693

--- S. 70, 16 M 276 (F B) .......................... 593

--- S. 70, 16 M 277 (F B) .......................... 643

--- S. 70, 16 M 278 (F B) .......................... 571

--- S. 70, 16 M 279 (F B) .......................... 1

--- S. 70, 16 M 280 (F B) .......................... 50

--- S. 70, 16 M 281 (F B) .......................... 119

--- S. 70, 16 M 282 (F B) .......................... 961

--- S. 70, 16 M 283 (F B) .......................... 773

--- S. 70, 16 M 284 (F B) .......................... 41

--- S. 70, 16 M 285 (F B) .......................... 537

--- S. 70, 16 M 286 (F B) .......................... 354

--- S. 70, 16 M 287 (F B) .......................... 328

--- S. 70, 16 M 288 (F B) .......................... 733

--- S. 70, 16 M 289 (F B) .......................... 328

--- S. 70, 16 M 290 (F B) .......................... 553

--- S. 70, 16 M 291 (F B) .......................... 126

--- S. 70, 16 M 292 (F B) .......................... 731

--- S. 70, 16 M 293 (F B) .......................... 700

--- S. 70, 16 M 294 (F B) .......................... 803

--- S. 70, 16 M 295 (F B) .......................... 911

--- S. 70, 16 M 296 (F B) .......................... 307

--- S. 70, 16 M 297 (F B) .......................... 378

--- S. 70, 16 M 298 (F B) .......................... 577

--- S. 70, 16 M 299 (F B) .......................... 1037

--- S. 70, 16 M 300 (F B) .......................... 729

--- S. 70, 16 M 301 (F B) .......................... 458

--- S. 70, 16 M 302 (F B) .......................... 691

--- S. 70, 16 M 303 (F B) .......................... 561

--- S. 70, 16 M 304 (F B) .......................... 70

--- S. 70, 16 M 305 (F B) .......................... 767

--- S. 70, 16 M 306 (F B) .......................... 623

--- S. 70, 16 M 307 (F B) .......................... 1038

--- S. 70, 16 M 308 (F B) .......................... 94

--- S. 70, 16 M 309 (F B) .......................... 514
### XXII

**Names of Cases:**

<table>
<thead>
<tr>
<th>Case Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subbaya v. Krishna, 11 M 186 = 1 MLJ 95</td>
<td>132</td>
</tr>
<tr>
<td>Subramanya v. Somasundara, 15 M 127 = 1 Weir 72</td>
<td>437</td>
</tr>
<tr>
<td>Sultan Moidoe v. Savlayamun, 15 M 343 = 2 MLJ 50</td>
<td>591</td>
</tr>
<tr>
<td>Sundaram v. Sittammal, 16 M 311 = 3 MLJ 144</td>
<td>924</td>
</tr>
<tr>
<td>Suryanarayana v. Appa Row, 16 M 40 = 2 MLJ 249</td>
<td>736</td>
</tr>
<tr>
<td>Syed Ameer Sahib v. Venkatarama, 16 M 296</td>
<td>913</td>
</tr>
</tbody>
</table>

**T**

<table>
<thead>
<tr>
<th>Case Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tanjore Ramachandra Row v. Vellayanandan Ponnusami, 11 M 258 (P C) = 18 I A 37</td>
<td>181</td>
</tr>
<tr>
<td>= 6 Sar P C J 30 = 15 Ind Jur 224</td>
<td></td>
</tr>
<tr>
<td>Thama v. Koudan, 15 M 378</td>
<td>616</td>
</tr>
<tr>
<td>Thaman Chetti v. Alagiri Chetti, 11 M 399 = 2 Weir 688</td>
<td>289</td>
</tr>
<tr>
<td>Thandan v. Perianna, 14 M 363 = 2 Weir 571</td>
<td>583</td>
</tr>
<tr>
<td>Thandanchella v. Subachella, 15 M 258</td>
<td>531</td>
</tr>
<tr>
<td>Thiragaraya v. Krishnasamy, 15 M 214 = 2 MLJ 127 = 1 Weir 817</td>
<td>500</td>
</tr>
<tr>
<td>Tirumal Sambana Pandara Vannadhi v. Nallatambl, 16 M 496 = 2 MLJ 272</td>
<td>1045</td>
</tr>
</tbody>
</table>

**U**

<table>
<thead>
<tr>
<th>Case Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ukkandan v. Kunhunni, 15 M 493</td>
<td>688</td>
</tr>
<tr>
<td>Ukk v. Kutti, 15 M 401</td>
<td>631</td>
</tr>
<tr>
<td>Umini v. Kunchi Amma, 14 M 26</td>
<td>19</td>
</tr>
<tr>
<td>Upali Haji v. Mammavan, 16 M 366 = 3 MLJ 191</td>
<td>962</td>
</tr>
</tbody>
</table>

**V**

<table>
<thead>
<tr>
<th>Case Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vaguran v. Rangayyangan, 15 M 125</td>
<td>436</td>
</tr>
<tr>
<td>Vaikunta Prabhu v. Moideen Sabab, 15 M 89</td>
<td>411</td>
</tr>
<tr>
<td>Vanaganudi v. Ramasami, 14 M 406</td>
<td>284</td>
</tr>
<tr>
<td>Varadaraja v. Dorasamy, 16 M 131</td>
<td>799</td>
</tr>
<tr>
<td>Vasudava v. Madhava, 16 M 326</td>
<td>934</td>
</tr>
<tr>
<td>Venkata Mahakshamamma v. Ram Jogi, 16 M 271</td>
<td>896</td>
</tr>
<tr>
<td>Venkata v. Parthasaratthi, 16 M 220 = 3 MLJ 35</td>
<td>860</td>
</tr>
<tr>
<td>Venkata v. Kandappa, 15 M 95</td>
<td>415</td>
</tr>
<tr>
<td>Venkatachuril v. Rangacharyulu, 14 M 316 = 1 MLJ 85</td>
<td>221</td>
</tr>
<tr>
<td>Venkatacharya v. Ragama, 15 M 191</td>
<td>699</td>
</tr>
<tr>
<td>Venkataramamma v. Venkayya, 14 M 377</td>
<td>264</td>
</tr>
<tr>
<td>Venkatayi v. Krishnayya, 16 M 341 = 3 MLJ 169</td>
<td>945</td>
</tr>
<tr>
<td>Venkatayi v. Venkatreddy, 15 M 12</td>
<td>358</td>
</tr>
<tr>
<td>Venkatavaraga v. District Board of Tanjore, 16 M 305</td>
<td>920</td>
</tr>
<tr>
<td>Venkatasubbaayya v. Venkaiyya, 15 M 290 = 1 MLJ 677</td>
<td>511</td>
</tr>
<tr>
<td>Venkata Varatha Thatha Chariar v. Anantha Chariar, 16 M 299 = 3 MLJ 180 = 6</td>
<td>916</td>
</tr>
<tr>
<td>Sar P C J 364 (P C)</td>
<td></td>
</tr>
<tr>
<td>Venkatayudu v. Venkataramayya, 15 M 284</td>
<td>549</td>
</tr>
<tr>
<td>Venkaiyya v. Lakshmayya, 16 M 98</td>
<td>775</td>
</tr>
<tr>
<td>Venkaiyya v. Venkatappayya, 15 M 348</td>
<td>594</td>
</tr>
<tr>
<td>Vigneswaran v. Bapaya, 16 M 486 = 3 MLJ 216</td>
<td>1010</td>
</tr>
<tr>
<td>Viraghava v. Parasaruma, 15 M 372</td>
<td>612</td>
</tr>
<tr>
<td>Viraraghava v. Venkaiyya, 16 M 348 = 3 MLJ 325</td>
<td>907</td>
</tr>
<tr>
<td>Vira v. Rama Doss, 15 M 360</td>
<td>596</td>
</tr>
<tr>
<td>Virayya v. Hanumanta, 14 M 459</td>
<td>321</td>
</tr>
<tr>
<td>Vithalinga Padayaachi v. Vithalinga Mudali, 15 M 111</td>
<td>426</td>
</tr>
<tr>
<td>Vittal Doss, Ez parte, 15 M 360</td>
<td>603</td>
</tr>
<tr>
<td>Vythilinga v. Venkatachala, 16 M 194</td>
<td>842</td>
</tr>
</tbody>
</table>
SATHIAPPAYAR (Defendant No. 1), Appellant v. PERIASAMI (Plaintiff), Respondent.  
[22nd, and 23rd April and 13th August, 1890.]  

14 M. 1.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

The plaintiff, the zemindar of Sivaganga, sued in a Subordinate Court to remove the defendant from the office of head of a mutt. The defendant was a married man living with his wives and children, whom he maintained with the produce of the property of the mutt, and it appeared that he had failed to perform the ceremonies of the institution.

The mutt in question came into existence under a deed of endowment or "charity grant," whereby the first zemindar of Sivaganga granted land to his guru for the erection and maintenance of a mutt and the performance of certain religious exercises in perpetuity, and provided that the head of the mutt should be of the line of disciples of the original grantee whose spiritual family he desired to perpetuate. In 1867 a predecessor in title of the plaintiff had sued unsuccessfully to recover certain property of the mutt from the defendant, alleging another cause of action than his status as a married man and his misappropriation of the mutt property; and in that suit it was established that the head of the mutt for the time being had the right to appoint his successor and that such appointment was not subject to confirmation by the zemindar. No sanction had been obtained for the institution of the present suit. It appeared that the trusts of the mutt had been violated and the income misapplied, and that there was no qualified disciple in whom the right of succession had vested, and that the members of the plaintiff's family were the only persons interested in the appointment:

Held, (1) that the jurisdiction of the Subordinate Court was not ousted by Act XX of 1863 since the trusts of the institution were in the nature of private trusts;

(2) that sanction under Section 539 of the Civil Procedure Code was not a prerequisite of the suit for the same reason;

* Appeal No. 1 of 1889.
1890 
AUG. 13. 
APPEL-
LATE 
CIVIL. 
14 M. I. 

INDIAN DECISIONS, NEW SERIES

[2] (3) that the suit was not barred by limitation, its object being to prove it a specific endowment from being diverted from its legitimate object and to re-attach it to that object: 
(4) that the suit was not barred under Section 13 or Section 43 of the Civil Procedure Code; 
(5) that the proper degree was (1) to declare the plaintiff’s right to appoint a qualified person with the concurrence of the rest of his family, (2) to direct him to do so within a given time, failing which the suit should stand dismissed with costs. If such appointment was made, notice should be given to the other members of the plaintiff’s family before it was confirmed: if such appointment were confirmed, the property should be directed to be delivered to the person appointed to be administered in accordance with the trusts and usage of the mutt.

Stable: that the para deshi or head of the mutt might be a married man, provided he had been duly initiated.

[F., 33 C. 781 (823) = 10 C.W.N. 581; R., 29 A. 46 (50); 12 C. 275 (245); 1 Rom. L.R. 719; 11 C.L.J. 212 = 3 Ind. Cas. 403; 8 Ind. Cas. 926 (928) = 1 S.L.R. 159; D., 9 C.L.J. 403 (538); 17 Ind. Cas. 270 (272) = 316 P.L.R. 1912 = 191 P.W.R. 1912.]

APPEAL against the decree of S. Gopalachariar, Subordinate Judge of Madura (East), in original suit No. 12 of 1888, passed in favour of the plaintiff.

The facts of this case appear sufficiently for the purposes of this report from the following judgments.

The defendant No. 1 preferred this appeal. 
Mr. Johnstone, for appellant. 
Subravanay Ayyar and Bhashyam Ayyangar, for respondent.

JUDGMENTS.

MUTTUSAMI AYYAR, J.—This is a regular appeal preferred by defendant No. 1 from the decree of the Subordinate Judge of Madura in the plaintiff’s favour. The appellant is the para deshi or representative for the time being of a religious foundation called Sathanapayyar’s mutt, which is situated at Sivaganga in the district of Madura; and the respondent is the present zamindar of Sivaganga, who succeeded to the zamindari upon his father’s death in 1883.

The matter in contest between them is the appellant’s liability to be removed from possession of the mutt and its endowments in order that they may be made over to the respondent or to an ascetic whom he may hereafter appoint. The respondent insisted on the appellant’s removal from his position, first, because he was a married man living with his wives instead of being an ascetic who had renounced all secular ties, and, secondly, because he had violated the trusts of the institution by diverting the income of the endowment from its legitimate objects and misappropriating it upon his family and for his own purposes. Admitting his status as a married man, and the fact that he had two wives living with him, the appellant contended that the representative of the mutt was not bound to be an ascetic. He denied the alleged breach of trust and the respondent’s right to interfere with the management of the mutt or its endowments. He urged further (i) that the Subordinate Judge had no jurisdiction to entertain the suit, (ii) that it was bad for misjoinder of causes of action, (iii) that it was not maintainable without the sanction prescribed by Section 539, Code of Civil Procedure, or Act XX of 1863, (iv) that the claim was res judicata, (v) that it was barred by limitation, (vi) that the respondent was not entitled to rely on matters which might have been, but had not been, urged by Nana Kottamun Natchiar, his predecessor in title, in original suit No. 20 of 1837, (vii) that
he had no cause of action at all, and that, if he had any, he could only sue to compel the appellant duly to perform the trusts of the institution. The Subordinate Judge overruled all the preliminary objections, and held on the merits that the paradesi of the mutt must be an ascetic, that the appellant was guilty of breach of trust, and that the respondent was entitled to ask the Court to remove the appellant from his position and to provide for the due performance of the trusts of the mutt by a competent person. On this view of the case, he passed a preliminary decree declaring that the appellant had rendered himself unfit for holding the mutt and its endowments, that he was liable to be ousted therefrom, that unless he obtained an order from the Appellate Court within three months staying further proceedings, the Subordinate Judge would, after issuing a notification in as public a manner as the circumstances of the case might require, calling for candidates for the headship of the mutt and after consulting the wishes and opinions of the appellant and the respondent, proceed to appoint, as a new trustee, such person as might, by his qualifications and character, promise to advance the interests of the institution, and after such appointment, to place the office and the properties in suit in his possession, removing the appellant therefrom. The Subordinate Judge directed also that the respondent’s claim for mesne profits be dismissed and that the appellant do pay the respondent proportionate costs. Hence this appeal. The respondent too has objected to the decree under Section 561 of the Code of Civil Procedure.

The institution came into existence in June 1734 under document I, which purports to be a “charity-grant” and to evidence a gift of land made by the first zamindar of Sivaganga to his guru or religious preceptor Sathappayyar. Thus, the relation [4] between the grantor and the grantee was that of disciple and preceptor. The grant was made in perpetuity and designed to endure so long as the sun and moon last and the line of disciples continues to exist. The grant purports also to have been made with power to alienate by sale or gift, but the power of alienation could only have been intuaded to be exercised consistently with the trusts mentioned in the instrument and without prejudice to the same. Though the transaction is described to be a gift of land, yet the document is termed a dharmasahasram or charity-grant. The land at Sivaganga, as comprised within the boundaries mentioned in the deed of endowment, is declared to be given in order that a muttam may be built thereon, that Sivayoga nishtai and other penances may be performed, and that the expenses of the necessary establishment may be paid. The first object of the gift or the first specific trust created by the document consists, therefore, in the erection and maintenance of a mutt in perpetuity, in the performance therein by the paradesi or head of the mutt; for the time being of Sivayoga nishtai and other penances, and in the maintaining of the necessary establishment. Two more lands are described in the document to be granted for the performance of the annual gurupuja and for debasuja.

Sivayoga nishtai is a form of meditating on God Siva in conventional use among paradesis or men of piety, and it consists in uttering alternately for a certain time, one in the morning and one in the evening, the two sacred words of five and eight letters, respectively, called panchaksharam and ashtaksharam with one’s attention devoutly centred in God and in the attitude prescribed for religious meditation. In substance the expression denotes a form of worship and prayer. The expression “Gurupuja” signifies the annual ceremony performed by the head of the mutt.
for the time being in honour and for the spiritual benefit of his guru; and
the word dhupuja means, in polite language, the self-support of a person
who has a sacred or religious status.

Apart from the specific trusts indicated by the terms of the grant,
there are two more trusts to be noticed. The first of them consists in the
distribution of food among paradesi or Sudra ascetics and others wher-
ever guru-puta is performed, but it must be observed that it is not an
independent trust, but only the accompaniment or incident of guru-puta
according to religious usage. The other trust consists in opening and
keeping up a water-shed in the mutt for the supply of drinking water
to the poor during the hot season. Though the appellant denied in his
evidence that it was customary to open and maintain a water-shed as
part of the mutt charity, yet he admitted that the fact was otherwise in
Exhibit P, as was deposed to by several witnesses cited by the respondent.
The maintenance, therefore, of a water-shed for supplying drinking water
during the hot season as part of the mutt charity rests on custom rather
than on the original grant. Document I states that succession to the
office of paradesi of the mutt shall be in the line of disciples, but it is
silent as to how and by whom the successor is to be chosen. It was,
however, finally determined in original suit No. 20 of 1867 that the right
of appointment vested in the head of the mutt for the time being, and
that it did not require to be confirmed or ratified by the zamindar. It is
also in evidence that the paradesi presiding over the institution first
makes a person his disciple by initiating him in what is called "Brahma-
maantram," then teaches him "Sivayoga nishtai" and other penances and
appoints him as his successor. After the death of the original grantee
there have been five cases of succession, as shown below:

<table>
<thead>
<tr>
<th></th>
<th>Guru Sathappayyar or original grantee.</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Kailasa Sathappayyar.</td>
</tr>
<tr>
<td>3</td>
<td>Muttunatha Sathappayyar.</td>
</tr>
<tr>
<td>4</td>
<td>Chitananda Sathappayyar.</td>
</tr>
<tr>
<td>5</td>
<td>Muthananda Sathappayyar.</td>
</tr>
<tr>
<td>6</td>
<td>Gauriananda Sathappayyar.</td>
</tr>
</tbody>
</table>
As regards the status of these representatives of the mutt, the first three had renounced all secular ties and then entered the order of ascetics or paradesis. The fourth was a married man who left a widow surviving him, the fifth was a widower when he became a paradesi, and the sixth is a married man living with his two wives. It would seem that the third paradesi died without appointing his successor, and that it was the zemindar who selected him. It was probably in accordance with the fact that the High Court observed in its judgment in second appeals Nos. 569 of 1870 and 236 of 1871 that it was not to be understood as expressing any opinion against the zemindar's right to appoint a successor in the event of the last holder of the office failing to do so. The foregoing is a summary of facts and is an instance of the nature and constitution of the mutt and on its trusts so far as they can be collected from the terms of the grant and the usage of the institution.

As to the preliminary objections to the suit, the question of misjoinder is not pressed in appeal. The contention regarding jurisdiction is that under Act XX of 1863, the District Court is the proper forum. This would be so if the institution were endowed and dedicated to any section of the public either as a place of worship, such as a temple, or a religious establishment where religious instruction is to be had like a public mutt. For Act XX of 1863 only replaced Regulation VII of 1817 so far as religious institutions are concerned, which, as shown by its preamble and its provisions, dealt with trusts, express or implied, created for public purposes. But the grant in the case before us discloses no intention to confer a benefit either upon the people in general or upon any class of se ctarians; on the other hand, the grantor desired only to perpetuate the spiritual family of his guru by providing for succession in the line of his disciples and the religious services designated Sivayoga nishtai and gurupuja performed by the grantee by enjoining their continuance by his disciples. Neither the general public nor any section of the people had an interest either in the erection and maintenance of the mutt or in the performance of the prescribed religious duties, the motive for the grant being the grantor's conviction that the performance of such services in perpetuity by the class of persons named by him in the mutt and with the aid of funds provided by him was an act of religious charity which would ensure the prosperity of his family. The original grantor and his descendants are thus the [7] only persons interested in seeing that the institution is kept up for their benefit in accordance with the intention of the former. Although a few paradesis and others are fed when gurupuja is performed and a water pandal is maintained in the mutt during the hot season, these were not contemplated as independent charities in which any class of the public was to have a direct and independent interest. The decision in Jusaghari Gosamiar v. The Collector of Tanjore (1) proceeded mainly on the ground that the Board of Revenue were bound under Section 4 of Act XX of 1863 to restore every endowment created for some religious purpose, which was in their possession, to the trustee entitled to its management. In Agri Sharma Embrandri v. Visinu Embrandri (2) it was held that the jurisdiction of the ordinary Courts was not excluded when the plaintiff sued only to establish his right to share in the management of a temple. Neither of these decisions is in point. It may be, as argued by appellant's counsel, that the oral evidence for the respondent is meagre so far as it tends to show that the mutt is the zemindar's

(1) 5 M.H.C.R. 384.
(2) 3 M.H.C.R. 196.
private charity, but it is materially corroborated by the nature of the grant and the description of religious and other duties required to be performed in perpetuity. I am of opinion that the Subordinate Judge is well founded in holding that the trusts of the institution concerned in this litigation are in the nature of private trusts.

Another contention was that the zamindar had no cause of action. This rests mainly on the fact that Exhibit I does not state expressly that the grant is to be resumed, and that the paradesi is to be removed from his position as the representative of the mutt either if it is not kept up or if the prescribed religious service is not duly performed, but that on the contrary it enables the grantee and his disciples to alienate the land given by sale, gift, &c. I consider that this contention was properly disallowed by the Subordinate Judge. Exhibit I shows that the land in dispute was given for a specific religious purpose in order that that purpose might be carried out in perpetuity for the benefit of the grantor’s family, and the respondent, as the representative of that family for the time being, is entitled to step forth when that purpose is neglected and the produce of the land is misapplied, and to ask the Court to prevent the misappropriation, and to see that the income of the endowment is applied to its legitimate purposes.

[8] Again, Exhibit E, the inam register of Marudavayal, describes the grant as jivitam for the support of Sathappayyar’s mutt at Sivaganga. Exhibits K, L and M, which are inam title-deeds, describe the land given as held in trust for the support of the mutt, and confirm the grant as one not to be interfered with only so long as the conditions of the grant are duly fulfilled. Exhibits A, N and O also lead to the conclusion that the grant was conditional and not absolute.

The objection that the suit could not be maintained without the sanction prescribed by Section 539 of the Code of Civil Procedure is also not tenable, the section purporting in its terms to relate to trusts created for public purposes. The preliminary questions which remain to be considered are those of limitation and res judicata. As to the former, the suit is certainly not barred, the object with which it is brought being to prevent a specific endowment from being diverted from its legitimate object and to re-attach it to that object. It is not simply a suit to remove a person from the management of an endowment on the ground that, although it is duly administered, the defendant has no personal right to administer it. If the appellant’s removal from his position as paradesi of the mutt is part of the relief claimed in the plaint, it is only claimed as necessary to ensure due appropriation of the endowment to its original trusts. In this view of the nature of the claim, it falls, as suggested by the respondent’s pleader, under Section 10 of the Act of Limitations. Article 143, to which our attention has been drawn on the appellant’s behalf, is not applicable to suits in which the property has vested in trust for any specific purpose and there has been a continuous breach of trust.

Neither is the respondent’s claim res judicata by reason of the decree in original suit No. 20 of 1867. That was a suit instituted by Ranee Kattama Natchiyar and her lessee to recover half of the village of Marudavayal from the present appellant together with monies collected by the execution creditor in original suit No. 107 of 1865 and to set aside the attachment, made at his instance, in execution of the decree in the same suit. The ground of claim then urged as against the appellant was that the right of appointing heads of the mutt in dispute vested in the representatives of the grantor and that no zamindar appointed the appellant
to the office. The High Court held on second appeal that the
appellant was appointed by his predecessor in office, that the right
of appointment vested in the latter unconventionally, and that the
remainder had no such right as he claimed except when the representative
of the institution died without nominating his successor. The ground
upon which the present suit is brought is that by reason of his status
as a married man and of misappropriation of the endowment to his own
purposes the appellant has become unfit to retain his office or continue in
charge of the mutt and its endowments. Neither of these matters was
the subject of adjudication in the previous suit, and in this sense the
claim is not res judicata. But it is argued for the appellant that he had
married prior to his accession to the office in 1858 and that his status as
a married man and his omission to rebuild and live in the mutt were
grounds of attack upon which the Ranees did not choose to rely, though
they were available to her when she brought original suit No. 20 of 1867,
and that her omission to do so prejudices the respondent from urging
them now in support of his claim. It may be that such omission is
evidence that there was no breach of trust, but I am not prepared to say
that when the breach of trust is clear, its condonation by a prior beneficiary
is binding upon his successor so as to enable the trustee to take advan-
tage of his own wrong and justify the continuance of the breach. In
this case the disqualification and the misfeasance imputed to the appellant
are said to have continued even subsequent to the former suit and up to
the date of the present action.

Passing on to the merits, the first question to be considered is
whether appellant’s status as a married man incapacitates him for presid-
ing over the mutt. The Subordinate Judge has decided it in the affirmative,
but the contention for the appellant is that a married man is not incom-
petent to preside over the mutt. The usage of the institution conveys
the impression that either an ascetic or a married man is eligible for the
office. In former times there was a conventional notion that the manage-
ment of a religious charity by an ascetic was more disinterested than that
of a married man, and, therefore, likely to prove more beneficial, but when
the usage of the institution is clear on this point, we are not at liberty to
ignore it. In ordinary parlance, the words paradesi and mutt, no doubt,
assign a Sudder ascetic and the institution presided over by him, but
they are of themselves inconclusive, since there are mutts in this presi-
dency of which the representatives are not ascetics. Though the
direction in Exhibit I is that succession should be in the line of
disciples, it loses much of its significance when it is remembered that
the succession ordained by the copper-plate grant of 2nd May 1733,
which was produced and acted upon in original suit No. 20 of 1867,
was that of sons and grandsons. In second appeal No. 569 of 1870,
which arose from that suit, the High Court, which then had before
it both that grant and Exhibit I, observed that the phrase, in regular succe-
sion of sons and grandsons, should not be taken literally, but that succession
by disciples qualified to discharge the peculiar trusts was in the contem-
plation of the parties. Referring to the appellant’s evidence that paradesi
for the time being makes one his disciple by initiating him in what is called
Brahma mantram and qualifies him for discharging the peculiar trusts
of the mutt in question by teaching him Sivayoga nishtai and other ren-
ances, it does not appear that the successor must belong to the order of
ascetics, though it is clear that he must be a qualified disciple in the sense
indicated above. This view receives strong corroboration from the
course of succession from the early part of this century. That the fourth paradesi left a widow surviving him at his death is clear from the judgment in original suit No. 110 of 1838, Exhibit F. The Sudder Amin Pundit says distinctly that "since it is proved that the defendant is a woman married by the said Sathappayyar (the fourth paradesi), and that the said person lived with the said defendant, it follows that the plaintiff (fifth paradesi) should give food and raiment to the said woman and protect her to the end of her lifetime." To this observation the Subordinate Judge declines to give effect and remarks that the Sudder Amin Pundit erred in directing the fifth paradesi to maintain the widow of the fourth, and that it might be that the latter did not live with his wife after he had become paradesi. But I do not deem it proper to impugn a judgment which has become final and hazard a statement at variance with it on mere conjecture. Another material fact overlooked by the Subordinate Judge is the conduct of successive zamindars from the time of the fourth paradesi to the date of the present suit. It is urged that the fifth was a widower, but there is nothing to show that he belonged to the order of ascetics as contradistinguished from that of grahamas. Nor does it appear that the Court of Wards raised any objection to the appellant's succession in 1858, whilst his evidence is that he was then not only [11] married but had two wives as at present. It is, again, strange that Ranee Kattama Natchiyar should have ignored his status as a disqualification, if, as is now suggested, it should have rendered him according to the known usage of the institution ineligible for the office. The result of the evidence is that of the six paradesis who represented the mutt during a period of about 150 years, the first three belonged to the order of ascetics, the fourth was a married man, the fifth was a widower, and the sixth is a married man, whilst the grant did not enjoin, either expressly or by necessary implication, the status of an ascetic as a qualification, and whilst for more than fifty or sixty years there has been no trace of a consciousness either among the zamindars or the paradesi that such status is indispensable. The conclusion, therefore, I come to is that the paradesi for the time being may be either an ascetic or a married man, but that he must be initiated by his predecessor in Brahma mantram and in Sivayoga nishtai and other penances and to this extent be a qualified disciple.

I agree, however, in the opinion of the Subordinate Judge that the trusts of the mutt have altogether been violated, and the income of the endowment has been misapplied for a series of years. It is proved that the mutt building has ceased to exist and that no attempt has been made to restore it for more than twenty years. Though the appellant states that he attempted twice to rebuild it, but that he was prevented by the zamindar from doing so there is no evidence to corroborate his interested statement. It appears also that no Sivayoga nishtai or any other penance nor gurupuja has been performed for more than ten years. Several witnesses cited by the respondent deposed to that effect, and the appellant has called no evidence in answer to it, although considerable evidence must be available, if, as stated by him, he has continued to perform them in his own house. Another act of mismanagement shown by the evidence is the mortgage of portions of the endowment without adequate necessity. Although the alinesses state that the money raised by the mortgage was applied to the payment of arrears of poruppu, the appellant has produced no evidence to explain why the poruppu was not regularly paid from the income derived from the lands. According to the
Kurnams of the villages in which the lands are situated their average income is sufficient for the payment of poruppu and for the due execution of all the [12] trusts. It is, again, in evidence that whilst no attempt has been made to keep up the mutt or restore it, the income of the endowment has been spent upon the improvement of the appellant's family house. The period during which these acts of mismanagement have continued shows that it has been wilful, and their continuance after the promise made at the inam inquiry to restore the mutt and after the execution of the karnama indicates that the mismanagement has been pernicious as well as wilful. I, therefore, concur in the opinion that the appellant has been guilty of breach of trust for a series of years, and that, in the circumstances of this case, it is necessary to remove him from management in order to ensure due performance of the trusts of the institution. On this ground I am of opinion that the appeal fails, and that it must be dismissed with costs.

As to the memorandum of objections, the first question is whether, in the contingency that has arisen, the respondent is entitled to the reversal of management of the endowment. By Exhibit I it is provided that the endowment should continue in perpetuity and that it should be administered by the head of the mutt for the time being. Consequently no right can be deduced from its terms for the respondent either to resume the endowment or to manage it in person. Though the trust created is one intended for the exclusive benefit of his family, all the members of that family are not plaintiffs in this suit. The only right which the respondent has as the representative and manager for the time being of the grantor's family is a right to claim due performance of the trusts of the institution by a person competent to perform them according to the intention of the grantor and the usage of the institution.

Another contention is that the removal of the appellant creates a vacancy, that the power of appointment vests in the zamindar for the time being, and that the appellant, who is found to be guilty of breach of trust and dismissed from his office, ought to have no voice in the appointment of a new trustee. The appellant, who is dismissed, has lost his status as a paradesi of the institution, and the right to name his successor, which is an incident of that status, cannot subsist after the status itself has been lost. The direction, therefore, so far as it recognizes any right in the appellant to name a successor, must be set aside.

[13] In the absence of a qualified disciple in whom the right of succession has already vested, the beneficiaries, who are the members of the zamindar's family, are the only persons interested in the appointment and entitled as such to express an opinion regarding the fitness of the proposed new trustee for the office. The case is then analogous to that of a vacancy arising from the death of a paradesi without appointing his successor. The proper decree is to declare the respondent's right to appoint a person qualified to discharge the peculiar trusts as new trustee with the concurrence of the rest of his family, to direct him to do so within a given time, and, upon his doing so, to confirm such appointment after notice to the other members of the respondent's family, and to direct that upon such confirmation the properties in dispute be made over to the person newly appointed to be administered so as to carry out the trusts of the institution in accordance with its usage. The decree should further direct that on default of the zamindar's doing so, the suit do stand dismissed with costs. I see no reason to interfere with the decree of the
Subordinate Judge so far as it dismisses the respondent's claim to mesne profits. The decree appealed against will be modified as indicated above.

There will be no separate costs on the memorandum of objections.

BEST J.—This is an appeal by the defendant against the decree of the Subordinate Judge of Madura (East) declaring that the appellant has rendered himself disqualified to hold the office of head of a certain mutt and is liable to be ousted therefrom and from the possession of the properties appertaining thereto.

The suit was brought by the zemindar of Sivaganga, alleging that the properties in question were given by the zemindar's ancestors "to the guru Sathappayyar in order that a mutt might be built on item No. 1 of the plaint schedule and concentrated meditation on Siva and other devotions might be performed, for the expenses of gurupuja and charities, with a view to the everlasting prosperity of the members of the zemindar's family," that the said properties were held by Sathappayyar, and after him by succeeding gurus till they came to the possession of the present appellant, who has disqualified himself for holding the mutt and its properties by reason that he, (a) instead of being an ascetic, has intercourse with women and indulges in other pleasures, and, (b) instead of appropriating the [14] income of the mutt to the devotions and charities thereof, he expends the same on women and his issue and for his own purposes.

It is further alleged in the plaint that, in consequence of misconduct as above on the part of appellant, he was, in January 1883, removed from the headship of the mutt by plaintiff's father, who also attached the properties of the mutt, since which appellant "without any regard to the devotions and charities which should be conducted in the mutt, with a view to the benefit of his issue and departing from the course of succession in the line of disciples," has arranged that his son should get the properties in dispute after his death. Thus the son was included as the second defendant in the suit, and though the decree is silent on the point, the Subordinate Judge has in his judgment stated that his appointment by the first defendant (now appellant) is "clearly fraudulent and unsustainable." The son, however, is not a party to this appeal.

The first objection now urged is that the Subordinate Judge had no jurisdiction to entertain the suit, it being one coming within the scope of Act XX of 1863. But even assuming that the suit might have been brought under that Act, I do not find anything in that Act making it obligatory on parties to proceed thereunder and not otherwise. Section 14 merely provides that any person or persons interested in a temple may, without joining as plaintiff any of the other persons interested therein, sue before the Civil Court, (i.e., the District Court, see Section 2). As remarked in Syed Amin Sahib v. Ibrom Sahib (1) "The enactments in Sections 14 and 15 are enabling and intended to give to the persons described and who are individually not interested otherwise than in connection with others the right to sue individually;" and the proviso in Section 18 that "no suit shall be entertained under this Act without a preliminary application being made to the Court for leave to institute such suit" was, I take it, intended for the protection of trustees, &c., from a multiplicity of suits. The wording of Section 14 is merely enabling and permissive and intended to apply

(1) 4 M.H.C.R. 112.
to the case of only a few of the interested parties suing in the interest of the public. Where all the parties interested join in bringing the suit, and where therefore, no special sanction of the Court is necessary; I see no reason why the suit should not be entertained in a Court having jurisdiction to entertain ordinary suits of the same value. Moreover, in the present case, the institution happens to be a private one created for the benefit of the plaintiff’s family. I agree, therefore, with the Subordinate Judge in finding that this objection is not valid.

It is next objected that the suit is bad for want of sanction of the Collector under Section 539 of the Code of Civil Procedure, if not for want of sanction of the District Court under Section 18 of Act XX of 1863. It follows from what I have already said that I do not think the case is one requiring the previous sanction of the District Court under the latter Act, which, it is to be observed, only requires such previous sanction for the entertainment of a suit under that Act—and the present is not a suit brought under that Act; while as to Section 539 of the Code of Civil Procedure, not only has it reference to public charities, but just as is Section 14 of Act XX of 1863 so also is this section merely enabling and permissive, its object being to allow of two or more persons interested in a public institution to sue without joining all the others interested in the same, the previous sanction of a public official being prescribed in order to prevent a multiplicity of suits which might otherwise be brought.

It is next contended that the present suit is barred by Sections 13 and 43 of the Code of Civil Procedure as the present objection that appellant is a married man living with his wife and children might and ought to have been taken in the former suit brought against him by the late Ranee of Sivaganga—the judgments in which suit (1) in the Court of first instance, (2) in the Appellate Court, and (3) in second appeal respectively are filed as Exhibits G, H and J. That was a suit to remove this appellant from the office of guru on the ground that he had no right to it in consequence of his not having been appointed by the zemindar. If the fact of his being a married man disqualified him for the office, I think that objection to him would not then have been lost sight of, for his marriage undeniably dates from a period prior to that suit. Though this objection to him might have been taken then I am not prepared to say that it ought to have been taken. In any case the present suit alleges acts of misappropriation of the mutt property of more recent date, which could not have been urged in the former suit. I agree, therefore, with the Subordinate Judge in holding that the present suit is not barred either as res judicata or under Section 43 of the Code of Civil Procedure.

We now come to the main question which is the subject of the fourth issue recorded in the Court below in the following words: whether "the allegation in clauses (a) and (b) of paragraph 3 of the plaint are "true, and if so, has the first defendant become disqualified to continue "as the head of the mutt?"

Clauses (a) and (b) of paragraph 3 of the plaint are as follows:
"(a) Instead of being an ascetic he keeps intercourse with females and pursues other pleasures.
"(b) Instead of appropriating the income of the said mutt for the upkeep of the devotions and charities of the mutt, he expends it on women and his issue and for his own purposes."

It is admitted at the hearing that by the "females" in clause (a) and "women" in clause (b) are meant only the defendant's wives, that no actual immorality is laid to his charge, and that the meaning of these
two clauses is nothing more than that he lives with his wives and children 
and maintains them with the produce of the lands given for the mainte-
nance of the mutt.

The question, therefore, narrows itself to this:—"Is defendant dis-
qualified for the office of guru by the fact of his living with his wife and 
children and devoting to their maintenance the produce of this property 
given as an endowment for the office of guru?"

My opinion as to the first part of this question is that the mere fact 
of the defendant being a married man cannot be held to disqualify him 
for the office of paradesi of the mutt. Had such been the case, no doubt 
the objection would have been taken in the Ranee's suit of 1867. More-
over, it is seen from the evidence that the two immediate predecessors 
of the defendant were both married men and it is also in evidence that 
defendant was already married when he succeeded to the office of paradesi 
of the mutt in question. Further, as is seen from the judgments in the 
suit of 1867, in the copper plate produced in that suit, the succession 
prescribed was to "sons and grandsons," see Exhibit J. On a considera-
ton of all these circumstances I come to the conclusion that the mere fact 
of the defendant being a married man and living with his wives and child-
en is not a valid ground for removing him from his office of paradesi 
of the mutt.

But there remains the question whether he has by misapropri-
[17] pating the proceeds of the endowments rendered himself liable to 
dismissal from this office. It is proved that the mutt itself has ceased to 
exist and no attempt appears to have been made to restore it notwithstanding 
the defendant's undertaking at the inquiry before the Deputy Collector 
on behalf of the Inam Commissioner (in 1864) that he would "build a 
separate muttam within a period of six " months" (Exhibit E) and his 
subsequent promise to the same effect in the karar A. dated 22nd June 
1878. At the same time the defendant's own family house has been 
improved. Moreover it is shown that the ceremonies for the perfor-
mance of which the endowment was made have not been performed for some 
years past. The defendant has entirely failed to prove the performance of 
these ceremonies at his house, as stated by himself examined as the sole 
witness for the defence. He has also admittedly mortgaged portions of 
the endowed property, whereas, as appears from the evidence of the kur-
nams examined on behalf of the plaintiff, the income of the endowed lands 
was sufficient for both payment of the poruppu and also for the expenses 
of the pujas, &c., for which the endowment was made. There can be no 
doubt, I think, as to the fact of the defendant having for years past mis-
appropriated the income of the endowed lands to the maintenance of his wives 
and children and to the improvement of his family house. This fact alone 
is sufficient to justify his removal from the office and to uphold the 
Subordinate Judge's decree to that effect.

I would therefore uphold the decree of the Court below modified as 
suggested by my learned colleague.

I agree in disallowing mesne profits and dismiss the respondent's 
objections taken under Section 561 of the Code of Civil Procedure except 
in so far as it relates to the first defendant having a voice in the appoint-
ment of the new trustees.
Madras Railway Company v. Thomas Rust

14 M. 18.

[18] ORIGINAL CIVIL.

Before Mr. Justice Handley.

Madras Railway Company (Plaintiffs) v. Thomas Rust
(Defendant).** [23rd July, 1890.]

Stamp Act—Act I of 1879, Section 3, Clause 4—Bond—Specific Relief Act—Act I of 1877, Sections 54, 57—Contract Act—Act IX of 1872, Section 90—Contract for personal service—Contract for more than three years—Interim injunction.

The defendant signed an agreement in England with a railway company, whereby he contracted to serve the company exclusively for four years in India under a penalty of £100. The defendant having come to India at the expense of the company and served it for two years, left its service for that of another employer, alleging that he had not been fairly treated by a locomotive superintendent:

Held, (1) that the instrument executed by the defendant was an agreement merely and did not require to be stamped as a bond,

(2) that the defendant had no right to rescind the agreement and the plaintiff company was entitled to an interim injunction restraining defendant from serving others on the term that the plaintiff company should consent to retain him in its employ.

[Appl., 18 B. 702 (711); 26 M. 168 (172) = 13 M.L.J. 18; R., 5 Bom. L. R. 878: 17 C. L. J. 427 (436).]

Motion for an interim injunction restraining the defendant from serving working for, or being employed by, any person or persons other than the plaintiff company pending the disposal of the suit.

The plaintiff in the suit prayed for an injunction restraining the defendant as above during the term of the agreement entered into by him and the plaintiff company, dated 20th June 1888, and for damages for breach of the agreement. The plaintiff stated and it was admitted by the defendant—

"That by an agreement bearing date the 20th day of June 1888, entered into between the defendant of the one part and the plaintiffs of the other part, the defendant thereby engaged himself in the service of the plaintiffs for four years from the day of his embarkation or departure for Madras on the following conditions (inter alia):—

(a) That he should proceed to Madras, and, while in India, should employ himself as might be required by the Board of Directors or their Agent at Madras or Locomotive Superintendent for the time being or other officer appointed in that behalf.

(b) He should faithfully and diligently employ the whole of his time in the service of the plaintiffs as a carriage painter, or in such other manner as the Board of Directors or their Agent at Madras or Locomotive Superintendent or other officer as aforesaid should require.

(c) He should in all things be subservient to, and obey the orders and directions of, the Board of Directors and of their Agent at Madras or Locomotive Superintendent or other officer appointed in that behalf.

(d) And in consideration of the agreement thereinbefore contained on the part of the defendant to be done and performed and of the due and faithful service to be rendered by him..."

* Civil Suit No. 173 of 1890.
to the plaintiffs for four years, the said Directors promised and agreed with him in manner following:

(c) That the Board of Directors should pay the expense of the passage of the defendant to Madras, and should pay him, during the continuance of his services, the sum of Rs. 200 per mensem, any increase of pay after or beyond the first annual increment of Rs. 13 per mensem to be subject to the defendant passing the Government examination in the vernacular, the amount of such salary to commence from the day of defendant's embarkation for Madras.

(f) And, lastly, the defendant thereby bound himself under a penalty of £100 to the said Directors diligently and faithfully to perform the various matters and things contained in that agreement.

(The agreement provided also for the dismissal of the defendant on three month's notice).

That the defendant left England on or about the 21st day of June 1888 and in due course arrived in Madras and was, from the date of such arrival, employed by the plaintiffs at their workshops at Perambur, Madras, under the orders and directions of the Locomotive Superintendant and continued to be so employed under the terms of the said agreement up to the 31st day of March, 1890.

[20] That the defendant, on the 1st day of April 1890, absented himself from the plaintiffs' said workshops and has since absented himself from the plaintiffs' said workshops and has been, plaintiffs are informed, since the said 1st day of April 1890, working for Mr. A. R. K. Moodley in Madras.

The defendant admitted that he was working for the person named, but claimed that he had a right to cancel the agreement on the grounds that Mr. Phipps, the Acting Locomotive Superintendant, had insisted on his disclosing a trade secret which he possessed, and that the language and manner of Mr. Phipps towards the defendant was such as to injure his feelings and lower him in the estimation of the men working under him &c.

On the motion coming on, Mr. B. F. Grant for defendant objected that the document put in for the plaintiffs in proof of the agreement containing the above terms, which was signed by the defendant only, was not admissible for want of a bond as on a bond for £100 and he relied on Reference by Board of Revenue, N.W.P., under Act I of 1879 (1).

Mr. K. Brown for plaintiffs. The reasoning of the dissenting judgment in that case is correct and is in accordance with the decision in Gisborne and Co. v. Subal Bourni (2). The document should not be regarded as a bond, but an agreement for the purposes of the Stamp Act.

Handley, J., ruled that the document did not require to be stamped as a bond, but was an agreement merely.

Mr. K. Brown. This is a case for an interim injunction under Civil Procedure Code, Section 493. As on the pleadings and affidavits the plaintiffs would be entitled to the injunction prayed for in the suit Nasserwanji Merwanji Pandav v. Gordon (3). Specific Relief Act, Section 57, governs the case. Cynnine the illustrations, which refer to cases of personal service and Lumley v. Wagner (4) and Montague v. Flockton (5). There is nothing in the nature of the contract which bars this remedy;

(1) 2 A. 654 (659).
(2) 3 C. 285.
(4) 1 De. G.M. & G. 604.
(5) 16 Eq. 189.
(3) 6 B. 266.
see Brahmaputra Tea Co., Ltd. v. Scarth (1) distinguishing Oakes & Co. v. Jackson (2) and the defendant's affidavit discloses no ground for rescinding it.

[21] Mr. R. F. Grant. The defendant was justified under Contract Act, Section 39, in rescinding the contract. In any view, however, since this contract could not be enforced by a decree for specific performance as being a contract of service and also as extending over a period of three years (see Specific Relief Act, Sections 12, 21), under Section 54 it should not be enforced by way of injunction. Section 57 has never been applied to a case where the two objections to specific performance above stated have concurred. Further the agreement is unfair; one-sided and wanting in mutuality; moreover on the face of it, it appears the parties regarded money-payment as sufficient compensation for its breach. Before granting an injunction the Court must regard the balance of convenience and weigh the consequences of an injunction on the defendant against the substantial mischief done to the plaintiffs by rescission of the contract. See Shinnagor Jute Factory Co. v. Ram Narain Chatterjee (3), Doherty v. Allman (4), Mogul Steamship Co. v. McGregor, Gow & Co. (5), Newson v. Pender (6).

Mr. K. Brown, in reply. The argument as to balance of convenience fails in view of the circumstances of the case and that as to money-compensation is not supported by the penal clause in the agreement; see Specific Relief Act, Section 20. There was clearly no ground for rescission by the defendant.

JUDGMENT.

I consider that this is a case in which an interim injunction should be granted.

No sufficient reason is shown in defendant's affidavit for his breach of the agreement. If any question arose between him and Mr. Phipps as to his right to conceal any trade secret he possessed, or if he had any complaint to make as to his treatment by Mr. Phipps, he should have brought the matter before the governing authority of the company and not have thrown up his employment in direct violation of his contract. It is argued that there is no mutuality in the contract because the company has not executed the agreement, and because they can dispense with defendant's services on three months' notice. As to the first point, the company sets up the agreement and of course is bound by it equally with the defendant. As to the second point, the company does enter into certain covenants with the defendant, and whether on the whole the bargain is more advantageous to them or to the defendant is a question not now to be determined. The defendant made the contract, and, in the absence of fraud or duress, must be bound by it.

And I do not think that pecuniary damages will adequately compensate the company for the defendant's breach of contract. Unskilled persons who enter into contracts of this sort, on the faith of which their passage out to this country is paid, are kept to their agreement, the consequences will be very serious to employers, who will often be unable to secure the services of persons to supply the places of the defaulters in a short time. It is argued that when the remedy by specific performance of a contract is expressly refused by Chapter II of the Specific Relief Act then by virtue of Section 54, Clause 2, an injunction cannot be granted, and therefore that

---

(1) 11 C. 54. (5) 15 Q.B.D. 476.
(2) 1 M. 184. (6) 27 Ch. D. 43.
(3) 14 O. 189. (4) L.R. 3 App. Cas. 709.
this contract, being one extending over more than three years and therefore not capable by Section 21, Clause (g) of specific performance, cannot be the subject of an injunction. It seems to me that this argument would make Section 57 of the Act a nullity. That section provides in the case of an affirmative agreement coupled with a negative agreement express or implied, that an injunction may be granted though specific performance could not, and it gives as illustrations some of the contracts specific performance of which is precluded by Section 21, Clause (b). If an injunction may be granted in the case of contracts, specific performance of which is refused by Section 21, Clause (b), why not in the case of those specific performance of which is refused by Section 21, Clause (g)? It is also argued for the defendant that an injunction should not be granted because the agreement provides for a penalty for its non-performance. But Section 20 of the Specific Relief Act provides that this should be no bar to the remedy by specific performance and the same principle applies to injunctions. I think a case has been made out for the interference of the Court by *interim* injunction, but it must be on terms that plaintiff company take back the defendant into their service if he is willing, and do not, pending the decision of this suit, exercise their powers under Clause 7 of the agreement of dispensing with his services on three month’s notice. Upon these terms there will be an injunction as prayed. Costs of this application to abide the result of the suit.

*Barclay & Morgan—Attorneys for plaintiffs.*
*Champion & Short—Attorneys for defendant.*

14 M. 23 = 1 M.L.J. 28.

[23] **APPELLATE CIVIL.**

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.*

**AMBU (Defendant No. 4). Appellant v. KETILILAMMA AND ANOTHER (Plaintiffs), Respondents.* [14th August and 2nd September, 1890.]

*Civil Procedure Code, Section 43—"Distinct cause of action"—Suit for possession after cancellation of Court-sale.*

In execution of a decree the defendant, who was sued as the representative of her deceased brother, objected, under Section 244 of the Code of Civil Procedure, to the attachment of certain lands to which she set up independent title. The objection was disallowed and the land was sold. She then sued the execution purchaser to set aside the Court sale and obtained a decree against which no appeal was preferred. She now sued for possession, and it was found that at the date of the previous suit she was not aware that the execution purchaser had obtained possession:

*Held, that the suit was not barred by Civil Procedure Code, Section 43.*

[**Diss.** 16 M. 140 (141); **F.** 29 M. 151 (152) (F.B.); 14 Ind Cas. 510 (511)=10 P.R. 1912=74 P.L.R. 1912=267 P.W.R. 1912; L B.R. (1898-1900) 410 (411) R., 19 M. 145 (148).]

**SECOND appeal against the decree of C. Gopalan Navar, Subordinate Judge of North Malabar, in appeal suit No. 261, of 1887, which was remanded by the High Court for rehearing in second appeal No. 1508 of 1888, reported *sub nom*, Ketililamma v. Kelappan (1).**

The facts of the case, which are stated at greater length in the report above referred to, were shortly as follows:—The plaintiff had intervened

*Second Appeal No. 1026 of 1889.*

(1) 12 M. 226.
in execution of a decree claiming that the land sought to be brought to sale was her property. Her objection was disallowed and the land was sold. She then brought a suit against the purchaser praying only that the Court-sale be set aside and she obtained a decree as prayed. She afterwards brought original suit No. 542 of 1886 in the Court of the District Munsif of Tellicherry for possession of the land. Her suit was dismissed and appeal suit No. 261 of 1887, in the file of the Subordinate Judge of North Malabar, was her appeal against this decree.

The Subordinate Judge on remand recorded a finding that the plaintiff was not aware of at the date of the previous suit that defendant No. 4 had obtained possession of the land and passed a decree [24] in favour of the plaintiff overruling a plea raised under Section 43 of the Code of Civil Procedure and holding that the cause of action in the present suit was distinct from that in the previous suit, on which points he referred to Moonshree Buzoor Ruheem v. Shumsoomissa Begum (1), DeSouza v. Coles (2), Viraragava v. Krishnasami (3), Piteapur Raja v. Surya Rao (4), Andi v. Thatha (5), Jibant Nath Khan v. Shik Nath Chuckerbutty (6), Nonoo Singh Monda v. Anand Singh Monda (7), Amanat Bibi v. Imdad Hussain (8).

Defendant No. 4, who claimed to be entitled to the land under the Court-sale, preferred this second appeal.

Sankaran Nayar, for appellant.
Bhashyam Ayyangar, for respondents.

JUDGMENT.

Best, J.—The question is whether the plaintiff's present suit is barred under Section 43 of the Code of Civil Procedure by reason of her omission to sue for possession of the land in her former suit, in which the present appellant was also included as a defendant?

The former suit (No. 508 of 1884, Tellicherry District Munsif's file), was for setting aside a summary order dismissing the plaintiff's claim to the land which had been attached in execution of a decree and subsequently sold. The statement in the plaint in that suit that the cause of action arose "on and after the 4th December 1883," (see paragraph 5 of Exhibits C.) shows that it was in fact a suit brought under Section 283 of the Code of Civil Procedure "to establish the right" of plaintiff to the property. It has been held that where a previous suit for a declaration of title and confirmation of possession of property has been dismissed on the ground that plaintiff was not in possession at the time of filing the suit, a subsequent suit on the same title for recovery of possession of the same property is not barred under Section 43, Civil Procedure Code see Jibunti Nath Khan v. Shik Nath Chuckerbutty (6) and Nonoo Singh Monda v. Anand Singh Monda (7). The present plaintiff's case is stronger than were those of the plaintiffs in the cases referred to above: for the present plaintiff's suit was not dismissed, but she obtained a decree setting aside the sale of the property. The decree thus obtained by her was merely declaratory (Dildar Fatima v. Narain Das (9)), and such a decree is not sufficient to bar [25] a subsequent suit for possession of the property. Moreover, the Subordinate Judge has found that, though the present appellant was in possession of the property at the date of the bringing of the former suit, plaintiff was not aware of the fact, and, such being the case, the authorities quoted

---

(1) 11 M.I.A. 551.
(2) 9 M. H. C. R. 384.
(4) 8 M. 520.
(5) 10 M. 347.
(7) 12 C. 391.
(6) 6 M. 344.
(8) 15 C. 300.
(9) 11 A. 365.
by him are sufficient to justify his finding that this suit for possession is
not barred.

The statement in paragraph 2 of the memorandum of appeal that the
Lower Appellate Court "has not considered Exhibits II, III, IV, V and
VII" is incorrect.

This appeal fails and must be dismissed with costs.

MUTTUSAMI AYYAR, J.—I am also of the same opinion. The only
question of law that arises for decision upon the facts found is whether
Section 43 of the Code of Civil Procedure bars the present suit. The
ground of claim in original suit No. 508 of 1884 was the order that reject-
ed the claim petition No. 1488 of 1883, and under Section 283 the
plaintiff was entitled to institute a suit to establish the right claimed by
him and thereby to prevent the order from acquiring the force of a decree
in a regular suit. The ground of the present suit was the wrongful with-
holding of possession from the plaintiff after his title had been declared in
the previous suit. The grounds of action not being identical, Section 43
is not applicable.

It is argued, however, for the appellant that the setting aside the
sale and the recovery of possession are remedies consequent upon the
declaration that the summary order is invalid. But it must be observed
that Section 283 gives a special right to sue for a declaration of title by
reason of the special attribute with which the order on the claim petition
is invested, unless it is invalidated. The right is one which the plaintiff
is at liberty to exercise without reference to the Court sale and the trans-
fer of possession under such sale that may or may not at once follow the
order, and it is indeed conceded by the appellant's pleader that, if there
had been no prayer in the previous suit for setting aside the Court sale,
the present suit would be maintainable. After the claimant's title has
been declared, he must no doubt sue but once, both to set aside the sale
and recover possession, but, until such declaration is made, the sale and
transfer of possession are in the nature of successive wrongful acts origi-
nating from the invalid order rather than of remedies which he is
bound to claim in the declaratory suit which is specially allowed on a
stamp of Rs. 10. [26] It is found further that, whilst instituting the
former suit, the plaintiff was not aware of the transfer of possession
under the Court sale which was sought to be set aside. In a case like
this, in which several wrongful acts consequent on the same order may
occur on different dates, no laches could be imputed to the plaintiff for
omitting to unite them all in one suit, unless he was aware of their
occurrence. The cause of action in such cases must be ascertained from
the facts within his knowledge and averred in the plaint.

I would also dismiss this second appeal with costs.
UNNI v. KUNCHI AMMA

14 M. 26.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Weir.

UNNI and another (Plaintiffs), Appellants v. KUNCHI AMMA and others (Defendants), Respondents.

[18th and 26th August, 1890.]


A suit was filed in 1888 on behalf of a Malabar tarwad by two of its members to recover property improperly alienated in 1879 under a kanom instrument by the kanaman, who had since been removed from office.

Held, that since a prayer for the cancellation of the kanom instrument was not an essential part of the plaintiffs' relief, the suit was not barred by the three years' rule in Limitation Act, 1877, Schedule II, Article 91.

[1890

Second appeal against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 1140 of 1888, confirming the decree of V. P. da Rozario, Subordinate Judge of South Malabar, in original suit No. 39 of 1887.

Suit to recover certain property, the jenm of the tarwad of the plaintiffs and defendants Nos. 1 and 2, which had been improperly alienated in 1879 under a kanom instrument by their late kanaman since removed from office. The plaint stated that the plaintiffs had been appointed managers of the tarwad by a decree of Court.

The Subordinate Judge and, on appeal, the District Judge, held that the plaintiffs could not recover the property without previously obtaining the cancellation of the kanom instrument, and that, as a suit to obtain such cancellation would have been barred under Limitation Act, 1877, Schedule II, Article 91, the present suit was not maintainable and they accordingly dismissed it.

The plaintiffs preferred this second appeal.

Sankaran Nayar, for appellants.
Narayana Rau, for respondents.

Judgment.

This is an appeal against the decree of the District Judge dismissing a suit brought on behalf of a tarwad to recover property improperly alienated by the late kanaman. The alienation, which was in the form of a demise on kanom, executed in favour of one Subban Patter, was made in 1879.

It has been held by the District Judge that, the suit being instituted more than three years after the date of the kanom, is barred by limitation, because before recovering the property it was necessary to have the kanom set aside. It will be observed that the kanom document was not

* Second Appeal No. 1269 of 1889.
executed by the plaintiffs or any person under whom they claim as heirs or otherwise.

There can be no doubt that when a person seeks to recover property against an instrument executed by himself or one under whom he claims, he must first obtain the cancellation of the instrument, and that the three years' rule enacted by Article 91 applies to any suit brought by such person—Janki Kunwar v. Ajit Singh (1). In such cases, according to the old practice, it was necessary to have recourse to the Court of Chancery, because at common law the claimant when met by his own deed was helpless. (Story's Equity Jurisprudence, cap. XVII; Davis v. Duke of Marlborough (2).) It was only in the Court of Chancery that he could get the requisite relief. Although similar relief might be given in cases where the deed was on the face of it void, on the principle of removing a cloud from the plaintiffs' title and preventing further litigation, we do not think that relief by way of cancellation of the deed was absolutely necessary, except in cases where the deed was sought to be avoided on account of fraud or other such ground. (See Story's Equity Jurisprudence, ib.). Provision is made for the two classes of cases above indicated by Section 39 of the Specific Relief Act. In the present case the plaintiffs are seeking to recover property alienated by their late karnavan, and their case, with regard to the alienation, is that the karnavan was not, under the circumstances, authorized to make it. They have no complaint to make of the manner in which the execution of the instrument was obtained by Subban Patter, but their charge is that the instrument cannot have the legal operation which the appellants seek to give to it. In our opinion there is no distinction between this case and other cases where a similar charge is made in respect of an instrument of alienation executed by a person who, not being the full owner of the property, has a conditional authority only to dispose of it. Such are the cases of a guardian of a minor, the manager of a Hindu family or the sonless widow in a divided Hindu family. In these cases, as was argued by the appellants' vakil, it is not only not necessary, but it is not possible, to have the instrument of alienation cancelled and delivered up, because, as between the parties to it, it may be a perfectly valid instrument. All that is needed is a declaration that the plaintiffs' interest is not affected by the instrument, and that declaration is merely ancillary to the relief which may be granted by delivery of possession—Azim Unnissa Begum v. Clement Dale (3). The question is really concluded by authority, for it has been held in the case of the guardian, the manager of a Hindu family, and the Hindu widow wrongfully alienating property, that the suit which may be brought to recover it is not governed by Article 91 of the Limitation Act, Sikker Chund v. Dulpatty Singh (4). In the case cited by the District Judge, Raman v. Valia Amma (5) which was a case similar to the present, Turner, C.J., and Kernan, J., observed:—"If a person not having authority to execute a deed, or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it to sue to set it aside, for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist." We entirely agree in this statement of the law. We do not think that the decision Jagadamba Chowdhri v. Dakhina Mohun (6) has any bearing on the present case. In principle,

---

(1) 15 C. 58. (2) 2 Swanston. 159. (3) 6 M.H.C.R. 455 (475). (4) 5 C. 363 (370). (5) S.A. 270 of 1890 not reported. (6) 13 I.A. 84.
as well as on authority, we think that a prayer for the cancellation of the
kanom document [29] was not an essential part of the plaintiffs' relief,
and that, therefore, the suit being instituted within twelve years, was not
barred by limitation. The result is that the decree must be reversed and
the case remanded for disposal by the District Judge on the merits.
Costs will abide and follow the event.

14 M. 29.

APPELLATE CIVIL.

Before Mr. Justice Mullasani Ayyar and Mr. Justice Best.

SANKARA (Plaintiff), Appellant v. KELU AND OTHERS (Defendants),
Respondents.* [12th August and 2nd September, 1889.]


In 1870 the managers of the plaintiff's tarwad demised certain land now in
suit on kanom. In 1885 they sued to redeem the kanom and a decree was
passed that the plaintiff do pay a certain sum to the kanomdar, and that he do
surrender the land; but in the judgment it was said that the kanom amount
should be charged on the land. In 1886 the tarwad was divided and the land
above referred to was allotted to the present plaintiff's branch. In 1887 the
kanomdar, in execution of the above decree, brought the land to sale and it was
purchased by defendant No. 1:

Heard, that the sale was not binding on the plaintiff.

[R., 18 M. 451 (453); 19 M.L.J. 132 (133) = 3 M.L.T. 189.]

SECOND appeal against the decree of E. K. Krishnan, Subordinate
Judge of South Malabar, in appeal suit No. 1040 of 1886, confirming the
decree of J. A. deRozario, Additional District Munsif of Calicut, in original
suit No. 193 of 1888.

Suit to set aside a sale in execution of the decree in original suit No. 11
of 1886 on the file of the Court of the District Munsif at Calicut, and to
recover possession of the land, the subject of the sale.

The plaint stated that the land in question in this suit was the property
of the tarwad of the plaintiff and defendants Nos. 3 and 4, and
that at a partition of the tarwad property, which took place on 7th
December 1886, it had been set apart as the share of the plaintiff's branch
of the tarwad. It appeared that the above suit [30] was brought by
defendants Nos. 3 and 4, alleging that they were the managers of the
tarwad with the consent of the karnavan against defendant No. 2 to
redeem a kanom (dated 1870) on the land now in question, and that
the District Munsif in delivering judgment in that suit said he allowed
the kanom amount to be charged on the property but by the decree, dated
17th June 1885, it was ordered that the plaintiff do pay to the defendant
a certain sum with interest as therein provided, and that "the defendant
do surrender the plaintiff's paramba." The defendant in execution of this
decree attached the land and brought it to sale and it was purchased on
28th February 1887 by defendant No. 1, who now resisted the plaintiff's
claim on the grounds that the decree-debt was contracted for authorized
purposes, and that the plaintiff's interest was bound by the decree.

The District Munsif passed a decree dismissing the suit, and this
decree was affirmed on appeal by the Subordinate Judge. The plaintiff
preferred this second appeal.

* Second Appeal No. 1115 of 1889.
Sundara Ayyar, for appellant.
Sankaran Nayar and Ramachandra Ayyar, for respondents.

JUDGMENT.

MUTTUSAMI AYYAR, J.—The question arising for decision in this second appeal is whether the sale in execution of the decree in original suit No. 11 of 1885 is binding on the appellant. The decree, as it was framed, was only a money decree, and it did not direct the sale of the property in dispute. Although the judgment recorded in that suit might be considered in construing the decree, it could not be used for varying the decreetal order so as to convert a money decree into a decree for the sale of property in default of payment. The interest then that passed by the sale was only the right, title, and interest of the judgment-debtors at the date of the attachment in execution in 1887. But by the partition effected in December 1886, the property in question vested in the present plaintiff subject, upon the facts found, to the payment of the decree debt, and his equity of redemption could not therefore be prejudiced by the sale. The decision of the Courts below rests on the ground that a money decree against the karnavan is sufficient to validate a sale of tarwad property as against an anand ravann, provided that the decree debt is one which binds the tarwad. But in the case before us, the plaintiff had separated from the tarwad and his community of interest with the judgment-debtors had determined before the attachment [31] and the sale in execution of the decree in original suit No. 11 of 1885.

The decrees of the Courts below must be reversed, the Court sale set aside, and the 1st defendant declared entitled to remain in possession until the amount due to the 2nd defendant under the decree in original suit No. 11 of 1885 is paid by the plaintiff to the 1st defendant, and the suit dismissed in other respects. The 2nd defendant will pay the plaintiff’s costs throughout.

BEST, J.—The decree, in execution of which the plaint property was sold (when 1st defendant purchased the same), was passed in a suit brought by 3rd and 4th defendants, members and managers of the plaintif’s tarwad, for redemption of the plaint paramba from 2nd defendant, who was a kanomdar. Second defendant set up an additional debt or poramkadam of Rs. 37, and the Munsif, finding that the poramkadam set up by 2nd defendant was true and binding on the property, passed a decree (Exhibit II), in the following words:—“that the plaintiffs (now 3rd and 4th defendants) do pay to the defendant (now 2nd defendant) Rs. 131-4-4, the sum made up of Rs. 37 due under the poramkadam deed, and Rs. 64-4-4 the interest thereon to the date of the decree at the rate of one per cent., together with interest at the same rate from the date of the decree to that of execution on Rs. 37, the amount advanced; that the defendant (now 2nd defendant) do pay to the plaintiffs (now 3rd and 4th defendants) Rs. 37, the arrears of rent after deducting the kanom, together with rent at the rate of Rs. 6-0-6 and 50 cadjans, from the date of the decree to the surrender of the land;” and then follows the order as to costs.

The Subordinate Judge remarks with reference to this decree “that it is perhaps not artistically drawn out, but paragraph 5 of the judgment (Exhibit II) declares the relative rights and liabilities of the mortgagor and mortgagee” and it is, he finds,” “capable of execution at the suit of either.”

Paragraph 5 of the judgment (Exhibit III) is as follows:—“I allow the poramkadam evidenced by Exhibit I to be charged on the property, and direct that the sum secured by that bond with one per cent.
interest only throughout be paid with the kanom to defendant on eviction. With the above modification, I decree surrender of the land.”

A judgment can no doubt be looked into to explain a decree; but neither in the judgment (Exhibit III) nor in the decree [32] (Exhibit II) is there any authority given to the then defendant (now 2nd defendant) to recover the amount then found due to him by execution of that decree. The decree was merely one declaring this 2nd defendant entitled to a certain amount and directing him to surrender the property to the present 3rd and 4th defendants on the payment to him of that amount.

The sale of the property in execution of that decree on the motion of the 2nd defendant must, therefore, I think, be held to be invalid as against the plaintiff; and 1st defendant as purchaser at such sale must be held to have acquired merely a right to possession of the paramba as assignee of the 2nd defendant.

I would, therefore, set aside the decrees of both the Lower Courts and declare the Court sale of no effect as against the plaintiff except in so far as it entitles 1st defendant to possession of the property in place of 2nd defendant, till the amount due to the latter under the decree (Exhibit II) be paid by plaintiff to 1st defendant.

The plaintiff’s costs throughout should be paid by 2nd defendant.

1889 SEP. 2.
APPRL-
LATE
CIVIL.
14 M. 29.

14 M. 32.

ORIGINAL CIVIL.

Before Mr. Justice Best.

BANK OF MADRAS (Plaintiff) v. SUBBARAYALU AND ANOTHER
(Defendants)." [20th October, 1890.]

Stamp Act—Act I of 1879, Sections 9, 33, 34, rule 6—Promissory note—Hundi Stamp.

In a suit on a promissory note for Rs. 4,300, which was executed on an impressed sheet bearing an impressed stamp with the word “hundi” at the top and the words “three rupees” at the bottom of the impression:

Held, on its appearing that the instrument was correctly stamped as to the amount of duty, that the instrument was admissible in evidence.

[F., 21 P.R. 1891.]

SUIT on a promissory note for Rs. 4,300. The defendants pleaded that the note was not duly stamped under the Stamp Act and the rules made thereunder. See notification No. 1288, dated 3rd March 1882, published in the Fort St. George Gazette of 23rd [33] March 1882, p. 157, and notification No. 2955, dated 1st December 1882, and published in the Fort St. George Gazette of 19th December 1882, p. 770.

Mr. W. Grant, for plaintiff.

Mr. R. F. Grant, for defendants.

The following cases were referred to in the argument besides the case mentioned in the judgment.

Reference under Stamp Act, Section 46 (1); Reference under Stamp Act, Section 46 (2); Radhakant Shaha v. Abhoychurn Mitter (3); Anonymous case (4).

* Civil Suit No. 359 of 1889.

(1) 7 M. 176. (2) 11 M. 377. (3) 8 C. 721. (4) 10 C. 274.

23
JUDGMENT.

This is a suit by the Bank of Madras for the recovery (with interest) of a sum of Rs. 4,300 due under a promissory note. The first defendant is the drawer of the note and the second defendant the indorser. First defendant admits his execution of the note, but pleads that he did so "at the request of the plaintiff (Bank) who through their agent T. Murugesas Mudali promised and agreed that the plaintiff would not at any time call upon him, the first defendant, to pay same or any part thereof," and that the note was executed by him (first defendant) for the accommodation of one Gurunatha Chetti, who was at the time already indebted to the Bank under two previous notes for Rs. 2,000 and Rs. 2,500 respectively, both of date 8th March 1889.

The plaint note has been filed as Exhibit A; it is dated 10th September 1889. The acceptor of the note is Ramaswami Chetti, brother of the Gurunatha Chetti referred to by first defendant. He has allowed the suit to proceed ex parte as far as he is concerned.

The issues are as follows:

(i) Whether the promissory note was signed by first defendant on the understanding that he should not be called upon at any time to pay any part thereof?

(ii) Was Murugesas Mudali empowered to make any such promise so that it should be binding on the plaintiff?

(iii) Was there no consideration for the note so far as the first defendant is concerned?

(iv) What relief, if any, is plaintiff entitled to?

[33] On the case coming on for trial it was objected on behalf of the first defendant that the note A is not admissible in evidence as it is written on a hundi paper. In support of this contention reference was made to the rules made under Section 9 of the Stamp Act by the Governor-General in Council, dated 3rd March 1882, No. 1288, and 1st December 1882, No. 2955. See Ponnuwami Chettiar's Stamp Manual, pp. 45-60. The rules of 3rd March 1882 relied on are Nos. 4 and 6, the former of which is that "all instruments chargeable with duty, except hundis, may be written on impressed sheets, and, except as provided by Section 10 of the said Act (i.e., Stamp Act) and by these rules, shall be so written." While rule 6 relates to the paper on which hundis shall be written. It is as follows:

"Hundis other than hundis which can be stamped with an adhesive stamp under Section 10 of the said Act shall be written as follows:

"Hundis payable otherwise than on demand, but not more than one year after date or sight and for amounts not exceeding Rs. 30,000 in individual value, on impressed sheets bearing the word hundi." (The rest of the rule need not be quoted.)

The rule of 1st December 1882, No. 2955, is that promissory notes "drawn or made in British India and chargeable with a duty of annas 6, 10 or 12 shall be written on impressed sheets of those values bearing the word hundi."

The contention on behalf of the first defendant is that the rule last quoted allows only of promissory notes chargeable with a duty of annas 6, 10 or 12 being written on paper bearing the word hundi, and as the plaint promissory note is for a sum requiring a stamp of Rs. 3 and as it consequently does not come within this rule, it being written on a hundi paper must be held to be not duly stamped.
I am unable to accede to this argument. If it was intended that promissory notes requiring a stamp other than 6, 10 or 12 annas should not be written on imprinted sheets intended for hundis and bearing the word hundi, the rule might easily have been avoided so as to make the intention clear. As the rules now stand, I find that a document such as A must be written on an imprinted sheet, and that, though promissory notes chargeable with a duty of 6, 10 or 12 annas must be written on hundi paper, there is no prohibition against other promissory notes also being so written, as these hundi papers are also "impressed sheets." Had the rule of 1st December 1882 been merely permissive with regard to the promissory notes therein specified, there would be force in the argument for the first defendant—that only such notes could be made on hundi paper, as such a rule would have shown that hundi paper could not have been used theretofore for the execution of promissory notes. But the passing of an obligatory rule with regard to some particular classes of notes is not a sufficient declaration that other notes shall not be executed in the same kind of paper; and to justify the exclusion from evidence of a document like A (which is admittedly executed on an imprinted sheet of the proper value) on the ground that the stamp bears the word hundi, there must be a distinct and positive rule against the employment of such paper for the purpose and not merely a dubious inference as to the intention of the framers of the rules. A decision of the Judicial Commissioner of Oudh to the effect now contended for on behalf of the defendant has been brought to my notice. It is not a reported case, and I am unable to accept the conclusion arrived at by the learned Judicial Commissioner in that case. I, therefore, allowed the note A to be filed as an exhibit.

Murugas Mudali has been examined by the plaintiff and denies that he obtained first defendant's signature to A on the understanding that first defendant should never be called on to pay anything on account of the debt. First defendant's statement to the contrary is unsupported by any evidence except that given by himself. Both Murugas Mudali and Mr. Duffield swear that the former was not empowered to make any such promise to the first defendant. The letter B admitted by first defendant shows that he was a party to the original loan of December 1888, and it is clear from his letter D, dated 13th December 1889, that he knew he was also liable for the debt. The other exhibits filed on behalf of plaintiff merely show the manner in which the original notes were renewed from time to time. My findings on the first and second issues are in the negative.

On the third issue I find that there was consideration for the note such as to make first defendant also liable for the debts, and as to the fourth issue my finding is that both the defendants are liable to pay to the plaintiff the amount sued for, with interest, amounting in all to Rs. 4,527-4-0.

I decree, therefore, that defendants do pay to plaintiff this amount and costs of the suit, with further interest on the whole amount at 6 per cent. per annum from this date to date of payment.

Barclay and Morgan—attorneys for plaintiff.
Branson and Branson—attorneys for defendants.

QUEEN-EMPRESS v. CHINNA TEVAN AND ANOTHER.* [9th April, 1890.]

Criminal Procedure Code, Sections 307, 418—Verdict of jury—Perversity of verdict—Procedure when Sessions Judge disagrees with verdict—Appeal against conviction.

A jury returned a verdict of guilty against the accused in a trial for dacoity. The Sessions Judge accepted the verdict, although he said he did not agree with it and had charged the jury for an acquittal; he observed that he could not refer the verdict as perverse since there was evidence against the accused which was open to the jury to believe. The accused appealed to the High Court on the ground (inter alia) that the Sessions Judge "ought to have referred the case to the High Court under Criminal Procedure Code, Section 307:"

"Held, that since there had been no misdirection by the Sessions Judge, and there was some evidence to support the verdict, the High Court had no power to interfere, however absurd the verdict might be considered.

APPEAL against the conviction of the appellants on 11th June 1890 by H. T. Ross, Acting Sessions Judge of Madura, and a jury on the charge of dacoity.

The appellants and three others were charged with having committed dacoity on the night of 6th November 1889 on the Periyakulam-Ammayanaikanur high road.

The case against the appellants rested mainly upon the evidence given by certain constables and kavalgars as to the circumstances under which they were arrested; there was, however, some evidence of their identification by the persons who had been robbed.

The Sessions Judge, in charging the jury, pointed out the inconclusive nature of the above evidence, but the jury returned a verdict of guilty against the appellants—the other persons being acquitted.

The Sessions Judge said as to this verdict:—"The juries in Nos. 7 and 9 refused to believe the story. This jury takes the other view, and though (as will be obvious) I charged this jury plainly for an acquittal and do not agree with their verdict, I cannot say that it was not open to them to believe the Police witnesses if they chose, or to believe the evidence of identification even apart from the Police story of the capture. I cannot, therefore, refer the verdict as perverse, though it is not what I myself should have found. In considering sentence I keep in view the fact that this is a high road in constant use by travelers to and from the railway which has become notorious for dacoity, which it is the duty of the Court to assist in suppressing by due severity of sentence where convictions are obtained. I accordingly sentence the first and second prisoners each to undergo the maximum term of rigorous imprisonment provided for the offence, namely, rigorous imprisonment for 10 years."

This appeal, which was preferred against the above conviction and sentence, proceeded on the grounds that the Sessions Judge "ought to have referred the case to the High Court under Criminal Procedure Code, Section 307: " that "there was no evidence on the record to convict the accused;" that "considering the evidence on the record the sentence was excessive," &c.

* Criminal Appeal No. 65 of 1890.
Mahadeva Ayyar, for appellants.
Mr. Wedderburn, for the Crown.

JUDGMENT.

This is another case of a conviction by a jury of persons accused of dacoity against the opinion and advice of the Sessions Judge although he declines to refer the case to the High Court under Section 307 of the Code of Criminal Procedure; we have no power to interfere however absurd or wrong we may think the verdict to have been. There has been no misdirection by the Sessions Judge, and there is evidence against the prisoners if the jurymen chose to believe it. The sentence also is not too severe supposing the prisoners are guilty. The prisoners, of course, may bring their case to the notice of His Excellency the Governor in Council, if they be so advised.

Our duty under the present state of the law is to dismiss the petition and confirm the conviction and sentence.

16 M. 38.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

BYARI AND OTHERS (Defendants 4, 7 and 8 and representatives of 10th Defendant), Appellants v. PUTTANNA (Plaintiff), Respondent. [16th October, 1889, and 22nd July, 1890.]

Aliyasanta Law—Unjustified alienation of family property by a member of undivided family—Limitation—Adverse possession.

In 1851 the ejaman of an aliyasanta family mortgaged family property to the ancestor of some of the defendants who and whose alliance were now in possession. The mortgagor died leaving besides one brother, two sisters, each having a son—the family remaining undivided. In 1856 one of the sons, with the concurrence of his uncle and mother, conveyed the land to the mortgagee, but this transaction was not justified by any family necessity; and in 1857 the other son and his mother sold their undivided moiety to the plaintiff’s predecessor in title. In a suit to redeem the mortgage of 1851, the plaintiff obtained a decree for redemption of a moiety of the mortgage property:

Held, that although it may have been supposed in 1857 that compulsory partition was permitted by the aliyasanta law, yet as the right to the half share purporting to be sold in 1857 had no legal existence, nothing could pass by that sale and the suit should be dismissed.

Per cur. Neither the original mortgagee nor his son can rely on the 12 years’ rule of limitation unless he can prove a subsequent valid sale, in the absence of which his possession must be taken to retain its original character.


* The appellants preferred a petition to His Excellency the Governor in Council, on which the following order was made, dated 20th November 1890—

"In exercise of the powers vested in him by Section 401 of the Code of Criminal Procedure, His Excellency the Governor in Council is pleased to direct that the unexpired portion of the sentence of 10 years rigorous imprisonment imposed upon the convicts No. 796, Chinna Tavan, and No. 727, Karuppa Tavan, alias Vellaya Tavan, be remitted, and that they be set at liberty."

† Second Appeal No. 249 of 1889.

Suit to redeem a mortgage executed in 1851 by one Basava Shetti, the eijamant of an aliyasantaana family, in favour of Uskunhi Byari, from whom defendants Nos. 1—6 claimed as heirs, and some of the other defendants claimed title under conveyances from them made less than 12 years before suit.

The mortgagor died in or about 1854, leaving a brother Tukra, and two sisters, Putta and Mani, each of whom had a son, called Mahalinga Shetti and Subbu Shetti respectively. In 1856 Mahalinga sold the entire estate to the mortgagee in satisfaction of the mortgage debt and another debt, with the concurrence of his mother, under circumstances of no justifying family necessity. In 1857 Subbu Shetti and his mother purported to sell an undivided moiety of the family property to the predecessor in title of the plaintiff. At the last mentioned date, Putta, Mani and their sons were members of an undivided aliyasantaana family.

The District Munsif passed a decree for redemption of one moiety of the mortgaged property, and this decree was affirmed on appeal by the Subordinate Judge.

Defendants Nos. 4, 7 and 8 and the representatives of defendant No. 10 preferred this second appeal.

Narayan Rau, for appellants.
Ramasami Muulialiar, for respondent.

JUDGMENT. (PRELIMINARY.)

"Both Courts have failed to record a finding on several points essential to the decision of his case, and, before deciding this second appeal, we must ask the Subordinate Judge to return findings on the following issues:—

"(i) Was the sale of 1856 evidenced by Exhibit I concluded by the eijaman for purposes binding on the family.

"(ii) Whether the two sisters, Puttamma and Mani, were at that time divided or undivided.

"(iii) Whether, at the date of the sale evidenced by Exhibit I, Mani was the vendor of an undivided share.

"(iv) Whether Uskunhi and his heirs have been in possession of the whole land since 1856, and, if not, who has been in possession, of how much, and for what length of time.

"The findings should be returned within two months from the date of the receipt of this order, and ten days, after the [40] posting of the "findings in this Court, will be allowed for filing objections. Fresh evidence may be taken."

The findings returned by the Subordinate Judge in compliance with the above order were—on the first issue, in the negative; on the 2nd, to the effect that the sisters were undivided; on the 3rd, in the affirmative; on the 4th, that the whole land had been in the possession of the mortgagee and his heirs and his and their transferees since 1856.

This second appeal coming on for final hearing, the Court delivered the following

JUDGMENT. (FINAL).

This second appeal comes on again for disposal upon findings returned on issues referred for re-trial. The land in dispute is part of an estate
which originally belonged to an aliyasantana family in South Canara. In 1851 one Basava Shetti, who was its ejaman or representative, mortgaged the estate with possession for Rs. 200 to a Mopla named Uskunhi Byari. Basava Shetti died prior to 1855, leaving him surviving a brother named Tukra and two sisters named Putta and Mani, each of whom had a son, called Mahalinga Shetti and Subbu Shetti respectively. In April 1856, Mahalinga sold the entire estate to Uskunhi Byari in satisfaction of the mortgage and for a further payment under document I which was attested by his mother Subbu and his uncle Tukra.

The purchaser continued to hold possession until 1866 when he sold a moiety to his brother-in-law Abdul Kadir, who gave it in 1872 to his two daughters who are the wives of the first and second defendants respectively. Uskunhi Byari had several wives, and defendants Nos. 1—3 are his sons by his 2nd wife and defendants Nos. 4—6 are his sons by his 3rd wife. In 1868 the latter sued the former for partition of the moiety of which Uskunhi Byari died possessed, and obtained 6/13ths as an allotment for their share and that of their mother, the other 7/13ths of the moiety remaining in the possession of the former. Defendants Nos. 2—6 alienated for value their several shares or portions of them afterwards. Of the entire estate, assessed at Rs. 64, a moiety, assessed at Rs. 32, is in the possession of the wives of the first and second defendants, and of the other moiety the first defendant is in possession of a portion assessed at Rs. 4-8-0, and the fifth and sixth of a part assessed at Rs. 5-12-0. As alienees in no way connected with Uskunhi Byari’s family, defendant No. 7 has in his possession land assessed at Rs. 7-12-0 under sale deeds III and IV, dated October 1877 and April 1880; defendant No. 8 is possessed of a part assessed at Rs. 5 under the sale deed V, dated April 1880; defendant No. 10 of a portion assessed at Rs. 9 under Exhibit XV, dated April 1876; defendant No. 9 is in possession of a small portion, but the claim against him was adjusted by compromise.

It was already observed that Basava Shetti had a sister named Mani who had a son called Subbu Shetti. In July 1857 they executed a sale-deed in favour of one Sabine Byari purporting to transfer to him for value their undivided moiety of the family estate. Sabine Byari assigned his right of purchase in 1871 to one Moidin Byari whose representatives resold it to the plaintiff in November 1886. It would seem that the sale in favour of Sabine Byari was not heard of until the partition suit of 1868, and that it was during that litigation that the right of purchase was transferred to Moidin Byari, but that no action was taken upon it before the plaintiff brought it in 1886, although the suit of 1868 terminated in a decree for partition among defendants Nos. 1—6 and the decree was followed by sub-division among the several sharers and by sales of several of their allotments. The plaintiff’s case was that according to the aliyasantana usage, as recognized by Courts of Justice in 1857, partition was permitted, and that the sale of a moiety of the estate by Mani and Subbu was therefore valid though subject to the mortgage executed in 1851 by Basava Shetti, about which there was no dispute. The defence was that the suit was barred by limitation, and that the prior sale by Mahalinga under which the parties now in possession claimed was binding upon Mani and Subbu, who executed the subsequent sale deed in favour of Sabine Byari under which the plaintiff claimed. As the possession of Uskunhi Byari commenced in 1851 under the mortgage executed by Basava Shetti, both the Lower Courts held that the right of redemption was in force for sixty
years. On the merits they found that the several transactions already described were real, and that though the circumstances under which the plaintiff sued upon the sale in favour of Sabine Byari excited some suspicion to the effect that Sabine purchased benami for Uskunhi Byari, they could not decline to uphold the purchase on mere suspicion. They found further that in 1857 the sisters of Basava Shetti and their sons belonged to an undivided aliyasantana [42] family, that the first sale by Mahalinga Shetti was not justified by family necessity and could not bind his aunt Mani and her son Subbu who were no parties to it. They held that the sale of an undivided moiety was good, but that the plaintiff was entitled by right of purchase not to the specific moiety in the possession of the defendants as contra-distinguished from the moiety in the possession of the wives of the first and second defendants, but to a moiety of the whole estate as originally mortgaged subject to the payment of a moiety of the mortgage-debt. On the ground, therefore, that the plaintiff did not make the wives of the first and second defendants parties and include the moiety in their possession in this suit, they decreed to the plaintiff possession only of a moiety of the properties mentioned in the plaint less certain portions not included in the mortgage, and directed him to pay to the defendants a quarter share of the mortgage debt, viz., Rs. 50. From this decree defendants Nos. 4, 7, 8 and 10 have appealed.

As this is a second appeal we must accept the facts as found by the Court below and see if the decree can be supported upon them. Two questions of law arise for decision, viz., those of limitation and of impari-bility of property governed by aliyasantana usage.

As to the former, we see no reason to doubt the correctness of the decision of the Courts below. The alienations upon which the appellants Nos. 2—5 rely are less than 12 years old, and the first appellant is the son of Uskunhi Byari. The moiety alienated by Uskunhi Byari to Abdul Kadiri Byari and by the latter to his daughters is included in this suit, and it is unnecessary to consider the question in relation to it. Neither the original mortgagee nor his son can rely on the 12 years’ rule unless he proves a subsequent valid sale, in the absence of which his possession must be taken to retain its original character. We are of opinion therefore that the claim is not barred to the extent to which it has been decreed.

As regards the second question, however, we are unable to hold that the sale by Mani and her son can be upheld at all. The Courts below rest their decision to the contrary on two grounds, viz., (I) that there was an erroneous notion in 1857 that compulsory partition was permitted by the aliyasantana law, and (II) that, as they were entitled to set aside the sale by Putta and Mahalinga in its entirety and to redeem the whole property, they might in [43] their discretion relinquish their right to a moiety and redeem the remainder. Neither of these grounds is tenable. It is now settled law that partibility is not an incident of aliyasantana property, and a mistake of law in 1857 cannot legalize a sale which is really opposed to law and which has not already been enforced. If the sale by Mahalinga and Putta can be set aside by Mani and her son in its entirety on the ground that it was not justified by family necessity, it can only be done by them on behalf of the family and for the purpose of recovering the property for its use. The right so to set aside the sale is not that of any individual member of an aliyasantana family, but it is the right of the family which the individual is taken to represent. This being so, the right to a half share
which Mani and Subbu professed to sell as the separate though undivided interest of their branch in the impartible family property had no legal existence and nothing could pass by such sale. The purchaser could not be permitted to stand in their shoes for the purpose of representing the joint family or enforcing its right because he is a stranger to the family and because the right of the family was not the interest that was sold or that is sought to be realized. If a similar sale by a coparcel is upheld under Hindu law to the extent of the vendor’s share, it is upheld not by virtue of the right of interdiction which he as a representative of the family under paragraph 28, Section I, Chapter I, Part II of the Mitakshara, but because the coparcel is at liberty to convert his interest into specific separate property by partition, and a purchaser for value has an equity to stand in the shoes of the vendor to that extent. This equity which rests on the partibility of ordinary Hindu property has no place in the aliyasantana law which forbids compulsory partition altogether.

The decrees of the Courts below must be reversed and the suit dismissed with costs throughout save so far as it relates to the land which is the subject of the compromise with the ninth defendant.

14 M. 44.

[44] APPELLATE CIVIL.


NARASIMHA NAIDU (Plaintiff), Appellant, v. RAMASAMI AND OTHERS (Defendants), Respondents.* [14th October, 1890.]

Rent Recovery Act—Act VIII of 1865, Section 11—Implied contract as to rent—Land irrigated under Kistna anicut—Collector’s sanction to increase of rent.

Land in a semidari in the Kistna delta was newly irrigated from anicut channels. The semidari tendered pattas at wet rates:

Held, (1) that the semidari was not entitled to levy increased rates without the Collector’s sanction under Section 11 of Act VIII of 1865, although he had expended money on the channels;

(2) that payment for five years of such wet rates under a five years’ lease did not imply a contract to continue such payments;

(3) that stipulation in the previous lease binding the tenants to pay such increased rates in case of future irrigation did not bind the tenants after the term of that lease expired.

SECOND appeals against the decrees of G. T. Mackenzie, District Judge of Kistna, in appeal suits Nos. 34 to 38 of 1888, confirming the decrees of C. Raghava Rao, Temporary Deputy Collector of Kistna, in suits Nos. 12, 13, 14, 15 and 17 of 1887.

The plaintiff in these five suits was the semidari of Vallur and the defendants were his tenants. The defendants held leases for a five years’ term from Fasli 1291 to 1295 inclusive. These leases were in a printed form which contained a stipulation that if the tenants brought land under irrigation they should pay not only the water rate due to Government but also an increased rate to the semidari. In Fasli 1296 the defendants

* Second Appeals Nos. 594 to 599 of 1889.
brought part of their lands newly under irrigation. The zamindar
tendered pattas in the printed form containing that stipulation and
imposing wet rates upon the newly-irrigated land. The defendants refused
to accept these pattas, objecting to that stipulation and contending that
they need pay upon the newly-irrigated land only the Government water
rate and the old dry rate due to the zamindar. [45] The zamindar then
filed these suits to compel acceptance of these pattas. The Deputy
Collector held that the zamindar could not levy increased rates without
the sanction of the Collector under the proviso to Section 11 of Act VIII
of 1865 and dismissed the suits. On appeal the District Judge affirmed
the decision of the Deputy Collector.

The plaintiff preferred these second appeals.
Parthasaradhi Ayyangar and Bhashyam Ayyangar, for appellant.
Pattabhiram Ayyar, for respondents.

JUDGMENT.—"It is not clear from the judgment of the District Judge
whether any contract, express or implied, has been entered into between
the landlord and his tenants or one or other of them who are parties to
these second appeals. Until this has been found, we are unable to dispose
of these appeals. Fresh evidence will be allowed. The District Judge is
requested to submit a distinct finding on the issue above stated."

In compliance with this order the District Judge submitted a finding
which explained that for convenience of the revenue accounts the land in
the Kistna delta is classed as dry and that a water-rate of Rs. 4 per acre
is levied by Government upon all land reached by the water of the anicut
channels. The raiyats contend that when this irrigation is extended to
their lands they need pay only this water-rate to Government and the
former dry rates to the zamindar. The zamindars contend that in such
cases the raiyats must pay increased or wet-rates to the zamindar, and
a stipulation to that effect is inserted in the printed form of patta. The
District Judge expressed an opinion that the acceptance in former years
of pattas with this stipulation does not deprive the tenants of the protec-
tion given them by the proviso to Section 11 of Act VIII of 1865, and
does not compel them to accept such pattas in future. The District
Judge also was of opinion that payment for five years by the tenant to
the zamindar of such increased rates supported the inference of a contract
to continue to pay these increased rates. Upon this ground the District
Judge found that four of the defendants who had paid the increased rates
upon some irrigated land in Fasli 1291 to 1295 must continue to pay these
increased rates upon that land but not upon the extent newly irrigated in
Fasli 1296.

[46] These second appeals coming on for final hearing the Court
delivered the following

JUDGMENT.

The District Judge has, we think, correctly found that there was no
contract to pay the wet-rates as regards the lands newly irrigated in Fasli
1296. The contract, which the appellant seeks to rely on to prove the
contrary, was a contract of lease which expired with Fasli 1295 or prior to
the term for which plaintiff now seeks to enforce a patta. Apart from
contract the plaintiff cannot succeed, as he has clearly not brought himself
within the requirements of the proviso to Section 11 of the Rent Act.
Taking it that he has been at some expense for the minor distribution
channels, he has not, it is admitted, obtained the sanction of the Collector
to the additional rent which he seeks to enforce.
We are unable, however, to accept that portion of the District Judge's finding in which he holds that there was an implied contract to pay wet assessment on the extent of land previously included in the lease for five years ending with fasli 1295. No implied contract as to future years can, in our opinion, be inferred from a single lease extending over a brief period of five years. The result is that we agree in the conclusions at which the District Judge arrived in the first instance and we accordingly dismiss the appeals Nos. 594—7 with costs and No. 598 without costs.

**14 M. 46.**

APPELLATE CIVIL.


CHOMU (Plaintiff), Appellant v. UMMA AND OTHERS (Defendants Nos. 2 to 4), Respondents. (5th August, 1890.)

**Specific Relief Act, Section 42—Objection that consequential relief available—Land Acquisition Act—Act X of 1856—Claim to share of compensation—Valuation in private transaction.**

The plaintiff, as heir to her husband, brought a suit, in which Government was not represented, for a declaration of title to a quarter share of jernim value of [47] land, taken up under the Land Acquisition Act. It appeared that the plaintiff's husband had mortgaged his share of the land in question to the defendant's predecessor in title in 1872 by an instrument in which his share was valued at Rs. 375.

_Held, (1) that the suit for a declaration only was maintainable; (2) that the valuation of the plaintiff's husband's share in the instrument of 1872 was not binding on the plaintiff in the present suit._

_ParCur: Assuming, for the moment, that the plaintiff was able and called upon in this case to ask for further relief, we are of opinion, following the decision of the Bombay High Court in Limba Bin Krishna v. Roma Bin Pimpili (I.L.R. 13 Bom. 558), that the suit should not, at the present stage, be dismissed on this ground, the objection not having been raised in either of the Lower Courts._

[R., 16 M 15 (18); 5 Bom. L.R. 329 (1890); 14 Ind. Cas. 776 (777)=13 P.R. 1912 —93 P.W.R., 1912; D., 15 M. 255 (257).]

SECOND appeal against the decree of E. K. Krishnan, Subordinate Judge of South Malabar at Calicut, in appeal suit No. 514 of 1888, affirming the decree of T. V. Ananthan Nayar, Principal District Munsif of Calicut, in original suit No. 127 of 1887.

The plaintiff sued, as the widow of one Unni Chetti, for a declaration of her title to receive Rs. 792-7-2, being her one-quarter share of the jernim value of a piece of land, which had been taken up by Government under the Land Acquisition Act. The land in question was the property of Unni Chetti and his three brothers, but a partition took place between them, and, in June 1872, Unni Chetti conveyed his share to the predecessor in title of the defendants under an instrument held to evidence a mortgage, which provided that the conveyance should become absolute if the kancm amount was not paid in two years, and that which Unni Chetti's share of the jernim was valued at Rs. 375. In those proceedings, the jernim right to the land as a whole was valued at Rs. 3,785-12-10, which sum remained at the date of the suit in the hands of the Collector, who was not made a party to it. The plaintiff came in as

*Second Appeal No. 1122 of 1889.*
defendant in the proceedings held under the Land Acquisition Act, but her name was removed from the record, and she was left to bring a separate suit.

The District Munsif passed a decree dismissing the plaintiff’s suit and this decree was affirmed on appeal by the Subordinate Judge, who held that the plaint which bore only a 10-rupees stamp, was insufficiently stamped under the Court Fees Act, which in the view he expressed, required that a court fee should be paid on the amount claimed, and also that the plaintiff was bound by the valuation of her husband’s share contained in the instrument of 1874.

The plaintiff preferred this second appeal.

[48] Sundara Ayyar, for appellant.
Narayana Rau, for respondents.

JUDGMENT.

On behalf of the respondents, it is objected that, as the plaintiff might have sued for further relief, she is not entitled, with reference to Section 42 of the Specific Relief Act, to maintain the present suit for a mere declaration.

Assuming, for the moment, that the plaintiff was able and called upon in this case to ask for further relief, we are of opinion, following the decision of the Bombay High Court in Limba Bin Krishna v. Rama Bin Pimplu (1), that the suit should not at the present stage be dismissed on this ground, the objection not having been raised in either of the Lower Courts.

We are of opinion, however, having regard to the circumstances of this case that the relief sought for by way of declaration was sufficient, and that it was not necessary for the plaintiff to ask for any further relief in the suit.

The objections on this ground accordingly fail.

The suit for a declaration being, for the reasons stated, maintainable, we are of opinion that the Subordinate Judge has erred in taking the value of the share of the jemn to have been fixed for the purposes of such a claim as that now advanced by the covenant between the plaintiff’s husband and the mortgagee in 1872 (Exhibit I). The value of the one-quarter share then fixed was fixed for a specific purpose, viz., the purpose of conditional sale then contemplated by the parties to that exhibit. The transaction contemplated is one which for reasons which need not be entered on the Courts refuse to enforce, and the object for which the valuation was made being therefore ineffectual even for the purposes contemplated by the parties, the party to the instrument cannot be held to be bound by that valuation, when a question actually arises in a suit properly brought as to what is the actual value of this share. In the present case the land to which the mortgage attached has been taken up under the Land Acquisition Act, and the property no longer exists in the shape in which it did at the time of the proposed conditional sale, but has been converted into money. The value of the entire property, of which plaintiff claims one-quarter share, has been realized in the shape of money, is Rs. 3,735, and the plaintiff, if entitled at all, [49] is, we think, clearly entitled to her proportionate share, viz., one-quarter of this amount, less the necessary deductions for kanom interest, &c.

(1) 13 B. 548.
These deductions may be fixed as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Rs.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kanom</td>
<td>200</td>
</tr>
<tr>
<td>Interest at 12 per cent. up to 30th November 1874</td>
<td>60</td>
</tr>
<tr>
<td>Interest approximately up to date at 6 per cent.</td>
<td>192</td>
</tr>
<tr>
<td>Total</td>
<td>452</td>
</tr>
</tbody>
</table>

This amount being deducted from Rs. 933-15-2, the one-quarter amount of the proceeds of the land, the value remaining is Rs. 481-15-2, and, in respect of this sum, the plaintiff is, we hold, entitled to the declaration prayed for. We accordingly reverse the judgments of the Lower Appellate Court and of the District Munsif and give a decree for the plaintiff in the terms above stated. Plaintiff is entitled to her costs throughout this suit. The defendants will bear their costs throughout.

14 M. 49.

APPELLATE CIVIL.

Before Sir Arthur J. II. Collins, Kt., Chief Justice, and Mr. Justice Sheppard.

NANU (Plaintiff), Appellant v. MANCHU AND ANOTHER (Defendants Nos. 1 and 2), Respondents.* [15th and 22nd August, 1890.]

Transfer of Property Act—Act IV of 1882, Section 83—Deposit in Court by mortgagor.

The deposit intended by Transfer of Property Act, Section 83, must be made unconditionally. Accordingly when the mortgagor in making the deposit prays that the amount should be paid out to the mortgagee on his producing certain deeds the provisions of the section are not complied with.

[D., 17 M. 267 (268).]

SECOND appeal against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 290 of 1889, reversing the decree of K. Ramanatha Ayyar, District Munsif of Tenmeprom, in original suit No. 254 of 1888.

[50] Suit to recover principal and interest due on a mortgage, dated 28th February 1877. Defendant No. 1 had acquired the rights of the mortgagee, and the plaintiff had acquired those of the mortgagor. On the 5th July 1883, defendant No. 1 deposited the sum of Rs. 699 in the Court of the District Munsif of Tenmeprom, presenting a petition under Transfer of Property Act, Section 83, in which he prayed that notice be sent to the plaintiff as provided in that section, and that the plaintiff be called upon to bring in seven documents which were specified, and that, on his doing so, the amount deposited be paid to him. The plaintiff brought in one document only and stated that he was willing to receive the amount deposited; but defendant No. 1 refused to acquiesce in this. In the present plaint, it was stated that the cause of action arose at the date of this refusal.

The District Munsif passed a decree against defendant No. 1 for the amount due on the mortgage and directed that the sum deposited in Court be paid out to the plaintiff in satisfaction of the principal and part of the

* Second Appeal No. 1466 of 1889.
interest. This decree was reversed on appeal by the District Judge, who held that the suit was not maintainable as framed.

The plaintiff preferred this second appeal.

Rama Row, for appellant.

Sankaran Nayar, for respondent No. 1.

JUDGMENT.

We think that the District Judge was right in holding that the deposit intended by Section 83 of the Transfer of Property Act should be made unconscionably, and that, therefore, the District Munsif was wrong in accepting the deposit. Putting the deposit aside, Mr. Rama Row argues that his client is still entitled to his remedies on the mortgage. But the decree of the District Munsif is not a mortgage decree and the appellant did not appeal against it. We could not, therefore, modify it to the prejudice of the respondents if, in other respects, we thought that the plaintiff was entitled to ask for a mortgage decree.

This second appeal is dismissed with costs.

[31] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

Leishman (Plaintiff), Appellant v. Holland (Defendant), Respondent. [1st August and 3rd September, 1890.]

Defamation—Privilege—Communication by a servant of a company to one of his subordinates as to another subordinate.

In an action for damages for defamation brought by a brewer recently employed by a brewery company against the local manager of the company, the defamatory statements complained of were contained in letters written by the defendant to the directors of the company, and also in a letter written to another brewer in the employ of the company in which he said that the plaintiff "had failed most utterly, and I have been compelled to inform him that you will take the position of senior brewer at the brewhouse."

It is held that all these statements were in the nature of privileged communications.

Appeal against the decree of W. E. T. Clarke, Subordinate Judge of Nolhans, in original suit No. 88 of 1886.

Suit for damages for defamation. The plaintiff was a brewer recently employed by a brewery company and the defendant was the local manager of the company. One of the defamatory statements complained of was set out in the plaint as follows:—

"Defendant in a letter to Mr. Crichton, dated 26th April 1864, writes: 'Mr. Leishman had failed most utterly, and I have been compelled to inform him that you will take the position of senior brewer at the brewhouse.'"

(The addressee of the above letter was a brewer subordinate to the defendant in the service of the company).

The other defamatory statements complained of were comprised in letters written to directors of the company by the defendant imputing mismanagement, neglect of orders, &c., to the plaintiff.

* Appeal No. 16 of 1889.
The Subordinate Judge dismissed the suit and the plaintiff preferred this appeal against his decree.

Mr. W. Grant, for appellant.
Mr. K. Brown, for respondent.

JUDGMENT:

This suit stands on an entirely different footing from that which has been prosecuted by the plaintiff against the company. Here the first question is whether the statements [53] complained of by the plaintiff, which, in themselves, are certainly defamatory, were made under circumstances conferring on the defendant any privilege; and, secondly, it has to be seen whether they were made maliciously and with knowledge on the defendant's part that they were false.

Agreeing with the Subordinate Judge, we are clearly of opinion that the statements were all in the nature of privileged communications, and that the plaintiff has failed to prove that the defendant believed them to be untrue when he made them or acted maliciously in making them. We dismiss the appeal with costs.

14 M. 92.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Weir.

POLU AND OTHERS (Defendants), Appellants v. RAGAVAMMAL
(Plaintiff, Respondent).* [1st September, 1890.]

Rent Recovery Act—Act VIII of 1881, ss 9, 11—Form of patta—Form of rent determined by implied contract—Variation in amount of rent.

In a landlord's suit to enforce acceptance of a patta and execution of a muthaka by the defendants, it appeared that the predecessor in title of the defendants had accepted from the predecessor in title of the plaintiff in 1919 a cowle for 11 years, which provided for payment in kind, but that the money was paid in money, though the amount varied. The tenant was described in the cowle as a sukavasi nayat, and the defendants also claimed to be sukavasi tenants:

Held, that it was unnecessary to determine the causes of the variations in the amount of rent, and that an agreement that the rent should continue to be paid in money should be implied, and the landlord accordingly was not entitled to impose a patta providing for payment of rent in kind.

[Not Appr., 27 M. 117 (121).]

Second appeal against the decree of S. T. McCarthy, District Judge of Chingleput, in appeal suit No. 374 of 1889, affirms the decree of A. David Pillai, District Munsif of Trivallur, in original suit No. 631 of 1885.

Suit by a landlord to enforce acceptance of a patta and execution of a muthaka by the defendants. The defendants (who were held by the District Munsif to be permanent sukavasi tenants) [53] objected to the patta on the ground that it provided for a varam rent, whereas their case was that the rent was payable in money.

It appeared that the plaintiff's predecessor in title had executed to the defendants' predecessor in title on 5th February 1849 a cowle for 11 years, which contained provision for payments being made in kind. But

* Second Appeal No. 796 of 1890.
it appeared that at any rate since the expiry of that period rent had always been paid in money though the amount varied from time to time.

The District Munsif held that the patta was such as the defendants were bound to accept and passed a decree for the plaintiff which was upheld on appeal by the District Judge.

The defendants preferred this second appeal.

Sadagopacharyar, for appellants.
Srirangacharyar, for respondent.

JUDGMENT.

The District Judge has held that the case did not come within the ruling in Venkatagopal v. Rangappa (1), because, although the rents have always been paid in money, there has been a variation in the amount of the money paid.

It is argued, however, that there has, in fact, been no variation in this respect, inasmuch as the increases of payment arose from an increase in the extent of lands occupied, and that a decision on this question which was, it is said, raised in the third issue was essential to a determination of whether there had been an implied contract to pay rent in money only. The question of the circumstances attending the variation has certainly not been gone into in either Court, and, if we considered it necessary, we should direct the question to be tried.

It appears to us, however, not necessary to test this point by a retrial. In a recent set of cases, which came before this Bench from Ganjam—see Nilakanta v. Mahadevi (2)—we held that where the contest was only as between a varam and money patta, and where payment had all along for a period of over 50 years been shown to have been made in one form only, viz., money, a variation in the amount of money paid did not affect the inference that there was an implied contract to receive rent in the form of money, and that that case did come within the decision in Venkatagopal v. Rangappa (1).

The circumstances of the present case vary very slightly from those of the cases just referred to. In the present case there has, all along, that is, since 1849, been a payment, it is found in the form of money only.

It is sought, however, to distinguish the present case by the circumstance that the tenancy now in question originated in an express written contract, viz., the cowle of 1849, and it is argued that this being so, it is not open to the Court to infer an implied contract from the act of the parties. As to this, in the first place, it is not shown that the tenancy did in fact originate only with the cowle of 1849. The defendants, in

---

(1) 7 M. 365.

(2) Second appeal No. 508 of 1889, in which the learned Judges said:

"The question in this case was as to the form of the rent, that is to say, whether the rent should be paid in money or in grain. Both the Courts have found that rents had been paid in money for a period of about 50 years. The District Judge has, however, come to the conclusion that the case is not governed by the decision in Venkatagopal v. Rangappa (I.L.R., 7 Mad., 365), because the rent is not shown to have been an invariable one. The variation, however, has been a variation in the amount of the rent and not a variation in the form of the rent, for, as already stated, the finding is that the rent has for about 50 years been paid in money alone. We think, therefore, the case is governed by the decision in Venkatagopal v. Rangappa (I.L.R., 7 Mad. 365)."

[N. E.—This note case has been followed in 14 M. 52, supra.—ED.]
their written statement, claim to be permanent sukavasi tenants, and the District Munsif has found that they were such. No contest was expressly raised in the matter, which was apparently passed over to some extent in the District Munsif’s Court, and entirely in the Lower Appellate Court. In the second place, granting that the tenancy originated in an express written contract, such contract endured only for 11 years, and the parties have, since 1860, been holding without at least an express written contract. During that period, i.e., for 24 years, there can be no dispute that rent has always been paid in money.

In these circumstances, we think, the case clearly does fall within the principle of the decision in Venkatagopal v. Rangappa (1), and that a contract to receive rent in money only must be inferred. In the circumstances of this case, the landlord having come into Court to enforce an acceptance of a particular kind of patta, viz., a varum patta, no further question is outstanding as to the propriety or non-propriety of the patta, and it is, therefore, unnecessary to direct an inquiry as to what would be a proper patta.

[55] On this view we allow the appeal, and, reversing the decrees of the Lower Courts, we dismiss the original suit with costs throughout.

---

1890
SEP. 1.

APPEL-
LATE
CIVIL.

14 M. 52.

14 M. 55.

APPELLATE CIVIL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and Mr. Justice Best.

NAGAPPA (Plaintiff), Appellant v. DEVU (Defendant), Respondent.*

[16th September, 1890.]

Registration Act—Act III of 1877. Sections 17 (c), 43—Specific Relief Act—Act I of 1877, Section 4 (c) — Admissibility of unregistered sale-deed—Suit for specific performance of contract to sell land.

The defendant executed a sale-deed of certain land to the plaintiff. The instrument bore Rs. 1 stamp only. The plaintiff alleged that the defendant had improperly refused to register the sale-deed and prayed for a decree compelling its registration and for the possession of the land in question.

Held, that the unregistered instrument was admissible in evidence, and that in any case, secondary evidence of its contents was admissible, the document having remained unregistered through no fault of the plaintiff.

[Rel., 16 Ind. Cas. 567 = 12 M.L.T. 262 = (1912) M.W.N. 917; F, 20 M. 250 (259); 10 C.P.L.R. 107 (110); R, 35 M. 63 (70) = 8 Ind. Cas. 520 = 21 M.L.J. 44 = 9 M.L.T. 142; 12 C.L.J. 25 (30) = 15 C.W.N. 375 (378) = 6 Ind. Cas. 316 = 5 N.L.R. 70.]

Second appeal against the decree of S. Subba Ayyar, Subordinate Judge of South Canara, in appeal suit No. 395 of 1888, reversing the decree of K. Krishna Rau, District Munsif of Udipi, in original suit No. 302 of 1887.

The plaintiff sued to compel the defendant to register a sale-deed of certain land executed to him on 25th June 1885 and to deliver possession of the land in question. The sale-deed was stamped with Rs. 1 only: the portion of it which is important for the purposes of the present report was as follows:—

“'I have conveyed to you, for the value of Rs. 100, the bhagaset garden-land in my possession, which I have been enjoying unencumbered

* Second Appeal No. 1689 of 1889.
(1) 7 M. 365.
by paying to the Mulgar-heir mulgeni at the rate of Rs. 2 per annum
and which is situated within the boundaries mentioned below and
appertains to the lands of the three following wargs:—

(1) Land assessed at Rs. 31, out of Kallapp Shetti's warg,
Muli No. 14 in Varambali village (no: Haradi), Brahmawar
Magne, Udini taluk, appertaining to the sub-district of Brahmawar within the registration district of South Canara.

(2) Land assessed at Rs. 84-15-0 of Chikkappa Shetti's warg, Muli
No. 15 in the aforesaid village.

(3) Land assessed at Rs. 19, out of Venkappa Shetti's warg,
Muli No. 16 in the said village, together with marumth,
house, cow-pen, outhouses and wells, also the improvements
made by me; and have received from you the said 100 rupees
for the purpose of discharging the debt incurred for household expenses (from Haradi Manjunatha Kamthi), for the purpose of paying the amount due to your younger brother Shrinivasa Kamthi on account of rice, &c., borrowed for
the maintenance of our family and also for the purpose of paying off other debt.

The plaintiff alleged that the defendant had improperly refused to register this instrument. The District Munsif passed a decree as prayed; but this decree was reversed on appeal by the Subordinate Judge, who held that the instrument in question was a sale-deed and not an agreement for sale; that it would defeat the provisions of the Registration Act to treat an ineffectual sale-deed as a valid agreement to sell, of which specific performance should be decreed; that even if the instrument had contained an agreement to sell, which it did not, it would have required registration, and that the plaintiff was precluded by Registration Act, Section 49, and Evidence Act, Section 91, from proving the agreement to sell by means of the unregistered instrument and the oral evidence of witnesses. He referred to Ramesami v. Ramesami (1), Somu Gurukkal v. Kangammal (2), Hurjivan Virji v. Jamsetji Nowroji (3).

The plaintiff preferred this second appeal
Ramachandra Rao Subheb and Fernandez, for appellant.
Mr. Subramanyam, for respondent.

JUDGMENT.

Adakkalam v. Theethan (4), is authority for holding that a document which, for want of registration is not admissible (5) in evidence as creating an interest in land, is admissible for the purpose of obtaining specific performance of the contract, which is in effect the object of the present suit; and Nynakka Routhen v. Pavana Mahomed Naina Routhen (6) is authority for the admission of secondary evidence in a case of a document being allowed to remain unregistered through no fault of the plaintiff. In either case, therefore, the Subordinate Judge's decision is wrong.

The Munsif has found that there was an agreement for sale.

The Lower Appellate Court having dismissed the suit on a preliminary point without going into the merits of the case, we set aside the decree and remand the case for replacement on the file and disposal on merits. The costs of this appeal will be paid by the respondent. The costs hitherto incurred will be provided for in the revised decree.

(1) 5 M. 115.
(2) 7 M. H.O.R. 13.
(3) 9 B. 63.
(4) 12 M. 505.
(5) 5 M. H.O.R. 128.
APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

RAGAVA (Counter-Petitioner and Defendant No. 2 in C.S. No. 36 of 1884), Appellant v. RAJARATNAM (Petitioner), Respondent.*

[19th and 21st August, 1890.]

Civil Procedure Code, Section 30—Representation of numerous plaintiffs—Advertisement—Community of interest—Decree for management of a Hindu temple—Application for execution by person interested.

In a suit by certain Tengalai Brahmans for declarations as to the mode of electing dharmakartas of a certain pagoda, &c., an order was made for a proclamation inviting "all persons interested" to come in and be made parties, or see that others by whom they are entitled to be represented are made parties," and a decree was passed comprising a scheme to be carried out for such election, &c. A person not on the record and not a member of the Tengalai community, but claiming certain rights under the decree, now applied to compel the observance of the scheme:

"Held, that the above order did not invest the suit with a representative character, and the applicant had no right to apply.

[F. 16 C.P.L.R. 161 (162); R., 33 C. 905 (912) = 10 C.W.N. 867; 29 M. 28 (32) = 7 M.L.J. 281.]

APPEAL against the order of Mr. Justice Handley, dated 5th September 1889, in civil suit No. 36 of 1884.

In this suit certain Brahmans of the Tengalai sect prayed for the appointment of dharmakartas for the Sree Parthasaradhi Pagoda at Triplican in lieu of the first defendant, and another dharmakarta then recently deceased, &c. On 31st April 1884, Mr. Justice Hutchins made an order in the suit, of which the portion now in question was as follows:—

"There are now several parties before the Court interested in the result of the suit, and, to make it a really representative suit, I order, under Section 30, that a proclamation be made through Triplican, and that copies be stuck up in at least four conspicuous places on the Pagoda gates or walls, inviting all persons interested to come in and be made parties themselves or so that some other or others by whom they are content to be represented be made parties defendants."

The decree, subsequently passed in the suit, declared that persons were eligible as dharmakartas and provided in what manner, and after what notices the elections should be made, &c.

A person, who was not on the record nor a member of the Tengalai sect, but who claimed to be entitled to receive notice of elections of dharmakartas, and to enjoy other privileges under the decree now applied for an order as follows:—

"That the second defendant herein the sole surviving dharmakarta of the Sree Parthasaradhi temple in the plaint mentioned and directed to call upon your petitioners as headman as for said to furnish him with a list of persons belonging to his caste as in and by the decree herein required, for the purposes in the said decree set forth, or for such further or other order in the premises as to this Honorable Court may seem meet and proper.

* Appeal No. 24 of 1889.
Mr. Justice Handley made an order as prayed in which he said:

"I think petitioner is entitled to the order prayed for. It is objected that he has no right to make this application, not being a party to the suit or the representative of a party, and that, if he has any rights under the decree, he must assert them by regular suit. I think that, in the case of a decree like this providing for election of dharmakartas and other matters in which many persons besides the parties to the suit are interested, it is competent to any of the parties so interested to apply to the Court to see that the provisions of the decree are carried out, even though no power to do so is specially reserved in the decree. [59] Otherwise, a multiplicity of suits will be necessary to carry out the decree. The Court, if it is informed by whatever method, that its decree is not being carried out, will interfere to prevent its decree from being a nullity; as the decree was not merely a private decree but one affecting a community. Then it is contended that the petitioner is not entitled to receive a notice to furnish a list of voters for the reasons (1), that he is not a headman of a caste within the meaning of the decree, and (2) that, even if he is such a headman, he is not of the Tengalai persuasion. As to (1) I think that the obvious meaning of the decree in speaking of headmen of castes was to include headmen of sub-divisions of castes... It is not denied that petitioner is a headman of the sub-caste he professes to represent, but it is said there is another, viz., one Annasami Mudali, who is a Tengalai, and therefore, shall be preferred to petitioner."

The second defendant in the suit preferred this appeal.

Anandachariu and Visvanada Ayyar, for appellant.

This application was made after decree by a person who was not a party and the decree did not give leave to apply. The suit, in 1884, was a suit for a scheme by two worshippers. Vide also affidavits put in by persons seeking to be joined as supplemental defendants in representative capacity.

(Shephard, J.—The order does not say that they are to be made parties.)

Then were the people represented by the respondent in fact made parties? A proclamation was made as under Section 30 and no one else came in.

The Advocate-General (Hon. Mr. Spring Branson), for respondent.

The decree is unworkable if the order appealed against is wrong.

(Collins, C. J.—You are not party to decree.)

(Shephard, J.—Does Section 30 make any difference?)

The Court converted it into a suit under Section 30, gave the permission referred to in that section—Ramayangar v. Krishnayangar (1). If the suit was not one under Section 30, I concede, I could not come in.

[60] Anandachariu in reply. See the Oriental Bank Corporation v. Gobind Lal Seal (2). The order converting the character of the suit is bad. The plaintiffs are Tengalais and voters, the respondent is neither. The suit was under Section 539 of the Civil Procedure Code and the Advocate-General sanctioned it.

JUDGMENT.

The main question arising in this appeal is whether the respondent, who was not a party on the record, was entitled to apply to the Court to compel the surviving defendant to carry out the terms of the decree.

(1) 10 M. 185. (2) 9 C. 604.
It was admitted in argument by the learned Advocate-General, who appeared for the respondent, that the order appealed against could not be supported except on the supposition that the respondent did, by the order of Mr. Justice Huchins, made on the 8th April 1884, become constructively a party to the suit, and it is clear that, if the respondent is to be regarded as a mere stranger to the record, he can have no locus standi to enforce the decree.

The suit, which was filed on the 22nd February 1884, was instituted by two persons, Tengalai Brahmans, claiming to be directly interested in the pagoda. It was a suit instituted under the provisions of Section 539 of the Code, sanction of the Advocate-General having first been obtained. Before the order of the 8th April was made, certain persons, claiming to represent sections of the Tengalai community and to be more intimately connected with the temple than the plaintiffs, came in and applied to be made parties "with a view (as they said) to act on behalf of the vast majority of the Tengalai community in the interests of that community." With reference to, or in consequence of, these applications, the order of the 8th April was passed. That order, after referring to Section 30 of the Code, directs that a proclamation be made "inviting all persons interested to come in and be made parties themselves or see that some others by whom they are content to be represented are made parties."

Is this an order under Section 30, and, if so, is the respondent a person having the same interest with the plaintiffs, on whose behalf the latter prosecuted the suit? In our opinion, it is clear that the learned Judge did not give and did not intend to give the plaintiffs permission to sue on behalf of other persons having the same interest with themselves in the manner required by the [61] section. Had he so intended, he could not have invited third persons to make themselves parties to the suit.

We are further of opinion, on the materials that we have before us, that the respondent is not a person having the same interest with the plaintiffs, for he does not belong to the Tengalai community, the members of which only are, as is stated in the plaint, entitled to take part in the election of dharmakartas or themselves be elected as dharmakartas. Nor does it appear from the decree that the respondent is interested in the same way as the plaintiffs were, for he is only one of the headmen through whom communications are to be made to the members of the Tengalai community.

It is unnecessary to express any opinion on the further questions which would have arisen, if the respondent could be regarded as constructively a party to the suit.

In our judgment the order appealed against is wrong and must be reversed with costs and the petition of the respondent dismissed.

Branson and Branson, Attorneys for respondent.
APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Best.

SETHU (Plaintiff), Appellant v. KRISHNA AND OTHERS (Defendants), Respondents. [*]

[16th September, 1890.]

Limitation Act - Act XV of 1877, Section 10 - Suit against a trustee.

The plaintiff said his father in 1877 for a declaration of his title to, and for possession of certain property as being stridhanam property of his late mother, whose only son he was. The plaintiff alleged that some of the property had been given to the plaintiff's mother about the time of her marriage in 1814; that in 1913 her father had appointed the defendant trustee of the property for the plaintiff and his mother, and that further sums had been since paid to the defendant in his capacity of trustee on account of the stridhanam of the plaintiff's mother, and that he had traded with the property and misappropriated it:

[82] Held that under Limitation Act, Section 10, the suit was not barred by limitation on the allegations in the plaint.

SECOND appeal against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 923 of 1883, affirming the decree of V.P. de'Minario, Subordinate Judge of South Malabar at Palghat in original suit No. 24 of 1887.

The plaintiff in this suit, which was filed in 1897, set out that the plaintiff was the only son of defendant No. 1 by his first wife, since deceased; that at and shortly after the time of the marriage of defendant No. 1 with the plaintiff's mother certain property was given to her and to defendant No. 1 on her behalf; that plaintiff was born in the year 1842; that subsequently in 1843 Ananda Pattar, her father, appointed the first defendant trustee for plaintiff and his mother, and entrusted him with all the stridhanam properties, in the capacity of a trustee, at the request of the first defendant and with the consent of plaintiff's mother.

It was further alleged that after the death of the plaintiff's mother, which took place in 1870, further sums of money had been paid to defendant No. 1 on behalf of the plaintiff and with his consent under an agreement entered into by her father at the time of her marriage; that defendant No. 1 had misappropriated the above property and failed to maintain the plaintiff, &c. The plaintiff prayed for a declaration of the plaintiff's title to and for possession of the above property.

The Subordinate Judge held that the suit was barred by limitation on the allegations in the plaint and passed a decree dismissing the suit. This decree was affirmed on appeal by the District Judge who said:—“the plaintiff's mother died in 1016 (1870-71) and this suit was not brought till 1897: such being the case, it appears that the plaintiff's claim must be held to be barred, unless it can be shown that it comes under the provisions of Section 10 of the Limitation Act. That section provides that, notwithstanding anything contained in that Act, no suit against a person in whom property has become vested in trust for any specific purpose for the purpose of following in his hands such property should be barred by any length of time. It appears to me that taking the facts of the case to be as set forth in the plaint it is quite impossible to hold that his wife's stridhanam became vested in the first defendant in

* Second Appeal No. 1619 of 1889.
"trust for any specific purpose. There is [63] not in the plaint any mention of any purpose for which the property was entrusted to him. What appears to have taken place was simply that the first defendant was allowed to remain in possession of his wife's stridharam and to manage it for her. He was not an express trustee. The case cannot, in my opinion, come under Section 10 of Act XV of 1877, and such being the case, the plaintiff's claim must be held to be barred. On this ground I dismiss this appeal with costs."

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and Ramachandra Ayyar, for appellant.

Sankaran Nayar, for respondents.

JUDGMENT.

The Lower Appellate Court's judgment proceeds on the plaint alone, but the Judge appears to have lost sight of the fact that the property is stated in the plaint to have been entrusted to first defendant for the benefit of plaintiff and his mother. If such is the case, the plaintiff's suit will not be barred, as Section 10 of the Limitation Act will apply (Sethu v. Subramanya (1) and Siddassook Kooyary v. Ram Chunder (2)).

The Lower Court's decree is set aside and the suit remanded for disposal on the evidence as to the portion which is the subject of this appeal.

The costs hitherto incurred will be provided for in the revised decree.

14 M. 63.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

KRISHNASAMI (Plaintiff), Petitioner v. KESAVA AND ANOTHER
(Defendants Nos. 1 and 2), Respondents.*

[5th and 15th September, 1890]

Legal Practitioners' Act—Act XVIII of 1879. Sections 28, 29—Promissory note made by a party in favour of his pleader in respect of his agreed fee—Agreement not certified—Suit on promissory note.

A party to a suit made and delivered to his pleader in respect of his agreed fee a promissory note which was not filed in Court in that suit. In a suit by the pleader upon his promissory note:

[64] Held, that the promissory note was invalid and that the plaintiff was entitled to recover only the amount to which he was found to be entitled for his labour.


PETITION under Provincial Small Cause Courts Act, Section 25, praying the High Court to revise the decree of N. Saaminda Ayyar, District Mursif of Cudaalore in small cause suit No. 20 of 1889.

Suit for principal and interest due on a promissory note, dated 1st May 1886. The note sued on was made and delivered to the plaintiff for his agreed fee as pleader for first defendant in original suit No. 301 of

* Civil Revision Petition No. 274 of 1899.

(1) 11 M. 274.

(2) 17 C. 820.
APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Best.

SETHU (Plaintiff), Appellant v. KRISHNA AND OTHERS (Defendants), Respondents. * [16th September, 1890.]

Limitation Act - Act XV of 1877, Section 10 - Suit against a trustee.

The plaintiff sued his father in 1847 for a declaration of his title to and for possession of certain property which was stridhanam property of his late mother, whose only son he was. The plaintiff alleged that some of the property had been given to the plaintiff's mother about the time of her marriage in 1816; that in 1818 his father had appointed the defendant as trustee of the property for the plaintiff and his mother, and that further sums had been paid to the defendant in his capacity as trustee on account of the stridhanam of the plaintiff's mother, and that he had misappropriated it.

[52] Held that under Limitation Act, Section 10, the suit was not barred by limitation on the allegations in the plaint.

SECOND appeal against the decree of L. Moora, District Judge of South Malabar, in appeal suit No. 922 of 1883, affirming the decree of V.P. de Rozario, Subordinate Judge of South Malabar at Palghat in original suit No. 24 of 1887.

The plaint in this suit, which was filed in 1887, set out that the plaintiff was the only son of defendant No. 1 by his first wife, since deceased; that at and shortly after the time of marriage of defendant No. 1 with the plaintiff's mother certain property was given to her and to defendant No. 1 on her behalf; that plaintiff was born in the year 1812; that subsequently in 1843 Anamda Patter, his father, appointed the first defendant as trustee for plaintiff and his mother, and entrusted him with all the stridhanam properties, in the capacity of a trustee, at the request of the first defendant and with the consent of plaintiff's mother.

It was further alleged that after the death of the plaintiff's mother, which took place in 1870, further sums of money had been paid to defendant No. 1 on behalf of the plaintiff and with his consent under an agreement entered into by her father at the time of her marriage; that defendant No. 1 had misappropriated the above property and failed to maintain the plaintiff, &c. The plaint prayed for a declaration of the plaintiff's title to and for possession of the above property.

The Subordinate Judge held that the suit was barred by limitation on the allegations in the plaint and passed a decree dismissing the suit. This decree was affirmed on appeal by the District Judge who said: - "the plaintiff's mother died in 1816 (1870-71) and this suit was not brought till 1877. such being the case, it appears that the plaintiff's claim must be held to be barred, unless it can be shown that it comes under the provisions of Section 10 of the Limitation Act. That section provides that, notwithstanding any thing contained in that Act, no suit against a person in whom property has become vested in trust for any specific purpose for the purpose of following in his hand that such property should be barred by any length of time. It appears to me that taking the facts of the case to be as set forth in the plaint it is quite impossible to hold that his wife's stridhanam became vested in the first defendant in

* Second Appeal No. 1613 of 1889.
trust for any specific purpose. There is [63] not in the plaint any mention of any purpose for which the property was entrusted to him. What appears to have taken place was simply that the first defendant was allowed to remain in possession of his wife's stridham and to manage it for her. He was not an express trustee. The case cannot, in my opinion, come under Section 10 of Act XV of 1877, and such being the case, the plaintiff's claim must be held to be barred. On this ground I dismiss this appeal with costs."

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and Ramachandra Ayyar, for appellant.

Sankaran Nayar, for respondents.

JUDGMENT.

The Lower Appellate Court's judgment proceeds on the plaint alone, but the Judge appears to have lost sight of the fact that the property is stated in the plaint to have been entrusted to first defendant for the benefit of plaintiff and his mother. If such is the case, the plaintiff's suit will not be barred, as Section 10 of the Limitation Act will apply (Sethur v. Subramanya (1) and Sudhasook Kootary v. Ram Chunder (2)).

The Lower Court's decree is set aside and the suit remanded for disposal on the evidence as to the portion which is the subject of this appeal.

The costs hitherto incurred will be provided for in the revised decree.

14 M. 63.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

KRISHNASAMI (Plaintiff), Petitioner v. KESAVA AND ANOTHER
(Defendants Nos. 1 and 2), Respondents.*

[5th and 15th September, 1890]

Legal Practitioners' Act—Act XVIII of 1879, Sections 28. 29—Promissory note made by a party in favour of his pleader in respect of his agreed fee—Agreement not certified—Suit on promissory note.

A party to a suit made and delivered to his pleader in respect of his agreed fee a promissory note which was not filed in Court in that suit. In a suit by the pleader upon his promissory note:

[64] Held, that the promissory note was invalid and that the plaintiff was entitled to recover only the amount to which he was found to be entitled for his labour.

[Del. 25 C. 665 (607); F., 20 M. 765; 27 M. 512 (516) = 14 M. L.J. 274; R., 16 M. 278 (279); 15 Cor. L.J. 650 = 17 C.W.N. 45 (46) = 13 Ind. Cas. 43; U.B.E. (1897-1901) 203.]

PETITION under Provincial Small Causes Courts Act, Section 29, praying the High Court to revise the decree of N. Swaminada Ayyar, District Munsif of Cudalore in small cause suit No. 20 of 1889.

Suit for principal and interest due on a promissory note, dated 1st May 1886. The note sued on was made and delivered to the plaintiff for his agreed fee as pleader for first defendant in original suit No. 304 of

* Civil Revision Petition No. 274 of 1899.

(1) 11 M. 274.

(2) 17 C. 320.
1890
SEP. 15.
APPEL-
LATE
CIVIL.
14 M. 63.

1886. The agreement was not filed in Court in that suit and the District
Munsif now found that the amount was excessive, and he accordingly
passed a decree for a smaller amount only.

The plaintiff preferred this petition.

Mahadeva Ayyar, for petitioner.
Nadamuni Chetti, for respondents.

JUDGMENT.

The petitioner was the plaintiff in a small cause suit in which he
sought to recover from two defendants a sum of Rs. 33-2-0 as principal and
interest due under a promissory note, dated 1st May 1886.

Defendant No. 1, admitting the execution of the note, contended that
the Rs. 25 mentioned in it were the fee to be paid to the plaintiff as the
first defendant’s vakil in original suit No. 304 of 1886, which suit the
plaintiff had withdrawn and that the plaintiff was entitled to no relief; defendant No. 2 is ex parte. The Munsif considered the following points:

1. "Whether the note A is invalid under Section 29 of the Legal
Practitioners’ Act?"

2. If so, what is the fair amount that can be awarded to the plaintiff
for his labour in original suit No. 304 of 1886?

As to the first point, the Munsif found Exhibit A to be invalid under
Section 29 of the Legal Practitioners’ Act because it was not filed in Court
in that suit and because the sum of Rs. 25 which the plaintiff admits to have
been intended as his fee as the first defendant’s vakil in that suit "is in
excess of the fee allowed in the decree for the defence vakil."

As to the second point, the Munsif’s finding is that the sum of Rs. 7
"is ample for the plaintiff’s advice and labour" in filing and attending at
the first hearing and then withdrawing the suit.

Section 28 of the Legal Practitioners’ Act (No. XVIII of 1879)
provides that "no agreement entered into by any pleader with any person
retaining or employing him, respecting the amount and manner of pay-
ment for the whole or any part of any past or future services, fees, charges
or disbursements, in respect of business done or to be done by such pleader
shall be valid, unless it is made in writing signed by such person, and is,
within fifteen days from the day on which it is executed, filed in the District
Court or in some Court in which some portion of the business in respect
of which it has been executed, has been or is to be done."

As the promissory note in the present case was admitted to have been executed
"in respect of business done or to be done" by the plaintiff as pleader for
the defendant, and as it was not filed in any Court within fifteen days of
its execution as required by the section quoted above, the Munsif is right
in holding it to be invalid and in ascertaining, independently of it, the
amount to which the plaintiff is entitled for his labour. What this amount
is is a question of fact which is not open for our consideration under
Section 25 of Act IX of 1887.

The Munsif’s decision in no way conflicts with the decision of this
Court in Rama v. Kuji (1), followed by the Allahabad High Court in
Razi-ud-din v. Karim Baksh (2).

The petition is therefore dismissed.

(1) 9 M. 375.  (2) 12 A. 169.
AMIRTHAYAN v. KETHARAMAYAN

14 M. 65 = 1 M. L.J. 177.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

AMIRTHAYAN AND ANOTHER (Plaintiffs), Appellants v.
KETHARAMAYAN AND ANOTHER (Defendants), Respondents.  
[15th September and 15th October, 1890.]

Will, construction of - Restricted power to widow to adopt.

A Hindu in 1884 made a will therein described as being executed in favour of the testator's wife in which he said "you must adopt for me a boy you like from the children that may be born in the families of my brothers," and after making certain provisions as to his property, &c., added "the principal object of this will is that [65] you should adopt for me any suitable boy." After the testator's death the widow, as in exercise of the power conferred on her by the will, purported to adopt a boy who did not come within the description in the first of the above clauses, although one of the testator's brothers offered his own son in adoption. In a suit by the testator's brother for a declaration that the adoption purported to have been made by the widow was invalid:

Held, that notwithstanding the general terms of the second of the above clauses, the widow's power to adopt was restricted by the first and the adoption purported to have been made by her was invalid.

[8. 16 C.L.J. 304 = 17 C.W.N. 319 (323) = 16 Ind.Cas. 817 (819).]

SECOND appeal against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 894 of 1888, reversing the decree of K. Krishna Menon, Subordinate Judge of Tanjore, in original suit No. 35 of 1887.

A Hindu made a will in the following terms:

"The will executed on the 18th December 1884 by A. Panchapakosayan, Brahmin, Sivite, Mirasdar and a Police Inspector of Nannilam firaq, and the son of Annachi Iyen of Agharapuwanur, Mannargudi taluk, and residing at Nannilam maganam, Nannilam sub-district, Nannilam taluk, in favour of his senior wife, Minatchi Ammal, of the same caste, sect, &c.

"As my health for some time past has not been good, and I have no issue, and as I have to make some arrangement very necessarily for the disposal of my property according to my intentions after my life, I hereby give you permission to do the following. Although an eager desire to take a boy in adoption has now sprung in me, yet as I could not now do it, you must adopt for me a boy you like from the children that may hereafter be born in my brothers' families. Till you do so, you must enjoy personally or through agents the real property mentioned in Schedule A herunto attached, which is my ancestral property obtained by division and enjoyed with absolute right from that time and must continue to do everything required to be done in reference to the same with all the rights I have over it. Besides you must recover all the moveables mentioned in Schedule B and do whatever you please with them. Whenever you deem fit you may convert all the moveables into immovable and immovables into moveables. If for any reason, you do not adopt a boy in your lifetime you must, in your last moments, hand over only to my brothers all the properties that may remain after what you have spent according to your will and pleasure and for the benefit of my soul. My second wife, Vembu Ammal, being very young, and has not..."

* Second Appeal No. 1560 of 1839.
1890 Oct. 15.  
---
APPENDICEL.
---
14 M. 65 M. L. J. 177

"yet attained the age of reason, you must keep her in your protection throughout your life along with you and cause Vritham, &c., to be performed for her. If, for any cause, you are necessitated to live apart from her, you must continue to give 30 kalam of paddy according to the measurement obtaining in this district for her maintenance till she remains without transgressing the Hindu dharma sastras, and you need not give her anything in any property. Those that enjoy my properties after your life must continue to give the same quantity for her and cause all her Vrithams, &c., to be performed. But she has no right in any of my properties or in reference to the adoption to be made on my account. If you cannot afford to live jointly with the adopted son, there is nothing to prevent you from making suitable arrangements for your maintenance, &c., according to time. The dwelling house in Schedule C, though purchased in my name with our funds, was purchased in fact for your brother E. V. Sundaram, and therefore if he pays you the purchase money you must at once convey it to him. Your younger sister Balambil's eldest daughter Soubagjavathy Sivakamisundary having been treated by us as our natural daughter from her infancy, her nuptials and all other marriages yet to come must be performed from our family funds suitably without awaiting for anything from her father. The principal object of this will is that you must adopt any suitable boy on my account that as you very well know all acts that may benefit my soul; you must, with my properties, make the expenditure on that account and gratify my soul, and that you must, with responsibility, manage all the properties mentioned and not mentioned herein. Thus, I have executed the will with free will and consciousness in the presence of many respectable men including my brothers.

* * * * Schedule A. B. C. *

"Every act you intend to do according to the above directions you must do in the presence of any of my brothers. If any of my brothers either by force or fraud has taken and appropriated to his use or damaged or attempted to take and appropriate or damage any of my aforesaid properties or my properties not stated herein, he shall not only be made to lose all his rights in all my properties, but shall also be sued in Courts of Justice without any objection, and such property be recovered from him. In the case of your making the adoption you must hand over to the adopted son all the aforesaid properties at the end of your life, and if you have a desire to do so before it, there is nothing to prevent it. The property in Schedule C need not be given to the said Sundaramayyar unless he pays the price thereof within one year."

After the testator's death his widow purported to adopt (in exercise of the power conferred on her by the above will) a boy who was a sapinda merely and was not a son of one of the testator's brothers. It was in evidence that a son and a grandson of one of the testator's brothers were available to be adopted. Both of these boys had been born at the time of the testator's death. The testator's brothers brought this suit against the boy adopted by the widow and the widow to declare the adoption invalid.

The Subordinate Judge passed a decree as prayed, which was reversed on appeal by the District Judge.

The plaintiffs preferred this second appeal.

Rama Rau and Krishnasami Ayyar, for appellants.

Bhashyam Ayyangar and Ramachandra Rau Saheb, for respondents.
MUTTUSAMI AYYAR, J.—The question for decision in this second appeal is whether the construction put by the District Judge upon the will (Exhibit I) is correct.

The testator, Panchapakesayyan, made his will on the 18th December 1884, and died on the 1st February 1885, leaving him surviving a widow named Minakshi Ammal, the first defendant, [68] and two divided brothers, the plaintiffs. The plaintiffs’ case was that Panchapakesayyan authorized Minakshi Ammal only to adopt one of their sons and that the adoption of the second defendant, who was a mere sapinda, was invalid. On the other hand, the contention for the defendants was that the authority was general and that the adoption was, therefore, open to no objection. The Subordinate Judge considered that the testator conferred upon the first defendant an authority to adopt a child only from a particular class, but the Judge held that there was no such restriction. It has been contended before us that the will has been misconstrued by the Judge.

The terms in which the will was made are set out by the Subordinate Judge in paragraph 4 of his judgment, and only two passages in it are material to our present purpose. The first is in these words:— Although an eager desire to take a boy in adoption has now sprung in me, yet as I could not now do it, hereafter you must adopt for me a boy you like from the children that may be born in the families of my brothers.” There can be no doubt that this passage confers an authority to choose a child for adoption from a class or two particular families designated by the testator. It shows further that it was his intention not to make an immediate adoption, but to postpone it until one of the class, viz., his brothers’ sons became available for adoption.

The other material passage which occurs near the end of the will is in these terms:— “The principal object of this will is that you should adopt for me any suitable boy, (yaravadi oru takka Puranai) that as you are perfectly acquainted with what is conducive to my spiritual benefit, you shall spend out of my properties for such benefit and that you should take upon yourself the responsibility of managing all my properties.” Does this passage mean any boy whom she considers suitable, or any boy who was already indicated by the testator as suitable? I have no doubt that the latter is the correct construction, for, the passage in question was intended to sum up and thereby explain the contents of the will and not to operate as an independent direction. If the other construction were to prevail, there was no occasion for the testator designating a class and thereby limiting his wife’s discretion. Nor was there any occasion for the testator for bearing to make an adoption at once and for directing his widow to wait until one of his brothers’ children should thereafter be born. It is [69] observed by the Judge that if by the words, any suitable boy, the testator meant some boy who was suitable out of his brothers’ sons, he should have expressly said so and that the words “any suitable boy,” are as imperative as the words, “you should adopt a boy you like from the children that may be born in my brothers’ families.” But the passage in question states in a general way the object with which the will was framed and the reasonable inference is that the testator intended not that any direction already given by him should be struck out or cancelled, but that it should be read in the light thrown by the object he had in view. “Any or some suitable or fitting boy” would, if read together.
with the direction contained in the earlier passage, only signify "such boy as I consider suitable or have already indicated as suitable." The Judge's view cannot be accepted, as it ignores the purpose with which the testator presumably inserted the second passage and thereby imputes an intention to him practically to contradict himself. The decree of the District Judge is set aside and that of the Subordinate Judge restored. The second respondent will pay the appellants' costs both in this Court and in the Lower Appellate Court.

BEST, J.—The question for decision in this appeal is whether under the will (Exhibit I) the second respondent, the widow of one Panchapak-sayvan, was authorized to adopt the first respondent or whether the authority to adopt given to her under the will was limited to a boy belonging to the families or her husband's brothers, who are the appellants in this case.

The Court of first instance, the Subordinate Judge of Tanjore construed Exhibit I, as giving only the limited power of adoption stated above, and held the adoption of the first respondent to be void, whereas the District Judge, on appeal, has found that the power conferred on the second respondent was not limited and that the adoption made by her of the first respondent is valid.

I am of opinion that the construction put on Exhibit I by the Court of first instance is the correct one.

The primary rule of construing a document in the nature of a will is that the meaning of any clause in it is to be collected from the entire instrument, as all its parts are to be construed with reference to each other. So construed, I am of opinion that the will in question limits the power of adoption given to the second respondent to boys born in the testator's brothers' families. It is so expressly stated in the first part of the will. Notwithstanding that at the end of the will, in summing up his instructions, the testator has said that the principal object of the will is that his widow should (inter alia) adopt "whoever may be fitting" as a son for him. These are general words—but general words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense; and it is only in cases where two clauses in a will are so absolutely irreconcilable that they cannot possibly stand together, that the latter of the two can be allowed to prevail, the theory being that the testator may have changed his mind. The rule is, however, never applied except on the failure of every attempt to give the will such a construction as will render every part of it effective. The words "any suitable boy" in the latter part of the will must, therefore, he read with the earlier clause which directs the adoption of a son "out of the children that may hereafter be born in my brothers' families." There is no reason whatever for supposing that the non-reiteration of the words "born in my brothers' families" in the latter part of the will indicated any change of mind on the part of the testator. The only fair presumption is that he thought the repetition unnecessary, his intention to limit the adoption to a boy born in his brothers' families having been sufficiently stated in the earlier part of the will. The further direction in the will that "every act you intend to do according to the above directions you must do in the presence of any of my brothers" is also significant as showing that the testator remained favourable to his brothers to the end of the will.

The direction to adopt being thus found to be limited to a boy hereafter to be born in one of the brothers' families was the mere fact of no
other sons having been subsequently born in those families sufficient to warrant the adoption of any other boy? The Subordinate Judge has answered this question in the negative and he seems to be supported by authority in this answer of his. But even assuming it to be otherwise, the passage from the will already quoted requires that any thing done under the will should be done "in the presence of any of my brothers, whereas the so-called adoption of the first respondent was made in the absence of the brothers, without their consent in defiance of the [71] first appellant's objections, who even offered to give his own second wife's son in adoption if required.

I agree therefore, in setting aside the decree of the Lower Appellate Court and restoring that of the Court of first instance and in directing the second respondent to pay the appellants' costs both in this Court and in the Lower Appellate Court.

18 M. 71.

APPELLATE CIVIL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and Mr. Justice Best.

NEELAMEGAN (Plaintiff). Appellant, v. GOVINDAN AND ANOTHER (Defendants Nos. 4 and 5). Respondents.* [23rd September and 15th October 1890.]

Transfer of Property Act—Act IV of 1882, Sections 60, 82—Partial redemption—Contribution.

In 1841 A and B, being divided brothers, bestowed on X and Y the house now in suit, which was A's family property, and a house belonging to B. In 1855 A bestowed the house now in suit to the plaintiff. In 1889 B sold his house for Rs. 700 by a conveyance alleged to be X and Y who accepted Rs. 550 in discharge of a moiety of the debt secured by the hypothecation of 1881, the balance of Rs. 150 being retained by B. In this suit the plaintiff sought to recover the principal and interest due on his security of 1886, and he contended that X and Y, who were defendants Nos. 4 and 5 were not justified in permitting B to retain Rs. 150 of the price and that that sum should accordingly be debited against them in the accounts:

Held, that under Transfer of Property Act, Section 82, plaintiff was not entitled to compel defendants Nos. 4 and 5 to satisfy their debt against B's house so far as it extended.

SECOND appeals against the decrees of S. Gopala Charuv, Subordinate Judge of Madura (Eas.), in appeal suits Nos. 455 and 462 of 1898, modifying the decree of P. S. Gurunath Ayyar, District Munsif of Madura, in original suit No. 501 of 1887.

Suit to recover principal and interest due on a hypothecation bond dated 1886.

The facts of these cases appear sufficiently for the purposes of this report from the judgment of the High Court.

These second appeals were preferred by the plaintiff.

[72] Mr. B. F. Grant, for appellant.

Parthasaradhi Ayyangar for respondents.

* Second Appeals No. 1299 of 1899 and 1003 of 1890.
† [Vide Exhibit B., Ed.]
JUDGMENT.

The appellant in both these cases is the plaintiff in original suit No. 501 of 1887, on the file of the District Munsif of Madura in which plaintiff sued for the recovery of Rs. 550 (with further interest) on the security of certain mortgaged property. From the Munsif's decree two separate appeals were preferred to the Subordinate Court of Madura (East). The result in both these appeals was adverse to the plaintiff. He thereupon preferred to this Court his second appeal No. 1299 of 1889, with reference only to his own first appeal (No. 465 of 1888), but objecting to the decree of the Lower Appellate Court also in the appeal of fourth and fifth defendants (No. 462 of 1888). He was, therefore, directed to prefer a separate second appeal from this latter decree. Hence the second appeal No. 1002 of 1890.

The only question arising for decision in second appeal No. 1299 of 1889 is whether the Lower Courts are right in holding that the mortgage bond I was not merged in the subsequent sale deed II, which both those Courts have agreed in finding was never carried into effect. Mr. Grant has admitted that he is unable to support this contention on behalf of appellant; second appeal No. 1299 of 1889 must therefore fail, and is dismissed with costs.

The question raised in second appeal No. 1002 of 1890 is whether the Lower Appellate Court is right in holding that defendants Nos. 4 and 5 were justified in permitting first defendant's brother to appropriate Rs. 150 out of Rs. 700, the amount for which his house was sold under Exhibit VI. The Subordinate Judge has held that this was allowable under Section 82 of the Transfer of Property Act. For appellant it is contended that Section 82 is inapplicable, as it must be read together with the last clause of Section 60 of the same Act.

The following are the facts:—In 1884, first defendant and his divided brother Nagasamy jointly hypothecated to defendants Nos. 4 and 5 the plaint house together with a house belonging to Nagasamy for Rs. 800 (Exhibit I). Subsequently, in 1886 first defendant alone hypothecated his house alone to the plaintiff for a sum of Rs. 400 (Exhibit C). In January 1888 first defendant's brother Nagasamy sold his house under Exhibit VI (which is attested by defendants Nos. 4 and 5) for a sum of Rs. 700, of which these defendants accepted Rs. 550 as the moiety due to them [73] under the joint mortgage of 1884, and allowed Nagasamy to retain the remaining Rs. 150.

The plaintiff's contention is that defendants Nos. 4 and 5 were not justified in allowing Nagasamy to retain this sum of Rs. 150, but should have insisted on payment to themselves of the whole Rs. 700, and that they have, under the circumstances, a lien on first defendant's house only for Rs. 400 and not for Rs. 550.

Section 82 of the Transfer of Property Act provides that where "several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducing from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage." It is not contended in the present case that the property sold under Exhibit VI was of greater value than the plaint house. Assuming, therefore, that the houses were at equal value, Nagasamy's share of the debt being a moiety, all that he was liable to pay to defendants Nos. 4 and 5 under Exhibit I
was Rs. 550, the other moiety being a charge on the first defendant's house.

With reference to the last clause of Section 82, it is to be observed that it is clearly not applicable to the present case, as Section 81 contemplates the mortgage of two properties owned by the same person: "If the owner of two properties mortgages them both, &c." Nor do we think the last clause of Section 66 relied on on behalf of appellant is applicable to this case. The section declares the right of the mortgagor to redeem; and its last clause is as follows: "Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of a proportionate share of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor." This proviso is clearly applicable only to parties who stand to each other in the relation of a mortgagor and mortgagee; and as no such relationship existed between plaintiff and Nagasamy, the proviso in question was clearly no bar to Nagasamy's redeeming his property on payment to his mortgagee, the fourth and fifth defendants, of his share of the mortgage-debt due under Exhibit I.

The Lower Court's decree is therefore right and this appeal No. 1002 of 1890 is also dismissed with costs.

14 M. 74.

[74] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Best.

DURGAYYA (Plaintiff), Appellant v. ANANTHA AND OTHERS
(Defendants), Respondents." [16th September and 15th October, 1890.]

Transfer of Property Act—Act IV of 1882, Section 99—Money decree "on the responsibility of mortgage premises—Attachment of mortgage premises—Purchase by mortgagee.

A usufructuary mortgagee left the mortgage premises in the possession of the mortgagor under a rent agreement in 1878. The rent having fallen into arrear, the mortgagee sued the mortgagor in October 1882 and obtained a decree for the arrear which provided for its payment by the mortgagee "on the responsibility of the defendants' mulgani right" in the mortgage premises. The decree-holder attached the mortgage premises in execution, and having brought them to sale and purchased them himself, he now sued for possession:

Held, that the sale was invalid under Transfer of Property Act, Section 99.

[Diss., 35 C. 61 (69) = 6 C.L.J. 320 = 11 C.W.N. 1011; F., 30 C. 463 (665); R., 12 A. 325 (328); 34 B. 128 (132) = 11 Bom. L.R. 1315 = 4 Inl. Cas. 595; 22 C. 859 (656); 22 M. 372 (377); 4 C.L.J. 533 (535); 14 C.P.L.R. 17 (21); 8 O.C. 327 (328); Expl., 22 M. 347 (349); D., 23 B. 119 (121).]

SECOND appeal against the decree of S. Subba Ayyar, Subordinate Judge of South Canara, in appeal suit No. 47 of 1889, confirming the decree of U. Babu Rau, District Munsif of Kundapur, in original suit No. 278 of 1888.

Suit to recover possession of certain land of which the defendants were in occupation.

* Second Appeal No. 1616 of 1889.
In 1878 the father of defendants Nos. 2 and 3 executed a usufructuary mortgage of the land in suit to the plaintiff, from whom he agreed to hold it as tenant at a certain rent. In 1882 the rent having fallen into arrear, the plaintiff brought a suit and obtained a decree (Exhibit E) as follows:

"It is ordered and decreed that defendant do pay plaintiff Rs. 97-8-0 with interest at 6 per cent. from the date of plaint (19th October 1882) till date of payment with Court costs, on the responsibility of the mulgeni right in the plaint property."

In execution of this decree the plaintiff attached the mortgaged premises, and having brought them to sale became the purchaser himself. He now sued as above for possession.

The District Munsif held that the sale to the plaintiff was invalid under Transfer of Property Act, Section 99, and dismissed the suit, and his decree was upheld on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal.

_Ramachandra Rau Saheb, for appellant._

_Narayana Rau, for respondents._

**JUDGMENT.**

On finding it stated in the judgment of the Lower Appellate Court (para. 10) that the case had been argued before that Court "mainly on the 6th issue and the correctness or otherwise of the decision of the Lower Court under this issue is the only point for determination in this appeal," the appellant's vakil has confined his contention in this Court to the same point.

The question is, therefore, whether the Lower Courts are right in holding to be invalid as against the respondents the sale in execution of the decree E obtained by plaintiff against Timmappa Chetti, the father of second and third respondents?

The decree in question was obtained in December 1882, i.e., after the coming into operation of the Transfer of Property Act, No. IV of 1882. Section 99 of that Act disentitles a mortgagee who attaches property in execution of a decree for the satisfaction of any claim "whether arising under the mortgage or not" from bringing such property to sale "otherwise than by instituting a suit under Section 67 of the Act."

The property in the present case was attached by appellant, who is a mortgagee, in execution of a decree obtained by him for arrears of rent due for three years from his mortgagor, and was subsequently sold in execution of the same decree, when appellant himself became the purchaser.

The present case is no doubt distinguishable from _Kaveri v. Ananthayya_ (1) in that in the latter case no sale had actually taken place. Moreover in _Kaveri v. Ananthayya_, it does not appear that there was a decree making the debt a charge upon the land. But the mere fact of the decree making the debt a charge on the property cannot be held to be sufficient to exclude the case from the rule contained in Section 99 of the Transfer of Property Act; nor is the fact of a sale having taken place sufficient to do so, compare the judgment of Kernan, J., in _Sathuwayyan v. Muthusami_ (2), where he says, "the fact that the sale took place before the suit (i.e., the suit to get back possession of the property sold) [75] was filed cannot give validity to the sale, if it was contrary to the provision of Section 99."

We are of opinion that the decrees of the Lower Courts are correct and that this appeal must be dismissed with costs.

---

(1) 10 M. 129.

(2) 12 M. 325.
MAHOMED v. ALI KOYA

18 M. 76.

14 Mad. 77

APPELLATE CIVIL.

Before Mr. Justice Mullusami Ayyar and Mr. Justice Best.

MAHOMED (Plaintiff). Appellant v. ALI KOYA AND OTHERS
(Defendants Nos. 1, 2 and 9), Respondents. *

[12th and 15th September, 1890.]

Malabar Law—Kanom—Redemption suit brought within 12 years from the date of
Kanom—Special stipulation for redemption.

In a suit to redeem a kanom executed less than 12 years before suit it appeared
that the kanom instrument provided for the surrender of the property "if at any
time the property should be necessary" for the jenmi. It was found that no
special exigency had been established by the plaintiff:

Held, on the above finding that the special stipulation did not oust the general
rule that the kanom was not redeemable for 12 years and the suit was therefore
premature.

SECOND Appeal against the decree of E. K. Krishnan, Subordinate
Judge of South Malabar at Calicut, in appeal suit No. 247 of 1888, reversing
the decree of N. Sarvottama Rau, District Munsif of Calicut, in
original suit No. 468 of 1886.

Suit to redeem a kanom executed less than 12 years before suit.
The District Munsif held that the ordinary rule that a kanom was a
demise for at least 12 years was precluded by the special terms of the
instrument referred to in the judgment of the High Court and passed a
decree as prayed. The Subordinate Judge found that the special terms in
question did not operate, as there was no special exigency proved by the
plaintiff, and he dismissed the suit as premature.

The plaintiff preferred this second appeal.

Achuta Menon, for appellant.
Govinda Menon, for respondents.

JUDGMENT.

[77] The question for decision in this appeal is whether the Sub-
ordinate Judge is right in holding that the plaintiff (now appellant) is
not entitled to redeem the property sued for before the expiration of 12
years from date of his document (Exhibit A).

The Court of first instance held that the property could be recovered
by plaintiff before the usual period of 12 years, because Exhibit A itself
provides that the property should be surrendered on demand at any time
within 12 years. Were this a correct translation of the stipulation in
Exhibit A, the decision of this Court in Shekhara Paniker v. Param
Nayar (1) would be authority in support of the above finding, for it was
there held that, although the right to hold for 12 years is inherent in every
kanom according to the custom of the country, it is competent to the
jenmi to exclude its operation by express agreement. Consequently it
must be held that the agreement in Exhibit A for surrender of the property
within 12 years is not unenforceable. But the stipulation is not for
surrender on demand, but in case of necessity the correct translation is
"if at any time the property shall be necessary for you." Such being

* Second Appeal No. 1547 of 1889.

(1) 2 M. 198.

55
1890 SEP. 15.  
APPPELLATE CIVIL. 
14 M. 76.

the case the Subordinate Judge seems to be right in holding that the case comes within the decision of this Court in Riman v. Mayur (1), and that in the absence of any special exigency the suit is premature and must be dismissed.

The second appeal fails therefore and is dismissed with costs.

14 M. 76.

[78] APPPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Weir.

KUNAHAN (Defendant No. 1), Appellant v. SANKARA AND OTHERS (Plaintiffs), Respondents. [16th September, 1890.]

Malabar law—Suit to remove a karnavan for mismanagement as de facto karnavan—Minor members of tarwad not joined—Civil Courts Act (Madras), Act III of 1873, Section 13—Valuation of suit.

A suit was brought to remove the karnavan of a Malabar tarwad from office on the grounds of mismanagement of tarwad property to the extent of more than Rs. 2,500. The acts of mismanagement complained of were really done by the present defendant No. 1 as karnavan de facto. The above suit was withdrawn with leave to sue again. The defendant therein died, and was succeeded by defendant No. 1, against whom the plaintiffs brought the present suit in the Court of a District Munsif (to which all the adult but none of the minor members of the tarwad were made parties) to obtain his removal from the office of karnavan alleging against him the acts of mismanagement above referred to:

Held, (1) that the suit was not barred by the previous suit and was within the jurisdiction of the District Munsif;

(2) that the minor members of the tarwad were sufficiently represented on the record;

(3) that the grounds alleged supported the action.

[R., 34 M. 491 (431) = 7 Ind. Cas. 153 (151) = 8 M.L.T. 159 = (1910) M W.N. 293 ]

SECOND Appeal against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 459 of 1888, affirming the decree of O. Chanda Menon, District Munsif of Shernad, in original suit No. 444 of 1887.

The plaintiffs and defendants were all the adult members of a Malabar tarwad, of which defendant No. 1 was karnavan; the members of the tarwad, who were minors, were not brought on to the record.

Suit in the Court of a District Munsif for the removal of defendant No. 1 from the office of karnavan and manager, and for the appointment of plaintiffs Nos. 1, 2 and 10 in his place. The plaintiffs alleged against defendant No. 1 acts of misfeasance and mismanagement in respect of tarwad property of a greater value than Rs. 2,500. It appeared that the acts complained of had been done by defendant No. 1 before he had become karnavan de jure, in the lifetime of Kunhi Krishnan Nayar his predecessor as karnavan.

The plaintiffs had brought original suit No. 443 of 1886 against Kunhi Krishnan Nayar, in which they sought his removal from the office of karnavan, alleging against him the same acts of misfeasance and mismanagement upon which the present suit was founded that suit, however, was withdrawn with leave to institute a fresh suit.

* Second Appeal No. 1564 of 1889.

(1) Second Appeal No. 747 of 1885 not reported.
The District Munsif passed a decree as prayed and his decree was affirmed on appeal by the Subordinate Judge. Defendant No. 1 preferred this second appeal.

Narayana Rao, for appellant.
Sankara Menon, for respondents.

JUDGMENT.

It is first urged that the District Munsif had no jurisdiction to entertain this suit, the encumbrances found to have been improperly created by the appellant being to the extent of more than Rs. 2,500. The plaint refers to the encumbrances as instances of mismanagement on the part of the appellant and it does not pray for a decree that they be set aside. The only relief prayed for is the removal of the appellant from his position of karnavan and it was held in Narangoli Chirakul Kunhi Rama v. Puttalatha Kimbunni Nambiar (1) that such relief is incapable of valuation. The decision in Ganapati v. Chatha (2) is not in point, for the plaintiffs in that case sued to obtain a declaration that the Urama right to a certain devsom was vested solely in their tarwads and the ground of decision was that the value of a suit for declaration of title to specific property should be taken, for the purpose of jurisdiction, to be the same as that of a suit to recover possession of that property.

Another contention is that all the members of the tarwad have not been made parties to the suit. The Subordinate Judge observes that all the adult members have been made parties and this is not denied before us. Though minors in the tarwad may not have been made parties to the suit, yet we agree with the Subordinate Judge in thinking that the adult members sufficiently represent the interest of the tarwad for the purposes of this suit.

It is next said that original suit No. 442 of 1885 on the file [30] of the District Munsif of Shermad bars the present suit. In that suit there was no adjudication, and when it was withdrawn permission to institute a fresh suit was asked for and granted. There is, therefore, no foundation for the contention that the present claim is either res judicata or barred by section 373 of the Code of Civil Procedure. But the ground of objection chiefly relied on in support of this appeal is that the mismanagement imputed to the appellant were committed by him whilst he was de facto karnavan during the lifetime of Kunhi Krishnan Nayar, and that they ought not to be accepted as a ground for depriving him of his present position as de jure karnavan. The question to be kept in view is, however, whether by reason of misconduct the appellant has rendered himself unfit for the office of karnavan, and on this point it can make no difference to the tarwad, whether the mismanagements were committed by him either solely or in conjunction with another; in either case, the interest of the tarwad requires that the management of its affairs should not be entrusted to him. It has also been found that he usurped the management during the lifetime of Kunhi Krishnan Nayar, and acted not as his delegate and under his direction, but without any restriction or regard to Kunhi Krishnan's authority as de jure karnavan. The decision in Nambian Nambudiri v. Nambian Nambudirs (3) shows only that the authority of a de jure karnavan is absolute, and that he may, at his pleasure, put an end to the management of tarwad affairs by an ancillary, and that for that purpose, such management is to be taken to have continued by his

(1) 4 M. 314.
(2) 12 M. 223.
(3) 2 M.H.R.R. 110.
sufferance or to have been that of his delegate. It is certainly no authority for exonerating the *de facto* manager from responsibility or blame for the mal-administration of tarwad property. Neither are we prepared to attach weight to the appellant’s contention that some of the lands unnecessarily encumbered belong to a branch tarwad, and that his acts of mismanagement, so far as they relate to them, should be excluded from consideration whilst coming to a finding as to his fitness for the karnavanship of the whole tarwad. This second appeal fails and is dismissed with costs.

[81] **APPELLATE CIVIL.**

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Weir.*

**GOVINDA (Defendant No. 3), Appellant v. BHANDARI (Plaintiff), Respondent.*  
[6th November, 1890.]

**Limitation Act—Act XV of 1877, Sections 5, 12—Time occupied in seeking review of judgment—Computation of time for appeal,**

An appellant is not entitled as of right to the exclusion of the time occupied by him in seeking a review of judgment, in the computation of the time within which his appeal is preferred.

Where it appeared that the application for review proceeded on grounds dealt with in the judgment sought to be reviewed and on the discovery of fresh evidence which was made nearly three months before the application, the Court declined to exercise its discretionary power to exclude the time so occupied.

[F., 1 L.B.R. 313 (314); Expl., 33 C. 1923 = 3 C.L.J. 545 (553) = 10 C.W.N. 986.]

**SECOND appeal against the decree of S. Subba Ayyar, Subordinate Judge of South Canara, in appeal suit No. 143 of 1888, modifying the decree of I. P. Fernandes, District Munsif of Kasargod, in original suit No. 28 of 1887.**

Defendant No. 3, who had sought to obtain a review of judgment in the Subordinate Court, preferred this second appeal more than eight months after the date of the decree of the Subordinate Judge.

**Narayana Rau, for appellant.**

**Ramachandra Rau Saheb, for respondent.**

**JUDGMENT.**

A preliminary objection is taken on behalf of respondent that the appeal is 113 days out of time.

If the time occupied in disposing of the application for review by the Subordinate Judge's Court, viz., 152 days is allowed and excluded, it is admitted the appeal will be in time. The question is whether the appellant has shown any sufficient ground for the review time being excluded. He cannot claim its exclusion as of right but merely as a matter of grace within the judicial discretion of the Court. The grounds of review, which have been read, are, with one exception, grounds which were already argued and decided against in appeal and are not grounds for review.

[82] Certain documents were said to have been newly discovered, but the circumstances in which they are alleged to have been discovered are said to be such as should not be believed. This was the—

* Second Appeal No. 1421 of 1889.
view taken by the Subordinate Judge and we cannot say that it was unfounded.

It has also been brought to our notice in this connection that additional evidence was taken even at the hearing of the appeal, so that the discovery of further evidence at a later stage seems improbable.

The petition for review moreover was not, we consider, presented with reasonable diligence, but after an interval of nearly three months from the alleged discovery of the new evidence.

On these grounds, we think, the appellant is not entitled to have the delay excused, and we must accordingly reject the appeal as barred by limitation.

Respondent is entitled to his costs.

14 M. 82.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SECRETARY OF STATE FOR INDIA (Defendant), Appellant v. CHOYI (Plaintiff), Respondent. [29th August and 1st and 30th September, 1890.]

Abkari Act—Act III of 1864 (Madras). Section 6—Rights of renter of Abkari farm—Right of Collector to close shops included in the renter’s contract—Collector’s orders modified by Board of Revenue—Suit for damages.

The plaintiff rented from Government an Abkari farm, on terms which reserved certain powers of control to the Collector, and obtained a license under the Abkari Act. He did not manage the shops in the contract area himself nor obtain separate licenses for their management by others. The Collector made orders which were subsequently modified by the Board of Revenue, directing the closing of certain shops which the plaintiff had sub-let and directing that others should not be opened. It was found that the Collector’s orders were not in excess of the powers reserved to him under the contract, and that they had not been issued arbitrarily or otherwise than in good faith. In a suit for damages occasioned to the plaintiff by these orders:

Held, the plaintiff was not entitled to recover.

[83] APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No. 36 of 1885.

Suit to recover Rs. 12,000, damages for breach of contract.

The Collector of Malabar issued a “notification of the sale of joint arrack and toddy farms by existing sub-rent arrooars”—Exhibit Y—which the portions material for the purposes of this report are as follows:

1. Notice is hereby given that the exclusive privilege of manufacturing and vending arrack and toddy (fermented palm juice) in the several parts of the Malabar District specified in the schedule hereunto annexed, from the 1st April 1885 to the 31st March 1886, will be sold by public auction on the dates and at the places mentioned in the aforesaid schedule, subject to the conditions and limitations hereinafter set forth.

10. The licensee shall keep true accounts of his receipts andbursements and of the quantity, strength and description of the liquor manufactured, issued and received at each distillery and depot established by him. Such accounts shall be produced when required for inspection.
by the Collector or any officer appointed by him, and the licensee shall
be bound to furnish, or cause to be furnished, such information or returns
as may be required by the Collector from time to time, regarding the
consumption of liquor within his farm, or relating in any way to his
management as renter.

"11. Liquor shall only be sold under this license in one shop for
arrack and toddy combined. Such shop or shops shall be under the
personal management of licensee. If he desires to open more shops, or
if the above shops are not under his personal management, he must
obtain a separate license for each such shop.

"12. The Collector may, whenever he thinks fit, direct shops other
than those managed by the licensee to be closed, or permit transfers of
shops from one place to another, or direct new shops to be opened and
a sufficient supply of spirits to be maintained in all sanctioned shops."

The plaintiff became the purchaser as from 1st May 1885 under the
above notification, and on 14th May 1885 he received from the Collector
a license—Exhibit A E—of which the portions material for the purposes
of this report are as follows:

"1. W. Logan, Esquire, Collector of the District of Malabar, being
"duly authorized by the Board of Revenue, hereby license you, Kottieth
"Choyi, son of Nadukodi Kaunan, residing at Cantonment, Kannore,
"to manufacture and vend arrack and toddy for the tract specified below
"in the Taluk of Cherrakkel from the 1st day of May 1885 to the 31st
"day of March 1886, subject to the following conditions and limitations
"to be observed by you, the said Kottieth Choyi.

"10. You shall sell liquor under this license in one shop for arrack
"and toddy combined. Such shop or shops shall be under your personal
"management. If you desire to open more shops, or if the above shops
"are not under your personal management, you must obtain a separate
"license for each such shop.

"11. The Collector may, whenever he thinks fit, direct shops other than
"those managed by you to be closed, or permit transfers of shops from one
"place to another, or direct new shops to be opened and a sufficient
"supply of spirits to be maintained in all sanctioned shops."

Neither of these documents specified the number of shops to be
opened. The plaintiff proceeded to open some and prepared to open others;
he did not manage his shops himself nor obtain any separate license for
their management by others.

In May and July 1885 the Collector made certain orders, whereby
he directed certain shops of the plaintiff which had been sub-let, to be
closed and disallowed the opening of others. Some of these orders
were subsequently modified by the Board of Revenue; but it was found
that they were not arbitrary or had not been issued otherwise than in
good faith.

The plaintiff's claim was for damages occasioned to him by loss of
trade consequent on the above orders.

The terms of Abkari Act, Section 6, are as follows:

"In cases where exclusive privileges of manufacture or sale, or of
"manufacture and sale, have been granted to a renter or assignee, the
"Collector, subject to the approval of the Board of Revenue, shall
determine the places at which stills and shops shall be erected, the plan
"on which such shops shall be built, the number of shops and stills in
"each district or other division of territory, the minimum prices at which
"liquor shall be sold at such shops, and the measures to be used in the
"sale of such liquor, the due publication of such prices and measures, and
"generally all matters relating to the management and control of such
"places of manufacture or sale."

The Subordinate Judge passed a decree for the plaintiff for
Rs. 11,432-8-0.

The defendant preferred this appeal.
The Government Pleader (Mr. Powell), for appellant.
Mr. Gantz, for respondent.

JUDGMENT.

BEST, J.—This is an appeal by the Secretary of State against the
decree of the Subordinate Judge of North Mulabar awarding to the respon-
dent a sum of Rs. 11,432-8-0 as damages sustained by the latter in
consequence of orders directing the closing of certain shops within the
limits of the Abkari farms, of which the respondent had become purchaser
for eleven months from 1st May 1885 to 31st March 1886.

It is urged on behalf of the appellant that the Collector had, under
Section 6 of the Abkari Act, No. III of 1861 (Madras), and also under
the sale notification, exhibit Y, and the license granted to the respondent,
exclude A E, power to close the shops; that respondent's suit was therefore
not maintainable; and that the damages awarded are excessive.

[85] The first issue recorded in the case is as follows:—"Whether,
under the terms of the agreement with the plaintiff (now respondent), the
Collector or other officer exercising his powers had right to pass the orders
complained of, directing the closing of the shops within the limits of the
farm leased out to the plaintiff."

The terms of the agreement are to be found in the sale notification,
Exhibit Y, and in the license, Exhibit A E, granted to the respondent.

In clause 11 of Exhibit Y, after stating that the "shop or shops shall
be under the personal management of the licensee," it is added "if he
desires to open more shops, or if the above shops are not under his personal
management, he must obtain a separate license for each such shop;" and
the next clause provides that "the Collector may, whenever he thinks
fit, direct shops other than those managed by the licensee to be closed."
The license, Exhibit A E, granted to the respondent also contains stipu-
lations as above (Vide Clauses 10 and 11). These are the two documents
from which we can gather what the contract between the parties was,
and it appears to me that under them the Collector had a right to
close shops without assigning any reasons for his so doing.

A former decree dismissing the suit with costs was set aside by this
Court, and the case remanded for re-trial, for the reason that the decision
rested on grounds not set up in defence by the defendant. It was then
remarked:—"In paragraph 10 of his judgment, he (the Judge) says that
the grounds on which the Collector was justified in making his orders
were that the plaintiff did not personally manage the shops and that he
sold to sub-renters part of the farm and that, as he did so, he should have
procured a separate license so to do, which license he did not obtain.
The written statement of the defendant or the issues raised no such ques-
tions."

It is true that neither in the defendant's written statement nor in
the issues is there anything said of the Collector's right to close the
shops on the ground that the plaintiff did not personally manage them, nor
is it even now contended that this was the reason for ordering the shops
to be closed, or rather for disallowing their being opened, for most of them
(49 out of 55) were new shops that had never before existed. The contention is that as both under the notification of sale, Exhibit Y, and the license, Exhibit A E, the obtaining of a license by the plaintiff was a condition precedent both to the opening of new shops and to the keeping of even old shops under management other than that of the licensee and as the plaintiff had admittedly not obtained any separate licenses as thus required, his claim for damages on account of the profits he might have obtained, if such shops had been allowed to be opened or maintained, is altogether unsustainable. This is, I think, an argument allowable to the defendant and comes within the scope of the 1st issue recorded for trial, and also within paragraph 2 of the defendant’s written statement, which is as follows:—“According to the stipulations of the karars entered into with the plaintiff, the Collector and other officers who exercise the Collector’s powers have full power to regulate the number and situation of shops within the local limits of the plaintiff’s farm and for ordering to take away any of the existing shops.”

I would therefore allow this appeal, and setting aside the Lower Court’s decree, dismiss the plaintiff’s suit with costs throughout.

MUTTIUSAMI AYYAR, J.—I am also of the same opinion.

The respondent rented on 1st May 1885 the Akbr- ri farm of 19 amshoms in the Cherakkal Taluk in North Malabar. The sale notice, Exhibit Y, and the license, Exhibit A E, embody the terms of the agreement between the appellant and the respondent and Clause 12 of the former and paragraph 11 of the latter reserved power to the Collector inter alia to direct, whenever he thought fit, that shops other than those managed by the license be closed. Exhibits C, L and N are the orders which it is asserted, the Collector issued in breach of the contract. Those orders related to shops which had been sub-let and not to those under the renter’s personal management, and they are therefore clearly not in excess of the power reserved by the contract to the Collector. Against this view, four objections are urged on behalf of the respondent. The first is that the orders were issued arbitrarily. Exhibit C, dated 22nd May 1885, directed that sub-contractors should not keep any shop within the area of three miles from the boundary of the farm of town arrack contractors. Exhibit L, dated 9th July 1885, stated that the six today shops mentioned therein were very near to the municipal limits, that licenses could not be granted in respect of them, and that the trade in these shops should be immediately stopped. Exhibit N, dated 13th July 1885, stated that without special grounds, permission could not generally be granted to keep shops in places lying within a distance of one mile from the Municipal limits. It appears that the Board of Revenue since excluded from the operation of this order any old shops in existence. It is provided in paragraph 10 of the license issued to the appellant that “if you desire to open more shops or if the above shops are not under your personal management, you must obtain a separate license for each such shop.” It is not the appellant’s case that any of the shops ordered to be closed were either those under his personal management or those in respect of which separate licenses had been issued. The orders in question appear to have been designed to ensure what was considered to be reasonable protection against undue interference on the part of the appellant, with the custom of the town arrack contractors and, in this sense, none of them can be said to be arbitrary. Nor does it make any difference that the Board of Revenue made the orders issued by the Collector in the exercise of their discretion as to what might be deemed sufficient protection to the
town contractors as those orders were issued bona fide in the exercise of the power reserved by the terms of the contract. As regards the contention that neither Exhibit Y nor Exhibit A E specified the number of shops, as was previously the case, which the apellant was entitled to open or sub-let, I have to observe that the apellant could only exercise his power subject to the restrictions as renter contained in paragraphs 10 and 11 of the lease, Exhibit A E. Another contention is that the orders in dispute were issued not on public grounds, but to protect the interest of the contractor for the municipal town of Cannanore. The apellant's contract and the town contract were both entered into with reference to the provisions of the Abkari Act and I cannot say that any provision in the latter contract which arms the Collector with power to see that the exclusive privilege conferred by the previous contract is not wantonly interfered with or impaired by the renter from interested motives is not legitimate or unreasonable.

On these grounds, I also hold that there was no breach of contract as alleged by the respondent and that the appeal must be allowed with costs.

14 M. 88.

[88] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

R.—(Petitioner), Appellant v. R.—(Respondent), Respondent.*

[27th and 28th August, 1890.]


A petition by a wife—petitioner in the one and respondent in the other of two cross-suits (matrimonial)—for an increase of alimony was treated by consent on appeal as a petition for alimony.

It appeared that the respondent was in receipt of a salary from Government which was subject to deductions on account of the pension and annuity funds, that his circumstances were similar and that he had agreed with his relatives to discharge his liabilities by certain installments, that as part of such agreement he was keeping up a policy of insurance on his life, and that he was maintaining and educating three children in England, but that his salary had increased since the order first made for alimony:

Held, that the respondent was entitled as of right to have only the deductions on account of pension and annuity funds taken into consideration in the computation of his nett income.

Per Cur. "We resolve to take into consideration the expenses the respondent "is put to in maintaining his children and also any taxes he has made "for liquidating his debts."

An order made by a Judge of the High Court at settlement of hearing a distant date for the hearing of a suit is not an order under Section 156 of the Civil Procedure Code and is appealable under Letters Patent, Section 15.

Quere, whether the Court has power to increase or diminish an allotment of alimony on the pendente lite on account of change of circumstances?

* Appeal No. 20 of 1890.
APPEAL against the order made by Mr. Justice Best on 8th August 1890 (1) dismissing a petition by a wife—petitioner in the one and respondent in the other of two cross suits (matrimonial)—praying on the ground of an increase in the husband’s income for an increase of the alimony pendente lite, fixed by an order of Mr. Justice Handley, made on 26th November 1889, and (2) adjourning the hearing of the suits till the first Monday in March 1891.

[89] The material circumstances of the case appear sufficiently for the purposes of this report from the judgment on appeal and from the following extract from the order appealed against:

"The law on the subject of alimony pendente lite is contained in section 36 of the Indian Divorce Act (No. IV of 1869) which provides that such alimony shall in no case exceed one-fifth of the husband’s average nett income for the three years next preceding the date of the order.

"At the hearing of the case before Mr. Justice Handley (by whom was passed the order of 26th November 1889), the nett income appears to have been accepted as the balance remaining after deducting all necessary expenses, not only income-tax and deductions made in the pay bill on account of annuity and other funds, but also (1) payments made for the maintenance and education of children, (2) payments made on account of debts, and (3) on policies of insurance. It is now contended on behalf of petitioner that these three latter items were improperly deducted.

"As to item No. 1, education and maintenance of children, the case of Harris v. Harris (1) is authority against the petitioner, for there the Court took into consideration the circumstance that the husband (who was also the respondent) had two children to educate and maintain; see also Otway v. Otway (2) and Hawkes v. Hawkes (3). As to item 2, payment of debts, Patterson v. Patterson (4) is authority for holding that if the husband is under obligations to pay off a debt by annual instalments, the amount of each instalment may be deducted from his annual income. As to item 3, payments made to maintain policies of insurance the authorities are against their deduction; see Harris v. Harris (1) and Patterson v. Patterson (4) referred to above. But I do not think it is open to me to reconsider this question of the income of the respondent upon which alimony has already been allotted,—an amount accepted as correct on behalf of the petitioner when the matter was before Mr. Justice Handley. Since Mr. Justice Handley’s order of 26th November last was passed, counter-petitioner has been directed to pay to petitioner’s attorneys Rs. 100 per mensem on account of her costs in the suit, and a further sum of Rs. 25 per mensem on account of her costs in the cross-suit in which she is first respondent.

"The increase of counter-petitioner’s pay is only about 360 rupees, of which these additional payments are nearly a moiety, and, as stated in Harris v. Harris (1), the circumstance that the husband will have to pay the expenses of the suits on both sides must also be considered in deciding the question as to the amount of alimony.

"Section 36 of the Divorce Act merely prescribes the maximum that can be awarded. It does not say that the wife is entitled to the full one-fifth.

---

(1) 1 Hagg Eccl. 351.
(2) 2 Phill. 109.
(3) 1 Hagg Eccl. 526.
(4) 33 L.J.P. & M. (N.S.) 36.
"As remarked by Sir John Nicholl in Hawkes v. Hawkes (1) though the wife during the pendency of the suit must be presumed not to be guilty (this is of course quoted with reference to the cross suit), yet she is not to live exactly in the same way as if she were exempt from any imputation. She is as it were under a cloud and should seek privacy and retirement. Whereas the husband must have a larger proportion (than one-fifth) if his rank and condition require more to support them."

"It is clear from the affidavit filed by the counter-petitioner that he is not in a position to pay alimony at a higher rate than what has already been awarded to the petitioner."

This order dismissed the petition for increase of alimony and adjourned the hearing of the cross-suits to the first Monday in March 1891.

The petitioner presented this appeal on the grounds that the nett income of this respondent had not been duly computed, that the amount allowed as alimony was insufficient, and that the adjournment was improper.

Mr. Wedderburn, for respondent, objected that no appeal lay as to the alimony under Divorce Act, Sections 45, 55, 62, and that the order of adjournment having been made under Civil Procedure Code, Section 156, was final, not being appealable under Section 588.

He added that in any view the appeal was in great part precluded by the order as to alimony made by Handley, J., in November, after a calculation of the respondent's debts and expenses against which order it was now too late to appeal. On [91] the increase of pay a review on fresh matter should have been applied for under Section 582.

(Collins, C. J.—New facts came in existence later.

Shephard, J.—The Divorce Act gives the Court power to modify the order.)

Most of this appeal is taken up with matters decided by Handley, J.; this appeal should therefore limited at any rate to the new matter, viz., increase of pay. There is no appeal against an order refusing to grant a review.

(Collins, C. J.—You admit jurisdiction to enquire into the increased income. So in effect the whole state of affairs must be considered here. We take the nett pay, Rs. 2,300, less certain deductions.)

The deductions were gone into before Handley, J. The actual figure there was taken by consent. The increase, the Judge says, is about Rs. 360.

The Advocate-General (Hon. Mr. Spring Branson), for appellant.

As to increase of alimony the whole matter must be opened up. The actual nett income must be arrived at. Best, J., had to consider what order was right at the date of his order.

(Collins, C. J., referred as to the maintainability of the appeal to Letters Patent, Section 15, and the Rules as to matrimonial suits and said—we can now hear you upon the adjournment, and, if necessary, we can allow you to appeal against Mr. Justice Handley's order, as you tell us negotiations have been going on.)

Mr. Wedderburn.—As to appeal, Civil Procedure Code prevails over Letters Patent. See Section 638 of the Code of Civil Procedure. Moreover there was consent to the order of Handley, J.

The Advocate-General (Hon. Mr. Spring Branson).—The figures only were admitted: they were not gone into.
The Advocate-General (Hon. Mr. Spring Branson) addressed the Court on the affidavits (the contents of which appear sufficiently for the purposes of this report from the judgment). He argued that the sum "net income" did not involve the deduction from the sum received by the husband as income of the costs of educating [92] the children, &c., and that the interests of the wife should not be sacrificed to those of the children.

Mr. Wedderburn.—Alimony rules in India are not the same as in England. In India there is no question of present income the only question is what was the net income.

(Collins, C.J.—What is net income by English practice and rules?)

The section says on what it shall be assessed, and it also provides for its continuance until final decree, Kelley v. Kelley and Saunders (1). Now the wife says "the income is increased, increase the allowance." As to permanent alimony there is a provision for variation see next section; but even in the English Books only one old case of variation of alimony pendente lite.

(Collins, C.J.—The English cases say we may always make deductions for expenses of education not must.

Shephard, J.—The English cases go on the assumption that the husband must continue to educate the children. Suppose they were to die? Moreover in allotting maintenance the English Courts make allowance for future expenses of education, &c.

Collins, C.J.—The bald words of the Indian Act are "net income" which means all he receives—he can spend it on his debts or children or what he wills.)

Installments of debts have been deducted, and that is right under the English cases—Patterson v. Patterson (2), no doubt however the husband is the richer by the payment of his debts. The matter is reduced to a mere question of discretion; how much is reasonable being not more than one-fifth of the income after these deductions in which it would be reasonable to take the costs into consideration.

(Collins, C.J.—None of the English Judges allows the costs to be taken into consideration in this respect.)

As to the costs the English rule is that costs of unsuccessful interlocutory applications should not be given against a husband whose interests are to be safe guarded too. See Harker v. Harker (3). Here mistakes may have arisen throughout as to [93] the way the section should be construed; but we do not plead res judicata and waive our technical objections.

The Advocate-General (Hon. Mr. Spring Branson) in reply, said the argument about debts might result in the wife paying half the debts and referred to Harmer v. Harmer (4), Hawkes v. Hawkes (5), Lewis v. Lewis (6) and Morrall v. Morrall (7).

(1) 3 B.L.R. App. 4. (2) 33 L.J.P. & M. 36. (3) L.J. 37, Mat. N.S. 12.
(7) L.R. 5 P.D. 93.
JUDGMENT.

This is an appeal against an order made by Best, J., dismissing an application for increase of alimony pendente lite and adjourning the final disposal of the suit until the first Monday in March 1891.

It was objected at the outset that no appeal lay against the latter part of the order, because it was an order made under the provision of the Civil Procedure Code, for which no appeal is provided; and a preliminary objection to be noticed hereafter was also taken to the maintenance of the appeal so far as the amount of the alimony was concerned.

With regard to the so-called adjournment of the suit, we are of opinion that the order is not one made under Section 156 of the Code, cited by the learned counsel. It was simply an order made at settlement of issues, fixing the day on which the final hearing was to take place and is only exceptional on account of the distance of the date to which the hearing was postponed. Although we think that an appeal does lie against such order as against every other order of a single Judge, except in matters where the right of appeal is curtailed by legislation subsequent to the Letters Patent, and, although we also think that this order was an unusual one, we do not think it necessary in this case to vary it; for we learn from Mr. Justice Best that the understanding on which the trial of the case was allowed to be postponed for so long a time was that in the meanwhile the parties should obtain such evidence as might be required by commission or otherwise and put themselves in a position to have the case disposed of on the day fixed.

As regards the appeal concerning the amount allowed for alimony, it was at first objected that, although Best, J., might have enhanced it in consequence of the increased pay to which the respondent has recently, and since the passing of the original order of the 26th November 1889, become entitled, he could not otherwise modify the order passed on that day by Handley, J. It was also contended that the original order of the 26th November was practically an order passed by consent, and that anyhow the time for appealing against it had long since passed away. The Advocate-General, who appeared for the petitioner, explained, however, that the figures were not examined, as it was then expected that the case would be amicably settled. After some discussion, however, these objections were withdrawn, and Mr. Wedderburn consented to have the whole question of the amount of alimony inquired into de novo and in the peculiar circumstances of the case we allowed that course to be adopted.

The order of Handley, J., by which the sum of Rs. 135 a month was made payable to the petitioner, was framed upon the supposition that, in calculating the net income of a husband as required by Section 36 of the Divorce Act, there should be deducted, from his monthly receipts, all sums expended on his children or in liquidation of his debts.

The average salary, the only source of the respondent's income, for the last three years before the date of Handley, J.'s order was about Rs. 1,600 per annum after deducting income-tax and the contribution to pension and annuity fund. This sum reduced by the amounts claimed to be deducted on account of the respondent's children's and debts, becomes a sum of Rs. 610 a month only, and it is this smaller sum which has been taken to represent the average net income of the respondent for the purpose of charging alimony against him. In our opinion it is an entire
mistake to suppose that the phrase “net income” in the Act has any other
meaning than that which it ordinarily bears. The cases cited, while they
show that in allotting alimony, allowance may be made for children
that have to be maintained by the husband or instalments of debts that
have to be paid, have no bearing on the question of what constitutes a
man’s “net income.” Ordinarily with an official drawing a fixed salary
and having no other means, that expression would be taken to mean the
amount of his salary minus deductions on account of income-tax, charges
for a pension fund, and the like; and, in our judgment, that is the sense
in which net income is to be understood in dealing with a case under the
Divorce Act.

[95] It is then contended that in allotting alimony on the average
amount of net income, viz., Rs. 1,600, the respondent is at least entitled to
have the charges of maintenance of his children and the monthly instalments
of debts payable by him taken into consideration. On the other hand, it
is contended that inasmuch as the respondent’s salary has increased since
the date of the original order, that increase of salary ought to be taken into
consideration. We do not think it is by any means clear that the Court
has power to increase or diminish an allotment of alimony made pendente
lite on account of change of circumstances; and no case has been cited in
which such power has been exercised in favour of the wife. But, however
that may be, we do not in the present case feel justified in taking into
account any income other than that which was received during the three
years next before the making of the original application. The average
net income from that period being Rs. 1,600, the maximum alimony which
under the Act we could allot would be about Rs. 330. To deduct the full
amount claimed by the respondent on account of the children and on
account of the debts and then to calculate the one-fifth on the residue
would leave the petitioner a sum plainly insufficient to maintain her in
the decent comfort to which she is entitled. Granting that enough must
be left to the husband to provide, among other things, for the maintenance
of his children, we think that the sum required for such maintenance must
be calculated with reference to the means of the parties and, although the
three children aged, respectively, 14, 11 and 8 in the present case appear to
have cost at the rate of £120 each per annum, we think that that expenditure
is, under the circumstances, excessive. And with regard to the debts said to
be payable by instalments, we observe that the creditor is the respondent’s
step-father and that he has security for his debt. We have, on the other
hand, to consider what sum is necessary to keep a lady in the petitioner’s
position in reasonable comfort. It seems to be admitted, and, in our
minds, there is no doubt, that the least sum on which such a person having
no other means can live in Madras, is between Rs. 200 and Rs. 250 a
month. And it is to be observed that Mr. Wedderburn stated at the
hearing that the respondent was willing to allow his wife Rs. 222
a month. Although we have power to grant as much as one-fifth of
the respondent’s net income, we resolve to take into consideration the
expenses the respondent is put to in maintaining his [96] children and also any arrangement he may have made for liquidating his
debts. It has been contended, on behalf of the respondent, that any
increase of the alimony should not refer back to the date of the original
order and we think there is force in this contention.

Taking all the circumstances into consideration, we order that in
substitution for the order of Handley, J., the respondent do pay to Messrs.
Barclay and Morgan, the Solicitors of the appellant, the sum of Rs. 240
per month, the first payment to be due on the 5th August 1890 and to be made within seven days from this date and the subsequent payments to be made on the 5th of each succeeding month. It has been alleged, on behalf of the petitioner, that the respondent improperly made a deduction from the sum he was ordered to pay as alimony. Although strictly speaking he was not justified in making such deduction, yet, as it appears that it was only made to pay a bill, which otherwise the appellant would have had to pay, we decline to make any order on this part of the case.

[Their Lordships next proceeded to consider the question of the costs incurred in the matter and ordered that they be paid by the respondent.]

Barclay and Morgan, attorneys for appellant.
Wilson and King, attorneys for respondent.

14 M. 96.

APPELLATE CIVIL

Before Mr. Justice Muttusami Ayyar and Mr. Justice Weir.

ALIMA (Defendant), Appellant v. KUTTI (Plaintiff), Respondent.*

[23rd October, 1890.]

Limitation Act—Act XV of 1877, Schedule II, Articles 142, 144—Adverse possession—Burden of proof.

The plaintiff, who was the sister of the defendant, sued in 1888 to recover from him a moiety of a paramba purchased by them jointly in 1877. In 1878 the plaintiff went to live elsewhere, but, from time to time, returned and spent a few days with the defendant on the land in suit. The defendant pleaded limitation:

[97] Held, that Limitation Act, Schedule II, Article 144, applies to the suit, and the burden of proving adverse possession lay on the defendant.

[F., 2 N.L.R. 32 (33); R., 105 P.L.R. 1901 = 66 P.R. 1901.]

SECOND appeal against the decree of V. P. deRozario, Subordinate Judge of South Malabar, in appeal suit No. 449 of 1889, reversing the decree of P. J. Itteyereh, District Munsif of Kutnad, in original suit No. 653 of 1888.

Suit to recover possession of a moiety of certain paramba.

The plaintiff and defendant purchased the paramba in question jointly in 1877. In 1878 the plaintiff went to live elsewhere, but it appeared that she occasionally returned and spent a few days on the land in question with the defendant.

The District Munsif dismissed the suit, but his decree was reversed on appeal by the Subordinate Judge.

The defendant preferred this second appeal.

Raman Menon, for appellant.
Sankara Menon, for respondent.

JUDGMENT.

The appellant is respondent’s sister, and in 1859 they jointly purchased the paramba in dispute. It is found that the exclusive title set up by the appellant has not been proved. Though the appellant has been in possession from 1878 when the respondent went to live in Ponnani, yet the Subordinate Judge finds that the latter has been frequently visiting the house on the paramba for ceremonies and festivals. Upon these
facts we agree with the Subordinate Judge in thinking that Article 142 is not applicable, but that Article 144 applies. The onus of proving adverse possession for upwards of twelve years was, therefore, on the appellant, and, as she failed to do so, the Lower Appellate Court was right in decreeing the claim. It was also held in Sayad Nyamulal v. Nana (1) and Faki Abdulla v. Babaji Gumaji (2) that it was for the defendant to prove adverse possession for twelve years or more when Article 144 applied to the suit.

We dismiss this second appeal with costs.

14 M. 98.

[98] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Best.

SUBBARAYA (Defendant No. 4), Appellant v. NATARAJA AND OTHERS (Plaintiffs Nos. 1 to 7), Respondents.*
[26th September, 1890.]

Mirasi rights— Kasavargam tenant—Ejection suit—Notice to quit.

The mirasiders of a village in the Tanjore District sued to recover a manai which had been put into the possession of the ancestors of defendant No. 8, who were village blacksmiths, as kasavargam tenants. Defendant No. 8 had left the village and sold the land as if it were his ancestral property to others of the defendants, who were now in occupation.

Held, that the plaintiffs were entitled to recover the land without proof of notice to quit to the occupants.

[R., 22 M.L.J. 1 (3) = 10 M.L.T. 341.]

SECOND appeal against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No. 613 of 1888, reversing the decree of S. Dorasami Ayyangar, District Munsif of Valangiman, in original suit No. 103 of 1888.

Suit by the plaintiffs as mirasiders of a certain village in the Tanjore District to recover possession of a manai, which had been put into the possession of the ancestors of defendant No. 8, who were the village blacksmiths. In the paimash account they were described as kasavargam tenants. Defendant No. 8, who was not a blacksmith, left the village; but claiming the land in question as his ancestral property, he sold it to the other defendants, who set up title in this suit under his conveyance.

The District Munsif dismissed the suit, but his decree was reversed on appeal by the Subordinate Judge, who passed a decree for possession.

Defendant No. 4 preferred this second appeal.

Pattabhirama Ayyar, for appellant.

Rama Rau, for respondents.

JUDGMENT.

Appellant's own Exhibit I, the paimash account describes Kaliathan's and his father's tenure as kasavargam, [99] which, as appears from Wilson's Glossary, gives no right to the land on which the house stands; and, as stated by the Sudder Udalut in Calleyana Ramien v. Soobramaney Chetty (3)

* Second Appeal No. 1642 of 1889.

(1) 13 B. 424. (2) 14 B. 458. (3) Sudder Decisions of (1858) 145.

70
means a tenant liable to be ejected by the mirasidars. The Lower Appellate Court has also found on the oral evidence that Kaliathan's family merely held as licensees of the mirasidars on condition of their doing blacksmiths' work.

As to notice to quit, we agree with the Lower Courts in finding that the appellant was not entitled to the same, he being as stated by himself, not a tenant, but a purchaser from the 8th defendant.

The appeal fails and is dismissed with costs.

14 M. 99.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Weir.

LINGAYYA AND ANOTHER (Defendants and Judgment-debtors),
Appellants v. NARASIMA (Plaintiff and Decree-holder),
Respondent.* [23rd October, 1890.]

Civil Procedure Code, Sections 2, 244, 25a, 589—Appeal against on order under Section 258.

Simile: An appeal lies against an order dismissing an application made under Civil Procedure Code, Section 258, that the adjustment of a decree be recorded as certified.

[F., 18 M. 26 (27); Appr., 16 A. 129 (180); 5 M.L.J. 140 (142); R., 7 C.W.N. 172 (174).]

SECOND appeal against the order of G. T. Mackenzie, Acting District Judge of Krishna, in appeal suit No. 344 of 1888, affirming the order of V. Suryanarayana, District Munsiff of Guntur, dated 12th March 1888, passed on civil miscellaneous petition No. 715 of 1887, in original suit No. 370 of 1887.

Original suit No. 370 of 1887 was filed on 21st October 1887 and came on for hearing on the 8th November 1887; the defendants did not appear and judgment was given for the plaintiff. On the 30th November 1887, the first and second defendants filed civil miscellaneous petition No. 715 of 1887, which stated that the [100] plaintiff had come to an agreement about the decree debt on November 10 at their village, Timmappuran, that the necessary documents had been executed at Narasaraopet on November 11 and had been registered on November 12, the cash, Rs. 649, being paid to plaintiff in presence of the Sub-Registrar, and prayed that the District Munsiff should record that the decree against them in suit No. 370 of 1887 had been satisfied. Plaintiff filed a counterpetition in which he denied the agreement and execution of the document. The District Munsiff held an enquiry into the matter and came to the conclusion that the defendants' story was false. Their petition was accordingly dismissed with costs and the Munsiff's order was affirmed on appeal by the District Judge. The judgment-debtors preferred this second appeal.

Anandacharlu, for appellants.
The Advocate-General (Hon. Mr. Spring Branson), for respondent.

JUDGMENT

A preliminary objection is taken that no second appeal and no appeal lies.

* Second Appeal No. 231 of 1899.
The order, which it is sought to appeal against, was made under Section 258, Civil Procedure Code, and no appeal is allowed against such orders under Section 588, Civil Procedure Code, unless therefore the order is a decree within the meaning of the definition in Section 2 of the Civil Procedure Code an appeal will not lie. The definition in Section 2 includes orders made under Section 244, Civil Procedure Code, but these orders must be orders, it is said, made in execution of a decree, that is to say, after application has been made to a Court in the execution department to enforce a decree.

Here it is admitted no application had been made for execution to the Court, the decree having been passed on the 8th November and the application of the defendants, out of which the present proceedings have arisen having been made on the 30th November following. We are not prepared to hold that the objection is a good one. The language of Section 244, clause (c), viz., any other question relating to the satisfaction of a decree, appears to us to be probably wide enough to embrace such a proceeding as that arising on an application to record satisfaction, even where no application has been made for execution.

A petition by an execution creditor for execution is not, in our opinion, a necessary preliminary to an order falling within the terms of Section 244, Civil Procedure Code.

[101] It is not, however, necessary to determine the question, as on the merits we consider the appeal cannot be sustained. The only objection urged on the merits is that the District Judge did not record an express finding on the sale-deed, which formed part of the consideration for the alleged satisfaction.

The District Judge has not, however, we consider, overlooked this item. The arguments and reasoning employed by him apply to the whole transaction, of which the sale-deed formed an item and he was clearly satisfied to concur in the District Munsi's conclusion that the whole transaction was fraudulent.

On the merits the appeal fails and is dismissed with costs.

14 M. 101.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Best.

ANANTAN (Defendant No. 1), Appellant v. SANKARAN AND OTHERS (Plaintiffs), Respondents.* [23rd September, 1890.]

Malabar law — Suit by junior members of a tarwad — Suit for declaration of invalidity of kanom — Limitation.

The junior members of a Malabar tarwad brought a suit against their karnavam and senior anandranan and certain persons claiming under a kanom granted by the former for a declaration that the kanom was invalid and for possession of the land demised with mesne profits. The suit was filed nearly twelve years after the execution of the kanom:

Held, (1) that the suit was maintainable by the plaintiffs;
(2) that the suit was not barred by limitation.


* Second Appeal No. 2 of 1890.
SECOND appeal against the decree of W. Dumergoo, Acting District Judge of South Malabar, in appeal suit No. 1 of 1889, affirming the decree of V. Raman Menon, District Munsif of Angadiyuram, in original suit No. 191 of 1888.

Suit brought on 3rd July 1888 by the junior members of a Malabar tarwad for a declaration that a kanom granted by defendant No. 11 to defendant No. 1 on 1st July 1876 was invalid as against the tarwad and for possession of the land demised and [102] for mesne profits accrued thereon. Defendant No. 10, the karnavan of the tarwad, had appointed defendant No. 11, who was the senior amanu, to be the manager of the tarwad under a karar. The other defendants claimed under defendant No. 1.

The District Munsif passed a decree as prayed, which was affirmed on appeal by the District Judge.

Defendant No. 1 preferred this second appeal.

Govinda Menon, for appellant.

Sankaran Nayar, for respondents.

JUDGMENT.

It is contended, in the first instance, that the suit brought by the junior members of a tarwad is not maintainable. The karnavan is included as a defendant in the suit, and, as he has failed to sue till the period of twelve years has almost expired, we are of opinion that the suit by the junior members cannot be validly objected to.

The other question is whether the suit is time-barred?

Applying the principle of the decision of this Court in Pachamuthu v. Chinnappan (1) and the decision of the Calcutta High Court in Rughubar Dyal Sahu v. Bhikya Lal Misser (2), we find the Lower Appellate Court is right in holding the suit to be not time-barred.

The lower Courts have found, as a fact, that the money was not advanced for tarwad necessity.

This second appeal fails, therefore, and is dismissed with costs.

1890 SEP. 23.
APPELATE CIVIL.

14 M. 101.

[103] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

NATESA AND OTHERS (Defendants Nos. 1 to 5), Appellants in Appeal No. 108 of 1888 and Respondents in Appeal No. 159 of 1888 v. GANAPATI AND OTHERS (Plaintiffs), Respondents in Appeal No. 108 of 1888 and Appellants in Appeal No. 159 of 1888. *

[24th, 27th, 29th and 30th January and 17th March, 1890.]

Civil Procedure Code, Section 31 — Misjoinder of causes of action — Religious Endowments Act — Act XX of 1883, Sections 3, 4 — Hereditary trusteeship — Suspension from trusteeship and right of pujat Maintenance in office in terms.

Suit by certain Dikshadara or hereditary trustees of the Chitamaram temple against others of the Dikshadara praying for their removal from office and for a money decree alleging that they had been jointly guilty of misconduct in respect of temple property in their custody and had obstructed the repair of certain shrines. The District Judge passed a decree suspending some of the defendants

* Appeals Nos. 108 and 159 of 1888.

(1) 10 M. 218.
(2) 12 C. 69.
from the office of trustee and the right of puja for a period which was not defined; he also passed a decree for the money claimed:

_Held_ (1) that the suit was not barred by misjoinder of causes of action;
(2) that the operation of Act XX of 1863 was not excluded by the admission that the trusteeship was hereditary in certain families;
(3) that the District Judge had jurisdiction under Act XX of 1863 to deprive the defendants of the right of puja.

_Held_ further, on the evidence, that the defendants merited the punishment which had been inflicted on them.

Decreed that the suspension of the defendants be withdrawn on the terms that they file an undertaking with two sureties that they would restore certain property belonging to the temple now missing, and that they would duly conform to the decision of the majority of Dikshadars as to the management of temple affairs, &c.

[F., 94 C. 587.]

APPEALS against the decree of E. C. Johnson, Acting District Judge of South Arcot, in original suit No. 7 of 1887.

The facts necessary for the purposes of this report appear from the following Judgments.

Ramachandran Rou Saheb and Sadagopacharyar, for appellants in Appeal No. 108 of 1888.

Subramanya Ayyar, Bhashyam Ayyangar and Desika Charyar, for respondents.

[104] Bhashyam Ayyangar and Desika Charyar, for appellants in Appeal No. 159 of 1888.

Sadagopacharyar, for respondents.

JUDGMENTS.

In Appeal No. 108.—The respondents brought this suit to remove the appellants and three others from the offices of dharma kastas and worshippers in the temple of Saba Nayakar at Chitambaram in South Arcot. Both parties to this appeal belong to a class of Smarta Brahmins called Dikshadars who, from time immemorial, have held both offices in that institution which is one of considerable antiquity and known in Southern India. About 250 families of Dikshadars reside at Chitambaram, and the net income of the temple, which is derived from general offerings, is their recognized means of livelihood. According to their usage every Dikshadar becomes entitled, on marriage, to take part in the management, to do puja or perform service in the minor shrines, and to share in the emoluments of the institution. He is, however, considered not qualified for performing service in the principal shrines, until he is twenty-five years old and initiated in a ceremony called Diksha. There are five principal shrines, and they are called (1) Chit Saba, (2) Kanaka Saba, (3) Deva Saba, (4) Amman Covil, and (5) Mulastanam. Of these, the first is the seat of the presiding deity, named Saba Nayakar or Natesar, and unless service is first held in it, it can be held, according to custom, in no other shrine. The temple being ancient, the necessity for putting it in repair was felt by the Dikshadars in 1877 and a wealthy class of merchants called Nattuottal Chetties, residing in the district of Madura, regarded its restoration as a great act of pious charity. A deputation of the former then waited upon the latter and induced them to undertake the repair. Between 1877 and 1881, the Chetties raised between three and four lakhs of rupees, and some of their leading men visited Chitambaram in 1881. Thereupon, general meetings of Dikshadars were held and an
agreement called sumakiya was executed in July 1881. It authorized the
Chettiars, inter alia, to proceed with the repair and specified the shrines
included in the scheme of repairs. The merchants deputed one of them,
named Chitambara Chetty, to carry the scheme into execution, and he
commenced the repair at once. The Chetty and the Dikshadars acted
in harmony till June 1882, when a minor shrine in the temple called
the Pillayar Covil had to be dismantled, in order that it might be
rebuilt. For this purpose, it was necessary to perform, according
to the usage of the temple, a ceremony called Vala Stapanam and an aus-
picious day was fixed for its performance. A leading Dik-hadar, named
Sabanatesa and eight or ten others objected to the day fixed as not being
sufficiently auspicious and their objections were discussed and overruled
at a general meeting of the Dikshadars. The question, whether the opinion
of a majority of Dikshadars present at a general meeting, ought to bind
the minority or whether all the Dikshadars should concur, before any
valid act could be done in connection with the temple, was then brought
into controversy. Despite the remonstrance of the minority, the Chetty
and the majority of Dikshadars carried out the ceremony; but the result
was a disturbance which the police had to interfere to put down. Hence-
forward, there was a split among Dikshadars, they divided into two fac-
tions, and the minor faction gradually gained strength and development.
There are conflicting versions as to the real motive for this party quarrel,
but, whether it was the Chetty’s refusal to give presents to the minor
faction, whilst he gave them to the major faction or a religious scruple as
mentioned above, the fact is clear that party strife began at that time and
gradually became so acrimonious as often to threaten the public peace
and impair the efficient management of the affairs of the temple.

For nearly thirty years previous to 1831, the right of collecting the
offerings made by worshippers in the temple, used to be leased out to the
highest bidder among Dikshadars at a general meeting convened in the
temple once in twenty days and held before a sacred lamp, brought from
the Kanaka Saba by a pandaram who held the office of Podumanishiyian
or common friend. The proceeds of the lease were first applied to the
payment of temple servants and to the expenses of necessary repairs and
temple festivals and the residue was then divided among all the Dikshadars.
Shortly after the factions came into existence, this practice was objected
to by the minor faction and first held in abeyance by mutual consent
pending the adjustment of their disputes, the "morai-karars" or turn-
holders among the Dikshadars taking the offerings made during their re-
spective turns. After the prior practice had remained in abeyance for some
time, it was felt that funds were required for some temple festival, and it
was then agreed between the two parties that the system of leasing was
[106] to be resumed for eleven days, and that, on the expiration of that
period, it was again to be held in abeyance. But, when that period ex-
pired, the major faction attempted to revive the old practice and the minor
faction resisted the attempt. The result was that, when the Podu-
manishiyian or common friend proceeded, according to usage, to fetch the
sacred lamp from the shrine, called Kanaka Saba, a riot ensued, and the
sixth defendant stabbed with a knife some of the members of the major
faction in June 1882 and caused them grievous hurt. This resort to
violence checked any further attempt to restore the previous practice which
continues yet to be held in abeyance. Another matter, which it is neces-
sary to mention for the purposes of this appeal in connection with the
conduct of the minor faction, is the systematic obstruction which it offered
1890 MARCH 17.

APPELLATE CIVIL.

14 M. 103.

to the repair by the Chetty of the Chit Saba and Kanaka Saba and Tirumalaivasati Mantapam. The contention was that such repair was incompatible with the traditions of the temple, that the edifices mentioned above were originally built by divine agency, that they should not be desecrated by repair, and that such desecration would materially lower the prestige of the institution for its sacred character in public estimation. In support of this contention, the minor faction relied on the plea that no act could validly be done in connection with the temple in question, unless all the Dikshadars concurred in it and that the voice of the majority ought not to prevail. It was also contended for it that those shrines needed no repair and that they were exempted from the scheme of repairs sanctioned by the agreement of July 1881. The major faction denied every one of these allegations and insisted that the scheme of repairs sanctioned by the agreement of 1881 should be carried out in its entirety. This was the contention between the two parties from 1884 to November 1888, until the District Court in the first instance and the High Court on appeal disallowed the several objections of the minor faction and decided in favour of the major faction in original suit No. 16 of 1885 and in appeal suit No. 53 of 1886. The misfeasances imputed to the defendants in connection with the question of repair are: (1) the institution of original suit No. 16 of 1885 otherwise than bona fide, (2) the closing of the principal shrines, viz., Chit Saba, Deva Saba and Amman Covil from the 29th June to the 4th July 1886, and (3) the obtaining of the agreement (Exhibit VI) on the 5th July 1886, under pressure or coercion, whereby the [107] custody of the keys of the principal shrines was transferred contrary to usage from the turn-holders to four persons who belonged to the minor faction.

Another result of the party quarrel was the loss of temple jewels and other articles of considerable value which was imputed to the misconduct of some of the members of the minor faction in 1886. After this seven members of the major faction brought the present suit against eight members of the minor faction under Act XX of 1863 with the sanction of the District Court and prayed for their removal from the offices of dharmakartas and worshippers for the acts mentioned above and other acts of misfeasance. The defendants denied that they were guilty of any misfeasance and that they were responsible for the loss of temple property which, they further alleged, was exaggerated. It was also contended for them that the suit was bad for misjoinder of causes of action and that it could not be maintained under Act XX of 1863. The Judge disallowed the two preliminary objections and found that the first five defendants wilfully obstructed the necessary repair of the temple, closed the three principal shrines of Chit Saba, Deva Saba, and Amman Covil from the 29th June to the 4th July 1886 and improperly obtained document VI, whereby the custody of keys of the principal shrines was changed to the prejudice and contrary to the usage of the temple. He also found that the loss of temple property to the extent of Rs. 11,800 was imputable to them and decreed that the first five defendants be suspended from their trusteeship and all right of puja and emoluments connected therewith and from all share in the management of the temple, until such time as they may succeed in showing to the satisfaction of the Court that such suspension may be withdrawn without prejudice to the interests of the institution. He further directed that they be held jointly and severally liable for the sum of Rs. 11,800 on account of the temple property missing. As regards the other defendants, he dismissed the suit as against them and directed
that their costs be paid out of the temple funds. The seventh defendant
died afterwards and the first five defendants appeal from the decree so far
as it is against them, whilst the plaintiffs' appeal from it so far as it
exonereates the sixth and eighth defendants from liability for suspen-
sion or dismissal.

As regards the defendants' appeal (No. 108 of 1888), the two prelimi-
ary objections taken in the Court below are again pressed [108] upon
us, but we are of opinion that the Judge was right in disallowing them. The
grounds of decision against the appellants are that they jointly obstructed
the execution of necessary repairs to the temple and that they were guilty
of negligence or misconduct in respect of temple property in their joint
custody and both those grounds concern all the appellants in common.
The plea of misjoinder of causes of action cannot, therefore, be supported.
It is true that the Judge has found that appellants Nos. 2 to 4 closed the
temple and that appellants Nos. 1 and 5 improperly obtained Exhibit VI,
but he has also found that both those acts were done on behalf of the
minor faction and in furtherance of its common object, viz., that of
obstructing the repair of the Chit Saha and Kanaka Saha, etc. It is then
argued for the appellants that, according to the plaint as originally framed,
the suit was bad for misjoinder and that the Judge erred in entering on
the merits without dismissing it at once. But we observe that the mis-
jooneances imputed to the defendants, consisted of acts alleged to have been
done on behalf of the minor faction and in pursuance of its common
policy. Even if the frame of the plaint was defective as alleged, the pro-
cedure followed by the Judge is in accordance with Section 31 of the Code
of Civil Procedure which authorizes him to deal with the matter in con-
troversy so far as regards the liability of the appellants.

As for the objection that Act XX of 1863 is not applicable to this suit,
the contention in the Court below was that the temple was not an
institution falling either under Section 3 or 4 of that enactment, but the
Judge held that the Act took the place of Regulation VII of 1817 and
that the temple in dispute being endowed both with land and jewels, the
trustees were liable to be dealt with under Section 14. It is now urged
that the temple is the Dikshadars' private property and that its endow-
ments ought to be treated as those of a private temple but this is
apparently an afterthought. The appellants admitted in their written
statement, paragraph 3, that they were Adinam Dharmakartas or
hereditary trustees of the temple and their present contention is at
variance with their own averment. It is not denied that the institu-
tion has been used as a place of public worship from time immemorial
but it is said that the public worship in it by permission of the Dikshad-
dars. Though it is denied that the temple has any endowment in
lands, the 86 inam pattas marked as Exhibit M series amply sup-
port the finding of the Judge. There is not a particle of evidence in
support of the assertion that this ancient temple is the private pro-
erty of the Dikshadars, and the occupation of some of the rooms in the
temple by the Dikshadars and the inclusion of such rooms in the
partition deeds of their families is referable to their status as hereditary
dharmakartas, and to an arrangement made between them for mutual
convenience whilst in the discharge of their duty as Dharmakartas,
worshippers and custodians of the temple and its property.

Turning to the merits, three questions arise for decision, viz.,
(1) whether the misjooneances, for which the appellants are suspended
from office, have been sufficiently proved, and (2), if so, whether the Judge
was entitled to deprive them of their right of puja under Act XX of 1863, and (3) whether the finding as to the description and value of temple property lost is supported by the evidence in the case.

As regards the first question, it was finally decided in original suit No. 16 of 1885 between the two factions that the minor faction was not entitled to object to the execution of the repair of the Chit Saba and Kanaka Saba and Tirumalaipati Mantapam. In that suit, six principal questions were raised for decision. The first related to the status of the Dikshadars in the temple and the final decision in regard to it was that it was sufficient; for the purposes of that suit to hold that the Dikshadars were the trustees and managers of the temple and were collectively the governing body. The second question was whether Dikshadars of the minor faction originally gave permission to the Chetti to repair Chit Saba, Kanaka Saba and Tirumalaipati Mantapam and whether such permission was validly revoked. It was decided that they did give permission and that it was not since validly revoked. The next three questions were whether the repair of those edifices was contrary to the regulations and usage of the institution, whether the execution of such repair would injuriously affect their sacred character and whether the repair was necessary or called for. It was held that there was necessity for the repair and that the repair of the particular edifices in question was not contrary to Hindu religion, provided that a necessity existed for the same. Another question raised for decision was whether unanimity among Dikshadars was necessary, according to the usage of the institution, for the carrying out of any act in connection with the temple, and, if so, whether such usage was valid. It was held that their own rules provided that the majority should decide. In accounting for the contention that unanimity was indispensable, the District Judge referred to the practice of religious councils in which resolutions are said to be passed unanimously, because it is the recognized duty of the minority to give way to the majority and suggested that such was probably the case among Dikshadars and that the procedure was intended to give weight to their resolutions among the general public and not to enable the minority to ignore the voice of the majority. We take it then to have been judicially determined that the minor faction was acting legally and contrary to the usage of the institution both in treating the decision of the majority at a general meeting duly convened as not binding upon those who dissented from it, and in opposing the repair of the Chit Saba, Kanaka Saba and Tirumalaipati Mantapam as inconsistent with the usage of the temple and its traditions. This being so, it follows that the acts done by them, if done for the purpose of obstructing the repair, were misfeasances within the meaning of Section 14 of Act XX of 1863. Of the three acts referred to by the Judge, the first was the institution of original suit No. 16 of 1885, and it is urged, with reference to it, that the minor faction ought not to be blamed for seeking to vindicate what it considered, though erroneously, to be its legal right. The Judge held that the suit was not instituted bona fide and we concur in his opinion for the reasons mentioned by him; and we may add that the learned Judges who heard appeal suit No. 53 of 1886, observed that the motive, which influenced the action of the minor faction, was personal and not creditable.

The second act which the Judge considers, was done in order to obstruct the repair, was that of closing three of the principal shrines on the 29th June 1886 and refusing to open them till 5th July next. Such an interruption of public worship is obviously a serious breach of duty on the
part of trustees of a public temple and is prejudicial to its interest. That
the appellants Nos. 2, 3 and 4 did close the temple, is not disputed. Nor
is it denied that they did so on the day prior to that, on which one of the
important annual festival was to commence, and this is an aggravation
of their misconduct. But it is urged on their behalf that [111] there
was a dispute among some of the Dikshadars about the turn, in which
Puja was to be performed and that the temple was closed for fear that the
major faction might, otherwise, take forcible possession of the shrines.
Judging, however, of the appellants’ conduct in the light thrown by docu-
ment VI, we consider that the Judge was right in finding that the shrines
were closed for the purpose of obstructing the repair and securing to the
minor faction possession of the keys of the principal shrines as a means
of rendering such obstruction effectual. The provisions in document VI
as to the turn are referable to the temporary interruption, and to the
festival which was likely to enhance the value of offerings.

The third act of misfeasance, which the Judge considered to be proved,
was the obtaining of Exhibit VI under coercion. It is argued before us
that the agreement was executed by five members of each faction as represen-
tatives of that faction in provisional adjustment of the dispute between
the two factions, and that the fact that the Thalshid and Inspector
of Police having assisted in bringing about the amicable adjustment, shows
that no coercion could have been used. We do not consider that any
physical restraint was used, for the major faction was numerically stronger
than the minor and it is in evidence that the Thalshid and Inspector
of Police advised the parties to temporarily arrange the matters in dispute
between them. But we are of opinion that the document was executed
under pressure put on the minor faction by persistently refusing to open
the temple at the time of the annual festival and thereby injuring its
prestige. The festival time was passing away and the interference of the
Magistracy and of the Police raises a presumption that there was probably
public excitement owing to the stoppage of public worship at an import-
ant juncture. Again, the agreement was on its face beneficial to the minor
faction and it secured, thenceforward, possession of the keys of three of
the principal shrines to four members of that faction. The only
consideration in its support, to which the appellants’ pleader can refer
us, is the opening of the temple and it cannot be accepted as a legal con-
sideration, as the act of closing a public temple and interrupting public
worship, is in itself illegal. Again, the provision as to the possession of
keys by four members of a faction is an innovation upon the usage of the
institution and as such bad law. The [112] subsequent conduct of the
major faction in repudiating the document as obtained under pressure and
denying to register it raises a presumption in favour of its contention.
Though the oral evidence on the point is conflicting, the probabilities of
the case support the evidence for the major faction and justify the con-
clusion that its members consented to execute the agreement under pres-
sure put upon them by the minor faction. However this may be, the
agreement is clearly bad as being contrary to the usage of the temple.
According to it, the daily puja or the regular service is performed in
rotations of twenty days by a body of twenty Dikshadars and these are
again subdivided into batches of four, each batch serving by turn in one
of the five shrines in the temple for four days and each member of that
batch being entitled to serve for one of the four days. The twenty Diksha-
dars who are on duty for twenty days at a time, are called morai-karars
or turn-holders and there are thus always twenty morai-karars for the
whole temple, four special morai-karars for each of the five shrines for every four days, and one special morai-karar for each day in each shrine. According to custom, the morai-karars had charge of the keys of their respective shrines, during their turn and when each set of four special morai-karars passed from shrine to shrine, the custody of keys of the shrine also changed hands; and the jewels and valuable articles in each shrine were examined once in four days. The change introduced by Exhibit VI, in regard to the custody of keys was a departure from the usage of the temple and injurious to its interests, so far as it put a stop to the necessity of seeing once in four days that the property in each shrine was safe. We see no reason to doubt the correctness of the conclusion, at which the Judge has arrived as to this part of the case.

Further, the document purports to have operation pending the settlement of the disputes between the two factions by a civil suit. Not only did the decisions in appeal suit No. 53 of 1886 set at rest the matters in controversy between them regarding the repair and the legal effect of the decision of the majority, but there is also evidence to show that the civil suit in contemplation was the one then pending on appeal in the High Court.

As to the loss of temple property, it consists partly of property kept for ordinary use in the several shrines and partly of property in the Treasury room which is usually called Astantram or Bookusham. The Treasury room is situated in the Deva Saba and no access can be had to it except through that shrine. It has also a smaller room inside and the outer door is secured by double locks and keys, whilst the door of the inner room is also usually locked. As valuable property belonging to the temple and not required for ordinary use is secured in it, it is not opened according to custom except in the presence of the general body of Dikshadars. The shrine of Deva Saba has also an outer door which is locked at night when it is not kept open for public worship. According to custom, of the two keys of the outer door of the Bookusham, one was kept in the shrine called Chit Saba and the other in Amman Covel, and the key of the inner room was kept in the shrine called Mulastanam. From the date of Exhibit VI, viz., 4th July 1886, the keys of three of the principal shrines, viz., Chit Saba, Deva Saba and Amman Covel, remained in the custody of the four persons mentioned in that document, viz., appellants 2, 3 and 4 and another. The respondents' case was that, from 4th July, 1886, the minor faction, especially, the four persons named in Exhibit VI, had the entire control of the three shrines and of the Astantram and that the appellants were responsible for the missing jewels and articles. It was not denied that appellants Nos. 2 to 4 were responsible for property which was in the three shrines of Chit Saba, Deva Saba and Amman Covel on 4th July 1886 and which was afterwards lost, but they repudiated all responsibility for any other property and for the property kept in the Treasury room. They also contended that the respondent tampered with some of the locks of the Treasury room and that some of the members of the major faction used to sleep in the Deva Saba. But the Judge found that property valued about Rs. 11,000 and odd was proved to be missing, that it was lost between 4th July 1886 and sometime in December of the same year, that the appellants Nos. 2 to 4 might have had access to the Treasury room during that period, that the respondents could not have had access to it, that the imputations made against them were not well-founded and that appellants Nos. 2 to 4, as persons in charge of the shrines under Exhibit VI, and
appellants Nos. 1 and 5 as their guarantors, were responsible for
the missing property. It is argued before us that the appellants had no
control over the property in the Treasury room, that the Judge was in
error in holding them responsible for any part of the property missing in
it and that the finding as to the extent [144] and value of property lost,
is not warranted by the evidence on record.

We shall first deal with the grounds, on which the Judge considered
the appellants liable. It is the case of neither party that the loss was due
either to robbery or house-breaking committed by strangers. There was
no such complaint before suit. From July 1886, the shrines, in which the
keys of the outer door of the Treasury room were usually kept, were ad-
mittedly in the possession and under the control of the four persons,
named in Exhibit VI, including appellants Nos. 2, 3 and 4. This suggests
the inference that, if the keys were in the shrines at the date of Exhibit VI,
they continued to remain under their control. As to one of them, viz., the
key usually kept in the Chit Saba, the possession of it is admitted and
appellant No. 4 eventually produced it before the Commissioner
in March 1887. Though the oral evidence is conflicting as regards
the key customarily kept in the Amman Cowl, we agree with the Judge
that the evidence for the appellants is inconsistent with the omission to note
the fact in Exhibit VI and with the fourth appellant's conduct in objection to
the Commissioner breaking open the Treasury room and examining its
contents in the presence of both parties. We think that the probabilities
of the case are in favor of the Judge's finding. It is said that the
Astantram was opened in November 1886, when the temple jewels were
shown to one Mr. Reid and that the general body of Dikshadars was
then present. This is not inconsistent with the Judge's finding that the
property was removed some time in December 1886, if not before. This
being so, the imputations cast on the major faction and the evidence of
partisan witnesses in support of those imputations do not, as observed by
the Judge, deserve credence. How could the major faction have found
access, through the Dava Saba which was in the possession of the minor
faction? How could it have gained access into the Treasury room, whilst
the key of the lock which was found to be fastened by the Commissioner,
remained with the appellant? If the door had been forced open, how was
it there was no complaint made at once by the four persons in charge?
As to the possession and control of both the keys of the outer door, we
see no ground for differing from the opinion of the Judge. The presump-
tion then in the absence of satisfactory evidence to show how property
[146] in the Treasury room came to be made away with in part is that
those who had the control of the keys and their guarantors, appellants,
are answerable for the loss either on the ground of negligence in preserving
trust property or of dishonest dealing with it.

The next question which we have to consider is as to the extent and
value of property lost from the shrines and from the Treasury room. The
Judge has held that the appellants are answerable for items of property
Nos. 7, 10, 21, 1 of 27 or 49, 51, 2, 3, 5, 4, 1 and a gold pot and the
finding is questioned in appeal as regards each of the items.

As to item No. 7, it is a jewel called Madura Pandiya padakam
of Rs. 750 in value. The Judge has found that it existed in 1872, and has
presumed that it continued to exist until the date of Exhibit VI. He relied
on Exhibit C10, and the appellants' contention was that such a jewel never
existed. It is in evidence that the Treasury room is opened at least twice
a year and that jewels are taken out for use during the annual festivals.
The lists marked C series were found inside the Treasury room by the Commissioner, and they purport to be authenticated by the signature of Podumaniwshiyan or common friend, and they contain information as to the condition of the jewels on the dates to which the entries refer. C10 and C9 contain two entries regarding this jewel, and there is also the evidence of plaintiffs' witnesses 14 and 21. We cannot say that the decision of the Judge as to this item of property is incorrect.

The next item is No. 10, which is described as Virappa Nayakan diamond padakam of Rs. 1,000 value. The appellants say that it is the same as item No. 49 in the Commissioner's list C8, which is described as consisting of diamonds and rubies. The Judge refused to accept the appellants' statement for two reasons, viz., (i) C10 mentions no rubies, and the appellants did not offer this explanation when the Commissioner prepared C8, in which this jewel was entered as missing and which they signed. Though they allege that the Commissioner did not note their explanation, they omitted to examine him on the point, and the appellants' witnesses Nos. 1 and 15, to whose evidence our attention is drawn, do not identify it as No. 49. There is the evidence of the respondents' 14th witness that such a jewel \[116\] was in existence as shown by C10. We consider that the Judge has come to a correct conclusion.

We may here observe that the endeavour on the part of the appellants to identify these items of property save the gold pot with property found in the Treasury room is probably an afterthought. The respondents stated, in paragraph 6 of the plaint, that the items, save the gold pot, were all in the shrines in appellants' charge when Exhibit VI was executed, and that they were not to be found there on the date of the plaint, and the appellants contended that the items were not in the shrines in paragraph 8 of their written statement. Issues were taken as to whether they were in the shrines or not, and the respondents' witnesses deposed that they were in the shrines in appellants' charge, and after they closed their case, the appellants tried to identify them with some of the items of property entered in the Commissioner's list as found in the Astantram. Their first witness was the only one who deposed to the identity. They produced two lists before the Commissioner of jewels in the shrines, and, though these items were not mentioned in those lists, they did not then say that they would be found in the Treasury room. These facts raise a presumption that the attempt to identify them with articles in the Treasury room was an afterthought, and it is in favor of the conclusion arrived at by the Judge.

The next item in dispute is 21 described as Mahalakshmi padakam set with rubies and of Rs. 1,000 value. The Judge has discredited the appellants' statement that it was identical with item No. 57 in the Commissioner's list, and has assigned satisfactory reasons for his opinion. The suggestion that it may be that the jewel derived its name from the name of the donor and not from the figure of the image of Mahalakshmi upon it rests on no reliable evidence, and appears to be an ingenious conjecture. As to the item which is said to be one of item 27 or 49 C10 and respondents' witnesses prove it, and no grounds are shown for disturbing the finding. As to item No. 51, there is evidence that two nose-ornaments existed in 1872, and that only one is now forthcoming. There is the evidence in its support of the respondents' 7th witness, who belongs to neither faction. As to items 2 and 3, which are of Rs. 3,000 value, the appellants admitted that they existed, but alleged that
Pandiyyaraja Dikshadar and Tungasami Dikshadar of the major faction took them for use during the consecration cere. The shrine called Mikkurini Pillayar Covil, but never returned them. This was denied on the other side. Appellants witnesses 1, 2, 3, 4, 6, 7, 8, 10, 12 and 15 gave evidence for them, and respondents’ witnesses 4, 5, 9, 14, 21, 25 and 27 contradicted them. The Judge has considered the evidence, and we see no sufficient reason to say that he was in error in declining to accept the evidence for the appellants as satisfactory. As to items 5 and 41, the appellants’ contention was that they were lost when the car of the temple fell down with the idol in it in January 1892. Here again there was conflicting evidence, but the respondents’ 22nd witness, a member of the family of the donor of item No. 5, swore that he saw the ornament on the idol some three years after 1882. There was no complaint made of the loss of the jewel at the time of the accident. We do not think that the Judge was wrong in giving credit to the evidence for the respondents in preference to that of the appellants. As regards item No. 41, the respondents’ 6th witness, the brother of the donor of the jewel, says that he saw it in the temple about fifteen or sixteen months before he gave his evidence in February 1898 and the Judge relied upon his evidence.

The next item of property is a gold pot of Rs. 5,000 in value. The appellants’ contention was that it was damaged and, therefore, it was given to the Chetty in order that it might be melted and that the gold might be used for gilding the vahanams or vehicles which the Chetty was making for use during temple processions. Here again, there was a contradictory evidence of witnesses, plaintiffs’ witnesses Nos. 3, 5, 10, 12, 14, 15, 16, 19 and 20 on the one side, and defendants’ witnesses Nos. 1, 2, 3, 4, 5, 10 and 12 on the other side. The 28th witness, who was Chitambara Chetty’s agent and superintended the making of the vahanams, denied that the gold pot was given as alleged by the minor faction. Having regard to the quantity of gold required for gilding the vahanams, the evidence of the witnesses for the minor faction was open to doubt. We may also observe that the Chetty, who was spending several lakhs of rupees on the temple, would hardly accept the gold pot used for pouring water on the principal idol as a contribution from the Dikshadars for gilding vahanams. Nor is it explained to our satisfaction how the gold pot, which was made in 1859, and which was in use only on special occasions in the temple, came to be so damaged as to induce the Dikshadars to [118] consent to its being broken up instead of its being repaired. The probabilities of the case appear to us clearly to point to the conclusion to which the Judge has come upon the conflicting evidence. There is also reliable positive evidence in its support. Among the witnesses, there are several independent persons of respectability who saw the gold pot in the temple in 1886 and subsequently. We may refer to the 3rd witness, Inspector of Police, who saw it in 1886; to the 16th witness, the Taluk Sheristadar, who saw it in use in 1882 or 1885; to the 15th witness a Head Constable; to the 10th witness, who is the agent of the Pandara Sannadhi at Tiruvadudurai, and who saw it in use till 1885; and to the 20th witness who is the agent of the donor and who saw it in use until two years before suit.

As to the value of the property lost, the respondents’ 29th witness gives general evidence and there is, besides the evidence of the 20th witness as to the gold pot, of the 7th witness as to item No. 51, of the 22nd witness as to item No. 5, and of the 18th witness as to item No. 2. The
appellants did not deny the correctness of the value in their written statement. We are not prepared to attach weight to the objection taken to the estimated value of the property missing.

The only question which remains to be considered is as to the decree that has been passed. The suit was in its nature punitive but, having regard to the acts of misfeasance and to the appellants' conduct in connection with the loss of temple property, the Judge has dealt with the appellants rather leniently. It is urged that the Nattukottai Chetty pays the expenses of the litigation and that the suit was vindictive. But, considering the facts proved against the appellants specially, and against the minor faction generally, we cannot say that the conduct of the former did not richly merit the punishment that has been inflicted upon them. It is argued that the Judge was not authorized by Act XX of 1863 to deprive them of their right of puja in the temple. According to the usage of the institution, it is appertaining to their status as dharmakartas and the interests of the temple would be but inadequately protected if the two rights were severed for their benefit. We consider, however, that, in its present form, the decree is open to amendment so far as it leaves the period of suspension indefinite. We shall, therefore, amend it by directing that the suspension be withdrawn, if the appellants file an undertaking with two sureties in the amount of Rs. 2,000 each that they will duly conform to the decision of the majority of Dikshadars recorded at a general meeting duly convened in all matters connected with the repair of the temple, and with the management of its affairs, and to the usage of the temple as to the leasing out of the general offerings, and the custody and preservation of its property, and confirm the decree in other respects. As the appeal has substantially failed, the appellants will pay the respondents' costs in this Court. We direct also that the undertaking do include restoration of so much of the property found to be missing or its value, as cannot be recovered in execution. The sureties must be approved by the District Judge.

In Appeal No. 159 of 1888.—In this appeal it is argued for the plaintiffs that the Judge was in error in not dismissing the defendants Nos. 1 to 5 and in exonerating defendants Nos. 6 to 8 even from liability for suspension. The plaintiffs' pleader states at the hearing that he does not press the appeal against the eighth defendant and the appeal is dismissed as against him with costs.

As regards defendants Nos. 1 to 5, the Judge has considered what punishment would be adequate and has apparently adjusted it with reference to the protection due to the interest of the institution. We consider that the terms we have imposed are also sufficient to prevent the recurrence of the party quarrel. The Judge has taken into consideration the loss of the right of puja and of the right to other emoluments which dismissal is likely to entail.

In connection with the obstruction to the necessary repair of the temple, the acts of misfeasance are excesses in the assertion of a supposed legal right. Though their conduct in connection with the loss of temple property is certainly serious, two of them are held liable as guarantors and it is not clearly established which of the other three took away the property, though their joint civil liability for its loss is made out. There is also the fact that they are only five out of upwards of about 250 trustees belonging to the temple.

We do not, therefore, consider it necessary under the special circumstances of this case to direct their dismissal.
So far, however, as defendant No. 6 is concerned, he obstructed the leasing of the offerings in 1882 and stabbed some of the [120] members of the major faction and the Judge himself finds that his special connection with the obstruction is proved.

Again, he was specially connected with the obstruction caused to the repair of the temple. He was one of the plaintiffs in original suit No. 16 of 1885 and one of the five who took Exhibit VI on behalf of the minor faction.

The only circumstances in his favour are that no special connection is proved against him with the loss of temple property. But it appears from the evidence of the Commissioner that he was one of those who objected to the Treasury room being opened and to its contents being examined. In a punitive action like this, in which a whole faction consisting of a large number of persons is passively concerned, we are inclined to agree with the Judge that the interests of the temple do not require that all should be punished and that they would be sufficiently protected, if those who took an active part were punished. But applying this principle, we are unable to hold that defendant No. 6 was not liable to be suspended together with defendants Nos. 1 to 5.

We shall, therefore, set aside the decree so far as it exonerates him from liability for suspension and directs that his costs be paid out of temple funds and decree instead that defendant No. 6 also be suspended in the same manner and subject to the same conditions save as to liabilities to restore the temple property found to be missing and as to the withdrawal of the suspension of defendants Nos. 1 to 5 are, and that he do bear his own costs in the District Court and pay the appellants' proportionate costs in this Court. The appeal against respondent No. 7 is dismissed with costs as it is not pressed.

The appeal is also dismissed so far as defendants Nos. 1 to 5 are concerned but under the circumstances without costs.

18 M. 121 = 2 Wair 7.

[121] APPELULATE CRIMINAL.

Before Mr. Justice Handley and Mr. Justice Weir.

QUEEN-EMPRESS v. BUDARA JANNI.† [15th and 23rd September, 1890.]

Criminal Procedure Code, Section 4—Letters Patent, Section 26—Scheduled Districts Act—Act XIV of 1874, notifications under Agency tracts, jurisdiction of High Court over Agency tracts—Act XXIV of 1833 (Madras), Section 3.

The High Court set aside a conviction by the Agent to the Governor in Vizagapatam on a charge of culpable homicide not amounting to murder, and directed that the accused be tried in the Sessions Court at Vizagapatam on a charge of murder. The accused was tried accordingly, and was convicted of murder, and he appealed to the High Court. The Agency tract of Vizagapatam is a scheduled district under Act XIV of 1874, and the Governor in Council extended the operation of the Criminal Procedure Code of 1861 to it by a notification made under that Act in 1862. In 1863 the Governor in Council, by notification under Madras Act XXIV of 1830, constituted the Agent a Sessions Judge under the Criminal Procedure Code:

Held, that the High Court had jurisdiction to direct that the accused be tried by the Sessions Judge under the provisions both of the Letters Patent and of the Criminal Procedure Code.

* Criminal Appeal No. 214 of 1890.
1890  
SEP. 23.  
APPEAL against a conviction and sentence by H. R. Farmer, Sessions Judge of Vizagapatam, in Sessions Case No. 9 of 1890.
The facts for the purposes of this report appear from the following judgment.
Mr. Wedderburn, for the Crown.

JUDGMENT.

The appellant, Budara Janni, has been convicted of murder by the Sessions Court of Vizagapatam, and has been sentenced to transportation for life.

In Sessions Case No. 18 of 1889 the appellant, on the same facts, was convicted by the Agent to the Governor in Vizagapatam of the offence of culpable homicide not amounting to murder, but this Court, being of opinion that the facts proved pointed clearly to the offence of murder, set aside, by its order in criminal appeal No. 13 of 1890 and criminal revision case No. 150 of 1890, dated 30th April 1890, the conviction for the offence of culpable [122] homicide not amounting to murder, and directed that the accused should be re-tried for the offence of murder, and the Court further directed that the re-trial should take place before the Sessions Court of Vizagapatam.

The appellant has been re-tried accordingly by the Sessions Court of Vizagapatam with the result already stated.

The Agent to the Governor in Vizagapatam (through the Government Pleader) now takes the objection that the order of this Court, dated 30th April last directing the re-trial of the appellant before a Court other than the Court of the Agent to the Governor was made without jurisdiction.

The appellant himself objected at the re-trial to the jurisdiction of the Sessions Court of Vizagapatam, but, in his grounds of appeal to this Court, he does not repeat the objection. The objection before us having been taken by the Agent, who is the local representative of Government, and, having been urged through the Government Pleader, it becomes necessary to consider fully the grounds of objection put forward.

The argument of the Government Pleader in support of the objection to the jurisdiction may be summarized as follows:—

Under Madras Act XXIV of 1839, Section 3, the Agents to the Governor in Vizagapatam and Ganjam have special jurisdiction within the limits of the Agency tracts in respect of the administration of criminal justice, and, in the exercise of this jurisdiction, they are to be guided by such rules as the Government of Madras may prescribe, and the authority the Agent is to exercise in criminal trials, as well as the cases he is to submit for the decision of the Faujdar Adalat (High Court), are, under Section 4 of the same Act, made subject to definition by the Government of Madras. This enactment created a special jurisdiction and a special procedure. In 1862, the first Code of Criminal Procedure (Act XXV of 1861) came into force, but in that Code it was provided by Section 445 that the Act should not take effect in any part of the territories in British India not subject to the general regulations of Bengal, Madras or Bombay, until the same should be extended thereto by the Governor-General of India in Council or by the Local Government to which such territory was subordinate, and until such extension should have been notified in the gazette. No notice extending the Criminal Procedure Code, as contemplated in Section 445 of [123] Act XXV of 1861 to the Agency tracts, would appear to have been issued by the Government of Madras so far as could be ascertained. This link of the argument was, as will afterwards be seen, found to be
non-existent. The fact was not, however, ascertained until after the argument had closed. After Act XXV of 1861, came the Criminal Procedure Code of 1872 (Act X of 1872). This Code in Section 2 preserved any special procedure at that time existing, and the Code of Criminal Procedure now in force (Act X of 1882), by virtue of Section 1, preserves all existing instances of special jurisdiction or of special forms of procedure prescribed by law. Such being the case, the special and exclusive jurisdiction relating to the administration of criminal justice in the Agency tracts conferred by the Act of 1839 must be held to be still subsisting, and the High Court had accordingly no authority, by its order of 30th April last, to direct that the re-trial of the appellant should be held before a Court other than the Court which, under the Act of 1839, exercises special and exclusive jurisdiction over the Agency tracts of the district of Vizagapatam.

The argument thus stated appears to us, on examination and apart from the erroneous statement of fact already noticed, not to be well-founded.

The question, whether the order made by us, under date the 30th April last, was an order which it was within our competence to make, does not, for reasons which will afterwards appear, depend solely on whether the Code of Criminal Procedure is applicable in the Agency tracts. It must first be seen, however, whether the Code does apply to such tracts. The Agency tracts of Ganjam and Vizagapatam have, by an enactment of 1874 (Act XIV of 1874), been included in the scheduled districts of the Madras Presidency, and the case of Queen-Empress v. Cheria Koya (1), recently decided, is authority for the position that the Code of Criminal Procedure is not excluded from operation in a scheduled district by the mere fact of the district being declared to be a scheduled district. The case of Queen-Empress v. Cheria Koya (1), which related to the Laccadive Islands, differed from the case now before us in this respect that, in the former case, there was no question of an established jurisdiction and procedure then existing under a special local law and conflicting possibly [124] with the general jurisdiction and procedure prescribed in the Code of Criminal Procedure. This, however, was, on the coming into force of the Criminal Procedure Code of 1861, the state of affairs in the Agency tracts of Ganjam and Vizagapatam, and if the Local Government had not, as it will be seen they have, in the clearest manner indicated their intention to supersede and withdraw the special jurisdiction and procedure then existing and to introduce in its place the jurisdiction and procedure defined in the Code of Criminal Procedure, we should be forced to conclude that the special jurisdiction and procedure continued, notwithstanding the circumstance that the Agency tracts were declared to be scheduled districts by Act XIV of 1874.

We have ascertained, however, that the Government of Madras by notifications dated 29th January and 17th February 1862, notified under Section 445 of the then Code of Criminal Procedure (Act XXV of 1861), that the Act was extended to the Agency tracts of Ganjam and Vizagapatam with effect from the 20th February and 20th March 1862 respectively.

It has also been ascertained that early in the following year, the then Agent to the Governor in Ganjam obtained an order from the Government of Madras cancelling the rules for the administration of criminal

(1) 13 M. 953.
justice framed under Act XXIV of 1839 on the ground that the same were inconsistent with the provisions of the Code and must be considered to have been superseded by that enactment, the operation of which had been extended to the Agency tracts. The order made by the Madras Government on the question submitted to them by the Agent (through the High Court) is dated 6th January 1863, and is in the following terms:—

"Under the authority vested in him by Section 4, Act XXIV of 1839, His Excellency the Governor in Council cancels so much of the revised Agency rules sanctioned by the Government in their Proceedings of the 24th July 1860 as relates to criminal justice and authorizes the Agents in Ganjam and Vizagapatam, respectively, to exercise the powers of a Sessions Judge in addition to those belonging to a Magistrate of a district under the Code of Criminal Procedure."

The effect of this order was to withdraw the rules theretofore regulating the administration of criminal justice in the Agencies, to constitute the Agent a Sessions Judge under the Code of Criminal Procedure, and to substitute for the rules then in force all the rules and conditions under which Sessions Judges exercise the powers conferred on them by the Code of Criminal Procedure. The rules and conditions of the Code of Criminal Procedure render the proceedings of Sessions Courts subject to the powers of the High Court as a Court of Appeal and of Revision, and it is not disputed that the order of this Court, which the Agent now contests, was an order which could lawfully be made by the High Court in the exercise of its powers as a Court of Appeal and of Revision (Sections 439 and 423, Criminal Procedure Code).

On the ground, therefore, that the Criminal Procedure Code is in force in the Agency tracts of Ganjam and Vizagapatam, we must hold that the objection taken by the appellant and by the Agent to the jurisdiction cannot be sustained.

It has, however, already been intimated that the jurisdiction of this Court to make the order, to which objection has been taken, does not rest solely on the circumstance of the Code of Criminal Procedure being in force in the Agency tracts. Even if the Code of Criminal Procedure had not been shown to be in force in these tracts, it appears to us that the order could be supported under the powers conferred in the Letters Patent of the High Court. The Letters Patent, by express terms in Section 28, confer, on the High Court, unrestricted power to transfer criminal cases or appeals from any one Court to any other Court of equal or superior jurisdiction.

On the grounds stated, therefore, it appears to us that the objection to the jurisdiction of the High Court to make the order, dated 30th April last, must fail.

On the merits, we are satisfied that there are no grounds for questioning that the appellant has been rightly convicted of the offence of murder.

The two individuals, whom the accused is clearly proved to have stabbed, had given him absolutely no provocation beyond interfering to prevent violence to others, and the plea of drunkenness, even if it were clearly established by the evidence, which it is not, cannot avail the prisoner.

The sentence, which the Sessions Judge passed on the appellant, viz., transportation for life, was the only alternative to a sentence of death.

We confirm the sentence and dismiss the appeal.
1890

APPELLATE CRIMINAL.

14 M. 126= 1 Weir 89.


One of two village factions objected to the other passing in procession over a vacant piece of ground in the main street of the village. An injunction prohibiting the procession was obtained in the Court of the District Munsif on 26th March. On 11th May a procession was formed and approached the ground in question. Forty-six members of the first named faction were assembled there to prevent the procession by force: the police ordered them to disperse: this order having been neglected the police prevailed on other faction to abandon the procession:

Held, that the persons who did not disperse on being ordered to do so were guilty of the offence of being members of an unlawful assembly.


APPEAL by Government against the judgment of acquittal pronounced by W. C. Holmes, Sessions Judge of Bellary, in criminal appeal No. 27 of 1890, setting aside the conviction and sentence of E. S. Laffan, District Magistrate of Bellary.

The accused, before the District Magistrate, were 46 in number, and they were charged under Penal Code, Sections 143, 144 and 145. The District Magistrate convicted 43 of the accused, of whom 4 appealed to the Sessions Court, which reversed the conviction.

The facts of the case were stated by the Sessions Judge as follows:

"The appellants have been convicted of being members of an unlawful assembly, the first under Sections 143 and 145, and the others under Sections 144 and 145, Indian Penal Code.

"There does not seem to be much doubt about the main facts in the case. It appears that in the village of Kamalapuram there are several divisions of Bois, and that between two of the divisions there has for some years been a dispute as to the route that one of the divisions—the Manmathakari division—should follow when on the day succeeding their new year's day they leave the village in procession on their way to hunt in the adjoining hills; the other division, the [127] Chavidikeri division, objects to their passing over a piece of ground called Hemagi Ukkad, and contends that they should go further on down the main street before turning to go to the hills.

"In 1888, the Manmathakari Bois did not carry out their procession. In 1889, the Head Assistant Magistrate prohibited the procession under Section 144, Criminal Procedure Code. This year before the 21st March, the Ugadi or new year's day of the Bois, it follows the representations of the Police Inspector, nine of the chief men of the Chavidikeri Bois were bound over by the Head Assistant Magistrate to keep the peace. This was done on the 15th March. On the 18th March the Chavidikeri Bois in a civil suit that they filed to obtain an injunction preventing the Manmathakari Bois from taking the procession by the Hemagiri Ukkad, presented a petition under Section 498, Civil Procedure Code, for a temporary injunction till the final disposal of

* Criminal Appeal No. 354 of 1890.
the suit. On the 20th March the District Munsif passed the following order on the petition.

"Defendants, all of them, served in person. None present. Two witnesses sworn for petitioner. I do not see why an injunction should not issue especially as there appear to have been prior attempts made by defendants to hold a similar procession successfully resisted by the plaintiffs. Injunction to issue returnable on 28-3-90."

"On the 21st March, it appears some of the Chavidikeri Bois presented a petition to the District Magistrate for an order under Section 144, Criminal Procedure Code, prohibiting the holding, of the procession by the Manmatakeri Bois. This was, it would appear, refused, but on the 22nd March, the day after Ugadi, the Taluk Magistrate apparently because the injunction of the Civil Court was produced before him, verbally prohibited the procession and it was not held.

"On the 2nd May, the Acting Head Assistant Magistrate gave an endorsement on a petition presented by two persons, presumably Manmatakeri Bois, asking that the Police Inspector should strengthen the Police force on the 10th May as they were willing to go in procession on that day. The endorsement ran as follows:—

"The Inspector of Police, Hospett, will strengthen the Police force on the 10th instant. He will be at Kamalapur on the said date."

"The Police Inspector was at Kamalapur on the 10th, but the expected increase in the number of constables had not arrived and the procession did not take place and the Manmatakeri Bois said they would go the next day.

"On the 11th, at about noon, some 60 or 100 of the Manmatakeri Bois formed their procession and seemed to have proceeded a short distance on their way down the main street. In the meantime, not far off, some 60 or 100 of the Chavidikeri Bois assembled on the Hemagiri Ukkadam. It is alleged that they had sticks and that three of them had daggers, but at any rate there can be no doubt whatever that the crowd was determined to forcibly prevent the Manmatakeri Bois' procession from leaving the village by passing over the Hemagiri Ukkadam.

"There can be just as little doubt that the Chavidikeri Bois had no intention whatever of doing anything else except obstructing the passage of the procession that way. This is clearly shown by their conduct after the Police Inspector came up. The Chavidikeri Bois would not obey his order to leave. He then fired in the air, and then fired with buck shot at the legs of one of the men in the crowd and wounded him. The wounded man was carried off and the crowd remained where they were and made no attack on the Police or on the Manmatakeri Bois.

"The only other question of fact that appears necessary to refer to is the nature of this piece of ground Hemagiri Ukkadam. It is a vacant piece of ground about 15 yards across in the main street of the village with housses of Chavidikeri Bois on each side of it. It was used for rubbish heaps and for stacking straw till some 10 years or so ago. Then there was a foot-path across the land. After the rubbish heaps and straw racks were ordered to be removed, carts were taken across the land and it was used for traffic generally. The Lower Court has held that, whatever may have been the case many years ago, it is not now private property. The land would appear to be a vacant piece of village site used as a short cut to get out of the village."
"In this appeal it is contended that the facts proved do not constitute an offence. In the Lower Court and here the right of self-defence was pleaded, but this is obviously untenable. In the appeal the main contention was that the appellants were not members of an unlawful assembly as defined in Section 141 of the Indian Penal Code. Their common object does not come, it is contended, under the first class of objects in the section because the object of the assembly was not to overawe the Police Inspector in the exercise of his lawful power, as he had no lawful authority to assist the Manmatakeri Bois in holding a procession which had been prohibited by the injunction of a Civil Court. The fifth class of objects of the section does not cover the case because the object of the assembly was not to compel the Manmatakeri Bois 'to omit to do' what they were 'legally entitled to do'; the object was to compel them to omit to do what they had been prohibited by the injunction of a competent Civil Court from doing. These, it is contended, are the only two paragraphs of the section that can be held to apply to the case. The Public Prosecutor, on the other hand, contends that the case comes under the fourth class of objects as the object was to enforce a right or supposed right."

The following authorities were cited by the Sessions Judge: Shunker Singh v. Burnah Mahbo (1); Proceedings of the Madras High Court, dated 10th August 1869 (2); Proceedings of the Madras High Court, dated 16th November 1869 (3); Proceedings of the Madras High Court, dated 8th January 1873 (4)—Queen v. Narain (5); Appavu v. The Queen (6); Peary Mohun Sircar v. The Empress (7); Russell on Crimes, ed. 5, Vol. I, p. 373.

The Government preferred this appeal.

The Government Pleader and Public Prosecutor (Mr. Powell), for the Crown.

Ramachandra Rau, for accused.

JUDGMENT.

MUTTUSAMI AYYAR, J.—There are two divisions of Bois in the village of Kamalapuram in the District of Bellary, and they used [129] to go in procession on the new year's day to hunt in the hills adjoining the village. For some time past, the Chavidikeri Bois objected to their rivals, the Manmatakeri Bois, passing in procession over a piece of ground called Hemagiri Ukkadam. That piece of ground is found not to be private property, but to form part of the vacant village site ordinarily used as a short cut to get out of the village. On the 11th May last, about 60 or 100 of the Manmatakeri Bois formed a procession and proceeded a short distance down the main street. In the meantime, some 60 or 100 of the Chavidikeri Bois assembled on the Hemagiri Ukkadam and there is no doubt upon the evidence that they did so to forcibly prevent the Manmatakeri Bois passing in procession over that spot. The Inspector of Police ordered them to disperse, but they did not obey his order. He then fired in the air and then fired with buck shot and wounded one of the men assembled. The wounded man was carried off, but the crowd did not disperse, though they attacked neither the police nor the rival faction. Finding that his efforts to disperse the crowd were

(1) 29 W.R. Cr. 25.  (2) 4 M.H.C.R. App. 65.  (3) 5 M.H.C.R. App. 6.
(4) 7 M.H.C.R. App. 35.  (5) 7 N.W.P. 269.
(6) 6 M. 245.  (7) 9 C. 639.
ineffectual, the Inspector prevailed on the Mannmatkari Bois to abandon their intention of going in procession on that day. It appears that on the 20th March a temporary injunction issued under Section 493, Code of Civil Procedure, in a civil suit instituted by the Chavidikeri Bois was in force and that it prohibited the Mannmatkari Bois from going in procession over the ground in dispute until the disposal of the suit. It is thus clear that the Mannmatkari Bois endeavoured to go in procession in contravention of the order of the Civil Court, that the Inspector of Police ordered their rivals to disperse instead of preventing their procession and that, but for the Mannmatkari Bois ultimately giving up their intention to go in procession on that day at the instance of the Inspector of Police, a serious riot would have ensued.

Upon the foregoing facts, the Acting District Magistrate convicted the four persons whose case is now before us, of offences punishable under Sections 143 and 145, and three of them also of an offence punishable under Section 141 on the further ground that they were armed with daggers. On appeal, however, the Sessions Judge considered that they committed no offence at all and acquitted them. The question which we have now to consider is whether upon the above facts the four persons acquitted by the Judge were not members of an unlawful assembly [130] within the meaning of Section 141 of the Indian Penal Code. The Chavidikeri Bois assembled at the place in dispute, being about 50 or 100 in number, and their object in doing so being to forcibly obstruct the procession of Mannmatkari Bois, there is no doubt that they formed an unlawful assembly, as defined in Clause 4, Section 141, of the Indian Penal Code. Even assuming that the assembly was not unlawful at first, it clearly became unlawful after it had been ordered to disperse and failed to disperse. The intention indicated by the heading of Chapter VIII, in which Section 141 is inserted, was to constitute certain acts, which endangered the public peace, into Offences against Public Tranquility, but it does not follow from it either that a person may do what he is entitled to do or prevent another from doing what he is not entitled to do by means of criminal force or by show of criminal force. In construing Section 141, regard must be had not only to the general intention deducible from the heading of the chapter, but also to the specific mode in which the Legislature intended to carry out that intention. The words in clause 4 “to enforce a right or a supposed right” show that it is perfectly immaterial whether the act which one seeks to prevent by the use of criminal force or show of criminal force is legal or illegal, the test of criminality being the determination to use criminal force and act otherwise than in due course of law so as to threaten the public peace. Hence it was that Holloway, J., observed in VII, Madras H.C.R., App. 35, that if a procession were actually illegal, it would be no defence whatever to the accused, unless the right of private defence arose.

In the case before us, the right of private defence, which was pleaded, was properly held as well by the Judge as by the Districts Magistrate not to be tenable. This being so, the remedy open to the Chavidikeri Bois, when their rivals acted in contravention of the terms of the injunction issued by the Civil Court, lay in getting them punished for contempt and not in seeking to prevent the act by assembling to commit a riot, if necessary. The Inspector of Police was further justified in ordering an unlawful assembly to disperse when a riot was imminent, though his prior action in omitting to prevent the rival procession might have been open to question or injudicious. The case reported in 4 Madras H.C.R., App. 65, shows only that a person in possession of crops or grain or other property
would be justified in protecting his possession by the use of force, if necessary, against another who forcibly disturbs that possession in the assertion of a supposed right. But in the case before us, the ground in dispute was neither the exclusive property of Chavidikeri Bois nor in their exclusive possession. On the contrary, it is found to form part of the village site, which both divisions of Bois are entitled to use as a short cut for going out of the village on ordinary occasions. The contention of Chavidikeri Bois was that Mannamatakeri Bois were not entitled to use it for going in procession on the Ugadi day, and the exclusive right asserted by the former was denied by the latter and pending adjudication in the District Munisif's Court of Narayanadevarkeri. The present case is therefore not one of protecting subsisting possession of private property against one who forcibly disturbs it, but it is one in which a right which was disputed and pending adjudication in a civil suit, to exclude the Mannamatakeri Bois from the use of a common village site or path on a special occasion, was intended to be enforced, on the ground that the latter had forborne to use it for some years. The right of protecting possession of property is substantially part of the right of private defence of property, which the Judge himself has disallowed.

For these reasons, I am of opinion that the order of acquittal cannot be supported and that the sentence of the District Magistrate should be restored and the unexpired portion of it be carried out.

Best, J.—The Acting Sessions Judge concurs with the Magistrate in finding that the four persons with whom we are now concerned were members of an assembly which had determined to forcibly prevent the Mannamatakeri Bois' procession from leaving the village by passing over the Hemagiri Ukkadam, which is, "a vacant piece of ground about 15 yards across in the main street of the village with houses of Chavidikeri Bois on each side of it." The Judge has also found the right of self-defence set up on behalf of the accused to be "obviously untenable."

The question is whether, under these circumstances, he was justified in setting aside the conviction of those persons of offences punishable under Sections 143, 144 and 145 of the Penal Code?

The offence punishable under Section 143 is being a member of an unlawful assembly; that under Section 144 is being such member armed with anything which, used as a weapon of offence, is likely to cause death; and that under Section 145 is the continuing in an unlawful assembly "knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse."

With reference to this last offence, there can be no doubt that the assembly of which these persons continued to be members was called upon by the Police Inspector to disperse, but would not do so; and that these four persons continued to be members of the assembly notwithstanding the Inspector's order to the contrary.

No doubt, as observed by the Judge, "the general principle underlying Section 141 is indicated by the heading of the chapter of which it is the first section, viz., Of Offences against Public Tranquility." I am, however, unable to accept the subsequent reasoning by which the Judge has arrived at the conclusion that the accused in this case are not guilty, although their acts were such as must have resulted in a riot, had it not been for the forbearance of the opposite party.

The circumstance that appears to have influenced the Judge in finding that the accused in this case were entitled to an acquittal, is the fact that they had already instituted a civil suit for an injunction to prevent
the Manmatakeri Bois from taking their procession over the Hemagiri Ukkadam, and had in that suit obtained a temporary injunction to
the above effect. The Judge's argument is that the accused are entitled
to an acquittal, because the Manmatakeri Bois were acting illegally in
attempting to pass over the place in question and because the Inspector
also acted illegally in directing the accused to disperse in order to allow
of the Manmatakeri Bois so passing. But as remarked by Holloway, J.,
in the case reported in VII, Madras H. C. R., App. 35, the fact of the
illegality of the act of the opponents of the accused is wholly immaterial
"unless it brings itself within the category of those in which self-defence
is permitted;" and, as already observed, the Judge has himself found
that the plea of self-defence is, in the present case, "obviously
untenable." Most, if not all the authorities referred to and relied on by
the Judge in support of this finding in favour of the accused are cases in
which the accused acted in defence of property or person.

[133] The assembly of the accused in the present case was unlawful,
because its object was to enforce a right or supposed right by show of
criminal force.

The Judge's order of acquittal must therefore be set aside and the
finding and sentence of the District Magistrate restored and the incomplete
sentences carried out.

14 M. 133.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SUBBARAYALU (Creditor No. 3) Appellant v. ROWLANDSON
AND OTHERS (Debtors Nos. 44, 46, 102 and 103) Respondents.*
[10th and 28th October, 1890.]

Insolvent Act—11 and 12 Vic., Chapter 21, Sections 40, 73—Commission—Cessor of
interest on filing of petition.

By a document styled an "agreement of commission" the executant acknow-
ledged the receipt of a loan and bound himself to pay commission thereon at the
rate of 10 per cent. per month and to repay the principal in two years and nine
months. It appeared that the so-called commission was in the nature of interest,
and was fixed at a high rate, because the debtor was expected to obtain the lease
of a forest and to derive large profits therefrom. The debtor filed his petition
in the Insolvency Court on 1st September 1884:

Held, that the creditor was not entitled to a dividend in respect of commission
claimed to have accrued due after that date.

[R., 112 P.L.R. 1913 = 92 P.W.R. 1913.]

APPEAL against an order made by the Chief Justice, sitting as Commis-
sioner of the Insolvency Court, in insolvent case No. 136 of 1884.
The facts of this case appear sufficiently for the purposes of this
report from the following judgments:—

Mahadeva Ayyar, for appellant.
Mr. W. Grant, for respondent No. 1 (the Official Assignee).
Parthasaradhi Ayyangar, for respondents Nos. 3 and 4.
Gopalacharlu, for respondent No. 6.

* Appeal No. 19 of 1890.
JUDGMENTS.

MUTTUSAMI AYYAR, J.—This is an appeal from an order made on the 4th August last in insolvent case No. 136 of 1884 in regard [134] to the appellant’s claim to dividend and the directions given to the Official Assignee on his application. One Shunmuga Mudali of Conjeeveram, an insolvent debtor at Madras, filed his petition and schedule on 1st September 1884, and in the latter the appellant was entered as creditor No. 3 for Rs. 1,300 and commission due under a bond, dated the 19th March 1883. By this document the insolvent agreed to repay Rs. 1,300, which he borrowed, before the end of 1885, and, in the meantime, to pay commission thereon at 10 per cent. per mensem. There is no dispute as to the appellant’s claim to be admitted to dividend on Rs. 1,300, the principal debt, and on Rs. 2,262 commission due at 10 per cent. per mensem up to 1st September 1884, the date on which the insolvent filed his petition and schedule. But the appellant contended in his affidavits, dated 2nd May 1889, and 11th April 1890, that he was entitled to dividend also on the commission which he claimed from date of the filing of the schedule until date of payment. The main question for decision was whether this contention was tenable. He alleged, further, that for the purpose of satisfying his claim in full, (i) that an arrangement made with respondents Nos. 3 and 4, two of the insolvent’s debtors, in the nature of a composition, ought to be set aside, and that the Official Assignee should be directed to make further collections from the insolvent’s debtors, (ii) that two sums of Rs. 1,200 and Rs. 3,000 ought to be treated in addition to Rs. 12,000 as part of the insolvent’s estate, (iii) that the costs allowed to the attorneys of the Official Assignee in connection with the arrangement made with respondents Nos. 3 and 4 should not be debited to that estate, and (iv) that an inquiry ought to be made as to the extent to which the claims of creditors Nos. 1, 12, 17, 20 and 21 had been satisfied out of Court by the sale of mortgaged property and the residue actually due to them ascertained and admitted to dividend.

The Official Assignee resisted the appellant’s claim and urged that the bond of 19th March 1883 being engrossed on a stamp of 7½ rupees value, the appellant was not entitled to recover under it more than Rs. 1,500.

By the order dated the 4th August last, the learned Chief Justice disallowed the appellant’s claim to subsequent commission and directed that dividend be paid to him only on Rs. 1,300 and on Rs. 2,252 commission due to him up to 1st September 1884, [135] and on Rs. 855.9-0, the taxed costs of his motion. As regards the Official Assignee’s contention that no more than Rs. 1,500 was recoverable by the appellant, the learned Chief Justice reserved to the former the right to raise the question if the insolvent preferred an appeal from his order. As to the sum of Rs. 1,000 paid to the Official Assignee by Mr. Laing under an order of the Full Bench, dated the 21st January 1890, it was directed that the amount be not distributed until further orders. Hence this appeal.

[His Lordships here stated the effect of various orders made in this insolvency which are not necessary to be explained for the purposes of this report, and proceeded as follows]:—

The first contention in appeal is that the appellant is entitled to dividend, not only on Rs. 3,562, but also on the subsequent commission; but the general rule in bankruptcy is that interest ceases at the date of the bankruptcy, and there shall be no proof for interest subsequent to
that date. Lord Justice James refers to the rule as well established in
*re Savin* (1) which was decided in 1872, and held, in that case, that even
a secured creditor, who sought to prove his claim for a deficiency was
bound to apply the sale-proceeds of his security in payment of principal
and interest up to the date of bankruptcy and up to that date only.
There is hardly any room for doubt that the same rule is applicable under
the Insolvency Act in India, and Section 40 of 11 and 12 Vic., Cap. 21,
places the claims which a creditor in insolvency may prove on the same
 footing with claims provable in bankruptcy. It must be remembered,
however, that the rule must be applied subject to the limitation mentioned
by Lord Justice Cotton, *viz.*, that there can be no proof in bankruptcy for
interest accruing due after the filing of the petition unless the estate is
more than sufficient to pay the creditors in full; *ex-parte Bath in re
Phillips* (2) decided in 1882.

The principle on which the general rule rests is stated by Lord Justice
James in the case first mentioned in these terms, "the theory in bankruptcy
is to stop all things at the date of the bankruptcy and to divide the wreck of
the man's property as it stood at that time." Directly the insolvent files his
petition and a vesting order is made; he is divested of all his property; and
he ceases to *sui juris* for the purpose of satisfying his obligations,
and the Insolvent Court intervenes as a Court of Equity to do equal justice
to all his creditors by enforcing an equitable distribution of his property in
discharge of his obligations as they stood at the date of the petition and
the vesting order. I take the general rule then to rest on this foundation,
*viz.*, that the contracts of the insolvent stop at the date of the vesting
order as a matter of legal right and the Insolvent Court becomes seized of
jurisdiction to deal with his property towards their satisfaction through
the Official Assignee as a Court of Equity and according to equitable
rules of distribution. The exception to the rule mentioned above
presupposes that there is a surplus left after all the debts as they stood at
the date of the petition are satisfied and rests on the basis that when
such is the case, a claim for subsequent interest may be permitted to be
proved. But it must be remembered, that even in the contingency indi-
cated, the Insolvent Court deals with such claim as a Court of Equity;
and according to rules of equitable compensation for deferred payment,
but not according to the letter of the original contract which it stopped at
the date of the vesting order, and placed under its protection as a Court of
Equity.

How do the facts of this case stand in relation to the foregoing
principles? Looking to the rate of commission, *viz.*, 10 per cent. per
mensem on Rs. 1,300, it amounts to Rs. 1,560 per annum on a loan of
Rs. 1,300. It certainly savours of a gambling transaction, as suggested
for the Official Assignee. Looking again to the substance of the transac-
ton, it is clear that the so-called commission is in the nature of interest
on the money lent, and the rate was fixed so high, on the appellant's own
showing, because the insolvent was expected to realize large profits from
the ijarah of a forest which he was to obtain. It is clear then, that when
insolvency supervened, the basis on which the agreement to pay commis-
sion rested failed, and its further enforcement would go beyond the original
intention of the parties. Moreover, the commission already allowed to
the appellant is Rs. 2,262, whereas the amount lent is Rs. 1,300 only.
Nor is it shown why the appellant's claim to subsequent commission is

---

(1) *L. R. 7 Ch. App. 760.*
(2) *L. R. 22 Ch. D. 450.*
entitled to any preference over similar claims to subsequent interest on the part of other creditors; and why it should be admitted to dividend which is to be declared with reference to scheduled debts. The conclusion I come to is that the appellant [137] is not entitled to insist on his claim to subsequent commission either as an incident of the original contract or in the special circumstances of this case, as a matter of equitable compensation for deferred payment.

[His Lordship next proceeded to deal with the objections taken to the directions as to what ought to be treated as the estate of the insolvent]

It only remains for me to notice the objection taken by the Official Assignee that the appellant is not entitled to claim more than Rs. 1,500 under the bond of the 19th March 1883. It was urged by his counsel that the document bore a stamp of 7½ rupees value, and that under Section 26 of the General Stamp Act, no more than Rs. 1,500 are recoverable. That section applies to cases in which the subject-matter of an instrument chargeable with an ad valorem duty is incapable of valuation at the date of execution; whereas the bond in dispute was for Rs. 1,300 repayable before the end of 1885 with a commission of 10 per cent. per annum. Moreover, Mr. Justice Karmn recorded a judgment in 1887 recognizing the appellant's claim as against the Official Assignee to the extent of Rs. 3,562, and at that time the objection now urged was not taken. It is too late to take the stamp objection after decree. When these difficulties were pointed out at the hearing, the respondent's counsel did not press the objection.

The result is that the order appealed against should be confirmed with the direction that the matter referred to in paragraph 14 of the appellant's affidavit of 2nd May 1889 be inquired into.

The appeal having substantially failed, it is dismissed with costs.

Mr. Justice BEST.—This is an appeal from the order of the learned Chief Justice, in re Conjeeveram Shumnuv Mudaliy, an insolvent.

The appellant is T. Subbarayalu Chetty, creditor No. 3 in the schedule. The debt claimed by appellant is due under a document, dated 19th March 1883. It is styled an "agreement of commission," and is, when translated, as follows:—"I have this day received from you Rs. 1,300 in ready money; as I have received these Rs. 1,300, and as the commission on the aforesaid sum of Rs. 1,500 amounts to Rs. 130 per month, commission being at the rate of Rs. 10 per month per Rs. 100; [138] therefore I bind myself to pay without fail, this monthly commission of Rs. 130 month by month commencing from this day till the year 1885 next, either to you, or to those who may obtain your order. I shall pay the above-mentioned sum of Rs. 1,300 at the end of the year 1885 and receive back this document."

The debt was proved to the satisfaction of Mr. Justice Karmn on the 14th February 1888, when he directed "that Rs. 1,300, principal and commission at 10 per cent. per month up to the filing of the petition be admitted to dividend by the Official Assignee out of the estate in the hands of the insolvent." The question "whether the claimant may be entitled to further payment of commission after the date of the petition in insolvency" being left undisposed of on the ground that the fund is then in the hands of the Official Assignee were not sufficient to discharge the additional claim, and it being "not yet ascertained whether the Official Assignee shall receive further estate of the insolvent."
On appeal the above order was confirmed, because "the objections against the principal sum allowed to creditor No. 3 were not pressed, and it is shown that the interest is not barred." (see judgment in appeal suit No. 10 of 1888).

The order against which the present appeal is preferred was one passed on the motion of the Official Assignee for directions of the Court as to the declaration of the dividend and as to the claim of Subbarayalu Chetti (now appellant) and as to the disposal of the balance that should remain after distribution of the dividend. The order is that appellant should be paid Rs. 3,562 (being Rs. 1,300 plus Rs. 2,262 as interest to 1st September 1884—date of filing the petition) and a further sum of Rs. 555-9-0 as costs; it is added "that no further interest or commission be allowed;" and there is a further order "that the sum of Rs. (1,000) one thousand, paid to the said Official Assignee by Mr. Laing under an order of the Full Bench bearing date the 21st January 1890 be not distributed as dividends by the said Official Assignee pending the further orders of this Court."

The first point taken in this appeal is that appellant is entitled to "further commission from 2nd September 1884, and further interest on the aggregate amount up to date of payment in addition to the said sum of Rs. 3,562, and costs viz., Rs. 555-9-0." Reference is made to the circumstance (already noticed) that the decree of Kernan, J., reserved this question of further commission [139] in consequence of the assets then in the hands of the Official Assignee not being sufficient for the payment of such further commission, whereas a further sum of Rs. 6,000 has since been added to the assets.

On the other hand, it has been urged on behalf of the Official Assignee that as the document under which the appellant claims is executed on a stamp of the value of Rs. 7½, the maximum claimable under it is Rs. 1,500, under Section 26 of the Stamp Act.

It will be convenient to consider, in the first place, this objection taken on behalf of the Official Assignee. The document in question has been set out above. Though it is styled an agreement of commission, it is in fact a bond for repayment of Rs. 1,300, with interest thereon at the rate of 10 per cent. per mensem. In calculating the stamp required for a bond, it is the principal amount alone that is taken into consideration, and the stamp of the value of Rs. 7½ used in this case is more than sufficient to cover a debt of Rs. 1,300. Section 26 of the Stamp Act is not applicable, in my opinion. Moreover, even were it otherwise, it would now be too late to raise the question, as the order of Kernan, J., fixing the amount due to appellant at Rs. 3,562 was upheld in appeal No. 10 of 1888.

The next question is as to the validity of the appellant's claim to commission or interest subsequent to the date of filing the insolvency petition. The "proper practice" is that a creditor in an insolvent estate, whose debt bears interest "is not entitled to interest up to the day of payment, but only to the date of the judgment for administration," See Judgment of Jessel, M. R., in re Summers, Boswell v. Gurney (1). The rule, as stated by James, L. J., in re Savin (2), is that there is to be no proof for interest subsequent to the bankruptcy. With reference to the judgments of Jessel, M. R., and Cotton, L. J., in ex parte Bath, in re Phillips (3), it is to be observed that the words,

(1) L. R. 13 Ch. D. 196.  
(2) L. R. 7 Ch. App. 760.  
(3) L. R. 22 Ch. D. 450.
"unless there is a surplus," used by the former, and the words, "unless the estate is more than sufficient to pay the creditors in full," found in the judgment of the latter, are mere obiter dicta. For it is seen that in that case there was no surplus, and consequently proof in respect of interest accruing due after the filing of the petition was held to be inadmissible. Moreover, as observed by J esel, M. R., in that same [140] case, the Court of Bankruptcy is a Court of Equity and has regard to the substance of the transaction; and it is clear that there will be nothing inequitable in disallowing the appellant's claim for further interest. The agreement on which he rests his claim was entered into on the understanding that the insolvent was to obtain a lease for supplying timber to the railway, and the high rate of commission agreed to was intended to give to the appellant a share of the large profits contemplated as obtainable from the proposed business in timber. But these profits do not appear to have been realized by the insolvent, and the appellant has already been allowed a sum of Rs. 2,269 as interest for less than 18 months on the original debt of Rs. 1,300. I am of opinion that his claim to further commission should be disallowed.

[After dealing with the other points raised in this appeal, His Lordship concurred in dismissing the appeal with costs.]

Barclay & Morgan, Attorneys for respondent No. 1.
Biligirir Ayyangar, Attorney for respondents Nos. 2 & 3.

14 M. 140.

APPELLATE CRIMINAL.

Before Mr. Justice Multusami Ayyar and Mr. Justice Shephard.

DAVIES v. PRESIDENT OF THE MADRAS MUNICIPAL COMMISSION.*

[15th & 21st October, 1890.]

City of Madras Municipal Act—Act I of 1884, Sections 103, 109, 192—Profession tax—Liability of members of a firm—Extent of appeal allowed against decision of President of Municipality.

A member of a firm in Madras, another member of which was absent, was assessed under the Madras Municipality Act to pay a certain sum for the tax on arts, professions, trades and callings as agent or charge of the business of the absent member of the firm. He complained to the President against the assessment under Sections 104, 190 of the Act on the ground that he was not liable to pay any tax as agent. &c.; but the assessment was confirmed. He thereupon preferred an appeal to the Magistrates:

 Held, (1) that the Magistrates had jurisdiction under Madras Municipal Act, Section 199, to decide the question of the liability of the appellant to be taxed under Section 103;

[141] (2) that, although the absent partner might be called upon through the appellant as his agent to pay the tax due by the firm with reference to its whole income, he was not otherwise chargeable with any tax in respect of the business carried on by him.

[N. F., 84 M. 130 (133)=11 Cr. L.J. 521=7 Ind. Cas. 743=20 M.L.J. 773=8 M.L.T. 805; F., 22 M. 529 (534).]

CASE stated for the opinion of the High Court under Section 193 of the City of Madras Municipal Act by J. M. Maskill and Sultan Mohidin Sahib, Presidency Magistrates, Black Town, Madras, in calendar case No. 19840 of 1890.

* Criminal Revision Case No. 391 of 1890.
The Magistrates' statement of the case is given in the judgment of Muttusami Ayyar, J. The Advocate-General (Hon. Mr. Spring Benson) and Mr. K. Brown, for the President of the Municipal Commission.

Mr. R. F. Grant, for appellant.

JUDGMENT.

Muttusami Ayyar, J.—This is a case stated for the opinion of the High Court under Section 193 of Act I of 1884. The questions which we have to determine and the facts upon which they arise for decision are stated by the Magistrates in the following terms:

"The appellant in this case, Mr. J. F. Davies, is a partner in the firm of Messrs. Oakes and Co. He was assessed under Section 103 and Schedule A, Class I, of the said Act to pay the sum of Rs. 125 as tax on acts, professions, trades and callings for the half-year ending 31st March 1890, as agent in charge of the business of Mr. W. H. Oakes, a non-resident shopkeeper, carrying on business under the style of Messrs. Oakes and Co. He complained under Sections 104 and 190 against such assessment, but it was confirmed by the President.

"The appellant next appealed to us under Section 192 against the decision of the President, hereinafter called the respondent, and for the purposes of our decision, the following facts were admitted:—that the firm of Oakes and Co. consists of three partners, two of whom are Mr. Oakes and the appellant; that Mr. Oakes left India for Europe in the month of July 1893, the business of the firm being managed in his absence by the other two partners; that Mr. Oakes never carried on any business separate or apart from the business carried on by the firm of Oakes and Co.; and that the appellant holds a power-of-attorney from Mr. Oakes in regard to the management of the firm of Oakes and Co. during his absence. After hearing Mr. Radly Branson for the appellant and Mr. Konworthy Brown, instructed by Messrs. Barclay and Morgan, for the respondent, we delivered judgment on a subsequent day to the effect that the appellant was not liable to be assessed as aforesaid.

"After the above adjudication, the respondent requested us to state a case and refer it for the decision of the High Court, and we accordingly beg to submit for Your Lordships' opinion the following questions, which were raised on the hearing of the appeal:

"(1) Whether this Court has jurisdiction under Section 192 of Madras Act I of 1884 to entertain and decide the question of the liability of the appellant to be taxed under Section 103?

"(2) Whether, assuming that this Court has jurisdiction to decide as aforesaid, Mr. Oakes is liable to be assessed individually and separately as a member of the firm of Oakes and Co., or whether the partners are liable as such to be assessed collectively under Section 103 of the said Act?

"(3) Whether, assuming further that each member of the firm of Oakes and Co., is liable to be assessed individually and separately under Section 103, the appellant is liable, in the circumstances of the present case, as set out in paragraph 2 above, to be assessed as a person coming within the designation 'agents . . . in charge of the business of the aforesaid persons when the principals are non-resident,' appearing in Schedule A, Class I?
"We decided the first and third questions in the affirmative. In regard to the second question, we hold that the partners of the firm are liable to be assessed collectively under Section 103, and that consequently the assessment of the appellant as the agent of Mr. Oakes, one of the partners of the firm of Oakes and Co., was illegal."

As regards the first question, I think our answer should be in the affirmative. The Magistrates derive their jurisdiction to hear appeals from decisions of the President under Section 190 from Section 192. Beyond referring to Section 190, Section 192 throws no light on the object matter of the jurisdiction. Section 190 describes the matter to be heard and disposed of by the President as "a complaint against or an application for revision of any classification or tax preferred under Sections 104, 115, 181 and 188." Section 104 provides "The President shall decide in which of the said classes such person ought to be placed. The President may from time to time revise such classification. Any person dissatisfied with any classification or revision may complain to the President who shall deal with the complaint as an application for revision in the manner provided by Section 190." The words, "the said classes, and such person," are words of reference to Section 103. That section enacts, "If the Commissioners determine to levy a tax on arts, professions, trades or callings and on offices or appointments, every person who, within the city, exercises any one or more of the arts, professions, trades or callings or holds any one or more of the offices or appointments specified in Schedule A shall pay in respect thereof the sum specified in the said Schedule as payable by persons of the class in which such person is placed subject to the provisions of Section 110." Here again Schedule A and Section 110, which are referred to in Section 103, should be read as parts of that section. Schedule A is a schedule of persons liable to be taxed and distributes them into seven classes and mentions the specific amounts as payable either with reference to the capital or income or the nature of the profession or trade or employment.

The contention for the Municipality before the Magistrates was that upon the true construction of Section 104, a distinction ought to be made between liability to be taxed and classification, and that the right of complaint conceded by that section to the person taxed extends to classification and to classification only. The Magistrates disallowed the objection; but it is reiterated before us. In the first place, the contention appears to me to be anything but reasonable. For instance, if a person is placed in Class VI instead of in Class VII, Schedule A, and thereby taxed at Rs. 10 instead of Rs. 5, he has a right of complaint under Section 104 according to the Municipal Commissioners; whereas a person who is not liable to be placed in any class or to be taxed at all has, according to them, no right of complaint under that section, whatever may be the amount with which he is taxed.

Nor is the contention consistent with the grammatical interpretation of Section 104. It commences with the words, "The President shall decide in which of the said classes each person ought to be placed." Who is the person referred to by the words, "such person"? We must look for an answer in Section 103, and in the words of that section, the answer is, every person who exercises, within the city, any one or more of the arts, professions, trades &c., specified in Schedule A, that is to say, as liable to be taxed; for, Schedule A is a schedule of only such persons as are liable to be taxed. Again, Section 196 premises the charge of a tax generally and declares the decision of the Magistrates to be final in regard
to it. The natural inference is that the liability to be placed in some class in Schedule A presupposes the liability to be taxed and such classification must be taken to include and cannot be dissociated from liability to be taxed.

That this is the probable intention of the Legislature appears also from other sections in the Act. Section 107 renders the tax recoverable together with a penalty by prosecution before a Magistrate when the person taxed fails to pay it within the given time and it prescribes a finding by the Magistrate that the person taxed is liable to be taxed as necessary to warrant his conviction. It lends support to the Magistrates’ view to this extent, viz., that there is no reasonable ground for excluding from the cognizance of two Magistrates a matter which is liable to be adjudicated on by a single Magistrate or for withholding from the person taxed a means of averting the prosecution by proceeding under Sections 190 and 192. As to the contention of the learned Advocate-General that it may be the intention of the Legislature that the party taxed should proceed by a civil suit if he is not liable to be taxed, I may refer to Section 208 which takes away the remedy by suit in respect of any tax provided that the directions of the Act are in substance and effect complied with. If the construction suggested for the Municipal Commissioners were to prevail, there would be this anomaly, viz., that the Legislature took away from every person, who is not liable to be taxed, but who is erroneously taxed by the Municipal President, his remedy by suit without substituting for it any other remedy and left him to wait to be prosecuted before he could obtain any redress.

The intention inferable from Section 196, which takes away the remedy by suit in respect of the charge of a tax (which includes both the liability to pay it and the amount to be paid), is that the remedy provided by Sections 190 and 193 is substituted for the remedy by suit and that Section 107 makes non-liability to be taxed available also as a matter of defence in case of prosecution. As to the argument founded upon the wording of Section 115, which directs the President to determine what persons are chargeable and the amount of tax, I am not prepared to attach weight to it, as the word classification means, when Sections 103 and 104 are read together, liability to be taxed and the rate at which the tax is to be fixed. The conclusion I come to is that the Magistrates have jurisdiction under Section 192 to determine as well the question of liability to be taxed as the question whether the person taxed is placed in the proper class.

As to the second question, I agree with the Magistrates in thinking that by reason of the interpretation Cause C to Section 3, a firm or partnership is a person within the meaning of Section 103. I also think that the tax prescribed by Section 103 is a tax upon a profession or trade or calling and that there can be but one tax when several persons jointly carry on one trade or business. The contention that, when several carry on a joint trade, each is liable to be separately taxed on his share of the income would lead to two anomalies. Take it, for instance, that the aggregate income of a firm renders it liable to be taxed whilst the share therein of each partner is not liable to be taxed. The result in that case would be that the trade carried on by the firm would altogether escape taxation under Section 103. Take, on the other hand, the case in which the aggregate income and the share of each partner are both taxable with the maximum amount of tax prescribed by Schedule A. In that case there would be as many taxes as there are partners instead of there being one.
tax on the one joint business. In Section 109 every member of a firm or partnership and every member of a joint Hindu family are placed on the same footing, and in an undivided Hindu family, there is but one family coffer or one family income, and until partition and so long as the family continues to be joint, no member can predicate that he has a specific share in the family income or property. Reading, therefore, Sections 103 and 109 together and having regard to the nature of the tax, I consider that there is to be but one tax on the partnership business or joint trade and that the amount of tax payable under Schedule A is to be fixed with reference to the aggregate income as under Section 110, but that, as a facility towards its collection, every member is to be treated as personally and separately liable for the tax. In this view the omission to specify a partnership as a distinct person in Schedule A is intelligible. In law a partnership is not a legal person, but each member is jointly and severally responsible for a partnership debt and the Legislature accordingly omitted to specify a partnership as a person in Schedule A. To indicate, however, that the partnership trade is a single trade or business for purposes of taxation, the Legislature treated a partnership as "a person" within the meaning of Section 103, but to deprecate any contention on the part of any individual partner that he is only liable to be taxed on his share of the income, the Legislature provided as regards the liability to pay the tax that each partner is to be regarded as if he was personally and separately liable, subject, however, to the condition that it is the partnership business that is to be taxed according to Section 103.

The second question submitted for our decision seems to imply that, unless the person taxed is described as taxed as a member of the partnership, he is not liable. It is no doubt desirable so to describe him, but such accurate description is not of the essence of a valid tax. By Section 208 no tax is liable to be impeached by reason of a mistake in the description of the occupation of the person liable to pay the tax.

I would, therefore, answer the second question by stating that, though Mr. Oakes may be called upon through his agent, Mr. Davies, to pay the tax due by the firm with reference to its whole income, yet he is not to be charged solely with reference to his share of that income, or as if his business as partner was separate and distinct from that of the firm.

My answers to the first and second questions render it unnecessary for me to answer the third question.

SIRIFHARD, J.—The first question is whether the exception taken by Mr. Davies to the decision of the President of the Municipal Commission is a matter which can form the subject of an appeal to two Magistrates under Section 192 of the Act, I of 1854. The decision of the President was that Mr. Davies, one of the three members of the firm of Oakes and Co., was chargeable with the tax payable under Section 103 of the Act, as being agent in charge of the business of another of the partners, Mr. W. H. Oakes, who was absent from Madras. The main objection taken on behalf of Mr. Davies was that it was the firm that should be taxed, and that, although any member of the firm might be held responsible, the tax could not be levied from each one of them. It is contended on behalf of the President that the objection which has regard not to the classification of the person complaining but to his liability to the tax is one which cannot be made the subject of a complaint under Section 193, and that therefore the Magistrates had no jurisdiction to entertain the appeal, because under.
Section 192 it is only from decisions of the President passed under Section 190 that an appeal to the Magistrate is given. The language of Section 104 which is the section giving the President power to decide the class in which any person liable to the tax payable under Section 103 shall be placed and of Section 190 lends some colour to this contention. In terms, those sections have reference to complaints made with regard to the class in which the complainant has been placed and not to the decision of the President, necessarily antecedent to any classification, that the complainant is a person exercising one of the arts, professions, trades or callings mentioned in the Schedule. In my opinion, however, the construction contended for on behalf of the President is not the one which should be placed on those sections of the Act. If the object of the Legislature was to empower the President in the first instance, and the Magistrates on appeal to decide questions with regard to the incidence or amount of any tax which otherwise would have to be decided by the ordinary tribunals, it would be strange that in the particular case of the tax payable under Section 103 it should not be open to a person charged with it to complain that he was wrongly charged. Admittedly it is open to him to complain of the classification, or, in other words, to object that he is over charged, and the President is bound to entertain his complaint and dispose of it under the provisions of Section 190. Yet it is said that the person charged has no right under Section 190 to object that he ought not to have been charged at all by showing for instance, that he was not the trader he was supposed to be.

It seems to me, that the jurisdiction to hear a complaint about classification necessarily implies a power to enquire into the particular art, profession, trade, or calling which the person charged may be carrying on. I do not see how, without making this inquiry and without ascertaining what the man's business is, the President can fix the class in which he is to be placed. That the object of the Legislature was what has been indicated above is, I think, rendered clear by reading Section 196 with the other sections already mentioned. That section makes the decision of the [148] President with reference to the assessment, service or demand of any tax or toll, or in case of appeal the decision of the Magistrates, final, and it also provides that no action shall be maintained to recover money paid in respect of any tax levied under the Act. Unless therefore the question of liability to the tax is one which must be adjudicated upon by the President under Section 190, the person charged in respect of a trade which, in fact, he was not carrying on would have no redress. Access to the special tribunal provided by Section 192 would not be open to him, and if the tax were levied by distraint, he would have no remedy in a Court of Law. I am of opinion that the Magistrates have put a right construction on the Act and that the first question must be answered in the affirmative.

The next question is whether Mr. Davies, as agent of an absent partner, is liable to the tax payable under Section 103. The contention on behalf of the President is that each member of a firm is liable to the tax, his class being determined by the amount of his share of the profits of the business, and it is argued that while "firms" or "partnerships" as such are not made liable in the Schedule, Section 109 indicates an intention to make each member of it liable. On the other hand, the learned counsel for Mr. Davies called attention to the definition of the word "person," which is so framed as to include a firm or partnership and argued that Section 109 should be read with the definition being inserted for the purpose of showing that, notwithstanding the definition,
the liability of the firm might still be brought home to any member of it.

In my opinion, the latter contention must prevail, and it was not intended that each member of a firm of merchants carrying on one business should be taxed as several distinct persons.

The tax is not levied in respect of the merchant's income, but in respect of his trade or business and, therefore, it would seem to follow that, if the business is one, there should be one tax only and not several. It would hardly be reasonable that the profits and extent of a business remaining unchanged, the amount leviable from the firm should vary with the number of the members. In the case of a firm the person exercising the trade within the meaning of Section 103 is the firm. It is the firm which is to be placed in one of the classes under Section 104, and, lest it should be supposed that the liability is to one joint only, it is declared by [140] Section 109 that each member of the firm is to be personally and separately liable. The language of this section is inartificial; but, in my judgment, no other meaning can be given to it, and it cannot be read as imposing on each member of a firm or a Hindu family an obligation to pay a distinct and separate tax in respect of the trade carried on by them.

I am of opinion that the second question must be answered by stating that Mr. Oakes, though he may be liable to be called upon to pay the tax payable by the whole firm, is not otherwise chargeable with any tax in respect of the business carried on by him.

Branson & Branson, attorneys for appellant.

Barclay & Morgan, attorneys for respondent.

14 M. 149 = 1 M.L.J. 46.

APPELLATE CIVIL.

Before Mr. Justice Muttsasami Ayyar and Mr. Justice Dest.

NALLANNA (Defendant No. 1), Appellant v. PONNAL AND ANOTHER (Plaintiff and Defendant No. 2), Respondents.*

[12th and 27th August and 13th November, 1890]

Hindu Law—Inheritance—Bandhu—Sons daughter.

A son's daughter is entitled to inherit to her grandfather as a bandhu.


SECOND appeal against the decree of D. Venkatarangayyar, Acting Subordinate Judge of Salem, in appeal suit No. 285 of 1887, affirming the decree of P. Ayyavayyvar, District Munsif of Namskal, in original suit No. 491 of 1886.

Suit for land formerly the property of Kuppachee Goundan (deceased). Kuppachee Goundan had a son, Seugoda Goundan, who predeceased him, leaving two daughters, viz., the plaintiff and the wife (deceased) of defendant No. 2, who was ex parte. Defendant No. 1 claimed as a purchaser form the widow of Kuppachee Goundan, but established no circumstances of necessity to justify the sale to him.

* Second Appeal No. 1041 of 1889.
1890

The District Munsif passed a decree for the plaintiff which was
affirmed on appeal by the Subordinate Judge.

[150] Defendant No. 1 preferred this second appeal.

Sadagopacharyar, for appellant.

Rama Rau, for respondents.

JUDGMENT.

It is found by the Subordinate Judge that Sengodi Goundan pre-
deceased his father. The question for decision is therefore whether
plaintiff is entitled to succeed to her grandfather as a bandhu. It was
held by this Court in Kutti Ammal v. Radakrishna Aiyan (1) that a sister
is a bandhu. The course of decisions from the date of that decision pro-
ceeds on the principle that consanguinity may be recognized as the basis
of title to succession in the absence of preferential male heirs. According
to the definition of the term sapinda as given in the Achara Kanda of the
Mitakshara, there is sapinda relationship when there exists a "connection
with one body either immediately or by descent."

In this view a son's daughter is as much a bandhu as is a sister, and
thus entitled to succeed as heir of her paternal grandfather in the absence
of preferential male heirs. Our attention has been drawn to the observa-
tions of Mr Mayne in paragraph 495 (4th edition) of his work on
Hindu Law. But they have been considered and dissented from by the
learned Judges who decided the case of Lakshmanammal v. Tiruvengada (2).

The appeal therefore fails and is dismissed with costs.

14 M. 150.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

PYDEL (Defendant No. 2), Appellant v. CHATHAPPAN
AND ANOTHER (Plaintiffs), Respondents.*

[14th and 23rd July and 20th October, 1890.]

Civil Procedure Code—Act XVI of 1882, Section 206—Amendment of decree after
execution.

In a suit for money against the karnavan and two amandravans of a Malabar
tarwad, the judgment directed a "deed for the plaintiff as prayed." but the
decree ordered payment by one amandran only. Land belonging to the tarwad
was [151] attached and sold in execution, an objection by the other members
of the tarwad having been overruled. After the sale, the decree was amended
and brought into conformity with the judgment.

In a suit brought by other members of the tarwad against the karnavan, the
decease-holder and the execution-purchaser, it was found that the judgment-debt
had been contracted for proper tarwad purposes, and that the land had been sold
for its proper value:

Held, that the sale was binding on the plaintiffs.

[F, 15 M. 403 (404); 3 C.L J. 188 (191).]

SECOND appeal against the decree of C. Gopalan Nayar, Subordinate
Judge of North Malabar, in appeal suit No. 401 of 1888, confirming the
decree of A. Chathu Nambiar, District Munsif of Nadapuram, in original
suit No. 69 of 1888.

(1) 8 M.H.C.R. 88.

(2) 5 M. 241.

* Second Appeal No. 949 of 1889.

106
Suit for a declaration that certain land, the property of the tarwad of the plaintiffs and defendant No. 1, was not liable to be sold in execution of the decree in original suit No. 162 of 1878 on the file of the District Munsif of Tollyharry and for the cancellation of an order made on miscellaneous petition No. 106 of 1877 by which the land was ordered to be sold. In the suit of 1873, the present defendant No. 2 sued the present defendant No. 1, his late karnavan and another anandranavan of the tarwad, to recover from them certain land with arrears of rent. The District Munsif ordered "a decree for the plaintiff as sued for," but the decree as issued ordered that the land be surrendered and that the present defendant No. 1 do pay the arrears of rent, costs, &c. In execution of this decree the land now in question was attached and an objection by the present plaintiffs having been dismissed, it was brought to sale and the present defendant No. 3 became the purchaser. The decree was subsequently amended and the karnavan and both anandranavans were ordered to pay the amount decreed.

The District Munsif held that the sale was invalid as against the plaintiffs and passed a decree as prayed, and this decree was affirmed on appeal by the Subordinate Judge.

Defendant No. 2 preferred this second appeal.

Sankaran Nayar, for appellant.

Sankara Menon, for respondents.

JUDGMENT.—(PRELIMINARY).

The decree passed in original suit No. 162 of 1878 directed the first defendant alone to pay the amount decreed to the appellant; but the judgment recorded in that suit showed that his karnavan was also intended to be made liable. The appellant attached four parcels of tarwad land in execution, but [152] the respondents objected to the attachment on the ground that the decree-debt was not a tarwad debt. Their objection being overruled, they brought this suit to have it declared that tarwad property was not liable to be sold in execution of the decree in question. Subsequently, the attachment was followed by sale and defendant No. 3, who was the purchaser at the Court-sale, was made a party to the suit. Subsequently to the sale, the decree was amended so as to include the karnavan among the defendants who were directed to pay the amount decreed. Both the Courts below decreed the claim, and held that for the purposes of this suit, the decree must be taken to have been as it stood originally and not as it was amended subsequently to the attachment and the sale. The contention before us is that the amended decree should be treated as having been made on the date of the original decree.

It is provided by Civil Procedure Code, Section 206, that the decree must agree with the judgment, and we must, therefore, take the amendment to have been made in accordance with a rule of law. This being so, it cannot be treated as one made to the prejudice of the respondents' karnavan who was a party to the suit. The contention that the amended decree must be taken as in force from the date of the original decree appears to be well-founded. There is a distinction between a case of amendment and one of novation or substitution. When an instrument is amended so as to express the real intention which it was intended to express, but which it did not completely express, the transaction is not in substance varied, but its inaccurate description is only rectified. It is also true that an amendment ought not to be allowed to operate so as to prejudice a third party, and the question, therefore, is whether the respondents have really
been prejudiced in respect of the right which they seek to establish. Their contention that a mere error ought not to be rectified is entitled to no weight. But it may be that they are prejudiced if, as alleged by them, the decree debt is not binding on their tarwad, or if tarwad property has been sold for an inadequate price by reason of the defect in the decree, as it stood originally. In the view which we take of the case, viz., that the amended decree was operative from the date of the decree except as specially provided for by Civil Procedure Code, Section 32, it must be decided once for all in this suit whether the plaintiffs are entitled to the relief sought for or to any and what other relief.

[153] We shall ask the Subordinate Judge to return a finding on the third issue, and also on the question whether the lands in dispute have been sold for less than their proper value.

Findings to be returned within six weeks from the date of the receipt of this order, when seven days after the report of the receipt of the finding will be allowed for filing objections.

[In compliance with the above order, the Subordinate Judge submitted findings to the effect that the debt for which the decree was obtained was contracted for the proper purposes of the plaintiffs' tarwad; and that the land in dispute had not been sold for less than their proper value.]

This second appeal having come on for final hearing, the Court delivered judgment as follows:

JUDGMENT.—(FINAL).

We accept the finding to which no objection is taken. The decrees of the Courts below must, therefore, be reversed and the suit dismissed. The respondents must pay the appellant's costs throughout. No order is necessary on the memorandum of objections.

14 M. 153.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

NILAKANDAN AND ANOTHER (Plaintiffs), Appellants v.
PADMANABHA AND OTHERS (Defendants), Respondents.*

[19th and 20th August, and 28th November, 1890.]

Malabar Law—Melkoima—Compromise by Urales of the right to manage a devas–m Claim of certain Urales to exclude others from management—Limitation.

The uraima right in a Malabar devas–m was vested in the ilom, of which plaintiff No. 1, a Nambudri Brahman, was a member; the defendants represented the family which formerly ruled over the tract of country where the devas–m was situated. The plaintiff sued for a declaration that their families were entitled to the exclusive management of the affairs of the devas–m. It appeared that the plaintiffs' and defendants' families had been in joint management since 1846 in accordance with the provisions of a deed of compromise:

Held (1) On its appearing that the compromise had been entered into by the karnavam of the plaintiffs' ilom, and that the compromise was not vitiated by fraud or the like, that the compromise was binding on the plaintiff;

(2) That the claim to exclusive management was barred by limitation.

[154] Per cur: A legal origin to which the joint enjoyment of the rights of management may be referred may be found in the continuance of what was Melkoima in ancient times as a co-trusteeship subsequent to the British rule

* Appeal No. 43 of 1889.
with the tacit sanction of the British Government, or in the status of the Nambidi family as patrons of the institution.

[F. 16 Ind. Cas. 325 (232) = 23 M. L. J. 131 = 12 M. L. T. 269; R., 37 C. 263 = 11 C.L.J. 304 (314) = 14 C.W.N. 497 = 3 Ind. Cas. 419; 19 M. 243 (247); 21 M. 278 (281); 11 C.L.J. 2 (13) = 8 Ind. Cas. 403.]

APPEAL against the decree of V. P. deRozario, Subordinate Judge of Palghat, in original suit No. 55 of 1837.

Suit for a declaration that the plaintiffs’ families as hereditary Uralers of a devasom in Malabar were entitled to the exclusive management of its affairs, and that the defendants’ family which formerly possessed a Melkoima right over it was entitled to no rights of management, their Melkoima right having been extinguished on the British conquest.

In 1845, certain arrangements were entered into between the families of the plaintiffs and defendants, the nature and history of which will appear from the following extracts from the judgment of the Subordinate Judge, referred to in the judgment of the High Court:

"In 1845, disputes arose between plaintiffs' and defendants' ancestors. "Second plaintiff's father filed a suit to set aside a kanom granted to a tenant on devasom land. Who the grantor of the kanom was does not appear. The defendants in the suit were first plaintiff's predecessor, the Samudayam of the temple, defendant's predecessor, and the tenant—plaintiff's first witness—gives the following version of the dispute. Cherukunnath Nambudri, first plaintiff's predecessor, proceeded to collect rents when Cherambatta Nambudri (second plaintiff's father) and Shakden Raja (the "Namboor) prohibited the tenants from paying rents. The latter Nambidi was in collusion with the Raja (Namboor) and was opposed to Cherukunnath Nambudri. On this account Cherukunnath Nambudri entered into karar with the other two. The statement of this witness as to the nature of the dispute is not supported by the Razi (D), subsequently filed in the suit, which tends to show that the dispute was as to the validity of a kanom granted by one of the parties. However this may be it is clear that there was a dispute between the Uralers and the Nambidi as to the management of the temple affairs. Plaintiffs' first witness states that the Nambidi had asserted that he was owner of the temple. It is immaterial whether one of the Uralers stipulated with the Nambidi or whether both the Uralers were opposed to the Nambidi. The dispute was settled by a karar (Exhibit C). The karar is in the following terms:

"Writing executed by Cherukunnath Sree Kumaren Kumaren Nambudri to Cherumatt Narayanan Vasudavan alias Narayanan Nambudri.

"Whereas you have instituted suit No. 203 of 1845 on the file of the Palghat District Munsif's Court against me, the second defendant Samudayam, the third defendant Melkoima, and fourth defendant Goldsmith Murukan, the tenant in possession, to set aside the right of 1,100 panams granted in favour of the said Murukan, it is agreed that we the Uralers and Nambudri, the Melkoima should cause the Samudayam to manage all the affairs of the devasom as hitherto, should cause him to collect the rents, interests, &c., and defray the expenses, usual and customary, and attend upon ceremonies, that the affairs which ought to be managed by us two and the Nambudri should be managed jointly and not independently of one another, that the devasom funds ought not to be wasted, that the affairs which ought to be managed by the Samudayam according to the powers given to him ought to be managed subject to the approval of all three (of us) and that accounts of each year should be
settled by all three (of us) in the month of Chingom. Nambudri (you)
having admitted the validity of the right questioned in the suit the
matter has been compromised. A karar embodying these terms has been
executed to me by you (Nambudri) on a stamp cadjan for 1 rupee
No. 1862, fasli 1254, sold from the Palghat taluk, another executed to
Nambudri by both of us on 1 rupee stamp cadjan No. 63 of fasli 1255
and a third executed to both of us by Nambudri on 1 rupee stamp cadjan
No. 64 of the same fasli year. A Razi ought to be put in Court, and all
should act in conformity with these provisions.
In accordance with the karar the parties filed a Razi (D) withdraw-
ing the suit. The Razi is as follows:
The plaintiff has executed to the first defendant a karar regarding
the management of the devasam on 1 rupee stamp cadjan No. 1863 of
fasli 1254 purchased at the Palghat Taluk Custom on the 2nd Chingom
1020, the first defendant has executed a similar karar to plaintiff on
stamp cadjan No. 1863. Plaintiff and first defendant have together
executed a karar on stamp cadjan No. 63 of fasli 1255 in favour of the
plaintiff and first defendant jointly, plaintiff has also admitted defendant's right of 1,100 lamsams now in dispute and plaintiff shall receive
the costs, Rs. 19-10 3 from the District Court.
The karar and the Razi recite that up to 1020 (1845) the affairs of the
temple were jointly managed by the Uralers and the Melkoima. Plaintiffs'
Exhibits A, B and A M do not show that up to 1012 (1836) the Nambidi
took part in the management. He probably advanced his claim subse-
sequently to interfere in the affairs and in the management of the temple.
That he did interfere in the management before 1020 (1845) is admitted
in the plaint (4th para.). In 1020 (1845) when the karar was executed,
the nature of Melkoima right was ill-understood. There is nothing to
show that the Nambidi did not really believe that as Melkoima he had
the right to interfere in the management. In the suit then pending
the Court would have decided whether the Nambidi had exclusive or
joint right of management; or no right of management; but the Uralers
chose to settle the dispute amicably out of Court. The plaintiffs do
not allege that their predecessor's consent to the agreement was obtained
by fraud, coercion, undue influence or misrepresentation. For a period
of 30 years subsequent to the date of the karar the parties to it, first
plaintiff's grandfather Shri Kumaran, second plaintiff's father Narainen,
and first defendant's predecessor Shadon Raja and their successors first
plaintiff's father and uncle, second plaintiff's uncle and first defendant's
uncle, managed the affairs of the devasam in accordance with its terms.
(See the deposition of plaintiffs.)
In 1874 disputes again arose between the Uralers and the Nambidi.
The Uralers were plaintiff's uncle's, who were not parties to the karar.
The disputes led to a suit which the Uralers filed in the Sub-Court of
Calicut for the recovery of devasam land from a tenant who held
under a demise granted by the Samudrayam appointed by the
Uralers and the Nambidi. The plaint (Exhibit VII) alleged that the
tenant in collusion with the Nambudri declined to surrender asserting
that the latter had Melkoima. The Nambidi was second defend-
ant [156] in the suit. He contended (see his written statement
Exhibit VIII) that he was the owner of the temple and in posses-
sion of its properties, that the plaintiffs were his appointees and
had no special right to sue. Issues were settled and the suit posted for
hearing on 24th October 1874. Here was an opportunity offered to the
parties to have their dispute settled by a decree of Court. None of the parties were parties to the karar. Now was the time to repudiate it or ratify it, or rely upon the right which each family possessed over the devasam. But the parties preferred like their predecessors before them to settle the dispute amicably out of Court, and for this purpose applied (see Exhibit X) to the Court for an adjournment of the hearing for 15 days. The parties represented to the Court that they intended to compromise the dispute in the suit and the matter of other suits and decrees filed and obtained by the Namadi against the tenants of the devasam. They also expressed their intention to conform themselves to the karar of 1020 (1845), but to modify its provisions in one particular, viz., to sue themselves instead of by a Samudayam. On 21st November 1874, the parties presented to the Court a razi (Exhibit E) and prayed that the suit might be struck off the file. The razi, which embodies the terms of the compromise, is as follows:

"First and second plaintiffs and second defendant are hereafter to manage jointly and cause to be managed as hitherto all the affairs of the plaintiff Kachen Kurshi devasam, all three shall jointly but not severally manage and get managed all the affairs of the devasam, first and second plaintiffs and second defendant have now appointed in writing Purapadiyat Perumpadapoli Vasudevan Subramanian Adibhi as Samudayam and Kunisher Korom Shuppa Pattar’s son Ananda Rama Pattar as Pattamali and have taken Kaichit from each of them, the first and second plaintiffs and second defendant shall jointly cause them to perform the duties assigned to each of them, first and second plaintiffs and second defendant shall in future jointly conduct themselves or by their pleader all suits and petitions, civil, criminal and revenue, on behalf of the devasam, second defendant shall keep in his possession the Marupotam deeds and the Shanku Mudra (seal) of the devasam as before, second defendant shall hand them over to all or any of them whenever necessary, second defendant shall be held responsible for the loss that may arise on account of his failure to deliver them; the second defendant shall not execute the decree No. 19 of 1874 on the file of the Chemplprom District Munsil’s Court and its appeal decree No. 215 of 1887 and realize the amount due thereunder, the demise to the first defendant shall be renewed to him on the conditions proposed by first and second plaintiffs and second defendant. The first and second plaintiffs and second defendant shall cause the Samudayam to grant a renewal within one month from this date with the stipulation that the value of the existing improvements has not been ascertained and first defendant shall be compensated with the value that may be ascertained at the time of redemption and in case of first defendant’s default to execute the kaichit, the (first and second plaintiffs and second defendant) shall sue him again on the basis of the plaint kaichit, and the parties shall bear their own costs in this suit."

"The parties to this razi and their successors, first plaintiff’s uncle his elder brother, first plaintiff, second plaintiff, first defendant’s uncle and second defendant’s mother and guardian acted up to the terms of the razi until the date of the present suit. The Uraders and the Namadi jointly appointed a Samudayam and a Pattamali (see Exhibits L M O)—they joined in suits to [157] recover devasam lands (Exhibits R S T U. XI and XIII) and in applications XIII and XIV to execute decrees."

The Subordinate Judge dismissed the suit.
The plaintiff’s preferred this appeal.

111
This is an appeal from the decree of the Subordinate Judge of South Malabar at Palghat, who dismissed the appellant's suit for a declaration that, as Uralers, they had the exclusive right of managing the affairs of Kachankurishi temple, and that neither the first respondent nor his family had a joint right of management. The institution in question is an ancient Hindu temple in South Malabar and the first respondent is the representative of the Nambidi family which ruled in former times over that tract of country in which the temple is situated, whilst the Urala right is vested in the illom or family of the first appellant, a Nambudri Brahman, from time immemorial. There is no legal evidence before us to show when and by whom the temple was founded or what was the nature of management prescribed by its original constitution. There are, however, certain facts which are established beyond doubt and which are, indeed, not disputed by the appellants, and the Subordinate Judge rests his decision upon them. The appellants admit, and there is considerable evidence to show that, at least from 1845, the appellants' and the respondents' families have been in joint management in accordance with the terms of the karar (Exhibit C) and the razi (Exhibit D) dated the 16th August 1845, which were re-affirmed, except in one particular, which is immaterial to our present purpose by document E, dated the 21st November 1874. The circumstances under which documents C, D and E were executed and their contents are set forth by the Subordinate Judge in paragraphs 16 to 20 of his judgment, and it will be seen that the documents referred to the first respondent's predecessors as Melkoimas and the appellants' ancestors as Uralers and that they were executed in adjustment of pending litigation regarding the respective rights of those persons. It is not urged, as pointed out by the Subordinate Judge, that either fraud or a wilful suppression of material facts vitiates the deed of compromise; but it is contended that they do not bind the appellants because (first) all the [members of their families, as constituted in 1845, had not joined in their execution, (secondly) that the compromise practically created a new right and thereby varied the original trusts of the institution, (thirdly) that the Melkoima right being a right of sovereignty, it ceased on the introduction of the British rule, and (fourthly) because no joint right can be acquired by prescription.

As regards the first ground of claim it is clearly untenable. Prior to 1848 the first appellant's grandfather's brother was the karvan of his illom, and from 1848 to 1859 it was under the management of the appellant's father. From 1859 to 1876 the appellant's uncle was the managing member, and from 1876 to 1882 the appellant's elder brother was in management. The first appellant has been the head of his family since 1882, and although all the members of the appellant's family in 1845 did not sign documents C and D, the then head of the family signed them, and the arrangement made by him was acted upon by his successors and expressly recognized in 1874 and acquiesced in by all the junior members of his family for more than two generations and during a period of upwards of 40 years. The contention, therefore, that the arrangement had not the sanction of the whole family in 1845 appears to us to be entitled to no weight.
As regards the second contention, the Subordinate Judge is right in holding that, after the compromise of 1845 and its ratification in 1871, the appellants are not at liberty to re-open the question, whether the right of joint management recognized in 1845 was then a subsisting right, and whether as M.ikoina, the first respondent's family was entitled to participate in management. It is sufficient to say that the right of joint management was brought into controversy in a Court of Justice, and that it was by way of compromise recognized as a subsisting right and as being in accord lance with the prior usage of the institution. It was held by the Privy Council in Sri Gajapathi Rudhika Patta Maha Devi Guru v. Sri Gajapathi Nilamani Patta Maha Devi Guru (1) that when a state of facts is accepted as the basis of a compromise whereby a suit pending decision is amicably adjusted and when the compromise is not vitiated by fraud, those who were parties to it and their privies should not afterwards be heard to say for the purpose of reviving the controversy that the real (159) state of things was otherwise. The principle is the same whether the mistake alleged to have been made is one of law or of fact. We may here draw attention to the words "as hitherto" in document C as indicating that it did not purport to vary the prior usage of the institution.

Even assuming that the appellants may now be permitted to show that the respondent's family had no joint management prior to 1845, the evidence before us cannot be held sufficiently to establish such contention. In 1821 the Collector of the district called upon the then Nambidi to pay up the arrears of revenue due on devasom land (Exhibit I), and this implies some control on his part over the temple income. Again in Exhibit A, which is the temple pymash of 1832, the Nambidi is described as having a Melkoima right over the temple. Further, Exhibit I shows that it was the Nambidi who got the devasom land exempted from assessment by Hyder Ali in 1773. Though the pymash account is of itself no evidence of title, it is of value in this case as confirming the view since taken by the Uralers as to the position of the Nambidi. The appellants' pleader suggests that Exhibit VIII disproves Exhibit I, but the explanation given by the respondents' pleader is not without weight. It does appear, as stated by him, that Kelu Nair only distributed the assessment payable on 3,500 paras of temple land at the rate of one-fourth of a fanam per para over a portion of it at a higher rate, whilst he entered the rest as rent-free, the aggregate assessment due by the temple remaining the same. Apart from these, there are other facts which indicate that the respondents' family had a special connection with the temple in question, and special interest in its efficient management. The first appellant admits in his evidence that whenever a member of the Nambidi family became its head or, as it is said, attains the stanom of the Nambidi his installation takes place in the temple, and the representative of the first appellant's family for the time being attends the ceremony and strews rice over his head as a token of respect or salutation. It is likewise admitted by him that whenever Brahmans in that part of Malabar perform a yagam or a vedic sacrifice, they obtain first the Nambidi's permission by accepting darbha grass from him as he is seated on a raised platform in the temple and pay him a fee. It is also in evidence that the appellants live in the Cochin territory, or near Trichoor, whilst the respondent's family lives close (160) to the temple at the distance of about a mile or two from it. The
documentary evidence to which our attention is drawn on behalf of the
appellants, Exhibits A, B and C to A N, refers to the first appellant's
ancestor and another as Uralers, and does not refer to the Namboodi as
being one of them. Seeing that he is referred to as Melkoima in
documents C, D and E, they are not conclusive on the subject of inter-
ference in management. However this may be, it is impossible to hold
upon the evidence that prior to 1845 the Namboodi had no connection
whatever with the temple nor control over its affairs, and that the recital
that document C recognized and regulated the prior practice was not bona
fide.

The next contention is that the Melkoima right is the sovereign
right of supervision, and that when the Numbudris ceased to be rulers,
their Melkoima ceased likewise, and that it was therefore not a subsist-
ing legal right in 1845. This is the substantial question raised for de-
cision in this appeal. The learned pleader for the appellants relies on the
definition of Melkoima given by Mr. Graeme, the Special Commissioner of
Malabar, about 1830, as "the right which the sovereign power possessed
over property of which ownership is in others. It is a right of superinten-
dence, an incident of sovereignty." The Melkoima right was also described
by Mr. Justice Holloway, whilst District Judge of North Malabar, in appeal
suit No. 118 of 1861 in the following terms: "This is not only not the
same, but absolutely incompatible with ownership. It was the right of
the sovereign power possessed over property of which the legal owner-
ship was in others. That sovereign power and the right of interference
which nothing can prevent these Malabar Rajas from asserting have of
course wholly ceased." Mr. Wigram, a former District Judge of Malab-
ar, gives a similar definition (see Wigram on Malabar Law and Custom).
On the other hand, the respondents' pleader refers to Logan's treatise on
Malabar, Vol. II, p. 177, wherein the Urama right is included among the
four functions of a dasavali, and to Exhibit A in which the Namboodi is
described as Kudavali. It appears from Logan's Glossary, page 211, that no
one was called a Kudavali who had not at least 500 Nayars attached to his
rank; any number below that ranked a person as a dasavali. Our atten-
tion is also drawn to the ancient constitution of Hindu temples in Malab-
ar as described by Mr. Conolly, a Collector of Malabar, in his letter to the
Board of Revenue which is cited in [161] Zamorin of Calicut v. Krishnau(1)
"The pagodas of Malabar," says Mr. Conolly, "generally are and have
always been independent of Government interference. "They are either
the property of some influential family, the ancestors of which either
built and endowed them, or, as is more commonly the case, are claimed
and managed by a body of trustees who derive their right from immem-
orial inheritance and who conduct the affairs of the temple under the
patronage and superintendence of some Raja or other person of considera-
tion. This latter state of things, it will be seen, is nearly that which the
Government are now desirous of introducing everywhere." It will be
seen that the above passage throws light also on the policy which the
British Government was inclined to adopt, viz., that of continuing the
supervision of the Raja, who was the patron, as it originally existed in
the interests of certain temples, instead of referring that supervision
solely to the status of the person exercising it as sovereign for the
time being and declaring it to have ceased on the annexation of
Malabar. There is some indication of such policy having been pursued

(1) R.A. No. 35 of 1897, not reported.
in this case—as in the Gurusavur Devasom case: *Zamorin of Calicut v. Krishnan* (1)—for the Revenue authorities have corresponded with the Nambidi relating to matters connected with the temple, whilst there are traces of the continuance of the right of interlocutor by the Nambidi family subsequent to the annexation of Malabar. The real question then, which we have to decide, is this—are we to ignore the state of things which has existed admittedly from 1845 and probably from the commencement of the century and which was submitted to by the Usurers as one consistent with the ancient usage and constitution of the institution and continued and countenanced by the British Government as conducive to the protection of the interests of the institution, and are we now to deduce a rule of decision from the abstract theory of Molkaina as it existed prior to British rule, and to change the usage and unsettle what was set at rest by a compromise 40 years ago? We have no hesitation in answering the question in the negative. In cases in which there is a conflict between an ancient theory and the modern usage in a religious institution, Courts of Justice must see whether the usage is referable to some other legal origin with [162] reference to the facts of each case, if not to the ancient theory. As observed by the Judicial Committee in the Ramnad case (*Collector of Madura v. Mootoo Ramalinga Sathupathy*) (2) with reference to a theory deduced from the ancient Hindu Law of Niyoga or appointment in connection with the law of adoption, the abstract theory has a juridical value for the purpose of explaining and upholding the existing usage and not for the purpose of ignoring it. It is then urged for the appellants that the joint enjoyment, however long, can be referable to no legal origin. But it must be observed that, from what has been stated above, such legal origin may be found in the continuance of what was Molkaina in ancient times as a co-trusteeship subsequent to the British rule with the tacit sanction of the British Government, or in the status of the Nambidi family as patrons of the institution as part of its ancient constitution a status which did not cease on the introduction of the British rule. It must have been well known in 1845 that the sovereign power vested in the British Government and the term Molkaina in document C must therefore be taken to be a word of description or distinction. The parties concerned took for their guide the subsisting usage of the institution and agreed to continue it without caring to ascertain to what legal relation of the Nambidi to the temple the continued participation in management subsequent to the British rule might be referred.

As regards the last question, viz., of limitation, it has been decided by the Privy Council that the 12 years' rule is applicable when there is no question for recovering any property for the trusts of the institution, and when the plaintiff sues only for his personal right to manage or to control the management of the endowment—*Balwant Rao Bishwanath Chandra Chor v. Parun Mal Chauhe* (3). When two persons have been in joint management for more than 40 years, the presumption is that they have a joint right of management. This is not a case of exclusive possession of portions of the same property at different periods or of a case of *contraria possesso* and the decision in *Lord Advocate v. Young* (4) is not in point. The decision of the Subordinate Judge, that the claim is barred by limitation, is also right.

The appeal fails and is dismissed with costs.

---

1. R.A. No. 36 of 1887, not reported.
2. 12 M.I.A. 397.
3. 10 I.A. 90.
[163] APPELLATE CIVIL.
Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

CHANDRAREKA (Defendant No. 1, Appellant v. Secretary of State for India (Respondent))
[18th November and 1st December, 1890.]

Civil Procedure Code, Section 411—Stamp duty on a pauper's plaint—Decree for less than the amount of claim—Disreputable defence.

A pauper sued his sister for the partition of property valued at a large sum. The parties belonged to the bogam caste, residing in the Godavari district. The defendant pleaded that the property had been acquired by her as a prostitute, and denied the plaintiff's claim to it. The plaintiff obtained a decree for Rs. 100, being a moiety of the property found to have been left by their mother:

Held, (1) on the evidence as to the local custom of the caste that the decree was right;

(2) that the defendant was liable to pay Court-fees only on the sum decreed.

Appeal against the decree of C. A. Bird, District Judge of Godavari, in original suit No. 6 of 1888.

The plaintiff, who sued as a pauper, alleged that he and defendant No. 1 (his sister) were members of an undivided family belonging to the bogam or dancing girl caste, and that defendant No. 1 was possessed of property amounting to Rs. 34,662, part of which, viz., a house, was in the occupation of defendant No. 2, and he claimed partition and delivery to him of a moiety of the property. Defendant No. 1 pleaded that she had acquired all the property as a prostitute and denied the plaintiff's claim.

The District Judge passed a decree for plaintiff for Rs. 100 as representing the moiety of the property left by his mother and directed that defendant No. 1 do pay the stamp duty due on the plaint.

Defendant No. 1 preferred this appeal in which the Secretary of State was joined as sole respondent.

S. Subramanya Ayyar and P. Subramanya Ayyar, for appellant.
Krishna Ayyar, for respondent.

JUDGMENT.

[164] BEST, J.—The first respondent is dead, and the appellant has elected to proceed against the other respondent alone. This other respondent is the Secretary of State for India, on whose behalf no one has appeared.

The main question is as to the propriety of the Lower Court's order in so far as it directs the appellant (who was the first defendant in that Court) to pay the Court-fees due to Government in consequence of the plaintiff having been allowed to sue in forma pauperis. The plaintiff claimed a moiety of property valued at Rs. 34,662, and was given a decree for only Rs. 100. The Court-fees which the first defendant (now appellant) has been directed to pay on account of the plaintiff amount to Rs. 699.

The plaintiff's case was that he was entitled to a moiety of property (of the above value) in the possession of his sister, the first defendant, as "ancestral property and property jointly acquired," in which he and the first defendant have equal rights, according to law and the custom of their caste.

* Appeal No. 105 of 1899.
As to the plaintiff's allegation that the mother of himself and the first defendant left property, the Judge's finding is that the mother was barely able to maintain herself and her two children, that she used to borrow, and that she did not train up her children in the usual accomplishments of their caste, the reason being that she could not afford it. The Judge finds that there is evidence that the mother "had a gold pattada worth Rs. 50," and he adds "she must have had some cooking utensils"; but he "cannot find it proved that she possessed any other property"; and the conclusion arrived at is as follows:—"Giving the plaintiff's case every allowance, I cannot put the value of ancestral property, i.e., property acquired by the mother of the plaintiff and the first defendant at more than a couple of hundred rupees."

As to the second issue recorded, viz., "Whether the property in possession of the first defendant is joint and ancestral property of the plaintiff and first defendant or whether it is the separate and self-acquired property of the first defendant," the Judge's finding is that it was acquired by the first defendant while she was in the keeping of a wealthy man, one Vinam Venkataramnam, and that, with the exception of a very small portion which, giving every allowance to the plaintiff, cannot be put at more than Rs. 200, the rest is the first defendant's own self-acquisition. Hence his decree in favour of the plaintiff for a sum of Rs. 100 only.

The reasons assigned for directing the first defendant to pay the whole Court-fees payable on the plaint are as follows:—

"The plaintiff and the first defendant were by birth in the same position. Both plaintiff and the first defendant have lived disreputable lives—the first defendant being a prostitute, while the plaintiff was the hanger-on of a prostitute. Yet himself is a pauper, and the first defendant has acquired comparatively great wealth; in the undefined state of the law, this induced the plaintiff to attempt to get a share, he has failed, and she has succeeded in resisting his claim by setting up a disreputable defence. There is a large sum due to Government for stamp duty. In these circumstances, I think it right to direct that the first defendant, considering the nature of her defence, be ordered to pay her own costs and the stamp duty due to Government."

As to the defence set up by the first defendant, it has been found to be a legally valid one, and such being the case, and she having succeeded in proving her exclusive right to the bulk of the property in her possession, the more fact of a large sum being due to Government for stamp duty, which it will be impossible to recover from the plaintiff, is no reason for directing the first defendant to pay the same. The utmost that the first defendant could have been directed to pay is the Court-fees on the Rs. 100 decreed to plaintiff. Even as to this, however, it is objected by the appellant that she is not liable as neither by law nor by custom of the caste was the plaintiff, being a male, entitled to any share in the property left by the mother of the plaintiff and the first defendant. There is, however, evidence adduced in the case which goes to show that, by the custom of the Bogam caste in the Godavari district, property left by a mother is divided between the sons and daughters.

There is, therefore, no reason for disturbing the Lower Court's decree so far as it awarded to the plaintiff a sum of Rs. 100; but the decree in so far as it directs the first defendant to pay the whole of the Court-fees due to Government on account of the plaint must be modified and the first defendant directed to pay the Court-fees in question only on the
Rs. 100 decreed against her; the rest being directed to be paid by the plaintiff, or (as he is now dead) out of the assets if any, left by him.

[166] The Lower Court's decree must be modified as above. Under the circumstances of the case there will be no order as to the costs of this appeal.

MUTTUSAMI AYYAR, J.—The only question which arises in this appeal is whether the Judge is right in directing the appellant to pay the Government the stamp duty due on the plaint presented by her brother as a pauper. The plaintiff being now dead, the Secretary of State is the only respondent before us, and he does not appear by Counsel to oppose this appeal. The appellant's brother claimed from her partition of what he described to be ancestral and joint property of Rs. 34,662 value, alleging that according to the rules of their caste, he was entitled to a half share. The appellant's defence was that her mother, who was a Sani or a dancing girl, died very poor; that she trained neither the appellant nor her brother in music or dancing; that there was no ancestral property, and that the appellant acquired the property in her possession by practising the profession of her caste, viz., prostitution. The Judge found that the ancestral property of which the appellant's brother was entitled to a moiety was but of Rs. 200 value, and that the rest of the property in her possession was acquired by her from a wealthy man named Visnam Venkataratnam, who had kept her, and inherited considerable property from his father. On this view of the facts, the Judge awarded to the appellant's brother a moiety of property worth Rs. 200, and dismissed the rest of his claim extending to property worth Rs. 34,262. He refused the appellant, however, her costs, and further directed her to pay the Court-fees due to Government mainly on the ground that she had set up a disreputable defence. Two objections are urged in appeal, viz., that, by the custom of the caste, appellant's brother is not entitled even to Rs. 100 decreed to him, and that the direction as to payment of stamp duty was illegal.

I do not think that either the defence set up by the appellant or her profession as a prostitute is sufficient to support the direction. Notwithstanding her profession, she (appellant) has rights of property and is entitled to the protection of law, and no penalty can lawfully be imposed upon her for pleading what is found to be substantially true to entitle her to such protection. The direction, therefore, that she should pay Court-fees in excess of Rs. 100 decreed against her cannot be supported.

[167] As regards the sum of Rs. 100, the respondent has clearly a charge to that extent on the property decreed to the pauper plaintiff under Section 411, Code of Civil Procedure. Both parties relied on the custom of their caste in support of their respective contentions, and the Judge found upon the evidence that the plaintiff was entitled to a share. I see no sufficient reason to disturb the finding.

I am also of opinion that the decree appealed against must be set aside so far as it directs the appellant to pay Court-fees in excess of Rs. 100.
KUNHAMED v. KUTTI

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KUNHAMED (Plaintiff), Appellant v. KUTTI (Defendant No. 1),
Respondent. [21st January and 13th February, 1891.]
Specific Relief Act—Act 1 of 1877. Section 42—Suit for declaration—Fraudulent decree—Injunction.

Suit for a declaration that a decree of a Subordinate Court was passed fraudulently, the Judge having been bribed by the present defendant:

Held, that the suit did not lie.

Per Cur. The remedy would appear to be by way of injunction to restrain the party from executing the decree.

[Appr., 8 C.L.J. 465 (477); R, 35 M. 712 (719) = 11 Ind. Cas. 769 = 21 M.L.J. 920 = 10 M.L.T. 124; 5 M.L.J. 140 (141); D., 25 G. 49 (53).]

SECOND appeal, against the decree of J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 407 of 1889, confirming the decree of V. Kellu Eradi, District Munsif of Pynad, in original suit No. 567 of 1888.

Suit for a declaration that the decree in appeal suit No. 23 of 1886, on the file of the Subordinate Court of North Malabar was passed fraudulently.

The plaintiff alleged that certain land was sold to him and defendant No. 2, that defendant No. 1 brought original suit No. 112 of 1885 against them in the Court of the District Munsif of Pynad to recover the land on the strength of a forged title-deed. It was dismissed, and proceeded that Mr. Kunjen Menon, late Subordinate Judge of North Malabar, who heard the appeal against the aforesaid decree, was bribed by first defendant, and he, finding the forged jemn deed a genuine document, reversed the decree of the Munsif's; that the decree of the Appellate Court was confirmed by the High Court, as a decision was not against law, and that in the judgment of the Appellate Court the opinion was expressed that plaintiff was an unnecessary party to the suit.

Defendant No. 1 denied the allegations in the plaint and pleaded that the suit was not maintainable, that it was barred by Section 13 of the Civil Procedure Code, and that plaintiff had no right to the plaint paramba.

The District Munsif, and, on appeal, the District Judge, held that the suit was not maintainable and passed decrees accordingly.

The plaintiff preferred this second appeal.

Desikacharyar, for appellant.
Narayana Rau, for respondent.

JUDGMENT.

We agree with the Acting District Judge that the suit is not properly one for a declaratory decree under Section 42 of the Specific Relief Act. The ground of action really is that the defendant by fraud has obtained an advantage in proceedings in a Court having jurisdiction which must necessarily make that Court an instrument of injustice and the remedy

* Second Appeal No. 60 of 1890.
would appear to be by way of injunction to restrain the party from executing the decree. The Court cannot itself be made a party to the suit—see Dhurondor Sen v The Agra Bank (1) and references thereunder, Daniell's Chancery Practice, 3rd edition, p. 1218 (4th edition, p. 1471), Drury on Injunctions, p. 96. Story's Equity Jurisprudence, §§ 899-900.

We cannot allow the plaintiff to be amended, as to do so would change the character of the suit.

The second appeal must, therefore, be dismissed with costs.

14 M. 169.

[169] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

KANARAN AND OTHERS (Plaintiffs), Appellants v. KOMAPPAN AND OTHERS (Defendants), Respondents." [15th December, 1890.]

Court Fees Act—Act VII of 1870, Sections 7, 19—Suit to cancel an instrument affecting land—Partial interest of plaintiff in the land—Appeal against an order for payment of additional Court Fees.

In a suit in a Subordinate Court by members of a Malabar tarwad to set aside an instrument affecting the whole of the tarwad property, the Subordinate Judge held that Court-fees were leviable, assessed on the value of the property, and accordingly ordered an additional payment to be paid by the plaintiffs. The plaintiffs failed to make the payment, and the Subordinate Judge dismissed the suit: Held, (1) that the order was erroneous since the plaintiffs would not be gainers to the extent of the value of the property if they obtained a decree;

(2) that the High Court was not precluded by Court Fees Act, Section 12, from revising it, and reversing the decree.

[F., 23 B. 486 (490) ; 28 C. 334 (338) ; Appr., 4 M.L.J. 168 (182) ; R., 16 C.L.J. 371 = 17 C.W.N. 503 (505) = 16 Ind. Cas. 575.]

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No. 40 of 1889.

Suit to set aside an instrument executed in respect of immovable property valued at Rs. 39,000.

The plaint was stamped with a Rs. 10 stamp only as in a suit for a declaration.

The Subordinate Judge who referred to Naraina Putter v. Aya Putter (2) held that the Court-fee was leviable, assessed according to the value of the property affected by the instrument sought to be set aside, and accordingly ordered the plaintiff to pay the additional duty. The plaintiffs failed to conform to this order and the Subordinate Judge dismissed the suit.

The plaintiffs preferred this appeal.

Sankaran Nayar, for appellants.

Bhashyam Ayyangar, for respondents.

JUDGMENT.

In our opinion, the Subordinate Judge was wrong in valuing the plaint according to the value of the whole tarwad [170] property. It is clear that the plaintiffs will not be gainers to that extent if they obtain a decree.

* Appeal No. 76 of 1890.

(1) 5 C. 86. (2) 7 M.H.C.R. 372.
It was argued for on behalf of the respondents that Section 12 of the Court Fees Act prevented our revising the decision of the Subordinate Judge, but it has been held by this Court that where it is not a mere question of amount or arithmetical calculation the Section does not apply—Chandu v. Kombi (1), Aioodhya Pershad v. Gunja Pershad (2). We reverse the decree and remand the case to be dealt with according to law. Appellant must have the costs of this appeal.

14 M. 170.

APPELLATE CIVIL.


AYAVAYYAR AND ANOTHER (Defendants), Appellants v. RAHIMANSA (Plaintiff), Respondent. 

[9th and 10th December, 1890.]

Vendor and purchaser—Conditional right of repurchase—Mortgage by conditional sale.

A having previously hypothecated certain land to B, executed a conveyance of it to him in 1873 for a consideration which was now found to have been an inadequate price. On the same day, B executed to A a "counterpart document" by which he covenanted to recover the land and return the sale deed if the sale amount be repaid to him in cash on 27th May 1875. The documents contained no provision as to interest and reserved no power for the purchaser to recover his purchase money. In 1888 A's representative, alleging that the transaction evidenced by the above documents was a mortgage, brought a suit to redeem it:

Held, that the transaction did not constitute a mortgage, and that the plaintiff was not entitled to redeem.

[R., 28 B. 153 (158); 131 P.R. 1894; D., 21 B 706 (708).]

SECOND appeal against the decree of L. A. Campoll, Acting District Judge of Coimbatore, in appeal suit No. 115 of 1889, reversing the decree of T. Ramaasami Ayyar, District Munsif of Udumalpet, in original suit No. 543 of 1888.

Suit to redeem a mortgage executed by Nachimuttu Pillai (the predecessor in title of the plaintiff) to Ayyasami Ayyan, the father (deceased) of the defendants, dated 17th January 1873.

[171] The alleged mortgage was comprised in two documents, dated 17th January 1873, of which one (Exhibit I) was in terms a conveyance by Nachimuttu Pillai and the other (Exhibit B) therein described as "a counterpart document" and executed by Ayyasami gave the boundaries of the land and stated that it was "owned and enjoyed before this by you Nachimuttu Pillai and thereafter by sale on this date by you to me, owned, possessed and enjoyed by me," and after reciting "the particulars of the receipt of the said sale amount by you from me proceeded; and, consequently, if the said sale amount should be repaid to me in cash on 27th May 1875, I shall put you in possession of the said land, and, in addition, shall return to you the sale-deed executed to me by you. I shall also transfer in your name the patta now transferred in my name. In default of the payment of the amount within the prescribed time, the sale-deed executed by you shall become permanent, and this counterpart document shall be cancelled. Thus have I executed this counterpart document with my free consent."

* Second Appeal No. 193 of 1890.
The District Munsif referred to Ramasami Satprigal v. Samiyappa Nayakan (1) and held that the transaction evidenced by the above instruments was a sale with a conditional right of repurchase and that the plaintiff was accordingly not entitled to recover the land in 1888 and he dismissed the suit. The District Judge, on appeal, finding that the consideration for Exhibit I was an inadequate price for the land and that the transferor's signature had been obtained for a muchalak executed to the transforee in respect of the land in question, held that the transaction in question was a mortgage by conditional sale and reversing the decree of the District Munsif passed a decree for redemption.

The defendants preferred this second appeal.
Bhashyam Ayyangar, for appellants.
Pattabhirama Ayyar, for respondent.

JUDGMENT.

Having regard to the language used in the two instruments, dated 17th January 1873, we think there can be no doubt that a sale with a condition for repurchase on the date specified was intended. The absence of reference to a reconveyance does not appear to us to be important, and there are certainly no words positively indicating that a mortgage was intended. There is no mention of interest and no power is reserved to the purchaser to recover his purchase money. On the other hand, there is the fact that property was already hypothecated to the purchaser and it is not explained why a different form of mortgage should have been required. The District Judge, however, refers to other circumstances, which, in his opinion, point to an intention that the land should stand as a security for the amount of the consideration stated in the sale-deed. He finds that the price was inadequate, and he refers to the fact that the signature of Nachimuthu Pillai, as an attesting witness, was taken to a muchallak given to the defendant's father by a tenant who appears to have been left into possession in the month of January 1873. This latter circumstance seems to us wholly unimportant for, in any view of the case, Nachimuthu Pillai had at that date a possible right to the property.

The District Judge does not allude to the conduct of the plaintiff in abstaining for some fifteen years from reclaiming the land.

We have to say whether there is any evidence to show that in 1873 the parties intended to enter into a transaction different from that which appears on the face of the instruments to which they are parties. In our opinion, there is no such evidence, and, therefore, we must reverse the decree of the District Judge and restore that of the District Munsif.

The respondent must pay the costs in this and in the Lower Appellate Court.

(1) 4 M. 179.
NARAYANASAMI v. RAMASAMI

14 M. 172=1 M.L.J. 39.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

NARAYANASAMI (Plaintiff), Appellant v. RAMASAMI AND OTHERS
(Defendants), Respondents.* [4th March and 27th November, 1890.]

Hindu Law—Adoption made the day after the adoptive father made his will—Adoptive son bound by the will—Inconsistent pleas.

A Hindu wrote his will devising certain ancestral property to his wife and on the following day he registered it and took the plaintiff in adoption. The testator [173] died shortly afterwards. It was found that the plaintiff’s natural father was aware of the dispositions contained in the will and that the testator would not have adopted the plaintiff but for the consent of the natural father to those dispositions. The defendants who claimed under a gift from the wife had denied the adoption in their written statement, and on appeal raised the further plea that the adoption, if any, was conditional on the provisions of the will being acquiesced in:

Held, (1) that the defendants were not precluded from succeeding on the latter of these inconsistent pleas;
(2) that the plaintiff was not entitled to the ancestral property devised by the will to the testator’s wife. Lakshmi v. Subramanya (I L.R., 12 Mad. 490), followed.

[F., 27 M. 577 (576)=14 M.L.J. 310 (F.B.); 8 Bom L.R. 921 (938); R., 16 M. 121 (124); 21 M. 10 (17); 5 Ind.灿. 745 (746)=6 N.L.R. 33; 1 O.C. 175 (176)]

SECOND appeal against the decree of T. Ramasami Ayyar, Subordinate Judge of Negapatam, in appeal suit No. 133 of 1888, confirming the decree of N. R. Narsimmya, District Munisif of Tiruvalur, in original suit No. 422 of 1886.

Suit by the adoptive son of Muttusami Ayyar (deceased) for possession of certain land, being part of his ancestral property. Muttusami Ayyar devised the land in question to his senior wife absolutely by will on 1st March 1880; on the following day he adopted the plaintiff and died shortly afterwards. The defendants, who claimed under the devise, denied that the plaintiff had been adopted as alleged.

The District Munisif found that the adoption as alleged was proved, but held that as it appeared that Muttusami Ayyar interd his adoptive son to take only the residue of his property, the plaintiff was precluded from questioning the validity of the devise, and he accordingly dismissed the suit. His decree was affirmed on appeal by the Subordinate Judge, who held that the case was within the rule laid down in Vinayak Narayan Jog v. Govindrao Chintaman Jog (1).

The plaintiff preferred this second appeal.

Bhashyam Ayyangar, for appellant.
Subramanya Ayyar, for respondents.

SHEPHARD, J.—It was contended on behalf of the plaintiff that, apart from the theory that the plaintiff’s adoption was a conditional one, the plaintiff was entitled to the property of his adoptive father, notwithstanding the latter’s will executed after the adoption, and that in fact there was no evidence that the adoption was conditional. And further it was argued that the defendants having denied the adoption and not raised in the [174]written statement the contention that the adoption was conditional, should not have been allowed to raise the contention in appeal. In

* Second Appeal No. 670 of 1889.
(1) 6 B.H.C.R.A.C.J. 224.
support of this argument we were referred to the case of *Mahomed Buksh Khan v. Hosseini Bibi* (1), where the Judicial Committee expressed the opinion that the plaintiff seeking to recover property conveyed by a deed of gift purporting to be executed by himself should not have been permitted at the same time to allege that the deed was a forgery and that the execution of it was obtained by undue influence. Mr. Bhasker Ayyar contended that similarly, in the present case, the defendants ought not to be allowed to plead first that there was no adoption, and then that there was an adoption, but that it and the will formed one transaction, so that the adopted son could not question the will. It is doubtless true that the two pleas, the one denying the adoption, the other admitting it and qualifying its effects, are inconsistent. I am nevertheless of opinion that the defendants are not precluded from raising the latter defence. It is to be observed that the defendants are complete strangers to the transaction, being persons who have taken by gift from the widow of the plaintiff's adoptive father. Both the defences which they have raised have reference to matters not necessarily or probably within their own knowledge. Whether or not the plaintiff's natural father consented to his son being taken in adoption on the terms expressed in the will is a matter as to which even the defendants' donor, one of the widows of the adoptive father, would not necessarily have personal knowledge.

There is a material distinction, therefore, between the present case and the one cited, where both charges related to matters necessarily within the plaintiff's personal knowledge. Moreover, the circumstance, that in the case before the Judicial Committee it was the plaintiff who sought to raise inconsistent issues is material, for while it is open to a plaintiff, under certain circumstances, to reserve a ground of claim, a defendant, failing to insist on a ground of defence in one action cannot afterwards raise it in another action at the suit of the same party. While I am of opinion that the Subordinate Judge was right in allowing the defendants to raise the contention, on the strength of which judgment has gone in their favour, I do not think he has sufficiently considered the facts with reference to (175) the principle applied in the case cited by him and in the more recent case of *Lakshmi v. Subramanya* (2). It is not sufficient that the plaintiff's father may have been aware of the dispositions made by the will, nor is the intention of the testator by any means a decisive circumstance. It has to be seen whether the plaintiff's father, while consenting to the adoption, at the same time consented to the dispositions of the adoptive father's property as forming the condition on which the adoption should take place. I would direct the Subordinate Judge to try an issue similar to that directed in the case referred to, *viz.*—Whether, when the plaintiff was given in adoption, his father or other person giving him in adoption was aware of the dispositions made by the late Muttusami Ayyar, and whether, but for his consent to those dispositions, Muttusami would not have adopted the plaintiff.

The finding should be recorded upon the evidence already taken and returned within six weeks from the date of the receipt of this order and seven days after the posting of the finding in this Court will be allowed for filing objections.

*Best, J.—The present case is distinguishable from *Mahomed Buksh Khan v. Hosseini Bibi* (3) as pointed out by my learned colleague.*

---

(1) 15 I. A. 81 [as to which case see Iyyappa v. Ramalakshmamma, 13 M. 549.]

(2) 12 M. 490.

(8) 15 I.A. 81.
I agree in thinking that the issues suggested should be tried by the Subordinate Judge.

The Subordinate Judge having recorded findings on both of the above issues in the affirmative, this second appeal came on again for final hearing on Monday the 24th day of November 1890, and the case having stood over for consideration, the Court delivered the following judgment.

JUDGMENT.

The findings of the Subordinate Judge on both the issues sent for trial are in the affirmative. To these findings objections have been taken on behalf of the appellant on the ground that they are not supported by any evidence.

It is true that no witness has expressly stated either that plaintiff's natural father was aware, at the time of his giving his son in adoption, of the dispositions made under the will by the late Muttusami Ayyar or that, but for the natural father's consent to those dispositions, Muttusami Ayyar would not have adopted the [176] plaintiff. But the circumstances, under which the will was executed and the adoption took place, afford evidence which supports the conclusions arrived at by the Subordinate Judge on both the issues.

It is proved that the plaintiff's father was sent for, while the will was being written, and arrived on the following morning at about 10 o'clock. The will was registered in the afternoon of this latter day, and, on the same afternoon, the adoption of plaintiff took place. The witnesses differ in their statements as to whether the registration of the will was effected before or after the adoption took place. But this does not seem to be of much consequence. The two events are so closely connected that there is no room for supposing that, in making the adoption, Muttusami Ayyar had any intention of superseding the will; and, as there can be no doubt that plaintiff's father knew of the will, his giving his son in adoption without any objection to the will must be taken to amount to consent on his part to the dispositions made thereby and this view is further supported by his subsequently carrying out those dispositions as deposed to by plaintiff's seventh witness, Venji Ayyan.

The intention of Muttusami Ayyar being apparent from his conduct in executing the will simultaneously with the making of the adoption, it may fairly be inferred, in the absence of any evidence to the contrary, that he only made the adoption subject to the dispositions contained in the will. It cannot be said that there is no evidence in support of the Subordinate Judge's findings on the issues, and there is no reason for thinking that these findings are incorrect.

This second appeal fails therefore and is dismissed with costs.
Obstruction of public street—Suit for declaration and injunction—Special damage.

A gate was erected in a public street (by the permission of the Municipal Council) which obstructed the exercise by the plaintiff and the public of their right to resort to and draw water from a well. It appeared in evidence, although it was not alleged in the plaint, that the plaintiff had to use the land between the newly erected gate and the well when he required his house. The plaintiff not having obtained permission to sue under Civil Procedure Code, Section 30, sued for a declaration of his right to use the street and draw water from the well and for an injunction compelling the removal of the gate:

Held, that the suit was within the rule precluding private actions for public wrongs without special damage alleged and proved, and was accordingly not maintainable.


SECOND appeal against the decree of R. Sewell, Acting District Judge of Bellary, in Appeal Suit No. 126 of 1889, modifying the decree of C. Purushottamayya, District Munsif of Bellary, in Original Suit No. 160 of 1888.

The plaintiff sued the Municipal Council of Bellary and the occupant of a house at a short distance from his own, to establish his right to use a certain lane in Bellary and to draw water from a well situated in the lane and to compel the removal of a gate erected across the lane by defendant No. 2 by the permission of the Municipal Council. The plaint averred that the permission had been given, "without making any inquiry, illegally, fraudulently and through partiality," and that the Municipal Council had no authority to permit the construction of the gate, whereby "trouble and inconvenience were caused to the plaintiff, all the residents of the said street to move about in the said street according to mancool and to go to and bring water from the well." No permission to sue under Civil Procedure Code, Section 30, was obtained.

[173] The District Munsif found that the ground between the gate and the well was the private property of defendant No. 2. But he recorded a finding in the affirmative on the second issue which was framed as follows:

"Whether the plaintiff is entitled to walk on the ground on his way to and whether he is entitled to draw water from the well inclosed by the second defendant."

"As to this issue, he said in paragraph 10 of his judgment:—It appears from the evidence of the plaintiffs' witnesses that for 25 or 30 years the plaintiff and many other people have been walking on the said ground in going to the said well to get water from the same. Although the well belonged to one Narayana Setti, by whom the well was sunk, yet he allowed people to draw water from the well. His successors also allowed people to draw water from the well. All people..."
who wanted the said well-water used to have free access to the well. The second defendant cannot obstruct this prescriptive right enjoyed by the plaintiff and others for a long time. The plaintiff must walk on the ground mentioned above to go to the said well and to repair the wall, windows, &c., of his house. The second defendant cannot prevent the plaintiff from walking on the ground and from drawing water from the well. I therefore decide the second issue in the affirmative.

The District Munsif passed a decree declaring the plaintiff’s right so found to exist, but otherwise dismissing the suit.

Both plaintiff and defendant No. 2 appealed to the District Judge, who recorded findings that the lane obstructed was a public street as far as the well and that the obstruction interfered with the exercise by those living near of their right to take water from the well. On these findings he dismissed the appeal of defendant No. 2 and modified the decree of the District Munsif by adding a direction that the gate in question be removed.

Defendant No. 2 preferred this second appeal.

Ramasami Mudaliar, for appellant.
Ramachandra Raju Sahib, for respondent.

JUDGMENT.

MUTTUSAMI AYYAR, J.—This was a suit to remove an obstruction in a public street of Bellary. There is a main street in that town called Karasala street and a lane runs from it north to south. Both the appellant and the respondent reside in that lane and there is a well in it near the house of the former. The respondent and others living in the lane are found to have been using it and getting water from the well at all times, both day and night, for more than 25 years. In May 1888 the appellant obtained permission from the Municipal Council at Bellary, the first defendant in this suit, to build a wall and a gate across a portion of the lane, and accordingly erected a wall and a gate so as to obstruct the respondent and others from freely using the lane and taking water from the well. The respondent then instituted the present suit to establish his right to use the lane and to pass to and from the well for the purpose of drawing water and to compel the appellant to remove the wall and the gate recently erected by him. His case was that the lane was a public street, that the inhabitants of the town, who live in it and in the neighbouring streets, had a prescriptive right to use the lane and to draw water from the well at their pleasure, and that the obstruction caused by the appellant in violation of that right put them to considerable trouble and inconvenience. The appellant contended, on the other hand, that the well was situated in his own compound, that the lane was not a public street, that the well was his own property, and that he erected the wall and the gate on his own ground. He took also the preliminary objection that the respondent, who asserted that the lane was a public street, was not entitled to maintain this suit on his own behalf.

Three issues were recorded for decision by the Court of First Instance, and the first was whether the ground enclosed by the appellant was public property or his private property. The finding is that it belongs to the appellant. The second issue was whether the respondent was entitled to walk on the ground on his way to draw water from the well enclosed by the appellant. Both the Courts find from the evidence of user for a period of 25 or 30 years that the respondent and others have a prescriptive right to do so. The third issue was whether the respondent was entitled to
1890

[180] With reference to the second issue, the District Judge remarked that he was satisfied upon the evidence that the plaintiff (respondent) had established his right by prescription to the use of the lane at all times of day and night at least as far as the plaintiff, and that the appellant had no right to block the lane by a gate or door. He accordingly directed that the new gate or door put up by the appellant be removed and confirmed the decree of the District Munsif so far as it allowed the wall to stand on the ground that it was substituted for an old mud wall which had long stood there, and upheld the plaintiff's right to use the lane as far as the well and to take water from it at his pleasure.

The question argued before us is as to the maintainability of the suit. It is urged that the lane at least as far as the well being found to be a public street, and no special damage being alleged and proved, it is not competent to the respondent to maintain this suit on his own behalf, and in support of the contention, our attention is drawn to the decision of this Court in Adamson v. Arumugam (1), which followed the leading case on the subject, viz., Saktu Valad Kudir Sau sare v. Ibrahim Aga Valad Mirza Aga (2), wherein the question was fully discussed and several English decisions were cited. There is no doubt that the English rule, viz., no action can be maintained by one person against another for obstruction to a highway unless special damage is proved, is applicable in India. As observed by my learned colleague, the principle on which this rule is founded is that of protecting the person causing the obstruction against being harassed by a multiplicity of suits and of providing, at the same time, a remedy for the common injury by indictment. I only desire to add that the special damage which it is necessary to plead and prove in order to take a case out of the rule does not necessarily consist in actual pecuniary loss and in a claim to compensation for the same. It is sufficient to show that the party suing has sustained special injury beyond what is sustained by the general public. In Dobson v. Blackmore (3), Lord Denman, C. J., explains it as "a damage brought on the individual complaining, which "might perhaps be more properly styled particular damage, or a "special damage more than the rest of Her Majesty's subjects" ordinarily sustain in consequence of the obstruction, "and not that "sort of damage only which may or may not ensue from the acts "done, but which entitles the plaintiff when it does arise to specific reparation in the form of damages." The special injury, however, should not be merely consequential nor remote as in Ricket v. The Metropolitan Railway Company (4); nor should it consist in mere delay in getting to a place as in Winterbottom v. Lord Derby (5). It should be an injury quite distinct from that of the public in general, and when such is the case, a Court of Equity will grant an injunction and such relief as may compe

(1) 9 M. 463.
(2) 2 B 457.
(3) 9 Q. B. 991.
(4) L. R. 2 Eng. & Ir. App. 175.
(5) L. R. 2 Ex. 316.
the wrong-doer to take active measures to discontinue the nuisance, Salku Valad Kadir Sawsarc v. Ibrahim Aga Valad Mirza Aga (1).

The substantial question then for determination is whether, upon the facts found, this case falls under the general rule or forms an exception to it. The finding that the lane obstructed is a public street as far as the well, discloses only a common injury. The finding that the obstruction in the lane obstructs also the exercise of the right of those living in the lane and near it to take water from the well suggests an injury not special to the respondent but common to him and to the general public, though the inconvenience arising from it may be felt more by those living near the well than those living at a distance. There is no averment in the plaint that by deprivation of the use of the well, the beneficial enjoyment of the respondent's house is materially interfered with or its value is lowered. There is, however, the observation of the District Munsif, in paragraph 10 of his judgment, that the plaintiff must enter and go upon the ground enclosed by the appellant to repair the wall, the windows, &c., of his house, but there is no averment in the plaint that any right of easement has been disturbed, nor is any relief claimed in respect of such easement. I thought, at first, that further inquiry was perhaps desirable to ascertain whether the obstruction, in any way, interfered with the beneficial enjoyment of the respondent's house, but, upon further consideration, I agree with my learned colleague that we might thereby vary the case disclosed by the plaint and go beyond the averments in it. The conclusion I come to is that upon the facts found by the Judge there is no special injury such as the law requires to sustain the suit. I concur, therefore, in the decree proposed by my learned colleague.

[182] BEST, J.—It is contended, on behalf of the appellant, that the suit by the plaintiff is not maintainable as the right to use the plaint lane and well is, according to his own showing, a public right. In support of this contention, reference is made to the ruling of this Court in Adrianos v. Arumugam (2), in which it was held that the rule of English law that no action can be maintained by one person against another for obstruction to a highway without proof of special damage would be enforced in India as a rule of "equity and good conscience."

A further contention is that if the plaintiff claims the right to use the well in question as an easement to which he is entitled as occupant of the house in which he is now living, his suit must fail by reason of his failure to prove that the well has been used by the occupants of this house for a period of twenty years.

So far as the plaintiff claims the right to use the well as occupant of his present house, his claim must be held to be invalid, as admittedly he has resided in this house only for a period of about 12 years, and there is no proof or even allegation that the right claimed is an easement attached to this particular house. On the contrary, the plaintiff makes up the prescriptive period of 20 years by adding to the period, during which he has occupied his present house, the time of which he was the occupant of a neighbouring house. He does this on the ground that the right of using the well and the lane leading to it belongs to the public of that particular neighbourhood. Such being the case, the plaintiff's suit, even though it purports to be a personal one intended to establish his individual right, is not maintainable in the absence of proof or even allegation of special damage to himself over and above the general inconvenience occasioned

(1) 2 B. 457.
(2) 9 M. 463.
1890 to the public. The rule in question is applicable to any public right, the
reason of the rule being the avoidance of multiplicity of suits, for, to use
the words of Lord Coke, "if any one man might have action, all men might
have the like."

In my opinion, therefore, the appeal must be allowed, and both the
Lower Courts' decisions being set aside, the suit dismissed, but under the
circumstances, each party should be directed to bear his own costs
throughout.

14 M. 177 =
1 M.L.J. 321.

14 M. 183 = 1 M.L.J. 234.

[183] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice
Shephard.

KRISHNASAMI (Defendant No. 2), Appellant v. KANAKASABAI
(Plaintiff), Respondent.* [15th and 19th December, 1890.]

Jurisdiction—Civil Courts Act (Madras)—Act III of 1873, Section 12—Valuation of
relief—Suits Valuation Act—Act VII of 1857, Section 11—Suit by a Court-purchaser for partition.

The purchaser at a Court-sale of eight pangu out of an estate of 28½ marks of pangu
sold them to the plaintiff. The whole estate was worth more than Rs. 2,500, but the
eight pangu sold to the plaintiff were worth less than that sum. The plainti-
iff brought this suit in a Subordinate Court against his vendor and certain per-
sons, who were in possession of and claimed to be entitled by right of purchase
to the whole estate, for partition and possession of his eight pangu. It was
found that the plaintifi was entitled to the eight pangu purchased by him as
against the defendants:

_Held, (1) that the suit was within the pecuniary limits of the jurisdiction of a
District Munsif;

(2) that since the disposal of the suit had not been prejudicially affected,
Suits Valuation Act, Section 11, was applicable and the decree of the Subordinate
Court should be confirmed.

Question: Whether the Subordinate Court has not concurrent jurisdiction
with a District Munsif in suits less than Rs. 2,500 in value.

[F., 15 M. 69; 23 M. 367 (370) = 9 M.L.J. 263; 11 Ind. Cas. 742 (743) = U.B.R.
(1911), 1st Q.R., 82; R., 19 M. 58 (59); 20 M. 289 (292); 8 Bom. L.R. 516 (521);
35 P.R. 1901 = 47 P.L.R. 1901.]

APPEAL against the decree of K. Krishna Menon, Subordinate Judge
of Tanjore, in original suit No. 6 of 1889.

Suit for partition and possession of certain land. The land in question
comprised eight out of 28½ marks of pangu, formerly the property of one Ramudu
Chetti. The eight pangu were purchased by defendant No. 3 at a Court-
sale held in execution of a decree against Ramudu Chetti on 7th April
1877. On 17th December 1882 defendant No. 3 sold them to the plainti-
iff for Rs. 1,500, the "particulars of the land sold" being described as
follows:

"Out of the total number of 40 shares lying within the following
"four major boundaries, viz., west of the limits of the villages of Avi-
"kottai, Mandala Kottai and Ulayakannam, [184] north of the limits
"of Audanu, east of the limits of the villages of Valasary and Nemmali
"and south of the limits of Paravakottai; Ramudu Chetti's pangu are

* Appeal No. 37 of 1890.
"28½/16, out of these Arethikarai and Samudayam appertaining to my eight pangus come to velis 65 and mahs 13 as mentioned in sale certificate."

The plaintiff alleged that he had been improperly prevented from taking possession, &c., by defendants Nos. 1 and 2, who, however, alleged that the purchase by defendant No. 3 was made benami for their undivided brother, since deceased, who had purchased the rest of the estate from Ramudu Chetti. It was also pleaded that the Subordinate Court had no jurisdiction to entertain the suit, as the value of the eight pangus was less than Rs. 2,500, although the value of the 28½/16 pangus was more. The Subordinate Judge held that he had jurisdiction to try the suit and that the purchase by defendant No. 3 was not benami, and he passed a decree as prayed.

Defendants Nos. 1 and 2 preferred this appeal.
Defendant No. 3 was ex parte throughout.
Pattabhiram Ayyar, for appellant.
Subramanya Ayyar, for respondent.

JUDGMENT.

As far as the facts are concerned, we expressed our opinion at the hearing that we saw no reason to differ from the finding of the Subordinate Judge. It was, however, contended that the case was one which the District Munsif had jurisdiction to try, inasmuch as the value of the shares ought to be recovered, and not the value of the entire property, should be taken to be the value for the purpose of determining jurisdiction. The value of the share would admittedly bring the case within the jurisdiction of the District Munsif. Following the cases cited, viz., Khansa Bibi v. Syed Abba (1) and Venkataramanah v. Meera Labas (2), we must uphold this contention, for here, as in those cases, the plaintiff and the defendant do not stand in the relation of coparceners to each other.

The question was then raised on behalf of the respondents whether, notwithstanding that the District Munsif had jurisdiction to try the case, the Subordinate Judge had not concurrent jurisdiction, the case did not come within the provisions of the Suits Valuation Act. With regard to the first of these points [185] there is authority in favour of the plaintiff, it having been held as well in Calcutta as in the North-West Provinces (3) that, although as a matter of procedure suits below a certain value ought to be instituted in the Court of the District Munsif, the Subordinate Judge still has jurisdiction to try them. In our opinion there is great force in the arguments in support of this view. But in the present case it is unnecessary for us to decide the point, because, assuming that the Subordinate Judge had no jurisdiction, we think that Section 11 of the Suits Valuation Act is applicable, and we certainly do not think that the over-valuation of the suit has prejudicially affected the disposal of the suit. It is argued that the section is intended to apply only in cases where the over-valuation or under-valuation is due to a mistake in estimating the value of the subject-matter, and does not apply to cases like the present in which there has been a mistake in principle. But what the section provides for is the "over-valuation or under-valuation of a suit or appeal," and there is nothing to show that any distinction should be made according as the mistake was made in one way or

(1) 11 M. 140.
(2) 13 M. 275.
another. The present case is certainly within the mischief of the Act, and we see no reason for holding that its provisions are not applicable. It is competent, therefore, to us to dispose of the appeal as if there had been no defect of jurisdiction in the Lower Court, and accordingly, having considered the case on its merits, we dismiss the appeal with costs.

---

14 M. 186 = 1 M.L.J. 95.

[186] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar, Mr. Justice Best, and Mr. Justice Weir.

SUBBAYYA AND ANOTHER (Plaintiffs), Appellants v. KRISHNA (Defendant), Respondent.* [28th March, 23rd and 27th October and 7th November, 1890.]

Civil Procedure Code, Sections 533, 573—Removal of trustee—Jurisdiction of District Court—Composition of Bench on hearing referred appeal.

In a suit under Civil Procedure Code, Section 530, in the District Court to remove the hereditary trustee of a public trust for breach of trust the District Judge held that he had no jurisdiction to pass the decree prayed for.

The plaintiff appealed and the appeal came on before two Judges who differed in opinion. The appeal was thereupon referred under Civil Procedure Code, Section 575, and was heard by a Bench of three Judges including the Judges who first heard the appeal.

Held, by Best and Weir, J.J. (Muttusami Ayyar, J., dissentient), that the District Judge had jurisdiction to remove the trustee hostilely for breach of trust in a suit under Civil Procedure Code, Section 539, Narasimha v. Ayyan (12 M. 157) considered.

[F., 20 A. 46 (51); 16 B. 626 (629); 31 C. 48 (51); 24 C. 418 (425); 33 C. 789 (803) = 10 C.W.N. 581; 2 C.L.J. 431 (431); Appr., 20 C. 810 (816); R., 33 C. 905 (910) = 10 C.W.N. 867; 17 M. 463 (464) (F.B.); 33 M. 131 (134) = 4 M.L.T. 345; 6 Bom. L.R. 131 (210); 3 O.C. 299 (303).]

APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in original suit No. 3 of 1888.

The plaint set out that about 1820 certain land was conveyed to an ancestor of the plaintiffs and the defendant by the then Maharajah of Tanjore on trust to apply the income "for the charitable purpose of maintaining a permanent watershed on the road to Rameswaram;" that the charity was conducted by the original grantee and afterwards by the father (since deceased) of the plaintiff No. 2 and the defendant; that the management of the charity, subject to the control of the other members of the family, passed to the defendant, and that he had for the last seventeen years neglected to maintain the watershed in question and misappropriated the income of the land to his own use and had failed to keep and render due accounts thereof. The plaint further stated [187] that the suit had been sanctioned by the Collector of Tanjore under the terms of Section 539 of the Civil Procedure Code, and the prayer of the plaint was "that the Court may be pleased to pass a decree removing the defendant from the management of the trust, appointing other proper trustees or trustees,

* Appeal No. 70 of 1899.

In Perumal Krishna Mudali v. Balakrishna Naidu (Original Side, Appeal No. 4 of 1891), heard by the Chief Justice and Parker, J., on 7th April 1891, the decision of the majority of the Judges in this appeal was approved and followed.
and granting such further or other reliefs as the nature of the case may require.

The defendant denied the breach of trust, but took no objection to the jurisdiction of the Court to grant the relief sought. But at the final hearing an issue was framed by the District Judge, which was as follows:—

"Whether the plaintiffs are entitled to sue under Section 539 of the Code of Civil Procedure." Upon this issue the District Judge held, with reference to the decision in Narasimha v. Iyvan (1), that he had no jurisdiction under Section 539 of the Civil Procedure Code to remove defendant from the trust and dismissed the suit.

The plaintiffs preferred this appeal on the following grounds:

i. The Lower Court erred in holding that it had no jurisdiction to hear the suit.

ii. The Lower Court erred in dismissing the suit on a ground not taken by the defendant in his written statement.

iii. Even granting that the Lower Court had no jurisdiction to hear the suit, it ought not to have dismissed the suit, but should have returned it for presentation to the proper Court.

Pattabhirama Ayyar, for appellants.

Rama Rau, for respondent.

The appeal came on for hearing on 28th March 1890 before MUTTUSAMI AYYAR and BEST, JJ., and their Lordships delivered the following JUDGMENTS.

MUTTUSAMI AYYAR, J.—The appellants are parties interested in the due administration of an endowed public charity in Tanjore, and the respondent is its present trustee by right of inheritance. The former charged the latter with negligence and misconduct and instituted this suit in the District Court of Tanjore to remove him from the office of trustee and to have another appointed in his place. The Judge held that he had no jurisdiction to entertain the suit under Section 539 of the Code of Civil Procedure, and, relying on the decision in Narasimha v. Iyvan (1), dismissed the claim with costs.

The contention in appeal is that the Judge has jurisdiction, and if he has no jurisdiction, he ought to have returned the plaint to be presented to a Court of competent jurisdiction. It is urged that since Narasimha v. Iyvan (1) was decided, Section 539 has been amended, and that, as pointed out in Chimpa v. Pattabhirama (2), the procedure under Sir Samuel Romilly's Act (52 Geo. III, Cap. 101) was by petition and summary order, whereas a regular suit is prescribed by Section 539 of the Code of Civil Procedure.

The decision in Narasimha v. Iyvan (1) rests on two grounds, viz., that the plaintiff in that case had no direct interest in the trust, and that it was not clear that a suit to remove a trustee hostilely could be brought under Section 539. As Act VII of 1888 amended that section by substituting the words "two or more persons having an interest in the trust," for the words "two or more persons having a direct interest in the trust," the question in this appeal is whether a suit to remove a hereditary trustee for misconduct will lie under Section 539, though the trustee denies the misconduct imputed to him and is willing to act as trustee. It is not denied that under Sir Samuel Romilly's Act a trustee could not be removed hostilely, but our attention is drawn to the Trustee Act, 13 and 14 Vic.

(1) 12 M. 167.
(2) Appeal No. 199 of 1897 not reported.
Cap. 60, section 50. Even under this statute, the Courts refused to remove a trustee by an order and otherwise than by a suit—(see the cases cited in Lewin on Trusts, 8th edition, p. 1028). A reference, therefore, to the English Statutes does not carry the case further than that Section 539 is taken from them, but that a suit has to be instituted under it whilst the procedure prescribed by the former was summary. The decision in Chimpa v. Pattabhirama (1) simply pointed out this distinction, and the question has, therefore, to be determined with reference to the language of Section 539 and the construction suggested by it. It is to be observed that the dismissal or removal of a trustee is not specified among the descriptions of relief to be awarded under [189] Section 539, and the proviso for such further relief as the nature of the case may require pre-supposes, as explained in Narasimha v. Ayyan (2) some matter incidental to the relief expressly authorized to be granted. This appears to warrant the construction placed upon it that it was intended not to include cases in which a hereditary trustee has to be hostilely removed, but to limit it to the classes of cases dealt with by orders under the English Statutes. The decision of the Judge is right. As regards, however, the contention that the plaint ought to have been returned for want of jurisdiction, I think it is well founded, as no other question has been decided in this case.

I would, therefore, modify the decree by ordering the plaint to be returned and confirm it in other respects.

† [The appeal has substantially failed and the appellants will pay the respondents' costs.]

BEST, J.—The District Judge has dismissed the suit on the ground that the plaintiffs are not entitled to sue under Section 539 of the Code of Civil Procedure, quoting, as his authority, the decision of this Court in Narasimha v. Ayyan (2).

The suit was held in that case to be non-maintainable, because "the plaintiffs had not a direct interest in the trust within the terms of Section 539 of the Civil Procedure Code." That section has, however, been amended by Act VII of 1888 (Section 44) by removal of the word "direct" and the section, as it now stands, is applicable to suits in which persons have "an interest in the trust."

The question remains whether Section 539 is applicable to a suit to remove a trustee. This is not one of the reliefs specifically mentioned in the section, but the last clause of the section provides for the "granting of such further or other relief as the nature of the case may require." In the case above referred to, the opinion is expressed that such "grounds of relief would be some matter consequent on the relief which the section enables to be granted." The section says "further or other relief," and if a new trustee can be appointed under the section in place of an existing trustee, the removal of the latter would be a "further or other relief required by the nature of the case." This is, I imagine, the reason why the removal of a trustee is not specifically mentioned in Section 539.

[190] It does not seem to me that the decisions under Sir Samuel Romilly's Act can be of use in deciding the question.

* [S. 34.—ED.]
† The sentence in rectangular brackets forms a portion of the judgment of Muttusami Ayyar, J., [though omitted in I.L.R.—ED.]
(1) Appeal No. 199 of 1887 not reported.
(2) 12 M. 187. [A.S. No. 160 of 1887.—ED.]
As pointed out by the learned Judges who decided *Narasimha v. Ayyan* (1) its object was to "enable trusts of certain classes to be carried out by summary procedure and not by suit;" whereas Section 539 of the Code of Civil Procedure contemplates a suit, not merely a petition. Such being the case, I do not see why the construction of the section should be limited so as to exclude cases in which there is "hostility." The opening words of Section 539—"in case of any alleged breach of any express or constructive trust"—seem to imply the existence of a trustee who is alleged to have been guilty of such breach; and the power subsequently given by the same section to appoint new trustees must imply, I think, also power in the Court to remove the old trustees (or trustee), if such removal is found to be necessary and justifiable as a result of the suit.

I would, therefore, set aside the Lower Court’s decree and remand the suit for replacement on the file and disposal according to law, and direct that the costs hitherto incurred be costs in the suit to be provided for in the decree to be passed by the District Judge.

In consequence of the difference of opinion between their Lordships the appeal was referred to Mr. Justice Weir under the provisions of Section 575 of the Civil Procedure Code on the 11th October 1890.

When the appeal came on for hearing before Mr. Justice Weir on 23rd October 1890, *Pattabhirama Ayyar* for the appellant took the objection that it was not competent to Mr. Justice Weir to hear the appeal alone and sitting apart from the two Judges who originally heard the appeal, and relied upon the Full Bench decision of the Allahabad High Court in *Rohilkhand Kumaon Bank (Limited) v. Row* (2).

*Rama Rau* for respondent supported the contention that the appeal should be heard by the three Judges.

*Weir, J.*—Appeal suit No. 70 of 1889 was referred by the Chief Justice to me by order dated 11th October 1890.

[191] On this case being called on, objection is taken by the Pleadors of both parties that it is not competent to a single Judge sitting by himself and apart from the Judges who have first heard the appeal to hear an appeal referred under Section 575, Civil Procedure Code. The language of Section 575, Civil Procedure Code, itself, and the construction put upon that section by a Full Bench of the Allahabad High Court in *Rohilkhand Kumaon Bank (Limited) v. Row* (2) are relied on in support of this argument.

The language of the section does not appear to me to imply that the appeal must necessarily be heard again at the reference by the two Judges who first heard it and differed; but there is authority in support of the opposite view, and as the Pleadors of both parties concur in supporting the objection, it would be inadvisable on my part to press them to proceed with their argument.

The question raised is one of great importance and the narrow construction placed on the scope of Civil Procedure Code, Section 539, by the decision in *Narasimha v. Ayyan* (1) is likely, it is said to affect prejudicially numerous endowments in the mofussil.

On this ground the Pleadors suggest that the case is one which it may be desirable to refer to a Full Bench. The great importance of the question involved, I think, justifies the suggestion. On the other hand, it may be considered that there is no such conflict of opinion as renders

---

(1) 12 M. 107. (2) 6 A. 468.
a reference to a Full Bench necessary. Excepting in the instance of Mr. Justice Best's opinion now recorded there has been no dissent from the view stated in Narasimha v. Ayyan (1). I myself followed the latter decision in a suit tried on the Original Side in September last—Krishnasami v. Balakrishna (2), but as a single Judge I of course considered myself bound by the reported decision of a Bench of two Judges. The question was also, I see, raised in an appeal before the Chief Justice and Parker, J., in Chimpa v. Pattabhirama (3), but was not gone into as the objection had not been stated in the grounds of appeal. With these remarks I refer the objection for the orders of the Chief Justice.

[The appeal came on again for hearing before Mutthusami Ayyar, Best and Weir, JJ., on 27th October 1890.]

[192] Pattabhirama Ayyar, for appellants.

The District Judge erred in holding that the decision in Narasimha v. Ayyan (1) is authority for the contention that the suit for removal of a trustee does not lie under Section 539 of the Civil Procedure Code. The only point decided in it was that the plaintiffs had not a direct interest within the terms of Section 539, and the Legislature has now substituted the words "having an interest" for the words "having a direct interest." See Section 44 of Act VII of 1888. The other point as to the removal of a trustee was no doubt considered, but there is no opinion expressed about it. It is not even an obiter dictum; it is only a quere. Besides the observations of the learned Judges are not strictly accurate. The provisions of Romilly’s Act were confused with those of another Act, the Trustee Act (13 and 14 Vic., Cap. 60). The appointment of new trustees is referred to only in Section 32 of the latter Act.

This question as to the removal of trustees was also considered in Chimpa v. Pattabhirama (3), which was heard before the Chief Justice and Mr. Justice Parker, and although it was unnecessary to decide the point, their Lordships pointed out that the procedure prescribed by Romilly’s Act was by petition, whereas a suit was permitted to be brought under Section 539. There is also a decision by Weir, J., in Krishnasami v. Balakrishna (2), but his Lordship there considered himself bound as a single Judge by the decision in Narasimha v. Ayyan (1). Then as to the construction of Section 539, it is true that it contains no special clause as to the removal of a trustee but the removal of a trustee is only auxiliary to the real relief, i.e., the proper administration of the trust. See Story’s Equity Jurisprudence, §§ 1287 to 1289 and the case of Lettersledt v. Broers (4). The fact that the removal of the trustee is only an auxiliary relief accounts for its not being specially mentioned in Section 539. The power to appoint new trustees under Clause (a) must be held to include the power to remove, if necessary, the old trustee, who has committed a breach of trust. Even apart from Clause (a) the Court has power to grant such further or other relief as the nature of the case may require, and in certain instances of breach of trust, the nature of the case may require the removal of the trustee. See also illustration (c) to Section 60 of the Indian Trusts Act.

The argument advanced on the other side would have weight if the section could be considered as contemplating only a summary proceeding and not a regular suit. But the section is the sole section in Chapter XL.

(1) 12 M. 157.
(2) Civil Suit No. 167 of 1899, not reported.
(3) Appeal No. 199 of 1887 not reported.
of the Code, the heading of which is "suits relating to public charities." The side note to the section refers to suits. The section clearly refers to suits and to decrees passed on such suits. The distinction between petitions and suits and between orders and decrees is well recognised by the Legislature. See the Minors Act and the Succession Certificate Act. Similarly the distinction is recognised in the Trusts Act, see Sections 34 and 74.

Section 539 was, for the first time, enacted in Act X of 1877. Then it was modified by Act XII of 1879, Act XIV of 1882, and Act VII of 1888 and the changes that have been from time to time introduced have extended the scope and usefulness of the section and show that the section ought to be liberally construed.

In Romilly's Act 52, Geo. III, Cap. 101, the procedure was summary—not by suit, but by petition. The leading case upon the construction of this Act is Corporation of Ludlow v. Greenhouse (1)—(see especially pages 49, 52, 66, 81 and 88 of the report); see also re Phillipott's Charity (2), (especially page 389 of the report) and re West Retford Church Lands (3), (especially page 111 of the report) and in re Hall's Charity (4), and the footnote in which all the cases are summarised. The Indian Legislature knowing the difficulties which arose in working Ramilly's Act have carefully avoided them in framing Section 539, and the procedure under the Trustee Act of 1850 (13 and 14 Vic., Cap. 60), is also of a summary character, see Sections 40-43. Section 32 of the Trustee Act of 1850 was considered in re Blanchard (5). See also re Hodson's Settlement (6), (especially page 121 of the report) and re Hadley (7), (especially page 70 of the report).

The language of Section 539 is thus materially different from the language used in Romilly's Act and in the Trustee Act of 1850, though the Legislature has, in framing the section, kept certain provisions of the two enactments in view.

[194] The construction of Section 539, contended for by the other side, will cause considerable difficulty. If the District Court is not competent to remove a trustee under Section 539, the suit to remove a trustee will have to be instituted elsewhere, and after the trustee is removed, a suit to appoint a new trustee will have to be instituted in the District Court—wide clause (a) of Section 539. In this connection the provisions of Section 43 of the Code have also to be kept in view. If a suit is brought in the Munsif's Court to remove a trustee, the District Court in appeal will have power to pass such decree as it thinks fit; but, according to the construction contended for on the other side, it will have no power to entertain the suit if it is instituted in the first instance in the District Court itself.

Rama Ram, for respondent.

The removal of a trustee is not specially mentioned in Section 539. The words at the ending of the section "further or other relief" ought not to be construed widely. The section finds its place in Chapter XI, which is one of the four chapters in Part V of the Civil Procedure Code treating of special proceedings. Though the special proceedings are termed suits, and the decisions arrived at in them are called decrees, yet the Legislature did not contemplate such a lengthy and exhaustive enquiry as takes place in an ordinary contentious proceeding. Section 539 contemplates only a

---

1 Bligh. N.S. p. 17.  (2) 8 Simon, 391.  (3) 10 Simon, 101.
4 Beav. 115.  (5) 3 DeG. F. & J. 131.  (6) 9 Hare, 118.
5 DeG. & Sm. 67.
summary proceeding, and that is the reason why the removal of a trustee hostilely is not mentioned. To remove the trustee hostilely a regular suit must be instituted.

The power to entertain suits to remove trustees always existed in the Civil Courts in the mutussil—see Ponnambala Mudaliyar v. Varaguna Rama Pandia Chinnatambiar (1). Section 539 is enacted to confer an additional remedy to suitors in cases falling within its scope. See also the observations of Whitley Stokes in page 429 of Volume II of the Anglo-Indian Codes. Under Section 14 of Act XX of 1863 the District Court has power to remove trustees, and the omission of the relief in Section 539 is significant.

Pattabhirama Ayyar, in reply.

If the object of the Legislature in enacting Section 539 was to provide for the granting of comparatively easy and unimportant reliefs, why should the section require, as an essential preliminary, the institution of the suit by at least two persons interested in the trust and the sanction of the Advocate-General to the institution of the suit—see Panchoroe Mull v. Chumroolall (2). It is true that removal of a trustee is mentioned in Section 14 of Act XX of 1863, but if it is held that the District Court has no power to remove a trustee under Section 539, this anomaly will result that the District Court has jurisdiction to remove trustees of religious endowments, but not of charitable endowments.

JUDGMENTS.

Muttusami Ayyar, J.—This was a suit relating to a public charity called Vastad Chavadi near Tanjore. The appellants, alleging that the hereditary trustee for the time being was bound to manage the charity subject to their control, charged the respondent with breach of trust and misappropriation of trust property and prayed for his removal from the management of the trust and the appointment of other proper trustee or trustees, and for such further or other reliefs as the nature of the case might require. The respondent denied the charge and insisted on his right to continue in management of the charity. The suit was brought in the District Court of Tanjore under Section 539; but the Judge, relying on the decision of this Court in Narasinha v. Ayyan (3), held that he had no jurisdiction to entertain the suit under that section. Hence this appeal.

The appeal was first heard by Mr. Justice Best and myself. I considered that the construction of Section 539 suggested in Narasinha v. Ayyan (3) was correct, but my learned colleague held that the District Court had jurisdiction. The appeal was, therefore, referred to a third Judge, Mr. Justice Weir, and argued again before him and ourselves. The point for determination is whether a suit can be maintained under Section 539 to dismiss a trustee for misconduct hostilely, that is to say, when he denies the misconduct imputed to him and claims to continue in the office.

Narasinha v. Ayyan (3) was heard by Mr. Justice Kernan and Mr. Justice Wilkinson, and the learned Judges rested their decision therein on two grounds. The first was that the plaintiffs there had not a direct interest in the trust within the terms of Section 539 as it then stood. As a second reason they observed as follows:—

"Section 539, in most parts of it, follows the provisions of Romilly's Act which enabled trusts of certain classes to be carried out by summary

(1) 7 M.H.C.R. 117.  (2) 3 C. 563.  (3) 12 M. 157.
procedure and not by suit: among the objects of the Act, one was to appoint a new trustee, and it was held under the Act that a trustee could not be removed hostilely. No doubt Section 539 provides that a suit may be brought to appoint the trustee and for other purposes, and it contains a proviso that further relief may be given according as the nature of the case required. Such grounds of relief would be some matter consequent on the relief which the section enables to be granted."

Except Narasimha v. Ayyan (1), we are referred to no other decision in which the question was considered and determined. Nor was the determination necessary even in Narasimha v. Ayyan (1), inasmuch as the absence of a direct interest in the trust was of itself sufficient for the disposal of that case. In this sense the opinion expressed in Narasimha v. Ayyan (1), is only an obiter dictum, although it was followed by the District Judge in this case and also in another case heard on the original side by a single Judge. I must add that there are also several cases in which the question was not raised, and which were decided on the assumption that the District Court had jurisdiction. There was, indeed, an attempt made to raise the question for determination in Chimpa v. Pattabhirama (2), before another Divisional Bench, but the learned Judges who heard that case observed that the proceeding prescribed by Romilly's Act was by petition, whereas, a suit was permitted to be brought by Section 539, and with that observation they declined to consider the question for the reason that it was not one of the grounds of appeal. In this state of authority, I think that the question is res integra, and, as the District Judge relied in support of his judgment on the dictum in Narasimha v. Ayyan (1), it becomes necessary to decide whether we should adopt or overrule it.

This case has been argued twice, and, on this occasion, with considerable learning and ability by the Pleaders on both sides. After carefully reconsidering the question, I do not see my way to alter the opinion which I expressed at the former hearing.

[197] Among the reliefs specified in Section 539, the removal of the existing trustee for misconduct and the relief which may be granted against him on such removal are not mentioned. The omission appears to me to be intentional when regard is had to the language of Section 14 of Act XX of 1863 and to the fact that it is the relief usually asked in an ordinary suit. If it was intended that whatever relief a Court of Equity might grant upon information might be granted under Section 539, there was no necessity for specifying only some reliefs or for any specification at all. According to the recognized rules of construction, the general words at the end of the section, viz. "granting such further or other relief as the nature of the case may require" must be taken, as observed in Narasimha v. Ayyan (1) to refer to what precedes them and to some matter consequent on the relief which the section authorizes to be granted. Again, the Civil Courts in the mofussil were at liberty to entertain suits for removing a trustee from the management of charitable trusts on the ground of malversation from before the date of Regulation VII of 1817 as pointed out by this Court in Ponnambala Mudaliyar v. Varaguna Rama Pandia Chinnatambar (3). Thus as Courts of Equity, they always exercised jurisdiction in an ordinary suit to remove old trustees for misconduct and appoint new ones in cases requiring such a remedy on the principle mentioned in Latterstedt v. Broers (4). As regards such suit, no

---

(1) 12 M. 157.
(2) Appeal No. 199 of 1867 not reported.
(4) 7 M. H.C.R. 117.
limitation is prescribed in Part I of the Civil Procedure Code as in Part V, Section 539, either to the effect that two or more persons ought to be plaintiffs, or that the sanction of the Advocate-General is necessary. It is not clear then why the pre-existing remedy by an ordinary suit is restricted by Section 539 if it includes the hostile removal of existing trustees. Again, District Munsifs and Subordinate Judges have always had jurisdiction to entertain such suits. Why is their jurisdiction taken away when the same relief is claimed under Section 539, and why is a concurrent jurisdiction given to the High Court so as to authorize the institution of a suit before that tribunal for the dismissal of the trustee of a petty village temple in remote parts of the Presidency? Moreover, Section 539 is inserted in the Civil Procedure Code, Part V, among what is designated, in contradistinction to ordinary suits, "Special Proceedings" and as one of the [198] four kinds of special proceedings. Its position in the Code and its designation as a special proceeding appear to me to be significant when I consider the nature of the special proceedings which are grouped together in Part V. The first special proceeding is a reference to arbitration, Chapter XXXVII, and its special character consists in excluding lengthy investigation by the Court of intricate questions of fact raised in a contentious suit and in adopting the award of arbitrators subject to certain conditions as the judgment of the Court. The second is the special proceeding on agreement of parties, and its special character lies also in excluding such protracted investigation as to facts as is often necessary in an ordinary suit and accepting the statements contained in the agreement as facts which the parties concerned are not at liberty to deny (see Section 530). It must be noted here that for purposes of future litigation, the proceeding is regarded as a suit and the decree passed on the award or the agreement is declared to have the same force as a decree passed in an ordinary suit. The third special proceeding is what is called the summary procedure on Negotiable Instruments.

Here, again, the special character consists in avoiding an intricate investigation of disputed facts indispensable in an ordinary suit by declaring it incumbent on the defendant to obtain special leave to appear and defend and empowering the Court to grant such leave subject to certain conditions. It will be observed that this proceeding is termed a summary suit, and yet the decree which the plaintiff obtains when leave to defend is refused has the force of a decree in a regular suit unless it is set aside in the mode prescribed by Section 534, Chapter XXXIX. It is also to be observed that the exercise of the power to refuse leave, which, if abused, would amount to a denial of justice, is constituted by Section 538 into a case of special jurisdiction vesting in the particular Courts mentioned therein, and in such other Court having ordinary Civil Jurisdiction as the Local Government may specially select.

What then is the peculiar characteristic of the so-called Special Proceedings in general? Why are they still termed suits, and why are decisions arrived at in such proceedings termed decrees though in some cases the procedure is expressly stated by the Legislature to be summary?

As already explained, the special character consists in avoiding the protracted investigation necessary in a contentious ordinary suit either by authorizing a reference to arbitration or insisting on an agreement or constituting a special leave to defend a condition subject to which the defendant is to be permitted to defend, and making the power of granting or withholding of such leave, a matter of special jurisdiction
to be exercised by particular Courts. The result is that in the cases to which they apply the decision is final as in an ordinary suit with this difference that a lengthy and expensive inquiry inevitable in contentious proceedings, and the delay consequent on the institution of an appeal and of a second appeal are avoided. This appears to me to be the scheme of the Code so far as it relates to Special Proceedings.

The insertion of Section 539 among such proceedings and as of the fourth kind indicates a unity of design in regard to them all and the avoidance of a protracted inquiry consequent on an ordinary hostile suit as their common special feature.

Reading the Section, as I think we ought to do, with reference to the nature of the special proceedings which precede it, the omission to include the removal of the existing trustee hostilely and the relief to be had against him on such removal among the reliefs specified in that section, appears to me to be significant as well as intentional, and neither the designating of the special proceedings as a suit, nor of the decision therein as a decree seems to make a difference or to imply plenary jurisdiction.

This view, I think, receives further confirmation when the law regarding public charities as administered in India prior to 1877 is considered together with the modification made by the introduction of Section 539 into Act X of 1877. That the removal of a trustee from the management of charitable trusts on the ground of malversation was a remedy always available in the Mofussil Courts as Courts of Equity is clear, as already observed, from the decision in Ponnambala Mudaliar v. Varapuna Rama Pandita Chinnatambi (1). But I am aware of no case nor was any cited at the hearing in which the equitable doctrine of cy-près was applied in relation to public charities in the mofussil and a scheme framed on such application. There was also a doubt as to what ought to be done with the accumulations called the pagoda surplus [200] funds and similar accumulations from charitable funds. That branch of equitable jurisdiction was, however, exercised in the Presidency towns, by the late Supreme Courts under the charter and as a notable instance, the establishment of the Patchayyappa’s High School at Madras on a firm basis is the outcome of the scheme framed in 1845 under the direction of the late Supreme Court based on the cy-près principle. When the High Courts in the Presidency towns displaced the late Supreme Courts, the former inherited this branch of equitable jurisdiction from the latter. I may here refer to the Mayor of Lyons v. Advocate-General of Bengal (2) and to Longbottom v. Satoor (3) as instances in which the High Courts of Calcutta and Madras exercised such equitable jurisdiction on petition. The non-existence in the Provinces of this special equitable jurisdiction in regard to public charities presumed from its non-exercise by the Provincial Courts or from the doubt felt regarding it, is the defect in the prior law which Section 539 was probably framed to remedy. I may here allude to the remarks of Mr. Whitley Stokes in his edition of the Anglo-Indian Codes, Vol. II, p. 431:—“The Supreme "Courts in the Presidency Towns says, the learned editor, had an equitable jurisdiction over charities. This jurisdiction the present High "Courts inherited, but the Provincial Courts had no such jurisdiction.” Hence it is that the section gives this special jurisdiction to the High Court which it always possessed concurrently with the District Court and limits it to the District Courts in the Provinces. Hence it is that it does

---

(1) 7 M.H.C.R. 117. (2) 1 C. 308. (3) 1 M.H.C.R. 429.
not prohibit private suits for dismissal of trustees for misconduct without
the consent of the Advocate-General because such suits were ordinarily
entertained by the Provincial Courts and not touched by the creation of
a special jurisdiction as to certain other reliefs or classes of trusts regard-
ing which they exercised no jurisdiction. As it was an additional branch
of equitable jurisdiction that the section conferred it was safeguarded by
requiring that two or more beneficiaries should join in the suit and by
prescribing as a condition precedent the consent of the Advocate-General
in the Presidency town and that of the Collector or other officer outside
the Presidency town. As a reason for limiting the jurisdiction in the
Provinces to the District Courts, I may say that this special equity
[201] was administered in the Presidency towns by Her Majesty’s Judges
and in England by the Lord Chancellor or by the Master of the Rolls.
I may also refer to the cases already mentioned as instances of the
exercise of this branch of equitable jurisdiction by the High Courts at
Calcutta and Madras, and state that a reference to them would show that
very difficult questions regarding construction of Wills and regarding the
nature of the cy-pres doctrine, and the extent of its application in
particular cases might arise as between rival charities on the one hand
and as between them and the residuary legatee on the other. I may
here add that the practice of leaving a vacancy in the office of trustee
open for years was a defect common in this country, as well in the
management of public as of temple charities, and the section was framed
also to provide an effective remedy in this respect, as was done by Act
XX of 1863, section 5, in regard to Hindu temples.

Furthermore, the source from which a selection was made of the
reliefs to be granted in the exercise of this branch of equitable jurisdiction
corroborates the view expressed as to the probable intention of the Legis-
lature.

Romilly’s Act (52 Geo. III., Cap. 101), declared that “in every case
of a breach of any trust created for charitable purposes or whenever the
direction or order of a Court of Equity is deemed necessary for the ad-
ministration of any trust for charitable purposes, it should be lawful for any
two or more persons to present a petition to the Lord Chancellor, Master
of the Rolls or the Court of Exchequer praying for such relief as the nature
of the case might require.” It was held with reference to these general
words as to the nature of the relief that the Court might settle or alter
a scheme of the charities or appoint new trustees or apportion the charities
among the districts where parishes have been divided or direct a sale of
the charity property in a proper case, and, in short, exercise as between
the trustees and the beneficiaries a discretion in putting in operation the
power conferred by the Act with benefit to the charity. It was also held
that when the question to be discussed was whether a trustee ought to
be adversely dismissed for malversation as he might be upon informa-
tion, the Act did not apply. (See Lewin on Trusts, 8th edition,
pages 928, 929, and the cases therein cited.) When the Act was put
into operation, two important defects were often pointed out by the
[202] eminent Judges who worked it. One of them was the difficulty
felt in putting a construction upon the Act by reason of the vague language
used in describing the relief to be granted and the other was the prescribed
procedure by petition which only tended to pave the way for fresh litiga-
tion, whilst the statute was avowedly framed to ensure speedy and cheap
justice to beneficiaries of public charities.
Now compare and contrast Section 539 with the English Statute. The cases premised are the same with this difference, viz., that constructive trusts are included in Section 539, whilst they were held not to be included in the English Statute. Two or more persons having an interest are required by Section 539 to institute the suit as was the case under Romilly's Act with the difference that the words "having an interest" are taken not from the Act itself, but from a case decided under it, the Corporation of Ludlow v. Greenhouse decided in 1827 (1). The sanction of the Advocate-General or other officer is prescribed by analogy to the provision in Romilly's Act that every petition presented under it must be allowed by Her Majesty's Attorney or Solicitor-General. The theory as stated by the Lord Chancellor is this. The Sovereign as parens patriae interferes through his representative to protect his subjects who have an interest in the trust, and who from their situation cannot themselves interfere in cases of public charities and sanctions the institution of proceedings by such beneficiaries.

Passing on to the reliefs, the English Act directed such relief as the nature of the case might require; and the interpretation placed on those words in re Manchester New College (2) decided in 1853 was that the Court had a discretion to put the powers conferred by the Act into motion with benefit to the charity as between the trustees and the beneficiaries, and that decided cases cut down the Act to questions arising between them and precluded interference where third parties were concerned. The plan adopted by the Indian Legislature consisted first in omitting the removal of a trustee adversely on the ground of malversation as a relief available under Section 539. The English Statute did not authorize it because the procedure was by petition and summary, and because a lengthy inquiry in a hostile suit was incompatible with such procedure (203) and Section 539 was not intended to include it because such inquiry would impede the course of speedy justice which the Section was framed to secure. The next step consisted in adopting with a slight addition or modification the reliefs granted under Romilly's Act in specific cases, such as, re The Royston Free Grammar School (3) decided in 1839 (settling a scheme), Bignold v. Spring-field (4) decided in 1837 (appointing a new trustee) and re West Ham Charities (5) decided in 1848 declaring the mode in which the charity is to be apportioned, and placing the general words at the end so as to render them only auxiliary to what precedes them, and thereby adopt the result of cases decided under the English Statute in lieu of the description of relief contained in the statute itself. I do not see how the general words at the end of Section 539 "further or other relief" are, even when considered without reference to the rules of construction, wider than the discretion which the Court had under Romilly's Act to put the powers created by the Act into motion with benefit to the charity between the trustee and beneficiaries. Almost all the reliefs are taken either from Romilly's Act (52 Geo. III., Cap. 101), or from the cases decided under it in which it was held a trustee could not be removed hostilely. The Trustee Act of 1850 (13 and 14 Vic., Cap., 60) formulated, inter alia into rules of law the principles of several classes of cases decided under Romilly's Act. Hence clause (a), it may also be said, was taken from Section 32 of the Trustee Act of 1850, clause (b) was borrowed from Section 34, clause (c) was taken from re Hall's Charity (6) and the general words

(1) 1 Blgh, N. S. 91.  (2) 16 Beav. 610.  (3) 2 Beav. 228.  (4) 7 Clark & F. 71.  (5) 2 DeG. & Sm. 218.  (6) 14 Beav. 115.
from Romilly's Act. The specification of particular reliefs in Section 539 is substantially a mere classification of the reliefs granted under Romilly's Act and the posting of the general words at the end of the Section was designed to subordinate their effect to the ordinary rule of construction and thereby to avoid the difficulty in the construction pointed out by the Lord Chancellor in re Manchester New College (1). The conclusion I come to is that no suit to remove a trustee for misconduct hostilely lies or was intended to lie under Section 539 and that while it creates a special and new jurisdiction in respect of the reliefs mentioned therein, it leaves unimpaired or unlimited in any way in the interest of the charities the ordinary equitable jurisdiction exercised in an ordinary suit for the purpose of removing a trustee for misconduct and obtaining such relief against him as is consequent on such removal. The jurisdiction created by Romilly's Act was called in England when it came into operation the "new jurisdiction" by reason of the several reliefs expeditiously granted under it, but the mischief of it was that the procedure being by petition, further litigation was not avoided. The Indian Legislature so framed Section 539 as to retain the benefit and to eliminate the mischief by excluding from its operation ordinary suits for the hostile removal of trustees as under the English Statute and by substituting for the procedure by petition a procedure by a special suit and thereby giving finality to the decision.

I now proceed to consider the objections urged by the learned Pleader for the appellants in support of this appeal. The first objection is that under Romilly's Act the proceedings commenced with a petition, whereas, Section 539 permits a suit though it is called a special proceeding. The remarks already made in regard to special proceedings mentioned in Part V and their common special character and as to how they differ from ordinary suits contain a sufficient answer to this objection. It may well be that what was a proceeding by petition was altered into a proceeding by a special suit to obviate the mischief felt in England in working Romilly's Act. The jurisdiction may still be new as under the English Act, because it introduced new reliefs for the benefit of public charities which were not granted before in the mofussil.

It is next urged that the jurisdiction conferred by Romilly's Act and the Statute of 1850 was exercised in a summary way by Courts which had plenary jurisdiction upon information and that the jurisdiction conferred by Section 539 ought to be taken to be plenary because a suit (corresponding to information) was thereby permitted. The answer is that Section 539 was framed to give the District Courts a special branch of equitable jurisdiction which it was considered they never exercised before. The state of things in England when Romilly's Act was passed and in the provinces when this branch of jurisdiction was created was not similar; hence a distinction is made by the Indian Legislature between an ordinary suit and special proceedings by investing the latter with a special character limiting their scope. I am therefore unable to attach weight to this objection either.

[205] It is next argued that the removal of a trustee hostilely is not specified in Section 539, because it is in itself no positive benefit but only a step towards claiming the other relief specified in that section. It must be observed that when Section 539 was framed, the Legislature must have

(1) 15 Bea. 610.
been aware that the dismissal of a trustee for misconduct and the appointment of another in his place was a remedy usually claimed in an ordinary suit and that they would have mentioned it if they had intended to make the jurisdiction plenary as was done in Act XX of 1863. The learned Pleader for the appellants overlooked the fact that as consequent upon such dismissal, a positive benefit on which he lays so much stress may also be claimed such as damages or the transfer of some specific property in the trustee's possession on the ground that it was acquired from misuse of the funds of the charity. (See also Section 14 of Act XX of 1863)

Another objection urged is that the words promised by Section 539, "in case of any alleged breach of trust" and "appointing new trustees under the trust" imply when considered as cause and effect a power to dismiss a trustee hostilely. There may, however, be cases in which there may be a breach of trust and the beneficiary may not deem it necessary to ask for the removal of the trustee. The Judicial Committee also say in Letterstedt v. Broers (1), after pointing out that it is the duty of Courts of Equity to see that the trusts are properly executed, that "this duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases."

Another objection is that the three expressions (1) "in case of an alleged breach of trust express or constructive," (2) "appointing new trustees under the trust," and (3) "such further or other relief as the nature of the case may require" imply and include the hostile removal of the existing trustee for misconduct.

As regards the last expression, the general effect claimed for it cannot be recognized under the rules of construction, the word "further" besides other relief, being only explanatory and as such referable to some relief consequent on or incidental to the relief specified and the words under the English Statute were much wider as shown already when read in the light of cases decided under it.

As regards the words "in the case of any alleged breach of [206] trust," they do not necessarily imply a jurisdiction to remove a trustee hostilely. Unless there is a breach of trust in some form, there would be no occasion for the beneficiaries to interfere with the existing management nor to ask for directions. It is hardly necessary for me to add that when the breach of trust is only constructive or venial, or when the beneficiaries ask only for a direction to prevent its recurrence, an ignominious dismissal of the existing trustee would be undesirable in the interests of the charity itself; while such dismissal can always be secured when the breach of trust is corrupt or fraudulent by an ordinary suit, without retarding by a protected investigation the exercise of a special jurisdiction beneficial to the charity. The words are also to be found in the English Statute which did not permit a trustee to be removed in a hostile proceeding except upon information.

Another objection is that all public charitable institutions are under the superintendence of the Crown as parens patria, and it is reasonable to hold that the section which recognizes the right of the Crown does not exclude suits for dismissal of the existing trustee for mismanagement. It must be remembered here that so far as the Crown's right to interfere is concerned, Regulation VII of 1817 recognized it and enabled it to interfere even without the necessity of instituting a suit. So far as private


M V—19

145
individuals are concerned, there was always a right of suit in respect of the
dismissal of a trustee for misconduct. Section 539 was not needed unless it was the intention, which it has been held that it was not, to restrict this right. That it does not, is clear from the fact that substantially the same language was used in the English Statutes which did not include the hostile removal of a trustee.

In this connection, our attention is drawn to the Indian Trusts Act, Act 11 of 1882, Section 73, where a procedure by petition is prescribed as it is said by analogy to the English Statute along with a right of suit. Section 1 declares the Act inapplicable to public charities, and, as regards these, the beneficiaries may be many, whilst in private suits they are few. May not the answer be this? The special proceeding when limited in the sense indicated already combines in it, with regard to certain classes of reliefs, the speedy justice which a procedure by petition is likely to ensure and the finality of decision, the absence of which led to the observation of Lord Redesdale that "the farthest way about was often the nearest way home." It will be noted here that Section 539 applies also to the High Court, where the prior procedure, it must have been known to the Legislature, was by petition.

In conclusion, I am unable to accede to the contention for the appellants, because I have to introduce in Section 539, first, words which I do not find there, and, secondly, to add to the reliefs specified, a relief not specified in it, viz., such relief as may be had consequent on the dismissal of a trustee, thirdly, to give to the general words at the end of the section "further or other relief," a wider meaning than is warranted by the rules of construction, and, fourthly, to ignore the presumable unity of design common to Chapter XL and Chapters XXXVII to XXXIX and the distinction contemplated between ordinary suits and special proceedings. I have further to let in two anomalies, viz., to suppose that the pre-existing jurisdiction by an ordinary suit for removing a corrupt trustee which is unrestricted by Chapter I is restricted by Chapter XL, and that a concurrent jurisdiction is given to the High Court and District Courts as regards such removal when there was no apparent necessity for it.

I have again to vary the result of grammatical interpretation, not to remove an apparent error or incongruity, not to execute the declared intention of the Legislature, but to introduce a theory of consolidation which does not fit into the frame of the section.

On the other hand, the contention for the respondent steers clear of these difficulties and suggests a simple solution as the one adopted by the Legislature, viz., adopt the principle of Romilly's Act as regards the reliefs granted under it, change the procedure by petition into a procedure by a special proceeding or suit in contradistinction to an ordinary suit for removing a trustee for misconduct and such relief as is consequent on it, and leave the latter which the Privy Council characterized in Letterstedt v. Broers (1) as the exercise of a very delicate jurisdiction as unfettered as before, or as if Section 539 were not introduced into the Code of Civil Procedure, and thus secure to the public charities the benefit of prompt and speedy justice done under Romilly's Act, and, at the same time, avoid the difficulty and mischief felt during its practical operation by substituting a special suit for petition and by a special classification of the reliefs or particular trusts falling under the section.

For these reasons I do not see my way to hold that the opinion expressed in *Narasimha v. Ayyan* (1) is not sound in law though it is only an obiter dictum.

Best, J.—The arguments of the Vakils on either side, at the further hearing of this appeal, have been sufficiently stated in the judgment of my learned colleague Weir, J., and as the conclusions of my learned colleague on the point at issue are in accordance with my opinion already expressed in that case, I do not think it necessary to say much more than that the result of the further hearing has been to confirm me in the opinion already expressed.

Section 539 of the Code of Civil Procedure is taken not from Romilly's Act, as appears to have been supposed by the learned Judges who took part in the case of *Narasimha v. Ayyan* (1), but from the English Trustee Act of 1850; but the Legislature in wording Section 539 has taken care to remove all words which might have supported the contention that the procedure under the section should be summary, being by petition and order thereon as in the English Acts, and has expressly provided that it shall be by suit which is to result in a decree. Such being the case, there is no reason for holding that only non-contentious cases can be disposed of under Section 539.

As to the non-mention in the section of the removal of trustees as one of the remedies that can be given thereunder—as has been contended on behalf of the appellants, where the removal of a trustee is merely auxiliary to the appointment of another in his place, the mere fact of such auxiliary relief not being mentioned in the section is no reason for holding that it is beyond the Court's jurisdiction.

The ordinary Courts of this country administer equity as well as law, and there is no doubt that Courts of Equity can remove old trustees and appoint new ones in cases requiring such a remedy. See Story's *Equity Jurisprudence*, § 1287, also § 1289 where it is said that "in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust." Such being the case, when, in a suit brought before a District Court under Section 539 of the Code of Civil Procedure, such Court has power to appoint a new trustee, it must also be held to have power to remove, if necessary, the old trustee whose misconduct justifies the suit and consequent decree for the appointment of a new trustee.

It is contended on behalf of the respondent that Courts other than District Courts possessed prior to 1877, when Section 539 was first introduced into the Code of Civil Procedure, jurisdiction to entertain suits for removal of trustees, and that the result of holding that such suits can be brought under Section 539 in the District Court would be to abrogate that jurisdiction. The answer to this seems to be that Section 539 relates only to suits being brought by a few of the public interested in an endowment, and is an exception to the rule that all persons interested in a suit should join in bringing it, or that, when one or a few only sue on behalf of many, sanction should be obtained and notice issued under Section 30 of the Code of Civil Procedure—the cost of issuing these notices being often very heavy and therefore likely to deter persons from coming forward as public benefactors. In order, however, that the procedure intended for the public benefit should not be available to any ill-disposed person wishing to harm a trustee, the section requires the

---

(1) 12 M. 157.
previous sanction to such suit of the Advocate-General or other officer appointed by Government to give such sanction. When all parties interested join in suing, or sanction is obtained under Section 30, the jurisdiction of the ordinary Courts as to suits for the removal of trustees still exists, I imagine. It is only in suits brought by a few of the persons interested with the sanction required by Section 539 that the District Court has exclusive jurisdiction—just as in similar suits under Act XX of 1863—and when a suit is brought under Section 539 with the necessary sanction the mere fact of a trustee having to be removed as an auxiliary relief is not sufficient to oust the jurisdiction of the District Court.

I would therefore set aside the decree of the Lower Court and remand the case for disposal as previously suggested by me.

Weir, J.—This is an appeal from the decree of the District Court of Tanjore dismissing a suit brought under the provisions of Section 539 of the Civil Procedure Code for the removal of a trustee of a charitable endowment and for certain other reliefs.

The plaintiff set out that the endowment was granted to an ancestor of the plaintiffs and of the defendant by a former Maharajah of Tanjore for the charitable purpose of maintaining a [210] permanent watershed on the road to Rameswaram, &c.; that the charity was conducted by the original grantee, and afterwards by the father of plaintiff No. 2 and of the defendant; that the management of the charity, subject to the control of the other members of the family passed to the defendant, and that the latter had for the last 17 years neglected to maintain the charity, and had misappropriated the income to his own use, and had failed to keep and submit accounts. The plaintiff also set out that the sanction of the Collector had been obtained for the institution of the suit under Section 539, Civil Procedure Code, and prayed for a decree removing the defendant from the management of the trust, appointing other proper trustees and granting such further or other relief as the nature of the case might require.

The defendant filed a written statement resisting the suit on various grounds which need not here be adverted to; but it may be noted that he took no objection that the suit to remove him from the trusteeship would not lie under Section 539, Civil Procedure Code. The District Judge, however, framed an issue as to whether the plaintiffs were entitled to sue under Section 539 of the Code of Civil Procedure, and being of opinion that the judgment of the High Court in Narasimha v. Ayyan (1) was authority for the proposition that a suit will not lie under Section 539, Civil Procedure Code, for the removal of a trustee, he dismissed the suit on that ground. Against this decision the plaintiffs appealed, and the appeal came on for hearing before a Bench consisting of Mr. Justice Muttsam Ayyar and Mr. Justice Best, and the learned Judges having differed in opinion as to the construction to be put on Section 539 of the Code of Civil Procedure, the case has been referred to a third Judge as provided in Civil Procedure Code, Section 575, and has been very fully and ably argued before a special Bench, including the learned Judges who first heard it.

On behalf of the appellant it was urged in the preliminary portion of the argument that the District Judge was in error in holding that the decision in Narasimha v. Ayyan (1) is authority for the proposition that a suit for the removal of a trustee will not lie under Section 539.

(1) 12 M. 157.
The decision in Narasimha v. Ayyan (1) proceeded, it was pointed out distinctly, on the ground that "the plaintiffs had not [211] a direct interest in the trust within the terms of Section 539 of the Civil Procedure Code, and the suit was not therefore maintainable." The Court, however, went on to remark as follows:—"Again we think it is not at all clear that a suit to remove a trustee can be maintained under Section 539, of the Civil Procedure Code. It has been pointed out by Mr. Pattabhirama Ayyar that Section 539, in most parts of it, follows the provisions of Romilly's Act which enabled trusts of certain classes to be carried out by summary procedure and not by suit. Amongst the objects of that Act one was to appoint a new trustee, and it was held that, under the Act, a trustee could not be removed hostilely. No doubt Section 539 provides that a suit may be brought to appoint the trustee and for other purposes and it contains a proviso that further relief may be given according as the nature of the case required. Such grounds of relief would be some matter consequent on the relief which the section enables to be granted."

These observations, although no doubt entitled to great weight, are not, it must be admitted, necessary to the decision which proceeded, as has been seen, on the special ground already stated that the plaintiffs in the suit had not such a direct interest in the trust as is required by Section 539 of the Code.

The argument of the learned Pleader for the appellants that the decision in Narasimha v. Ayyan (1) is not a binding authority to the extent supposed by the District Judge may then be conceded. Nevertheless, as already stated, the observations of the learned Judges, who were parties to that decision, are entitled to great weight, and the doubts suggested by them having being adopted by the District Judge as the ground of the decision now under appeal, the whole question has now to be considered and determined on the materials available for decision.

The next argument advanced on behalf of the appellant was that there was some apparent inaccuracy in the argument, as reported, of the learned Judges in the passage cited, the provisions of Romilly's Act having been confounded with those of another and distinct Act, viz., the Trustee Act (13 and 14 Vic., Cap. 60), and the power conferred in Section 32 of the latter Act in regard to the appointment of trustees having been assumed to be exerciseable under the former Act. The last-mentioned Statute in Section 32 provides that "whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or trustees either in substitution for or in addition to any existing trustee or trustees." Although it has been held that the Court has power under Romilly's Act in certain circumstances to appoint new trustees (2), it was with reference to this provision in the Trustee Act and not with reference to any provision in Romilly's Act that it was held, by the Court of Chancery in England that that Court had not jurisdiction under the 32nd section to remove hostilely a trustee who was desirous of continuing in the trust. (In the matter of Hodson's Settlement) (3). This decision was followed in the later case of the matter of Richard Blanchard (4), and in other cases cited in Lewin on Trusts, page 1028.

---

(1) 14 M. 186 = 1 M. L.J. 95.
(2) CLA R & FIN. 71.
(3) Do & F. J. 187.
(4) See p. 118.
In this connection it was also pointed out by the learned Pleader for
the appellants that of the reliefs specified in Section 539 of the Code of
Civil Procedure, those set out in Clauses (a) and (b) were apparently
founded upon Sections 32 and 34 of the Trustee Act, 1850 (13 and 14
Vic.t., Cap. 60); that set out in Clause (c) was a relief which it was held
could be granted under Romilly's Act in re Hall's Charity (1) while the
reliefs set out in Clauses (d) and (e) of the section were equitable reliefs
which, provided the cases were simple cases, could also, for the most part,
be granted under Romilly's Act (see Lewin on Trusts, 8th edition, p. 929,
also cases summarized in re Hall's Charity (1).)

It appears to follow from the above that the decision in Narasimha v.
Ayyan (2) in so far as it is founded—if it is founded on the view that a
trustee could not be removed hostilely under Romilly's Act—is not sound.
No doubt he could not be removed hostilely as has been seen under
Section 32 of the Trustee Act, and it may be—especially as it is now
stated that both the enactments were referred to at [213] the argument—
that the learned Judges, although they do not expressly refer to the
Trustee Act, had that enactment in mind.

The similarity already noticed between the provisions of Sections 32
and 34 of the Trustee Act and the provisions of Clauses (a) and (b) of
Section 539 may be thought to some extent to favour the conclusion that
the relief given in the Code is subject to the same restrictions as that
given in the English Statute.

The determination of this question will, however, depend on wider
considerations than the mere similarity of the provisions.

These considerations will be dealt with hereafter. It may, however
here be pointed out that, while Section 32 of the Trustee Act enables
appointing new trustees in substitution for, or in addition to any existing
trustee or trustees, the Civil Procedure Code in Clause (a) enables merely
of appointing new trustees under the trust. The difference of language can
scarcely have been unintentional.

Before leaving this portion of the case it may also be as well
to notice that the procedure under the Trustee Act was a summary
procedure. The procedure is prescribed in Sections 40 to 43. Under
Section 40 of the Act the party might apply by petition for an order of the
Court of Chancery, and might give evidence by affidavit, and the matter
was to be disposed of by an order of the Court (Section 43 of the Act). In
this respect also, as will be seen hereafter, the language of Section 539
of the Civil Procedure Code is materially different from that of the Trustee
Act.

Proceeding now to Romilly's Act, 52 Geo. III, Cap. 101, its provi-
sions, so far as they are material, are as follows:—

"Whereas it is expedient to provide a more summary remedy in
cases of breaches of trusts created for charitable purposes, as well as for
the unjust and unright administration of the same, By it therefore enacted
in every case of a breach of any trust or supposed breach of any trust cre-
ated for charitable purposes or whenever the direction or order of a Court of
"Equity shall be deemed necessary for the administration of any trust for
"charitable purposes, it shall be lawful for any two or more persons to
"present a petition to the Lord Chancellor, Lord Keeper or Lords Commis-
"sioners for the custody of the Great Seal or Master of the Rolls, and praying

(1) 14 Brev. 115
(2) 12 M. 157.
such relief [214] as the nature of the case may require, and it shall be lawful for the Lord Chancellor, Lord Keeper and Commissioners for the custody of the Great Seal and for the Master of the Rolls and the Court of Exchequer, and they are hereby required to hear such petition in a summary way and upon affidavits or such other evidence as shall be produced upon such hearing to determine the same and to make such order therein and with respect to the costs of such applications as to him or them shall seem just; and such order shall be final and conclusive unless the party or parties who shall think himself or themselves aggrieved thereby shall, within two years from the time when such order shall have been passed and entered by the proper officer, have preferred an appeal from such decision to the House of Lords, to whom it is hereby enacted and declared that an appeal shall lie from such order.

The material portions are that in every case of a breach of any trust or supposed breach of trust created for charitable purposes, or whenever the direction or order of a Court of Equity shall be deemed necessary for the administration of any trust for charitable purposes, any two or more persons may present a petition to the Court of Chancery or to the Court of Exchequer stating such complaint and praying such relief as the nature of the case may require and the Court shall make such order thereon as shall seem just.

Prior to this enactment the only mode of proceeding in such breaches of trust had been by information of the Attorney General and the new procedure was welcomed as giving a more speedy and less costly remedy—(see Lewin on Trusts, Chapter XXX, Section IV, and Story's Equity Jurisprudence, Chapter XXXII). In its practical operation, however, the Act is said to have disappointed the expectations that were entertained of it, and the construction put upon the Act confined to comparatively narrow limits, the reliefs which could be granted under it—(see Lewin on Trusts, Chapter XXX, Section IV, Clause 4, and the observations of Lord Raleigh on the Corporation of Ludlow v. Greenhouse (1). The decisions on the point are summarized in a note, which will be found in re Hall's Charity (2). It is unnecessary to go through the decisions there cited, but speaking generally, although the [215] Court exercised wide powers under the Act in the absence of adverse claims, or where third persons were not interested, the Act was held to be confined in its operation to simple cases of abuse of a clear trust and it was also held not to apply to cases of constructive trusts.

It has been argued on behalf of the appellants that the Indian Legislature, when framing Section 539 of the Code of Civil Procedure, had the advantage of the experience derived from the practical operation of Romilly's Act, and was therefore careful to frame this newly introduced provision of the Code in such a way as to avoid the difficulties which had arisen on a construction of the English Statute. This argument is one which from the nature of the case cannot well be supported otherwise than on the inferences derivable from certain considerations which will now be discussed, and the first of these matters for consideration is the language and the apparent scope, as defined by that language, of the provisions of the section under consideration.

Romilly's Act, has been seen, was intended to provide a more summary remedy than that hitherto existing. The procedure was to be by petition

(1) 1 Bligh N.S. 49. (2) 14 Beav. 115 (121).
which was to pray for such relief as the nature of the case might require, and the Court was to make such order thereon as should seem just.

Two or more persons were empowered under the Act to put the Court in motion and the Act applied in every case of a breach of any trust or supposed breach of trust created for charitable purposes, or whenever the direction or order of a Court of Equity should be deemed necessary for the administration of any trust for charitable purposes. Comparing the language of Section 539 of our Indian Code, the provisions of Romilly’s Act last cited would appear at first sight to be very closely reproduced in the opening lines of Section 539, viz.: “In case of any alleged breach of any express or constructive trusts created for public, charitable or religious purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust.” Even, however, in these lines, there are these material differences, that the provision in the Indian Code applies to constructive trusts while Romilly’s Act was held not to apply to them in ex parte Brown (1), and the words the “direction of the Court” are substituted in the Civil Procedure Code for the words “the direction or order” of the Court in the English Act. It is unnecessary for our present purpose to notice that the provision in the Code applies also to trusts for religious purposes.

Proceeding next to the reliefs which can be given under the two enactments, we find that while the Court under Romilly’s Act was to make such order as shall seem just on the prayer for relief as the nature of the case might require, under the Code of Civil Procedure, the Court is empowered, besides the specific reliefs already noticed, to grant such further or other relief as the nature of the case may require.

These specific reliefs include, as has been seen in Clauses (a) and (b), reliefs which were specifically provided for subsequently to Romilly’s Act by a different enactment (the Trustee Act) and other reliefs, as to some of which it is, at least, doubtful whether they could be given under Romilly’s Act.

The language of the section in regard to relief especially in the words ‘such further or other relief as the nature of the case may require’ appears to me wider than the language of Romilly’s Act, and in respect of relief the section in its entirety appears to me to travel beyond the limits laid down by the express terms of the English Statute, as well as by the construction put upon the terms of that statute by the English Courts.

Lastly, as to procedure, the procedure throughout under Romilly’s Act is clearly expressed to be a summary procedure, and one of the points most debated at the argument in this case has been whether the procedure, under Section 539 of the Indian Code, is to be held to be a summary procedure or in the nature of a summary procedure.

In favour of the view that the procedure is not of a summary character, there is, it is argued in the first place, the heading of Chapter XL itself ‘of suits relating to public charities,’ and there is the provision in the section itself that the parties may institute a suit to obtain a decree. Under Romilly’s Act and under the Trustees’ Act, the adjudication which the parties were entitled to obtain was to be an order and without in any way relying on the clear distinction by definition in our Indian Code between ‘decrees’ and ‘orders,’ it seems reasonable to infer from the use of

(1) Cooper 295.

152
the terms 'petition' and 'order' in the English Statute that the adjudication under the English Statute was one of a less formal and more summary character than that contemplated under the Indian Code.

The distinction between summary procedure resulting in a determination by order is one which is well known to the Indian Courts (see, for example, the Minors Act and the Succession Certificate Act), and the Legislature would not have used in Section 539, Civil Procedure Code, the words "suit" and "decree," it may fairly be contended, if they had intended to introduce merely a summary procedure.

This view is strengthened by a reference to the Indian Trusts Act—Act II of 1882, which Act is declared in Section 1 not to apply to public or private religious or charitable endowments. This Act in Section 72 and in Section 74 (in the latter section following the English Statute) provides a summary procedure by petition and "without instituting a suit" for the reliefs therein specified, that contemplated in Section 74 being the appointment of new trustees. This Act, viz., Act II of 1882, was passed in 1882 at a time when Section 539 of the Civil Procedure Code was amended and made applicable to religious endowments, and the preservation by express terms of a summary procedure under the Indian Trusts Act, when contrasted with the provision in Section 539 of the Civil Procedure Code, that the procedure shall be by suit is, it may be said, peculiarly significant.

On the other hand it is argued for the respondent that the peculiar position of Chapter XL in the scheme of the Civil Procedure Code under Part V, Special Proceedings, and following immediately on the chapters relating to "Reference to arbitration," "Proceedings on agreement of parties," and "Summary Procedure on Negotiable Instruments," warrants the view that suits other than suits of the character of regular suits were contemplated in Section 539 of the Code of Civil Procedure.

An observation of Mr. Whitley Stokes, the learned Editor of the Anglo-Indian Codes, and an undoubted authority, Vol. II of the Anglo-Indian Codes, page 429, is cited in support of this view.

In this connection, it may, perhaps, be observed that Chapter XL of the Code would appear to have been interpolated, if it may be so said, into the Civil Procedure Code of 1877, at the last moment. The provision does not appear in the latest edition of the Bill sent to this Court under date 16th October 1876, and the [218] Act received the sanction of the Governor-General on the 31st March 1877. In the Bill of 10th October 1876, Chapter XXXIX was as now "On summary procedure on Negotiable Instruments," while Chapter XL related to "Appeals from Original Decrees."

I am not, however, able to see that the position of Chapter XL in the Code of Civil Procedure, or the other argument cited affords any valid ground, in the face of the express language of the section and in view of the strong contrast between that language and the language of the English Statutes, for the opinion that the procedure under Section 539 of the Civil Procedure Code is intended to be of a summary character.

Moreover, if regard be had to the importance of the subject matter of the suit, there is no reason why the suit should be of a summary character. On the contrary, there are very strong reasons why it should not be such.

It appears to me, therefore, that Section 539, Civil Procedure Code, differs materially both as respects the nature of the relief that can be
granted and the procedure which has to be followed from the English Statutes on which the Court proceeded in arriving at the decision in 
Narasimha v. Ayyan (1), and that those statutes and the construction put 
on them can, therefore, be no safe guide in determining the construction 
of the provision in Section 539 of our Indian Civil Procedure Code. I 
arrive at this opinion on a construction of the section itself and an exami-
nation of the English Statutes.

Having arrived at this conclusion for the reasons stated, it may now 
more appropriately than could hitherto have been done be pointed out 
that the inconvenience, which must manifestly arise from the construc-
tion that the reliefs contemplated in Section 539 do not extend to the 
removal of a trustee, would be very great. If the view that a trustee 
cannot be removed under the section is correct, it would appear to result 
that, while a suit for the appointment of new trustees can be instituted 
only in the District Court, and after obtaining the required sanction, a 
suit for the removal of a trustee, which must in most cases be a necessary 
preliminary, will ordinarily have to be instituted elsewhere.

Under the rules relating to the valuation of suits and jurisdiction, the 
latter suit would generally be instituted in a District [219] Munsif’s 
Court, and another suit arising out of the same cause of action would 
have to be brought in the District Court. Assuming the cause of action 
in both suits to be the same—an assumption which in the conditions 
stated may not unreasonably be made—the splitting of the suits would 
be opposed to the provisions of Section 43 of the Code of Civil Procedure. 
It may also, I think, fairly be conceded, as was maintained at the argu-
ment, that the object of the section would be in great part defeated if the 
Court had not power in a suit framed under the section to remove a 
defaulting trustee. The object of the section is to take cognizance of 
breaches of trust of the special class stated and to give direction for the 
administration of the trust in furtherance of the object of the trust. How, 
it may be asked, is the object to be effected if the hands of the Court are 
tied in regard to the removal of the trustee? The new trustees to be 
appointed under the section are not, as is the case in regard to the trustees 
under Section 32 of the English Trustees Act, expressly to be appointed in 
substitution for, or in addition to, the existing trustees. The power is 
apparently unrestricted and the basis of the suit being an alleged breach 
of trust, the Court is presumably not to act unless the alleged breach of 
trust is ascertained after trial to be well founded. As it is not every 
breach of trust which of necessity renders it obligatory to remove a trus-
tee, the section may, it seems to me, not unreasonably, be read as if it 
contained the words "in case of a trustee being found to have committed 
a breach of trust which renders his removal necessary, the Court may 
appoint new trustees."

If the Court cannot, on such a result being arrived at, remove the 
defaulting trustee, the power to appoint a new trustee seems uncalled for 
and the remedy futile and illusory.

The words of the section relating to relief, viz., "such further or 
other relief as the nature of the case may require," are, certainly in my 
opinion, wide enough to render such a futile result a far from necessary 
construction. The omission, however, from the section of any words 
directly importing a power to remove a trustee has been much pressed on 
the side of the respondent, and an inference against the existence of a
power to remove a trustee has been said to be derivable from Section 14 of Act XX of 1863, in which power is expressly given to Courts to remove a trustee of a mosque or temple. For the reasons already stated, however, I am of opinion that the omission of any express provision conferring a power to remove has not the significance sought to be given to it.

In connection with this portion of the case, the argument has also extended to a brief examination of the state of the law on the subject of the removal of trustees of such charitable or religious institutions as are described in Section 539 anterior to the enactment of that section, it having at one portion of the argument been asserted that no suit for the removal of a trustee presumably lay before Section 539 found a place in the Civil Procedure Code.

The provision now enacted as Section 539, Code of Civil Procedure, made its appearance for the first time, as already noticed in the Civil Procedure Code, Act X of 1877. It found no place in the first Civil Procedure Code, Act VIII of 1859.

Apart from authority on the subject, there can however, be no question that a suit would, at any period of our administration, have lain for the removal of a trustee on the ground of his having committed a breach of trust. That the Supreme Court possessed the jurisdiction scarcely requires to be stated. The Courts administering justice outside the Presidency town also clearly possessed it. From their first establishment these Courts were vested with an equitable jurisdiction (vide Regulation II of 1802, section 17), and the power to remove defaulting trustees is a power which the Courts of Equity in England have indisputably exercised in a long series of cases (vide Story’s Equity, §§ 1287, 1288, 1289 and the cases there cited). There is, however, express authority on the subject in our own High Court Reports viz., in Ponnambala Mudaliar v. Varaguna Rama Pandia Chinnatambiar (1). In that case, a District Judge had dismissed a suit for the removal of a trustee of certain charitable trust who was charged with malversation, on the ground that in his opinion Regulation VII of 1817 required that application should first be made in such cases to the Board of Revenue. The High Court observed that the decision of the District Judge was wrong:

"The Courts had unquestionably jurisdiction in such cases prior to the enactment of Regulation VII of 1817, and there is nothing in the Regulation to deprive the Courts of their jurisdiction, while it gives the Board of Revenue the power [221] and imposes upon it the duty of interfering whenever it appears necessary to do so for the protection of charitable endowments. The Regulation is clearly intended to be supplementary of existing remedies. This was held by the late Sudr Court in the decision in Kassynasy Kristna Puller v. Vangala Shangaranat Josser(2) which was followed in Narasimma Charry v. Tundree Comara Tata Charry(3)."

Besides the case cited, there appear to be no other reported decisions on the matter. The power of supervision conferred by the Regulation and exercised by the Board of Revenue may not unreasonably, perhaps, be taken to account for the apparent paucity of suits relating to such trusts. The case of the Attorney-General v. Brodia (4) was also referred to, but it merely decides that the then Supreme Court of Madras had an equitable

---

(1) 7 M. H. C. R. 117.  
(2) Sudder Decisions (1858) 39.  
(3) Sudder Decisions (1859) 141.  
(4) 4 M. I. A. 190.
jurisdiction similar to and corresponding with the equitable jurisdiction exercised by the Court of Chancery in England over charities.

The power then to remove a trustee for breach of his trust undoubtedly existed prior to the enactment of Section 539 in the Code of 1877.

What then, it may be asked, was the intention of the Legislature according to reasonable presumption in enacting the provision which first appeared in the Code as Section 539 of Act X of 1877.

On behalf of the respondent it has been urged that it was the intention of the Legislature to confer a special privilege by enabling two or more persons to sue in the case supposed for certain specified reliefs only, but in the case of the relief being for the removal of the trustee, to leave the persons having the same interest to their ordinary remedy by suit after obtaining, if necessary, the permission of the Court as provided in Section 30 of the Code for one or more to sue on behalf of all, and it was also argued that the section was confined to non-contentious cases.

In India non-contentious suits of this class are, it may be remarked, as far as my experience enables me to speak, comparatively few, whatever may be the case in England.

In my opinion this argument does not give a reasonable view of the intention of the Legislature. The object aimed at was, it appears to me, to consolidate and embody in one definite provision the procedure to be followed in British India in suits relating to public charitable and religious endowments other than the limited classes of such endowments which fall to be dealt with under Act XX of 1863. It cannot reasonably be contended that the intention of the Legislature was to take away any existing remedies, but if such was not their intention, and if the intention was not to embody the law of procedure in one single provision, then we are landed on the anomalies and difficulties already noticed of the party moving the Courts having to split up his suit and seek for one relief in respect of the dismissal of a trustee in a Court subordinate to the District Court and for the other specified reliefs in the District Court itself.

Such a state of affairs could not, I think, it may reasonably be concluded, have been the intention of the Legislature.

For the reasons stated, therefore, I arrive at the conclusion that the opinion expressed in the case of Narasimha v. Ayyan (1) that Section 539 of the Code of Civil Procedure is subject to the restriction imposed by the construction placed by the English Courts on Romilly’s Act and on the Trustee Act, 1850, is not well founded, and that, although the power to remove a trustee is not in express terms given by Section 539 of the Code of Civil Procedure, it is a power which, from the nature of the case, may reasonably be held to have been given under the wide words, ‘such further or other relief as the nature of the case may require.’

For the reasons stated, I would allow the appeal, and reversing the decree of the District Judge, I would remand the suit for trial on the merits. The costs of this appeal, and in the Lower Court, will abide and follow the result of the retrial.

(1) 13 M. 167.
QUEEN-EMPRESS v. SUKA SINGH AND ANOTHER. [8th August, 1890.]  
City of Madras Police Act (Act III of 1888, Madras), Section 71, Clauses xi and xv—Crowd collected by music—Obstruction of street—Music performed in private place.

Members of the Salvation Army were found by the Magistrate to have played tambourines and sung "at the angle" of a street in Madras, and thereby collected a crowd which thronged the street, and they were convicted of offences under the City of Madras Police Act, Section 71, Clauses xi and xv.

Held on revision, that, since the intention of the accused was to collect a crowd in the street, the conviction under Clause xi was right, whether or not the place, where the accused played and sang, was a private place; but that, if it was a private place, the conviction under Clause xv was wrong.

PETITION under Sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the finding and sentence of Sultan Moidin, Presidency Magistrate, Black Town, Madras, in calendar case No. 10975 of 1890.

The accused were convicted of committing offences against the City of Madras Police Act, Section 71, Clauses xi and xv, under circumstances which appear sufficiently from the judgment of the High Court.

The provisions of the section in question are as follows:

"Whoever, in any public street, road, thoroughfare, or place of public resort, commits any of the following offences shall be liable, on conviction, to a fine not exceeding 50 rupees, or to imprisonment, which may extend to one month:—

"xi. Whoever causes any vehicle to remain or stand longer than may be necessary for loading or unloading, except at places appointed for the purpose by the Commissioner, or fastens any horse or other animal so as to cause obstruction, or in any way wilfully obstructs or causes obstruction to the free passage of any thoroughfare.

"xv. Whoever beats a drum or tom-tom or blows a horn or trumpet, or beats or sounds any brass or other instrument or utensil, or plays any music except at such times and places as shall be, from time to time, allowed by the Commissioner."

Mr. R. F. Grant, for petitioners.
The Crown Prosecutor (Mr. W. Grant), for the Crown.

JUDGMENT.

The petitioners, who are members of a body known as the Salvation Army, have been convicted under Section 71, Clauses xi and xv of the Madras City Police Act, and have been sentenced to pay fines. The case was tried summarily by the Magistrate, and there has been, so far as we can see, no evidence recorded in the case.

The Magistrate was not bound, under Sections 263 and 362 of the Code of Criminal Procedure, to record the evidence, but, as the case was one of some public importance, we think it is to be regretted that he did not do so, more especially as the learned counsel for the accused maintains that the judgment is misleading, or at least ambiguous as to certain features of the case.

* Criminal Revision Petition No. 167 of 1890.
The proceedings came, however, before us in revision, and we are bound to take the facts to be as stated in the Magistrate’s judgment, and we have no power to consider any facts other than those stated in the Magistrate’s judgment.

As regards so much of the conviction as is under Clause xv of Section 71, it is argued, on behalf of the accused, that the conviction is not sustainable, inasmuch as there was no evidence that the accused played music in the public streets. In connection with this argument, we have to observe that the Magistrate’s judgment states that one witness deposed that the accused played music along Errabauloo Chetti Street, after being warned against it by the Police.

It was sought to be argued by the counsel for the accused that this incident occurred after the termination of the transaction, in respect of which the charge now under trial was laid; but the observation of the Magistrate in his judgment does not show that this was so, and, as already observed, we are bound, in the absence of any record, to take a statement made in the judgment to mean what it appears to mean.

So taking it, it would appear that the accused did play music in the public street, and, this being found as a fact, the accused were undoubtedly liable under Clause xv of the section.

[225] We may, however, on this part of the case, intimate our opinion that, if the accused had not, as a matter of fact, been found to have played in a public street, but on private property, the conviction, on this head, for merely playing music, except at such times and places as may be allowed by the Commissioner, could not have been sustained.

The provision in Clause xv is, we consider, governed by the words at the head of Section 71, viz., "whoever in any public street, road or thoroughfare, or place of public resort," that is to say, by virtue of the words at the beginning of the section, playing of music at times or places other than those allowed by the Commissioner must be the playing of music in a public street, road, thoroughfare, or place of public resort, and it follows, therefore, that the playing of music, where there is no willful obstruction of a thoroughfare caused thereby, is not in itself punishable, when such playing takes place on private property.

The next ground of objection urged has been that the language of Clause xi, "whoever in any way wilfully obstructs or causes obstruction to the free passage of any thoroughfare," when read along with the words in the heading of Section 71, already referred to, must be held to mean that, whoever being at the time in any public street, road, thoroughfare, or place of public resort in any way wilfully obstructs or causes obstruction shall be liable, and that inasmuch as the accused were at the time, in respect of which the offence is charged, not in a public street, &c., but on a piece of private ground, they are not liable under the section.

As to this argument it has, in the first instance, to be observed that the Magistrate’s judgment describes the accused as being at an angle of the street at the time of the alleged obstruction. This expression is somewhat ambiguous and may mean that the accused were actually in or on the street, or that they were at some spot or corner closely abutting on the street. Taking it, however, to have the latter meaning, it has to be considered whether the argument put forward, on behalf of the accused, is one which can reasonably be admitted.

It appears to us, on consideration, that it cannot have been the intention of the Legislature that the person causing the obstruction should actually be on or in the street at the time of the alleged obstruction.
The words of the clause are very wide, [226] viz., "whoever in any way willfully obstructs or causes obstruction, &c.," and it is clear that it was the intention of the Legislature to confer very extensive powers on the City Police for the control and regulation of street traffic.

A narrow construction of the terms of the section, such as is contended for on behalf of the petitioners, would obviously restrict very much the powers of the Police in respect of street traffic, and, in so far as it did so, would defeat the object aimed at by the Act, and it appears to us that a person or body of persons, who, although not actually in the street, are on a piece of ground or in a house immediately abutting on or adjoining a street have, under such conditions as were found to exist in this case, as much power of obstructing the traffic by collecting a crowd as if they were actually standing on the street. It is not disputed that the accused played music and sang on the spot where they were, immediately adjoining a street, and the effect of the music and singing, the natural and ordinary effect, and we think, we may add the intended effect and object (the players and singers being members of the Salvation Army) was to collect a large crowd, which crowd obstructed the free passage of the public road.

Such being, in our view, the natural and ordinary result, as also the intended result of the action of the petitioners, we think, it must be concluded that the accused willfully, i.e., intentionally brought about that result, and, as the result was undoubtedly an obstruction to the traffic, we think, they were liable under Clause xi of the section, and that the conviction under this clause, as well as under Clause xv of the section, must be sustained.

We must, therefore, refuse to interfere in revision.

14 M. 227.

[227] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

VENKATA (Petitioner), Appellant v. SAMA AND OTHERS (Counter-Petitioners), Respondents.* [16th October, 1890.]

Civil Procedure Code, Section 306 — Court sale — Material irregularity.

Per cur. — We do not consider that the commencement of a Court sale, prior to the expiry of the thirtieth day or any delay in making the deposit required by Section 306 or the adjournment of the sale from time to time without sufficient ground, is more than a mere irregularity.

[F., 3 L.B.R. 225 (226); R., 132 P.R. (1900) = 11 P.L.R. 1907.]

PETITION under Civil Procedure Code, Section 622, praying the High Court to revise the order of S. Subba Rau, District Munsif of Chittur, dated 29th April 1889, and appeal against the same.

The petitioner was a judgment-debtor whose property had been attached and sold in execution of a decree, and the prayer of the petition was that the sale be set aside by reason of various alleged irregularities, the nature of which appears sufficiently from the judgment of the High Court.

* Appeal against Appellate Order No. 13 of 1890.

159
The District Munsif referred to Arunchellam v. Arunchellam (1), Goopee Nath Dobey v. Roy Luckmeeput Singh Bahadur (2), Mohunt Megh Lall Pooree v. Shib Pershad Mad (3), Bandy Ali v. Madhub Chunder Nag (4), Macnaghten v. Mahabir Pershad Singh (5), Bhim Singh v. Sarwan Singh (6), Iftizam Ali v. Narain Singh (7), and Lakshmi v. Krishnabhat (8), and dismissed the petition saying "on the whole I am satisfied that no "substantial injury has been proved by the petitioner, although it has come to light, there have been certain irregularities in publishing and conduct-"ing the sale as described above."

The petitioner preferred this petition and appeal.

Mr. Ramasami Raju and Ramasami Mudaliar, for appellant.
Mr. Subramanyam, for respondents.

JUDGMENT.

[228] It is admitted that the appeal cannot be maintained. It must therefore be dismissed.

As to the petition under Section 622, it is urged that the sale was not merely irregular, but was wholly void ab initio and that therefore the Courts below exceeded their jurisdiction. Seeing that it was the present petitioner, the judgment-debtor, who put the Court in motion by applying under Section 311, we are unable to see how the petitioner can be heard to say that the Court had no jurisdiction.

As the case was put by the judgment-debtor, the Court clearly had jurisdiction. Apart from this, we do not consider that either the commencement of the sale prior to the expiry of the thirtieth day, or any delay in making the deposit required by Section 306, or the adjournment of the sale from time to time without sufficient ground is more than a mere irregularity.

Although we are referred to the decisions of the Allahabad High Court in Bakshi Nand Kishore v. Malak Chand (9) Jasoda v. Mathura Das (10), Ganga Prasad v. Jag Lal Rai (11), this Court has held that the omission to make the deposit immediately, or the fact of the sale taking place before the expiration of thirty days, is not fatal to the sale, unless substantial injury is proved.

The view taken by this Court is also in accordance with the decision of the High Court of Bombay in Lakshmi v. Krishnabhat (8).

The petition is dismissed with costs.

(1) 12 M. 19.  (2) 3 C. 542.  (3) 7 C. 34.  (4) 8 C. 932.
(5) 9 C. 656.  (6) 16 C. 33.  (7) 5 A. 316.  (8) 8 B. 424.
(9) 7 A. 289.  (10) 9 A. 511.  (11) 11 A. 399.
QUEEN-EMPRESS v. VENKATASAMI 14 Mad. 230

[229] APPELLATE CRIMINAL.


QUEEN-EMPRESS v. VENKATASAMI. [17th October and 13th November, 1890.]


The accused, being in the employ of Government in the Post Office Department, while assisting in the sorting of letters, secreted two letters with the intention of handing them to the delivery peon, and sharing with him certain moneys payable upon them. He was charged under the Indian Post Office Act, Section 48:

He did, (1) that since the intention of the accused was not to prevent the delivery of the letters to the addressees, he was not guilty of the offence of secreting them within the meaning of that section;

(2) that he was guilty of the offence of stealing and of fraudulently misappropriating the letters within the meaning of that section, and of the offence of theft and of attempt to commit dishonest misappropriation of property within the meaning of the Penal Code.

CASE referred for the orders of the High Court, under Section 438 of the Criminal Procedure Code, by E. C. Johnson, District Magistrate of Ganjam.

The case was stated as follows:

"The accused, in this case, a postal peon, was charged with theft in respect of two letters. The Senior Assistant Magistrate has discharged him under Section 258, Criminal Procedure Code.

"The facts of the case, as proved, are as follows:—The accused was assisting the head clerk to sort letters. While so doing, he was observed to secrete two letters in his cloth. The head clerk called the Postmaster, and accused was searched, two bearing letters being found in his cloth.

"When questioned, he said that he intended to give them to the delivery peon, and to share with him in the bearing postage, which he would collect.

"The Senior Assistant Magistrate observes:—'The accused did not intend to fraudulently appropriate the letters, nor did he wilfully secrete them, the words implying, as I understand, wilful intention to keep them out of the possession of the addressees and not covering the action of the accused in this case. The accused was originally charged with theft, but, as there was no intention to take [230] away the letters and thereby cause gain to himself, the accused was not guilty of this offence.'

"This reading of the law, as it appears to me, is clearly wrong. The letters were in charge of the Postal Department for a double purpose—(1) for delivery to the addressee, (2) for the recovery of the bearing postage due to Government thereon. The act of the accused frustrated the second of these purposes, and was in so much a 'fraudulent appropriation' of the letters; thus constituting an offence under Section 48 of the Post Office Act. Moreover, as long as the letters were in the possession of accused with an honest intent, they were in the constructive possession of the Postmaster. As soon as he concealed them with a

* Criminal Revision Case No. 363 of 1890.
"dishonest intent [an intent to defraud Government of the bearing postage]

they ceased to be any longer in the Postmaster's possession; and the act

of the accused amounted either to theft, or criminal misappropriation.

"This being so, the accused has, I consider, been improperly
discharged; and, if the Judges of the High Court are of the same opinion,

I request that the order of discharge may be set aside and that the Senior
Assistant Magistrate be directed to replace the case on his file, and to
frame a charge against the accused, and dispose of the case in accordance
with a correct view of the law."

Counsel were not instructed.

JUDGMENT.

The accused, in this case, was in the employ of the Post Office at
Berhampore, and the facts found are that, on the arrival of the mail, he
assisted the sorting clerk in sorting letters, and that, while so doing, he
was observed to secrete two letters in his cloth. The head clerk called
the Postmaster and accused was searched. Two bearing letters were
found in his cloth. When questioned, he said that he intended to give
them to the delivery peon, and to share with him the bearing postage,
which the latter would collect. The Senior Assistant Magistrate, before
whom the accused was charged, was of opinion that the accused did not
intend to fraudulently appropriate the letters, nor did he willfully secrete
them, the words implying, in the Magistrate's opinion, willful intention to
keep the letters out of the possession of the addressees and not covering
the action of the accused.

The Magistrate observed also that the accused was originally charged
with theft, but, as there was no intention to take away the letters and
thereby cause gain to himself, the accused was not guilty of this offence.

The Magistrate accordingly discharged the accused under Section 253,
Criminal Procedure Code.

The District Magistrate submits that the order of the Senior Assista-
ant Magistrate, discharging the accused, is erroneous in law.

The prosecution, we observe, was brought under Section 48 of [231] the
Indian Post Office Act, the material words of which, in so far as we are
concerned with the section in this case, are as follows:

"Whoever, being in the employ of the Government, in the Post Office
"Department, shall steal, fraudulently appropriate, or willfully secrete,
"destroy or throw away any letter or other article sent by post, &c., shall
"be punished with imprisonment of either description for a term not
"exceeding seven years and shall also be liable to fine."

We are of opinion that the view of the Magistrate that the accused
did not intend to willfully secrete the letters within the meaning of the
section is correct on the facts found. The words in question appear to us
to be directed to such a secreting or concealment of letters as would
frustrate or tend to frustrate their delivery to the addressees.

We are of opinion, however, that the accused was otherwise liable
under the section, and that the discharge is erroneous for the following
reasons:

The intention of the accused was admittedly a dishonest intention,
_viz.,_ that of causing wrongful gain to himself and wrongful loss to the
Post Office. To carry out that intention, he, for the time being, took the
letters into his own personal possession and out of the possession of
the Post Office, or, in other words, he appropriated the letters. The
letters were until delivery, property to the possession of which the
Post Office was entitled and should have been handed over in the ordinary course to the delivery man, whose possession would, of course, in point of law, have continued to be that of the Post Office until such time as the letters were delivered. The accused, by taking possession of the letters with the dishonest intention which he admitted was guilty, we consider, of the offence of stealing and of fraudulently appropriating the letters within the meaning of the section, and also of the offence of theft and of attempt to commit dishonest misappropriation of property within the meaning of the Penal Code.

For these reasons, we are of opinion that the discharge of the accused was erroneous in law, and we accordingly set aside the order of discharge and direct that the accused be retried by the Senior Assistant Magistrate.

Ordered accordingly.

---

[232] APPELLATE CIVIL.

Before Mr. Justice Handley and Mr. Justice Weir.

RAMAYYA (Plaintiff), Appellant v. GURUVA AND OTHERS
(Defendants) Respondents. [20th October and 5th November, 1890.]

Transfer of Property Act (Act IV of 1882), Sections 58 (d), 67—Usufructuary mortgage with a personal covenant—Suit by mortgagee for sale.

In a suit for sale by a mortgagee, it appeared that the mortgage comprised a covenant by the mortgagee for payment of the mortgage amount, but otherwise answered the definition of an usufructuary mortgage contained in Transfer of Property Act, Section 58 (d): Held, that the mortgagees were not precluded by Transfer of Property Act, Section 67, from bringing the property to sale under the mortgage.

[Disso., 38 A. 157 (1902) = A.W.N. (1903) 226; F., 26 M. 662 (669); 5 O.C. 286 (223); Appr., 21 A. 4 (11); R., 24 C. 677 (681).]

SECOND appeal against the decree of V. Srinivasa Charlu, Subordinate Judge of Cocanada, in appeal suit No. 414 of 1888, reversing the decree of V. Krishnamurti, Acting District Munsif of Amalapuram, in original suit No. 173 of 1888.

Suit by a mortgagee to recover the mortgage money and in default of payment to bring the mortgage premises to sale. The mortgage instrument was as follows:—

"Usufructuary mortgage bond in respect of inam land executed on the 27th June 1884, corresponding to the 5th Ashada Sudda of the year "Tharanu, to Vissanavudhanulu Garu, son of Dokka Brahavanadhanulu Garu, Brahman, Inamdar, residing in Vakkalanka Agraaram, by us "both jointly Ravi Muttanna Garu’s son, Guruvadanadhanulu and his "undivided son, Chenulu, Brahman, Inamdar, residing in Durivriri "Mukkamala. The amount of loan received from you this day on account of our urgent necessity is Rs. 300 (three hundred rupees).

"The amount agreed to be paid to you for the interest hereof is "Rs. 30 (thirty rupees). For the discharge of the said interest amount, "5 acres of land with fruit trees thereon, which goes by the name of "Mamidethota Pampa, which is situated to the south of Madugu (water- "source) and which is owned by us in the village of Munipanavallu,

* Second Appeal No. 1126 of 1890.
attached to the Sub-Registration District of Kottapeta, Amalapuram 
taluks, Godavari district, have been made over to your possession this 
very day (for being enjoyed) for 4 (four) years from this year up to the year 
Sarvajithu. It is settled that we should pay the principal amount to you 
in three instalments within this period. In default of payment of the 
principal amount within the 30th Palguna Bahula of the year Sarvajithu, 
it is settled that you should continue to enjoy the same, for interest in the 
afore-[233]said manner from the year Sarvadari, and if the principal 
money be paid in the 30th Palguna Bahula of any year make over to our 
possessions the said land with trees in the same year. It is settled that 
out of the mango, palmyra, banyan and other trees standing on the 
said land belonging to my junior paternal uncle and in the enjoyment 
of Dokka Narasamma Garu, deducting the half-share belonging to my 
junior paternal uncle and in the enjoyment of Dokka Narasamma Garu, 
the remaining half appertaining to my share should be enjoyed by you 
according to mool hiterto. It is settled that we ourselves should 
pay the quit-rent and other taxes due on the said land hiterto.

"Boundaries of the said land. Plot 1.—East, inam of Upathiyala 
Ayyanna and others; south, boundary lane; west, inam belonging to our 
"junior paternal uncle and in the enjoyment of Dokka Narasamma Garu; 
north, ditto, consisting of 3 acres with the aforesaid boundaries.

"Plot 1.—East, Kodamattivar's inam; south, inam belonging to my 
"junior paternal uncle's share and in the enjoyment of Dokka Narasamma 
"Garu; west, Nemanivar's inam; north, Kummarabunda consisting of 2 
"acres with the aforesaid boundaries. Total 2 plots consisting of about 5 
"acres of land with trees have now been put in your possession this day. 
"This is the usufructuary mortgage bond in respect of inam land executed 
"with consent."

The District Munsif passed a decree as prayed, but this decree was 
reversed, on appeal, by the Subordinate Judge, who dismissed the suit 
throughout.

The plaintiff preferred this second appeal.

S. Subramanyar Ayyar and P. Subramanyar Ayyar, for appellant.
Parthasaradhi Ayyangar, for respondents.

JUDGMENT.

The question to be determined in this second appeal is whether the 
plaintiff is entitled to a decree for recovery of the amount due to him 
under his mortgage by sale of the mortgaged property. The Court of First 
Instance held he was so entitled and gave him a decree, but the Lower 
Appellate Court held he was not, and dismissed his suit. The mortgage 
was executed after the Transfer of Property Act came into force, and, 
therefore, the rights of the mortgagee are those declared by that Act. 
Section 67 gives the mortgagee the right to obtain from the Court a decree 
for sale "in the absence of a contract to the contrary," but with the 
proviso that nothing in that section shall be deemed (a) (inter alia) to 
authorize a usufructuary mortgagee as such to institute a suit for foreclosure or sale. The term usufructuary mortgage is defined by Section 58 (d) 
to be "when the mortgagor delivers possession of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of the mortgage money and to receive the rents and profits accruing [234] from the property and to appropriate them in lieu of interest or in payment of the mortgage money, or partly in lieu of interest and partly in payment of the mortgage money." No doubt the incidents
here enumerated occur in the present case and the mortgage would therefore be a usufructuary mortgage within this definition, but for the fact that the mortgage deed contains a covenant for payment of the principal by a certain date. Chahnu v. Kunjam (1) is an authority for the position that a mortgage is not a usufructuary mortgage within the meaning of the Transfer of Property Act if there is a covenant to pay the mortgage-debt.

The Subordinate Judge holds that the mortgage is of the kind defined as "anomalous" by the Transfer of Property Act and therefore to be governed by the contract of the parties and that by the contract in this case the mortgagee is precluded from selling for sale of the mortgaged property by the provision in the mortgage deed that, in default of payment within the prescribed time, the mortgagee shall continue to enjoy the mortgaged property for interest as before. This provision is one in favour of the mortgagee, extending his security beyond the prescribed period, and does not, in our opinion, take away his right, arising out of the covenant to pay, to sue for sale of the mortgaged property.

We reverse the decree of the Lower Appellate Court and restore that of the Munsif. The plaintiff is entitled to his costs in this and the Lower Appellate Court.

14 M. 235.

[235] APPELLATE CIVIL.

Before Mr. Justice Mullusami Ayyar and Mr. Justice Best.

AGRA BANK (Plaintiff) v. HAMLIN (Defendant No. 1). (2)
[4th September and 8th October, 1890.]

Civil Procedure Code, Section 290—Court-auction—Withdrawal of bid.

It is competent to a bidder at a Court auction-sale to withdraw his bid.

Case referred for the opinion of the High Court, under Civil Procedure Code, Section 617, by W. E. T. Clarke, Subordinate Judge of the Nilgiris, in the matter of execution petition No. 39 of 1889 in original suit No. 1 of 1889 on his file.

The case was stated as follows:

"On 20th January 1890, two estates known as 'Chemballi' and 'Burnside,' respectively, were put up for sale by Court auction, being the property of the judgment-debtor in original suit No. 1 of 1889 on the file of this Court. At such sale, Mr. David, on behalf of plaintiff (who had permission to purchase), bid Rs. 10,005 for 'Chemballi' and Rs. 3,005 for 'Burnside,' but, on 21st January, Mr. David intimated to the nazir that he wished to withdraw these bids, and, on 22nd January, informed the Court of his wish to withdraw. In these circumstances, the Court adjourned the sale of these properties for two months from 22nd January 1890.

"As no definite rules have been laid down by the High Court as to the power of bidders at Court sales to withdraw their bids, and as I entertain a reasonable doubt whether such a practice is permissible, and the matter being one of importance and general interest, it seems to me it would be as well to have it settled authoritatively and finally now the

* Referred Case No. 6 of 1890.
(1) 12 M. 103.
JUDGMENT.

MUTTUSAMI AYYAR, J.—On the 20th January 1890, two estates known as "Chembali" and "Burnside" were put up for sale in execution of the decree in original suit No. 1 of 1889, on the file of the Subordinate Court at Ootacamund. Mr. David bid, on behalf of the plaintiffs, Rs. 10,005 for "Chembali" and Rs. 3,005 for "Burnside"; but he intimated his wish to withdraw these bids to the nazir on the 21st January and to the Subordinate Judge on the 22nd. The Subordinate Judge refers to this Court the question whether it is permissible for bidders at Court sales to withdraw their bids.

I am of opinion that the answer must be in the affirmative. Until the lot is knocked down and the sale is concluded, the Court may, in its discretion, adjourn the sale under Section 290, Civil Procedure Code, and it is bound to stop the sale if the judgment-debtor satisfies the decree before the lot is knocked down. It is clear then that, until the lot is knocked down, the Court has a locus penitentiae and it follows, in the absence of some specific provision to the contrary, that bidders are intended to be placed in a similar position. It appears that, in the case under reference, it was not one of the conditions of sale that bidders were not at liberty to withdraw their bids. For these reasons, I answer the question in the affirmative.

BEST, J.—The question submitted for consideration is whether it is permissible for bidders at Court sales to withdraw their bids? I agree in answering this question in the affirmative. An offer to buy or sell may be retracted at any time before it is unconditionally and completely accepted, by words or conduct; and a bidding at an auction is a mere offer which may be retracted before the hammer is down. Such is the rule with regard to auctions in general, and the same must be held to be applicable also to Court auctions, in the absence of any law or rule to the contrary.
JAGANNADHA RAZU v. RAMABHADRA RAZU 14 Mad. 238


[237] PRIVY COUNCIL.

PRESENT:
Lord Hobhouse, Lord Macnaghten, Sir B. Peacock, Sir R. Couch and Mr. Shand (Lord Shand).

[On appeal from the High Court at Madras.]

SRI RAJA SATRUCHARLA JAGANNADHA RAZU, ZAMINDAR OF MERANGI (Defendant) v. SRI RAJA SATRUCHARLA RAMABHADRA RAZU AND OTHERS (Plaintiffs).

...[21st November, 1890, and 31st January, 1891.]

![Image]

Present partibility of a zamindari originally existing before 1759—Grant by Government in 1802, and again in 1835 of the same zamindari—Absence of intention to grant it as impartible—Sanad-i-milikyat-i-istimrari.

Although it might be taken that the Mirangi zamindari was formerly held on a military tenure under a raj, and that it continued to be held on the same tenure after it had been incorporated in another zamindari, and, subsequently, when, by conquest, it became part of the Vizianagram zamindari, which was dismembered in 1758, and, even if impartibility was the rule then applicable to the estate, yet the subsequent dealings with the zamindari, the nature and terms of the grants under which it was held after 1802, and the absence of proof of its having been impartible during the present century; also the character of the estate, which was in no way distinguishable from that of an ordinary zamindari assessed to the revenue, all led to the conclusion that the zamindari was now impartible.

It was clear from the kabuliyat, or instrument of assent to the sanad-i-milikyat-i-istimrari of 25th April 1804, that the latter was in the ordinary form of such grants, and there was no ground for inferring that the Government intended to create an impartible zamindari, or to restore an old one with impartibility attached.

In 1835, there was, for a second time, such a dealing with the estate by the Government, in granting it again by sanad, as showed that there was no intention to the effect above mentioned.

The case of the Hansapur Zamindari (1) situate in Behar, as to which their Lordships in 1867 held that it must be taken to retain its previous old quality of impartibility, after having been granted in 1790, was distinguished.

[F., 17 M. 362 (365); R., 26 M. 686 (706); D., 24 M. 562 (537) = 11 M.L.J. 191; 29 M. 437 = 16 M.L.J. 178 (204).]

APPEAL from a decree (13th March 1888) of the High Court (2), affirming a decree (14th December 1885) of the District Judge of Ganjam.

The suit out of which this appeal arose was brought by three uncles of the minor Zamindar of Merangi to obtain a decree against him, he being entered in the revenue records as sole proprietor, for partition of that estate with mesne profits from the [236] year 1873, when they were excluded from possession. The plaint (1884) stated that the istimrari was issued at the permanent settlement in the name of Sri Ganga Razu Garu, who was one of the sons of Venkata Pathi Razu, manager for the family. The sanad was not produced, but only the kabuliyat, dated 25th April 1804. After his death, and in the time of his son, who succeeded him, the zamindari was, on 20th June 1833, sold and was purchased by the Government. In 1835, it was restored with a new sanad, dated 22nd

(2) Jaganatha v. Ramabhadra, 11 M. 380.

167
1891
Jan. 31.

Privy Council.

14 M. 237
(P.C. =)
18 I.A. 45 =
5 Sar. P.C.I.
645 = 15
Ind. Jur.
222.

September 1835 to Jagannadha, son of the last preceding zamindar. He died in 1864 leaving four sons, of whom the eldest was recorded as zamindar in the revenue papers, but, as the plaintiff's case asserted, managed the estate for them, and their minor brothers, who were now made parties defendants.

The eldest son, Chandrasekhar, died in September 1869, and, his son being a minor, the zamindari was taken under the management of the Court of Wards (Regulation V of 1804). As manager and agent, the Collector in 1872 refused to divide the zamindari.

The defence, which was filed by him, as Agent of the Court of Wards on behalf of the minor, set forth that Merangi was originally an impartible estate appertaining to a raj; and that not only from the character of the original tenure, and by immemorial usage and custom, but also by the terms of the sanad of 1804, it descended to the eldest male heir.

There being an historical account of the Merangi family among those of the ancient zamindari families and estates, given by Mr. D. F. Carmichael in the Vizagapatam Manual, at pages 301, 303, both parties accepted it as correct. This also was set forth in the judgment below, to the effect that "this hunda" came into the possession of the present family in the time of one of the rajas of Jeypore, in whose reign the zamindar of that time tried to make himself independent. He was, in the end, put to death, and Merangi was made over to Jaganath Raz, "a principal Joyporean," who was called Satrucharla (destroyer of the enemy), a title still borne by his successors. About the year 1759, Merangi was incorporated with the neighbouring zamindari of Kurupam by a chieftain, who was afterwards overthrown, and both estates continued under Vizianagram till its dismemberment in 1795, when they were restored to the old families. Satrucharla Ganga Raz getting Merangi. He was a descendant of the Jaganath Raz upon whom the title was first bestowed. The admitted pedigree [239] which also is set forth in Jaganatha v. Ramabhadra (1) does not go further back than Tammirazu, the grandfather of Ganga Raz, with whom the settlement of Merangi was made, after Venkata Raz had been deprived of it for taking arms against the Government. As to this, and as to the restoration of the zamindari to the Satrucharla family, the Commissioners appointed to carry out the permanent settlement stated as follows, in their report to Government, dated 22nd September 1803.

"On Mr. Webb taking charge of the district in 1795 Venkata Raz, "the representative of the younger branch of the family formerly in "possession of the Merangi zamindari, was in arms against the Company, "and his defection induced the Collector to recommend Ganga Raz being "appointed zamindar as well on account of his better pretensions than "those of Venkata Raz, as that he was descended from the elder branch "of the family. This preference, it would appear, confirmed Venkata Raz "in his opposition to the Company's Government, and, on the breaking "out of the disturbances in Kimedi, he joined the party of Jagannath Deo. "To detach him from this rebel, Mr. Webb considered it expedient to "promote a settlement for his son Jaganath Raz in the Merangi zemin-
dari, by granting him a portion of the country. In this he has so firmly "established himself that it is known by the name of China Merangi, "and, as he makes all his payments directly to the treasury of "the Collector, he appears to consider himself as joint zamindar with "his relation Ganga Raz, holding immediately from the Company.

(1) 11 M. 380.

168
though, on being required to set forth his pretensions, he did not attempt to prove more than his being a son of the younger brother of Ganga Razu's father, which, of course, established no right of participation. He must, therefore, be considered as holding the share he now possesses through the favour of his cousin, Ganga Raz. Consequently, he cannot advance a claim to partake of any addition that may be made to the zamindari either by the resumption of alienations or otherwise. If the tenure of Jagannath Raz be viewed in this light, Mr. Alexander conceives that the permanent settlement need not be retarded, but that, on its taking place, an engagement may be entered into by Ganga Raz with his relation for the temporary, or permanent, lease of the country at present held by him, advertizing to the amount of the total jumma fixed on the whole zamindari. We concur in opinion with Mr. Alexander that an arrangement of this nature was desirable as tending to preserve the peace of the country which might otherwise be disturbed by Jagannath Raz; yet as his claim originating only in the concession of the late Collector Mr. Webb, yielding to the pressure of temporary circumstances, without the authority or even knowledge of Government, we do not think that any reference should be had to him in forming the permanent settlement, which we would recommend to be made exclusively with the acknowledged Zemindar Ganga Raz, who will be at liberty to make what arrangement he pleases with Jagannath Raz.

The Government concurred with the Commissioners in their opinion that the permanent settlement "should be concluded with the rightful proprietor Ganga Raz." He, however, died before the sanad was delivered to him, and Chandrasekhara, his son, received it on the 25th April 1804. The latter fell into money difficulties, and his estate was sold under a decree of the Civil Court to pay his debts. It was purchased by the Government for Rs. 500 on the 20th June 1833. At this time a rebellion was going on in Paleondah. The Dewan of the late Zemindar of Merangi suppressed it, with the help of his retainers. They were offered a reward, but entreated that instead of granting it to them, "the Government would be pleased to restore Merangi to the ancient family." This request was supported by the Special Commissioner, Mr. Russell, and agreed to by the Government, and accordingly a new sanad was granted, on the 22nd September 1834, to the minor son of the late Zemindar, Jagannadha. This sanad was in the usual form of such documents, except that it contained a special recital, stating the circumstances under which the estate had been lost to Chandrasekhara and restored to Jagannadha. This new zamindar was succeeded in 1864 by his son, also named Chandrasekhara, during whose life no attempt at a partition was made by his brothers, the present plaintiffs. In 1869, Chandrasekhara's son, the present defendant, Sattruchala Jagannadha Razu, succeeded his father. No attempt was made to oppose the entry of his name in the Collectorate record as sole zamindar. In 1872, however, a claim was made by the present plaintiffs to have a general partition of all the property including the zamindari. But the claim was conceded only as regarded the moveable property, the division of which was referred to a panchayet. They made their award on the 7th October 1874.

In June 1883 a formal notice demanding a partition of the zamindari was served upon the minor Jagannadha, then under the guardianship of the Court of Wards, and, on the refusal which followed, the plaintiffs commenced the present suit.
The District Judge decreed in favour of the plaintiffs for a partition of the zamindari with mesne profits for three years, but without costs. In his judgment, he stated that the zamindari was originally held on a military service tenure from the Raja of Jeypore. He then traced its history down to 1821, and, after noticing the scantiness of evidence as to the devolution of the estate, and expressing his opinion that it could not be regarded as a principality or raj, he proceeded as follows:— "As to immemorial family usage, it appears that the estate had never been divided before English rule, and, in ordinary cases, where property descends to one member of a family, the presumption would be in favour of primogeniture, but any such presumption would be much weakened in the present case when we regard the military nature of the tenure and the unsettled character of the Government in the last century, and would be quite insufficient to establish a family custom which must be proved by clear and positive evidence. Further, even assuming that the family custom of primogeniture formerly governed the descent, there was a breach of continuity in the custom for nearly half a century, and the old custom would not attach to the estate, restored under new conditions, unless the family subsequently showed their intention to adopt it."

Finally, he stated that there was nothing, at the time of the permanent settlement, to indicate that the Government intended to create an impartmental estate for the first time and his opinion was that there was nothing in the terms of the new sanad to constitute the zamindari impartmental. From this decree the defendant appealed on the merits, and the plaintiffs for costs.

The High Court confirmed the decree of the first Court, except as to costs, which it disallowed altogether.

The judgment of the High Court is given at length in the report of Jagannatha v. Ramabhadra (1). It was delivered by Kernan, J., who commented on the break in the possession of the family from 1760 up to 1795, and said that after 1795 the zamindari was certainly not held on military tenure. He considered that from 1795, Ganga Raz was merely in possession on sufferance for seven years, and that there was no reasonable ground for presumption that it was the intention of the Government to create an impartmental zamindari. He thought that the terms of Section 8 of the sanad, as to the right of transfer, was inconsistent with the idea that the zamindari was impartmental, and was to remain so. As to the sanad of 1835, he considered that it only conferred on the grantee an estate of the same kind that his father had held, subject to the ordinary incidents.

The plaintiffs having appealed, Mr. J. D. Mayne and Mr. R. B. Michell, appeared for the appellant.

The decree of the High Court should be reversed, and the suit dismissed, the impartmentality of the zamindari having been established. For impartmentality to attach, the estate need not be traced to a ruling raj, but it was sufficient that the zamindari had been found to have originated in a military tenure, before the establishment of British rule. The zamindari was an ancient one, and no evidence had been given that it had lost the quality characteristic of the tenures to which it originally belonged. There had been three periods in its existence, and, as to the first, the High Court should have held that down to 1795 the estate having been a military tenure was impartmental, and also by family custom. As to the second

(1) 11 M. 380.
period, the circumstances under which in 1803 the zamindari was granted to Gangaraz, and permanently settled with his son showed that the Government did not intend to create a new zamindari, but to restore an ancient one. The restoration of the old title carried with it all those incidents of impartibility, and primogeniture, which were formerly believed always to attach to such estates. The terms of the sanad, represented in Section 6 of the kabuliyat, were not inconsistent with there having been an intention to restore an old tenure; to create no new estate, but to select another holder in the old line, and that a single person. The terms of the sanad were, in effect, neutral upon the question that now had to be decided, but with reference to the reasons actuating the Government, as especially shown by the report of 22nd September 1803 by the Commissioners, and other documentary evidence, it seemed to have considered that the peace of the country would be better secured by the grant to a single zamindar.

If, moreover, nothing was shown, but a grant to a zamindar and his heirs, the presumption was that the estate accorded with the law, or the custom, of his race in devolving upon successors. The sanad, in effect, carried little beyond that an arrangement had been made for revenue purposes, and here the estate had virtually, if not formally, been already granted, the sanad only fixing the permanent revenue payable. Here the estate was impartible already when the Government took it in hand to grant it, and the same authority, having the power to withhold or to grant, selected a member of the old family, restoring it to them. Thereupon, as in the Hansapur case (1), the estate was granted with its customary rule of descent, and not to be held as an ordinary zamindari. In that case it was held that there was nothing to show that the quality of the estate was altered by the grant or that the intention of the Government in making it was to render the estate partible. The same principle was applicable here. The regulation giving the law of the partibility of zamindaries in Bengal (Regulation XI of 1793) had never been enacted for Madras. The judgment in the Hansapur case said:—

"There was nothing to show that the quality of the estate was altered by the grant," and again "the zamindari must be taken to possess its old quality of impartibility." So also in the second Shivagunga case, Muttu Vaduganadha Tewar v. Dora Singha Tewar (2), it was held that the evidence of impartibility must receive effect, unless it could be avoided by showing some dealing with the zamindari transmitting its ancient quality. The Nuzvid case, Raja Venkata Rao v. The Court of Wards (3) was distinguishable from this, because, in that case, the zamindari could not be identified with any ancient one existing before the sanad of 1803 put into the same class with other zamindaries. The general observations in the judgment in the Devarakota case, Mallikarjuna v. Durga (4) were referred to as supporting the appellant's case.

The subsequent conduct of the junior members of the family showed a belief to exist that the custom of impartibility was binding upon them. A suit was brought by a relation against Chundrasekhara in 1805, but it did not seem to have occurred to any one that partition was claimable. In 1859, when Somaraz, another claimant, was referred by the authorities to a regular suit, he did not sue. The documentary evidence supporting the view that the family regarded the estate as impartible was referred to. The re-grant of the zamindari by sanad in 1835 was a restoration of the ancient title, and in no way was it the creation of a new estate.

(1) 12 M.I.A. 1. (2) 8 M. 299 = 8 I.A. 99. (3) 2 M. 128 = 7 I.A. 38. (4) 13 M. 405.
The respondents did not appear. On the 31st January, their Lordships' judgment was delivered by:

**JUDGMENT.**

Mr. Shand.—The matter for determination in this case, which arises on a question of disputed succession between the parties, is whether the zamindari of Merangi is partible or impartible. The appellant, the present registered zamindar of Merangi, maintains that the estate, which is described on the record as consisting of 86 villages with their hamlets, situated below the ghauts, and adjoining the zamindari of Jeypore, is impartible; and he complains of the decisions of the District Court of Ganjam, and of the High Court at Madras, in both of which Courts the judgments have been to the effect that the zamindari is partible, and, consequently, divisible between him and the respondents, for whom no appearance was made at the hearing of this appeal.

Their Lordships are of opinion that the judgments of the Courts of First and Second Instance are right. It is unnecessary to recapitulate the facts, which are fully stated in the judgments complained of. For the purpose of this decision, it may be assumed, as it was by the Subordinate Judge (the High Court say there is no evidence of it) that the zamindari was at one time held under military tenure from the Rajah of Jeypore, when it was granted to an ancestor of the present appellant. It may further be assumed, though there is little, if any evidence to warrant the assumption, that the tenure continued to be the same after the estate had been taken by force and incorporated in Kurupam zamindari, and, subsequently, when, by conquest, it again became part of the Vizianagaram zamindari, which was dismembered in 1795. Taking it, in accordance with the argument of the appellant's counsel, that impartibility was the rule then applicable to the estate, their Lordships are clearly of opinion that the subsequent dealings with the estate, the nature and terms of the grants under which it has been held throughout the present century, the absence of proof of any usage or practice of impartibility in the succession to the estate, contrary to the ordinary Hindu Law of Succession, and the character of the estate, which is in no way distinguishable from an ordinary zamindari subject to the payment of a fixed assessment of revenue, all clearly lead to the conclusion that the zamindari is now a partible estate in a question of succession.

The grant of 1803 by the Government does not appear amongst the documents on the record; but it is clear from the kabuliyat that the sanad-imlikiat-i-istimrari was in the ordinary terms of such grants. There is nothing in the circumstances under which this grant was made to lead to the inference that the Government had in view, in making this new grant, the creation of an impartible zamindari as an exception to the ordinary rule of succession of the Hindu Law. The single circumstance that the property was given to a representative of an elder branch of the family formerly in possession, in preference to the representative of a younger branch, who had been in arms against the Government, is of very little weight; and, accordingly, even at this early date, in the beginning of the century, it appears to their Lordships that the zamindari of Merangi, if impartible before, became partible in question of succession, as it became also subject to the disposition of the zamindar by deed of transfer on sale or gift of the whole or part of the property.

What occurred in 1835, however, makes the determination of the case perhaps even more clear. The estate had again come into the
possession of the Government. It had been exposed to public sale for payment of debt due by the zamindar, and might have been bought by any third party as purchaser. The Government, however, bought it, and held it for some time. During this time the Dewan of the former zamindar, and certain of the Doratanams, performed an important service to the Government, who had offered a considerable pecuniary reward for the capture or putting down of certain rebels who had caused much disturbance in the district. They succeeded in putting down the rebellion. Instead of the pecuniary reward to which they became entitled, they begged that a new grant of the zamindari might be given to the son of the former zamindar (then still in life), who was a boy of only nine years of age, and the grant was accordingly made to this boy in the usual terms of a sanad-i-milkiyat-i-jamali, and his heirs, with the ordinary power of sale or disposal of the property in whole or in part, and concluding with the words: —Article 14 "Continuing to perform the above stipulations, and to perform the duties of obedience to the British Government, its laws and regulations, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns, at the permanent assessment herein named, the zamindari of Merangi." It appears to their Lordships that here again, for a second time, there was such a dealing with the estate, as in the circumstances, and having regard to the terms of the grant, clearly shows that there was no intention to create an impartible estate, assuming there was power to do so, or to restore an estate previously impartible. The circumstances were entirely different from those which occurred in the Hansapur case, where an estate, in itself an important raj or principality, was simply confiscated to the Government and again given out to the nearest heir of the next line. As was observed in the judgment, "the transaction was not so much the creation of a new tenure as the change of the tenant." In the present instance, the grant followed on a purchase of the property by the Government. It was given, on the solicitation of persons who had a claim against the Government, to one who, though no doubt the son of the former zamindar, might have had no such grant, but for the intervention of those persons who were attached to him; and there is nothing in the terms of the grant to support the contention of the appellant,—on whom the onus lies of proving that this is the exceptional case of a zamindari impartible in its nature,—and nothing to prove a usage or custom of succession, throughout the operation of the grants of 1803 or 1835 contrary to the ordinary rule of the Hindu law.

Their Lordships, therefore, will humbly advise Her Majesty that the decree of the High Court ought to be affirmed and the appeal dismissed. The appeal having been heard ex parte, their Lordships make no order as to the costs of it.

The costs of an application for leave to be heard, which was made, after the conclusion of the hearing of the appeal, by certain of the respondents, and which was opposed by the appellant, must be paid by those respondents.

Appeal dismissed.

Solicitors for the appellant:—Messrs. Burton, Yeates, Hart and Burton.
APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

QUEEN-EMpress v. JANGAM REDDI And OTHERS.*
[14th and 26th November, 1890.]

14 M. 247 = 1 Weir 776. Forest Act (Act V of 1832, Madras), Sections 2, 3, 4, 6, 8, 9, 50.

The accused, who were servants of the shrotriemdar of an agraharam, destroyed a cairn erected by the Forest Department on the shrotriem land along the boundary line of a proposed forest reserve. No notice under Forest Act, Section 6, was served on the shrotriemdar, and it did not appear whether the land in question was comprised in the boundaries specified in the notification published under Section 4. The accused were convicted under Section 50 (d):

Held, (1) that the provisions of the Act did not apply to the shrotriem land; (2) that the right of a forest officer to enter upon and demarcate land under Section 9 is limited to the purpose of the inquiry directed by Section 8; (3) that the conviction was wrong.

PETITION under Sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the proceedings of T. Rama Row, Sub-Divisional Magistrate of Cuddapah, Sidhout division, held in criminal appeal No. 18 of 1889, confirming the finding and sentence of R. Narayana Row, Second-class Magistrate of Chitwail, in calendar case No. 48 of 1889.

The facts of the case and the arguments adduced on this revision petition appear sufficiently for the purposes of this report from the judgment of the High Court.

Mr. Wedderburn, for petitioners.
The Government Pleader (Mr. Powell), for the Crown.

JUDGMENT.

The petitioners 3 in number, have been found guilty of removing a cairn erected by officers of the Forest Department in the Cuddapah district as marking the southern boundary of the Salivendula Gattimani-kona reserve, and sentenced under Section 50 (d) of the Forest Act, Madras, as follows:—First petitioner to pay a fine of Rs. 40, or, in default, to be rigorously imprisoned for six weeks, and the other two petitioners to pay each a fine of Rs. 20, or, in default, to be rigorously imprisoned for one month.

[248] It is urged on their behalf (1) that the Forest Act is not applicable to the place where the cairn was erected, and (2) that the Lower Courts were wrong in declining to consider what are the limits of the Maharajapuram agraharam.

Section 3 of the Act gives the Governor in Council power to constitute, as a reserved forest, “any land at the disposal of Government.”

“Land at the disposal of Government” is defined in Section 2 as including “all unoccupied land, whether assessed or unassessed, but does not include land, the property of landholders, as defined by Section 1 of Act VIII of 1865, Madras,” among whom shrotriemdars are expressly mentioned.

* Criminal Revision Petition No. 38 of 1890.
Section 4 is as follows:—"Whenever it is proposed to constitute any land as reserved forest, the Governor in Council shall publish a notification in the Fort St. George Gazette and in the official gazette of the district—

"(a) Specifying, as nearly as possible, the situation and limits of such land;

"(b) Declaring that it is proposed to constitute such land a reserved forest;

"(c) Appointing an officer (hereinafter called the Forest Settlement officer) to inquire into and determine the existence, nature and extent, of any rights claimed by, or alleged to exist in favour of, any person in or over any land comprised within such limits, or to any forest produce of such land and to deal with the same as provided in this chapter."

The next thing to be done is contained in Section 6, which is as follows:—

"When a notification has been issued under Section 4, the Forest Settlement Officer shall publish in the official gazette of the district and at the head-quarters of each taluk in which any portion of the land included in such notification is situate, and in every town and village in the neighbourhood of such lands a proclamation—

"(a) Specifying, as nearly as possible, the situation and limits of the lands proposed to be included within the reserved forest.

[249] "(b) Fixing a period of not less than three months from the date of publishing such proclamation in the official gazette of the district and requiring every person claiming any right referred to in Section 4 either to present to such office, within such period, a written notice specifying, or to appear before him within such period, and to state the nature of such right, and, in either case, to produce all documents in support thereof."

The section further directs that the Forest Settlement Officer shall also serve a notice to the same effect on every known or reputed owner or occupier of any land included in or adjoining the land proposed to be constituted a reserved forest, or on his recognized agent or manager."

Section 8 next directs that the Forest Settlement Officer "shall take down in writing all statements made under Section 6 and shall inquire into all claims made under that section" and Section 9 gives to the Forest Settlement Officer power, "for the purpose of such inquiry" to enter, by himself or any officer authorized by him for the purpose, upon any land "and to survey, demarcate and make a map of the same."

The only other section of the Act that need be noticed for the purposes of this case is that under which the petitioners have been convicted, i.e., Section 50, which provides for the punishment of any one who, with intent to cause damage or injury to the public or to any person, or to cause wrongful gain as defined in the Indian Penal Code (inter alia) "alters, moves, destroys or defaces any boundary mark of any forest or any land to which the provisions of this Act apply."

The contention on behalf of the petitioners is that the place where the cairn in question was erected was not "land to which the provisions
of the Act applied," in that it is not included within the boundaries specified in the notification published under Sections 4 and 6; and it is further objected that the shrotriemdar of Maharajapuram, whose servants the petitioners are, was not served with any notice as required by the latter part of Section 6.

The Deputy Magistrate, who was required to take evidence and submit his findings on these two points, now reports (1) that he "cannot find that the required notice under Section 6 of the Madras Forest Act was served upon the shrotriemdar," and (2) [250] that he has "not been able to obtain satisfactory evidence" on the other point.

The only evidence forthcoming on this "other point," i.e., the question of boundary is given by Mr. Higgins who was the Forest Settlement Officer by whom the boundary in question is alleged to have been fixed. He states that the western and southern boundaries of the Gattimanikona reserve, as notified under Section 4 of the Forest Act, were not adhered to in the demarcation that he ordered, and explains that, finding it would be more convenient for all parties, he made an alteration of the western boundary, which "involved the cutting off of a corresponding portion of the southern boundary." However, all that he did with regard to the southern boundary was to fix the western point from which it should commence. He says "the question of what the actual boundary of Maharajapuram might be was left to be threshed out when the southern boundary of the Gattimanikona reserve, which was not dealt with in my instructions, came to be cut," and adds "It will be noticed that, in my instructions, I stated that no work is required on the southern boundary or eastern boundary at present, showing, I think, that no question had then arisen as to what was the authorized boundary of Maharajapuram." He does not remember any dispute having arisen about the matter before he left the district, and concludes as follows: "Whatever I did or said on the 14th May 1887, or said afterwards in my instructions, cannot, I think, be construed into an authoritative determination of the location of the Maharajapuram boundary."

It is thus seen that there was no decision as to the southern boundary by Mr. Higgins; and there is no evidence of any subsequent determination of that boundary by any authorized officer. Further, it is clear that the cairn in question was erected at a point south of the river which (as appears from the arbitrator's award, confirmed by the Deputy Director of Revenue Settlement in March 1874) is the northern boundary of the Maharajapuram shrotriem village, and, consequently, the southern boundary of the proposed forest reserved as notified under Section 4 of the Act.

It is contended by the Government Pleader that even then the petitioners have been rightly convicted under Section 50 of the Forest Act, because Section 9 gives the Forest Settlement Officer power to enter, by himself or any officer authorized by him for the purpose, upon any land and to survey, demarcate and make a [251] map of the same. But as appears from the first words of Section 9, which are "for the purpose of such inquiry," the power conferred under that Section is not unlimited. It is limited to the purpose of the inquiry directed by Section 8, i.e., as to "claims made under Section 6," namely claims to "any right referred to in Section 4," and the rights "referred to in Section 4." Any rights claimed or alleged to exist on or over any land comprised within the limits specified in the notification published under that Section. The
site in question being found to be beyond those limits, Section 9 is inapplicable even if the demarcation in question was being made for the purpose of any future inquiry, instead of, as appears to have been the case, for the purpose of being a permanent mark of a finally decided boundary.

Section 50 makes punishable the destruction of a boundary mark only in case of its being done "with intent to cause damage or injury to the public or to any person; or to cause wrongful gain as defined in the Indian Penal Code." The Section is therefore inapplicable to a case in which any of the acts therein specified is done in good faith in the exercise of a valid right, which appears to have been the case in the present instance. Further, the acts punishable under Clause (d) of Section 50, the clause under which the petitioners have been convicted, is expressly limited to boundary marks of any forest lands "to which any provisions of this Act apply." In the definition of "land at the disposal of Government" in Section 2, shrotriemdas are expressly mentioned as landlords whose land is excluded from the definition. Consequently, the land on which the cairn was erected being shrotriem land, was not land to which the provisions of the Act could apply, it being only lands at the disposal of Government that can be constituted reserved forests under Section 3 of the Act.

The conviction of the petitioners is therefore bad. It must be set aside, and the fines levied ordered to be refunded.

14 M. 252 = 1 M.L.J. 240.

[252] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

RAMASAMI (Petitioner) v. ANDA PILLAI (Counter-petitioner).*
(6th and 7th November, 1890.)


A Hindu obtained in 1878 a decree for partition of certain property, and he now applied in 1888 to have it executed. He relied in bar of limitation on an application for execution made by his son, who had obtained a decree against him in 1881 in a partition suit, whereby his right was established to one-fifth of whatever should be acquired by the father by virtue of the decree of 1878.

The father's application for execution in 1885 was held to be barred by limitation in Ramsami v. Anda Pillai (1).

On review it appeared that the son had applied for execution of the whole decree, stating that his father would not join him in such application, and that notice was given to the father:

Held. (1) that the son was an assignee by operation of law of one-fifth of the judgment-debt in the suit of 1878;

(2) that his application accordingly kept the decree alive under Limitation Act, 1877, Schedule II, Article 179, Clause 4, and the father's application in 1885 was not barred by limitation.

APPLICATION under Civil Procedure Code, Section 623, for review of the judgment pronounced in Ramsami v. Anda Pillai (1), in the report of which case the facts are fully stated.

* Civil Miscellaneous Petition No. 766 of 1890.
(1) 13 M. 347.
The head-note to that report is as follows:—

A Hindu obtained in 1878 a decree for partition of certain property and applied in 1888 to have it executed. It appeared that the deceree-holder's son, having obtained against him in 1881 a decree for a share of whatever he should acquire under the decree of 1878, had applied for execution of the last-mentioned decree; and reliance was now placed on that application to save the bar of limitation:

Held, that assuming the decree of 1881 had effected an assignment by operation of law of the decree of 1878, the father [253] and son were not joint decree-holders within the meaning of Civil Procedure Code, Section 231, and the father's application for execution was barred by limitation.

The appellant preferred this petition for review on the following grounds:—

(1) That the petitioner's son, Saranatha Ayangar, got a declaration that he is entitled to one-fifth of petitioner's properties in the decree in original suit No. 29 of 1881 on the file of the Subordinate Court at Kumbakonam.

(2) This decree only declared a pre-existing right as petitioner and the said son were members of a joint Hindu family.

(3) That in virtue of that decree petitioner's son became entitled to a portion of the decree in original suit No. 245 of 1878 on the file of the District Munsif's Court at Kumbakonam, and as such became a joint decree-holder in the said decree.

(4) That joint decree-holders are bound to apply for execution of the whole decree, and petitioner's son did apply for execution of the whole decree in his application, dated 13th December 1984.

(5) That that application clearly saved petitioner from the operation of the statute of limitation (see Article 179).

(6) That explanation I, as to several decrees, does not apply in this case to this decree, because—

(a) it does not distinguish portions of the subject-matter;
(b) it was not passed severally;
(c) petitioner's son would be entitled only to one-fifth of the realizations on the whole decree;
(d) the wording of the explanation clearly refers to the decree itself, distinguishing portions of the subject-matter as payable or deliverable to each.

(7) The decision of their Lordships of the Privy Council in 16 W. R., 29 has not been given due effect to.

Mr. Wedderburn, for petitioner.

JUDGMENT.

At the hearing of the appeal, our attention was not drawn to the facts that the son applied for execution of the whole decree, stating that his father would not join him in such application, and that notice was given to the father.

[254] These facts alter the position considerably.

The effect of the decree in the partition suit was to make the son, by operation of law, an assignee of one-fifth of the judgment-debt in the suit brought by his father.

178
Such an assignee has a right, if the original decree-holder and other assignees, if any, do not consent to join him in applying for execution, to apply himself for execution of the whole decree making them counter-petitioners by giving them notice. Otherwise, he would have no means of obtaining his right under his assignment, but by a separate suit, and there seems no reason why he should be driven to such a circuitous course, when, by applying for execution, the right of all parties can be properly determined by the Court.

In this view, no question arises as to the effect of explanation 1 to Article 179 of Schedule 2 of the Limitation Act. The decree was passed, not in favour of more persons than one, whether jointly or severally, but in favour of one person, viz., the father, and the explanation has, therefore, no application to the case; and the application for execution by the son as transferee of part of the decree having been an application in accordance with law, is sufficient to keep the decree alive under Article 179, Clause 4 of Schedule 2 to the Limitation Act.

We allow the review and set aside our former order and the order of Mr. Justice Wilkinson, and restore the order of the District Court. Counter-petitioner will pay the costs of petitioner of the appeal before Mr. Justice Wilkinson. There will be no costs of the appeal under the Letters Patent or of this application for review.

1890
Nov. 7.
— APPEL-
LATE
CIVIL.

14 M. 252 =
M.L.J. 240.

14 M. 255 (F.B.)

[255] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, and Mr. Justice Weir.

REFERENCE UNDER STAMP ACT, SECTION 46.*
[17th and 23rd April, 1890.]

Stamp Act—Act I of 1879, Sections 17, 33, 37 (b)—Act XXXVI of 1860, Section 13—Act X of 1862, Section 15—Unstamped document executed in 1862 out of British India—Penalty.

A document comprising an assignment of the executant's interest under a will, and also a power-of-attorney, was executed on 26th May 1862 in Australia. It was sought in 1890 to use the document in Madras, but it was not stamped:

Held, that no penalty could be levied upon it under the Stamp Act of 1879.

Case referred by the Board of Revenue under Stamp Act, 1879, Section 46.

The case was stated as follows:—

"Messrs. Barclay and Morgan submitted to the Collector of Madras, under the provisions of Section 37 of Act I of 1879, an unstamped instrument, dated 26th May 1862, for adjudication of stamp duty payable on it. The instrument was executed in South Australia on the 26th May 1862 when the Stamp Act XXXVI of 1860 was in force in British India, and was received in Madras on the 22nd June 1862 when the Stamp Act X of 1862 was in force. The adjudication of stamp duty on the document is now applied for under Act I of 1879. The document falls under Articles 21 and 50 of Schedule I of the Stamp Act I of 1879. The Board in its Proceedings, dated 13th July 1881, No. 1354, held that 'in the case of documents unstamped or insufficiently stamped at

* Referred Case No. 9 of 1890.
the time repealed Acts were in force, the duty should be calculated with reference to the requirements of the law at the time of execution, but the penalty under Act I of 1879. The High Court also concurred in this opinion—vide Referred Case No. 2 of 1882; also Narayanan Chetti v. Karuppathan (1).

The Stamp Acts XXXVI of 1860 and X of 1862 contained no provision for stamping documents executed out of British India, except bills of exchange. Section 24, Clause (c) of Act XVIII of 1869 for the first time provided that every instrument chargeable with duty executed out of British India, and not being a bill of exchange, cheque, or promissory note, may be stamped within three months after it has been first received in British India.

As the Stamp Act which was in force at the time when the document under reference was received in Madras did not provide for the stamping of such documents, the Board doubts whether it can be imposed and the amount of duty and penalty certified as requested by Messrs. Barclay and Morgan.

The letter of Messrs. Barclay and Morgan above referred to, submitting the document for adjudication and a certificate as to stamp duty, stated the circumstances connected with the document as follows:

"We forward herewith an assignment, dated 26th May 1862, from Daniel Henry Schreyvogel of Adelaide, South Australia, to Edward Winstanley Brettingham of the same place, of the former's interest in a sum of Rs. 2,500 and all other his interest under the will of his father, the Rev. Daniel Schreyvogel.

"The facts connected with this instrument are shortly as follows:—

"By his will, dated 1st January 1840, the Rev. D. Schreyvogel directed that a certain sum of money should be invested in Government securities and the interest thereof paid to his wife so long as she remained a widow, and that, on her death, the money should be considered as part of his estate, or, if his estate should have been already divided, that such money should be divided between his two children, the above named Daniel Henry Schreyvogel and a daughter, in equal shares. The testator gave the residue of his estate in equal shares to his son Daniel Henry Schreyvogel and his (testator's) daughter, the son's share to be paid to him on his coming of age and the daughter's to be held on certain trusts. The testator's estate, with the exception of the sum set apart for the benefit of his widow, was many years ago divided between his son D. H. Schreyvogel and the daughter's children, she having died.

"D. H. Schreyvogel went to Australia, and on the 26th May 1862 executed the enclosed assignment in consideration of sum of Rs. 13 advanced to him by Mr. Brettingham. From the deed it appears that Mr. Brettingham was to have [257] advanced D. H. Schreyvogel further sums; but we are instructed that he never did so, and on the 8th April 1864 Brettingham was declared by the Insolvent Court of Adelaide an insolvent.

"In a letter dated 26th May 1862, Mr. W. Vernon Herford, who acted as Mr. Brettingham's solicitor, forwarded to Messrs. Binny and Co., of this place the enclosed assignment. At this time Mrs. Ann Schreyvogel, the testator's widow, was alive, and as the estate of the testator had already been divided with the exception of the sum set apart for the benefit of his widow, there was at that time nothing
payable under the assignment in favor of Mr. Brettingham. Mrs. Ann Schreyvogel, the testator's widow, died on the 15th December 1888.

Mr. Herford's letter of 26th May 1862, with the assignment, was received here on the 23rd June 1862.

More than one year having expired since the date of execution of the assignment, we cannot proceed under Section 33 of the Stamp Act, and the only alternative is to ask you to proceed under Sections 33 and 37 (b) of the Act and to impound the assignment in the first instance and then require payment of the proper duty and the penalty, if you think this is a case in which a penalty should be inflicted. The circumstances of the case are somewhat peculiar. Mr. Brettingham in whose favour the assignment was made, being in Australia, could not get the assignment stamped, and Messrs. Binny and Co., to whom the assignment was sent in 1862, had, of course, no interest in having the deed stamped. By Mr. Brettingham's insolvency his interest under the assignment passed to the Official Receiver of the Insolvent Court of Adelaide, and that officer, who had never heard of the assignment until we communicated with him, now claims from the administrator of the Rev. D. Schreyvogel's estate the share of D. H. Schreyvogel in the sum set apart for the benefit of his mother under the testator's will. Mr. J. A. Boyson, of Messrs. Binny and Co., who in 1884 became the administrator of the estate of the late Rev. D. Schreyvogel, declines to recognize the claim of the Official Receiver unless he can produce the assignment to Mr. Brettingham duly stamped, as otherwise Mr. Boyson would have no document he could put in evidence to justify the payment of the Official Receiver's claim.

The Government Pleader (Mr. Powell) for the Board of Revenue.

JUDGMENT.

[258] We are of opinion that the unstamped instrument executed in Australia and dated 26th May 1862 is not chargeable either under Act XXXVI of 1860 or Act X of 1862 with stamp duty. Consequently no penalty can be levied under Act I of 1879.

1890
APRIL 23.
FULL
BENCH.
14 M. 255
(F.B.)


PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, Macnaghten, Morris, and Sir Richard Couch.

[On appeal from the High Court at Madras.]

TANJORE RAMACHENDRA RAU AND OTHERS (Plaintiffs) v.
VELLAYANADAN PONNUSAMI AND OTHERS (Defendants).
[21st and 31st January, 1891.]

Contract to pay interest—Construction.

In reference to a debt carrying interest at a certain rate, the debtor gave to the creditor, on the approach of the date when the debt would have been barred by limitation, an acknowledgment to prevent that from occurring:

Held, that the acknowledgment, being intended only for the purpose of eluding the law of limitation, had not, by any novation of the contract, given to the creditor a right, in the absence of special stipulation to the contrary, to claim interest at a rate higher than that which the debt had borne down to the date when the acknowledgment was made.
Appeal from a decree (12th February 1885) of the High Court, varying a decree (25th January 1884) of the High Court in its original jurisdiction.

The defendants, of whom the first and second were brothers, and the three last were minor sons of the first, carried on business through the latter, as managing member. They had, for many years, dealings with the plaintiffs’ firm, having been in the habit of borrowing money from the latter, and also Government promissory notes, for which, ordinarily, 12 per cent., interest was allowed, on both sides, in current account. The plaintiffs had interests as partners with the defendants in abkari contracts, taken by the latter from Government, in several districts of Madras. Tuljaram Rao, the fourth plaintiff, was the managing member for his family. The plaint (25th March 1881) claimed Rs. 2,06,213, or such other amount as should, on an account being taken, be found due to the plaintiffs in respect of advances, and in respect of partnerships’ interests in abkari contracts, in which they claimed to be interested as partners, and to be entitled to share profits.

There were questions of fact, on this appeal, as to the transactions and relations between the parties regarding the abkari contracts, and their shares in the profits. A question of construction also had arisen, as to the rate at which the plaintiffs were entitled to claim interest on an admitted debt (1).

At the hearing of this appeal, the first matter contested was as to the result of an agreement in 1875, between Tuljaram and the first defendant, that the plaintiffs should have an interest in an abkari contract for the district of Trichinopoly, obtained from Government, for three years, from the 1st July of the above year, and terminating on the 30th June 1878. The profits of that contract were stated at over Rs. 44,000. The plaintiffs claimed a half share, while the defendants alleged that they were only entitled to one quarter of the profits. There was also a defence that the plaintiffs had by a contract in a letter of 16th September 1880 agreed to give up all claim to share the profits of this contract, as well as the profits of others; and, in lieu, to take the interest on Government promissory notes, which the plaintiffs had deposited in several Collectorate, as security for the performance of the abkari contracts, as well as interest, at a stated rate, on advances.

The first Court (Turner, C.J.) decided that the plaintiffs were entitled to one-half of the profits of the Trichinopoly contract of 1875. In this the Appellate Court did not concur. And, on the next question, as to the fact of a partnership in abkari contracts, taken from the Government in the name of the fourth plaintiff, which were by agreement of the present parties to be managed by the first defendant, there was also a difference of opinion between the first and the Appellate Court. The latter held that the evidence did not establish a general agreement for partnership, but only agreements for partnership in particular transactions.

The third question was the one to which this report mainly relates, viz., as to the rate of interest to which the plaintiffs were entitled in respect of a loan of Government paper for Rs. 55,000, [260] made over by the plaintiffs to the first defendant on the 23rd April 1877, the latter giving to the former his promissory note, payable on demand, for Rs. 55,000, with interest payable at 4½ per cent. per annum.

(1) Act XXXII of 1839 (Madras).
The matters connected with the acknowledgment of this debt on the 20th April 1880, and the contents of the letter of acknowledgment, are stated in their Lordships' judgment.

The first Court held that the plaintiffs were entitled in respect of the note signed by the first defendant on 23rd April 1877 for Rs. 55,000, to interest at 4% per cent. only, down to the 23rd April 1880; in other words, till the expiration of the two months mentioned in the defendants' letter of the 20th April 1880; and that they were entitled to interest after that date at such rate as the Court might give them, which would be, in regard to the course of dealing between the parties, at 12 per cent. on the sum of Rs. 62,425, "in the nature of damages for the failure to fulfil the "promise."

The Appellate Court (Kerram and Muttusami Ayyar, JJ.) on the evidence was of opinion that the transaction was not, as to the interest, governed by the general dealing between the parties; and that, as to this matter, the plaintiffs' right was to interest at 4½% per cent. per annum on the principal sum from the 23rd April 1877, until paid, and also to interest at 12 per cent. on such interest.

On the plaintiffs' appeal,

Mr. J.D. Mayne and Mr. J.H.A. Branson, for the appellants, argued that the first Court had rightly found the facts as to the shares of the profits. On the question of interest on the loan, they contended that the failure by the respondents to pay on the due date the amount of the debt acknowledged to be payable was ground for the claim to interest at the usual rate of 12 per cent. per annum. The effect of the acknowledgment, of 20th April 1880, was to give the appellants a legal claim to interest at that rate, upon Rs. 62,425, the principal and interest down to due date, when upon due date failure occurred.

Mr. J. Graham, Q.C., and Mr. R.V. Doyne, for the respondents, were not called upon.

Their Lordships' judgment was delivered by Lord Watson.

JUDGMENT.

This is a suit between two undivided Hindu families, who may be conveniently described as the "plaintiffs" [281] and the "defendants," because, whilst some of the transactions to which it relates are denied, it is not disputed that the individual members, who are alleged to have entered into those transactions, had authority which would have enabled them to bind their respective families. As originally framed, the plaint concluded for repayment of specific advances with interest; but, before the adjustment of issues, it was amended, so as to cover a claim for a partnership accounting in regard to all abkari contracts taken up by them and the defendants during the period of three years, commencing from 9th March 1878.

The plaintiffs, who are the present appellants, complain of a judgment of the High Court of Madras, reversing an order passed by Sir Charles Turner, C. J., in the exercise of the original civil jurisdiction of the Court, in so far only as the reversal concerns (1) the rate of interest payable by the defendants upon an admitted loan of Rs. 55,000, (2) the right of the plaintiffs to participate in certain abkari contracts effected in their own name by the defendants, and (3) the validity and effect of a writing, bearing date the 18th September 1890, signed by the managing member of the plaintiffs' family. The argument at the bar has been confined to these points, which will be noticed in the order in which they have been stated.
On the 23rd of April 1877, the plaintiffs advanced in loan to the defendants the sum of Rs. 55,000, in Government bonds bearing 4½ per cent. interest, and received from them, of same date, a promissory note for the amount, payable on demand, with interest at 4½ per cent. per annum. The loan was not called up, and on the 19th April 1880, the triennial period of limitation being about to expire, the plaintiffs wrote to the first defendant, suggesting that, if they had no mind to renew the note, they should send a letter undertaking to pay the principal and interest within two months. The defendant replied by a letter, dated the 20th April 1880, admitting their liability under the promissory note, stating that the interest due upon the unpaid principal of Rs. 55,000 until the 22nd of the month was Rs. 7,425, and containing these obligatory words,—“With regard to these Rs. 62,425, I will settle the accounts, and pay the amount which may be due within two months, though the note might be barred by the Statute of Limitations.” After the receipt of that letter, no demand for payment appears to have been made [262] by the plaintiffs until the present suit was brought in March 1881, when they claimed interest at the rate of 12 per cent. per annum.

The plaintiffs now maintain that the undertaking given by the defendants operated as a complete novation of the debt: that it transmut ed the loan of Rs. 55,000, bearing 4½ per cent. interest into a legal claim for the principal sum of Rs. 62,425, upon which, in the absence of any stipulated rate, interest became due ex lege from the time of payment. That construction of the letter of the 20th April appears to their Lordships to ignore the express obligation which it imposes upon the defendants to “settle accounts” and to pay the amount “which may be due” within the two months allowed for payment. These expressions plainly import that the sum specified in the letter merely represented the amount of their liability calculated to the 22nd April, and did not represent the sum payable by them at the date of actual settlement, which was to be ascertained by taking accounts, or, in other words, by making a new calculation so as to include interest accruing up to that date. The letter was applied for, and was given solely with the view of eluding the Statute of Limitations; and, in the opinion of their Lordships, it had as little effect in altering the quality of the debt constituted by the promissory note as would have been produced by a notice of the same date from the plaintiffs requiring payment within two months.

The next point taken by the plaintiffs raises a question of fact. They allege that, on the 9th March 1878, one of their number entered into a verbal contract with a representative of the defendant family, to the effect that all abkari contracts made by the plaintiffs or defendants within three years from that time, whether with or without previous consultation and arrangement, should be shared by both families, in the proportions of one quarter to the plaintiffs and three quarters to the defendants. The defendants do not dispute that certain abkari contracts, taken by the plaintiffs in their own name during the period in question, were shared by the two families in these proportions; but they deny the existence of the antecedent general agreement alleged by the plaintiffs, and maintain that the subsequent participation of the two families in these contracts was due to special arrangements made at the time with reference to each contract. It is matter of admission that, during the same period, the defendants [263] took up in their own name several abkari contracts which it is unnecessary to enumerate; and the plaintiffs consider themselves aggrieved by the finding of the High Court that they are not entitled to
claim a share of those contracts or of the profits arising from them. They have neither alleged nor attempted to prove that a special agreement was made in relation to each of these contracts, so that they cannot successfully impeach the decision of the Court below, unless they establish the general agreement of the 9th March 1878.

The direct evidence bearing upon that agreement, which is of the most meagre description, is to be found in the oral testimony on the one side of the first defendant, Thavasimuthoo Nadan, and on the other of Tularam Rao, the fourth plaintiff, and of three other witnesses who, according to his evidence, were present at the time when it was concluded.

The evidence of the fourth plaintiff is contained in these words:—
"In 1878 a verbal agreement was made that in all abkari contracts taken "between March 1878 and 30th June 1881, by me or by first or second "defendants, I should have a quarter share." That is contradicted by the first defendant, who admits that "there may have been conversation "about sharing contracts taken during that period, but denies that any general agreement was made with respect to such contracts at any time, and states that all agreements to share were specially made at the dates when the contract was taken and also that when made they were reduced to writing. The three witnesses, who are said to have been present when a general agreement was concluded, are intimately connected with the plaintiffs. Viramuttu Mudali, their partner in a printing firm, says, "I "was present when first defendant agreed with plaintiffs that contracts "should be taken in the name of fourth plaintiff and defendants 1 and 2, "and that fourth plaintiff should be interested to the extent of one-fourth." Lazarus Cashart, a clerk in the employment of the same firm, says,—"I "was present when the first defendant agreed with fourth plaintiff "that he should obtain a quarter share in the profits of any contract taken "in the name of the first defendant, or second defendant, or fourth plaintiff, "in any taluk." The third of these witnesses, Vencatassam Iyer, who is a gomashta in the employment of the plaintiffs, and had, according to the fourth plaintiff, the same opportunity of hearing what passed, does not corroborate the plaintiffs' case. He does not state, and was not invited by them to state, what passed on the occasion of the alleged agreement; but he was examined as to communications which took place between the parties in relation to abkari contracts for which the defendants had tendered in the beginning of April 1878. If the case made by the plaintiffs is true, they were bound to share as partners in these contracts; but according to this witness they declaimed to aid in making the deposit necessary in order to obtain them. He says, "there had been a proposal "to give plaintiff a fourth share;" and he adds,—" at that time no complete agreement was made that plaintiffs should have a share."

It appears to their Lordships as the result of that evidence to be highly probable, if not certain, that, in or about the month of March 1878, a conversation or conversations took place between the fourth plaintiff and first defendant with regard to their families becoming jointly interested in future contracts. Whether these communings were in such terms as to constitute a binding engagement to share in all contracts which either of them might choose to enter into, or merely amounted to a provisional arrangement that they would divide in the proportion of one quarter and three quarters such contracts taken by one or other of them as they might mutually approve of and agree to hold as partners, appears to be the real controversy which their Lordships have to determine. In that view, the
evidence adduced by the plaintiffs is vague and unsatisfactory. It is
the plain duty of every litigant who endeavours to set up a verbal contract
to lay before the Court, not the mere impressions of the witnesses who heard
the communings, but in so far as possible the particulars of what was
said or done, so as to enable the Court to form its own conclusions upon
the question whether these did or did not import a binding agreement
in the terms alleged. The plaintiffs have carefully abstained from
making any attempt to fulfil that duty, and have contented themselves
with eliciting the conclusions derived by the witnesses from what they
heard or supposed that they heard. It is not even clear that the wit-
nesses are speaking of the same occasion, because the fourth plaintiff
fixes it on the 9th of March, whereas his partner, Viramuttu, says it
was some time in the month of April 1878. Besides, the evidence of
Viramuttu does not fully bear out that of the fourth plaintiff; it only
implies [265] that some contracts were to be taken in which the parties
were to share, and tends rather to support than to exclude the inference
that the selection of the particular contracts which were to come within
the arrangement then made was to be matter of future agreement. The
plaintiffs' oral evidence, standing by itself, would form a very shadowy
foundation for a contract; but it is directly contradicted by the first defend-
ant, and it is quite inconsistent with the testimony given by their own
servant and witness, Venkatasami Iyer, whose veracity they did not
attempt to impugn.

Their Lordships have had no difficulty in coming to the conclusion
that the parol proof which they have adduced fails to establish the part-
nership agreement which the plaintiffs allege. There are in evidence
written and also verbal communications between the parties with respect
to abkari contracts, taken by the plaintiffs during the currency of the
alleged agreement, in which the defendants had admittedly a quarter share.
But none of these communications countenance the suggestion that the
defendants took their shares by virtue of an antecedent general agreement,
or otherwise than by a specific agreement made with reference to each
contract at the time when it was taken up by the plaintiffs; and, save in
one instance (to be noticed presently), no allusion is made in them to
abkari contracts taken up by the defendants. It is, in their Lordships'
opinion, unnecessary to consider the arguments addressed to them for the
plaintiffs with regard to the probabilities of the defendants having entered
into the agreement of the 9th March 1878, which were nothing more than
a series of speculations having no foundation in the evidence.

In their argument upon this appeal, the plaintiffs, for the first time,
maintained that, irrespective of the general agreement, there is evidence to
show that they acquired right as partners to three-quarters of an abkari
contract for Salem taluk, which was obtained by the defendants in June
1878, and that they ought accordingly to have an accounting for their
share of profits. No such claim is made in their plaint; and it appears
from a passage in the judgment of the High Court that it was repudiated
by them, and that they only sought to use the evidence upon which it
was preferred here as proof in aid of the existence of a general agree-
ment of partnership. These facts would afford sufficient reason for refusing
to entertain the claim now. But their Lordships [266] think it
right to observe that the fourth plaintiff's letter of the 25th August 1878,
and the second defendant's reply, dated the 27th August, when read to-
gether, do not necessarily imply that the plaintiffs were partners in the
Salem contract. That part of the correspondence in which mention is
made of Salem has exclusive reference to management; it does show that
the parties were arranging that a certain individual should reside in Salem
and superintend several abkari contracts, but it does not per se show
that these contracts were all joint. The letters contain a distinct
acknowledgment by both parties of their partnership in contracts other
than Salem, and that in terms which seem to negative the existence of
any general agreement.

The last point submitted to us had reference to the validity, and also
(assuming it to be valid) to the effect of a writing dated the 16th September
1850, signed by the fourth plaintiff, which bears, inter alia, that he
agreed, upon the conditions therein stated, to surrender the whole interest
of the plaintiffs in the joint abkari contracts standing in their name to
the defendants, who were to take over all profits and losses. The plaintiffs
pleaded that the document was not a completed contract, and was never
acted upon. A complete answer to the first part of the plea is to be found
in the evidence of the fourth plaintiff, who states that it was written in
his presence to the dictation of the defendants, and was then signed by
him and delivered to the defendants; whilst the allegation that the writing
was never acted upon is explained by the fact that the plaintiffs subse-
sequently refused to settle accounts in accordance with its provisions.
The question raised as to the legal effect of the document has ceased to
be of practical importance, in consequence of the failure of the plaintiffs
to prove any joint abkari contracts other than those standing in their
own name. Their Lordships are of opinion that the plaintiffs were right
in maintaining that the document contains no stipulation referring to
abkari contracts standing in the name of the defendants; but that cir-
cumstance, coupled with the statement in the fourth plaintiff’s evidence,
to the effect that he signed it because he was “anxious to get rid of the
matter anyhow,” appears to them to confirm their conclusion that there
never was any general agreement binding the defendants to give the
plaintiffs an interest in their contracts.

Their Lordships will therefore humbly advise Her Majesty [267]
that the judgment appealed from ought to be affirmed. The appellants
must pay to the respondents their costs of this appeal.

Appeal dismissed.

Solicitors for the appellants—Messrs. Keen, Rogers & Co.

Solicitors for the respondents—Messrs. Lawford, Waterhouse, & Law-
ford.

Bikutti v. Kalendan

Before Mr. Justice Shephard and Mr. Justice Handley.

Bikutti (Defendant No. 3), Appellant v. Kalendan and
Others (Plaintiff’s Nos. 1 to 7 and Defendants Nos. 1 and 2),
Respondents.* [8th and 18th December, 1890.]

Declaratory decree—Withdrawing portion of claim—Specific Relief Act, Section 42.

Plaintiffs, members of a Malabar tarwad, sued (1) for the cancellation of a deed
of gift of certain immovable property alleged to belong to their tarwad, (2) for
restoration of the property the subject of gift, either to plaintiff No. 1, or defend-
ant No. 1, the present karnavan, on behalf of the tarwad. The Munsif

* Second Appeal No. 131 of 1890.
dismissed plaintiff’s suit on the merits. On appeal, the Subordinate Judge allowed plaintiffs, who were unable to pay the Court-fees for recovery of the property, to withdraw that portion of the claim, and decreed for plaintiff as to the remaining portion, viz., for cancellation of the document.

On second appeal it was held, reversing the decree below, that the prayer for restoration of the property being in the circumstances of the case maintainable, it was not competent to plaintiffs to restrict themselves to the other kind of relief sought, and that the maintenance of the suit in its maimed form would be an evasion of Section 42 of the Specific Relief Act.

SECOND appeal against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 362 of 1889, modifying the decree of S. Subramanya Ayyar, District Munsif of Cannanore, in original suit No. 212 of 1888.

The facts of this case appear from the following judgment.

Sankaran Nayar, for appellant.

Subramanya Ayyar, for respondents.

JUDGMENT.

This is a suit brought by the junior members of a Malabar tarwad in respect of land alleged to have been alienated to some of the defendants. The plaint states that after the death [268] of the late Karnavan Cheria Kunhhammad, defendants Nos. 1 and 2, executed a deed of gift in favour of the other defendants including the name of the late Karnavan as an executant. It charges that defendants Nos. 1 and 2, of whom one is the present Karnavan are not authorized to make such a gift and concludes with a prayer for the cancellation of the deed of gift and the surrender of the land given to the plaintiffs or to defendant No. 1 on behalf of the tarwad.

The District Munsif who tried the suit dismissed it on the merits, and the plaintiff appealed. On the appeal, in order to save Court-fee stamp, he abandoned the prayer for possession, but insisted on his right to have the other relief prayed for in the plaint; and it is against the decree accordingly made in his favour by the Subordinate Judge that defendant No. 3 now appeals. In the opinion of the Subordinate Judge, it was competent to him to grant such a decree, because the relief prayed for was not of a declaratory nature and because the plaintiff being an anandraman was not entitled to maintain a suit for possession.

At the hearing before us, it was argued that a suit for possession would not lie under the circumstances and that therefore whether or not the relief claimed was of a declaratory nature the suit was maintainable. We are unable to accede to this contention. The prayer is for the surrender of the land to the plaintiff or to defendant No. 1 on behalf of the tarwad. According to the case of the plaint the land being in the hands of strangers, it was clearly the right of the plaintiff as of other members of the tarwad to have the land restored to the possession of the tarwad. Obviously this right could not be enforced by defendant No. 1 in the face of his own deed, and therefore the objection which may generally be raised to a suit for possession by an anandraman was not applicable. Except at the suit of a junior member the tarwad’s right could not be asserted and enforced. Under these circumstances, we are of opinion that it was competent to the plaintiff to maintain the suit for possession as framed in his plaint. The question then arises whether it being open to the plaintif to sue for possession, he was at liberty to restrict himself to the other
kind of relief claimed in the plaint. We agree with the Subordinate Judge that the plaint does not ask for a declaration though we must observe that the Subordinate Judge has framed the decree as if that had been the nature of the prayer of the plaint. But [269] are the circumstances stated in the plaint such as to justify a prayer for the cancellation of the instrument of gift? It was argued that the alleged forgery of the late karnavan’s signature necessitated a cancellation of the instrument and that the case was therefore distinguishable from that in which a declaration has been sought for by anandrayans impeaching the alienations of their karnavans. In our judgment, however, it is clear that the factum of the gift is admitted and the alleged forgery is not the ground on which relief is sought. The substantial charge made in the plaint is that defendants Nos. 1 and 2 have, without authority, made a gift of tarwad property and, if that charge is made out, it is a declaration of the tarwad’s right and not a cancellation of the instrument of gift that should be granted.

This being so, it must follow that the suit, as framed by the plaintiff on the appeal, is not maintainable. The relief in the shape of cancellation of the deed could only have been granted in the form of a declaration, in the form indeed in which it has been granted, and as such ancillary to the principal relief by way of delivery of possession. It would be a mere evasion of the provision of Section 42 of the Specific Relief Act to allow the suit in its maimed form to be maintained. We must, therefore, reverse the decree of the Subordinate Judge, and restore that of the District Munsif. Respondents to pay costs here and in the Lower Appellate Court.

14 M. 269.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker

ACHAYYA, (Plaintiff) Appellant v. HANUMANTRAYUDU AND ANOTHER (Defendants) Respondents.* [24th February, 1891.]

Lessee—Power to bring ejectment suit.

A lessee is entitled to maintain a suit for ejectment against the party in possession, notwithstanding the fact that, at the date of the lease, his lessor was not in possession of the property. Pratkrishna Dey v. Biswanath Sen (2 B.L.R. A.C. 207) and Tiyv v. Krislo Mohan Bose (1 I.A. 76) referred to.

[F., 16 M. 194 (198); R., 15 M. 95 (96); 34 M. 246 (247) = 6 Ind. Cas. 711 = 20 M.L.J. 764 = 7 M.L.T. 365; Expl., 23 M. 313 (321).]


Plaintiff sought to recover certain land leased to him by defendant No. 1 under a registered cowle, dated the 15th May 1887. It was admitted that defendant No. 1, an agraharamdar, was the owner of the land.

Defendant No. 2, who was actually in possession, pleaded that he had permanent occupancy rights in the land, the subject of suit. Both the Court of First Instance and the Lower Appellate Court found against the occupancy rights thus set up. But the Lower Appellate Court held that.

* Second Appeal No. 683 of 1890.
plaintiff was not entitled to sue, he being a mere lessee, and his lessor, defendant No. 1, not having been in possession at the date of the lease. Plaintiff preferred this second appeal.

Mr. Subramanyam and Panchapakesa Sastri, for appellant. Ananda Charlu and Ramasawami Mudaliar, for respondent No. 2. Sundaram Sastri, for respondent No. 1.

JUDGMENT.

Both Courts concur in finding that no occupancy right has been established. It is urged by the appellant’s pleader that it lay on the plaintiff to show that second defendant was liable to be ejected, and that the second defendant ought not to have been called on in the first instance to prove his occupancy right. We are unable to assent to this view. It is not denied that the land belongs to the agraharamdar, and that the plaintiff obtained a lease from him. There was also evidence in the case to show that the second defendant’s possession commenced about 1843. There is no apparent foundation for the presumption that his enjoyment was immemorial.

We cannot therefore say that the Courts below were in error in holding that the onus of proving occupancy right rested on second defendant in this case. The District Judge, however, decided against the plaintiff on the ground that as a mere lessee he was not entitled to sue to eject the second defendant, his lessor not having been in possession at the date of the lease.

We are of opinion that the dismissal of the suit on this ground cannot be supported. The agraharamdar is clearly entitled to eject the second defendant on proof of title, unless the latter proved his occupancy right. This being so, we do not see why the lessee claiming under him should be debarred from recovering possession on proof of such title and his own lease. That he could do so has been held in several decisions. We may refer to Pranakrishna Dey v. Biswambhar Sen (1). Nor has the Privy Council, as observed by the Judge, decided to the contrary in Tiery v. Kristo Mohun Bose (2).

We must reverse the decree of the Lower Appellate Court and restore that of the District Munisif. Appellant is entitled to his costs in this and in the Lower Appellate Court.

14 M. 271.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

RATNASABHAPATHI (Plaintiff), Appellant v. VENKATACHALAM (Defendant), Respondent.* [24th February, 1891.]

Lease deed—Compulsory registration.

Where a lease deed contained a clause whereby the tenancy thereunder was absolutely determinable at any moment at the option of the lessor. It was held, that such deed was not compulsorily registrable, notwithstanding that it also contained provisions for an "annual rental," and for payment of "rent in advance each year," provisions, which, had they stood alone, would have raised a presumption that a tenancy exceeding a year was contemplated.

* Second Appeal No. 25 of 1890.

(1) 2 B.L.R. A.C. 207.
(2) 1 I.A. 76.
SECOND appeal against the decree of T. Ramaswami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 25 of 1889, confirming the decree of V. Narayana Rau District Munsif of Negapatam, in original suit No. 356 of 1887.

In this case the Chairman of the Negapatam Municipality, as plaintiff, sought to recover a small piece of ground, being the "alody" site in front of the defendant's house, No. 61, in the Perumal Civil Street, Nagoor, and to remove defendant's encroachment thereon.

The following allegations appear in the plaint as amended.

The lane in dispute belongs to the Municipal Councillors, being a portion of a public street. In March 1884, defendant encroached upon the street to the extent of 5½ feet. The matter having been brought to the notice of the Town Councillors and proceedings taken thereon, a demand for rent was made upon the defendant, and rent was paid by him. In February 1885, the defendant executed a rent deed to the Municipality, but did not register it. In April 1887, the Councillors passed a resolution to the effect that defendant should execute a rent deed to the Municipality within two weeks, and that in default the Municipality would take possession. On the 3rd May 1887, due notice of the same was given to the defendant, but he failed to execute a lease.

The defendant pleaded to the merits, that the piece of ground in dispute had been the property of his forefathers for seventy or eighty years, that plaintiff's suit was time barred, that the rent deed of February 1885 was executed by him under coercion, and that it was not valid and did not bind him.

The Subordinate Judge, endorsing the Munsif's finding, held that the defendant had acquired a prescriptive right to possession by lapse of time. He held, however, that the ground in dispute was originally a portion of the street.

Upon the lease and rent question his finding was as follows:

"The second question is whether defendant rented the land from the Municipality, and I find he did not. The rent deed executed not being registered, it is ineffectual for the purpose of proving the lease; inasmuch as there can be no lease, under Section 107 of the Transfer of Property Act, except by a registered instrument. Defendant has not, of course, established that the lease deed was obtained from him by coercion; but it is unnecessary to consider that point there being no lease in the legal sense of the term. The evidence shows that rent for two years was recovered from defendant by the attachment and sale of his moveables; but, had there been proper lease, the recovery of rent by legal process will have the same effect as if it was voluntarily paid. There being no lease, the recovery of rent by the sale of defendant's moveables will not make the defendant a tenant of the Municipality."

Pattabhirama Ayyar, for appellant.
Tiruvengadasami Pillai and Subbaya Ochelli, for respondent.

JUDGMENT.

[273] The Subordinate Judge finds that the ground was originally part of the public street, and, as such, the property of the Municipality, but he decided against the plaintiff on the ground that the defendant had
been in possession for forty years and had thereby acquired a title by prescription. He found further that, though the rent deed was genuine, it was not shown to have been obtained under coercion; yet he held that it was a lease for more than one year, and was legally inoperative as it was not registered. It is urged on appeal that, upon the true construction of document A, the tenancy created by it was determinable at any moment at the option of the lessor, and that it was not therefore subject to compulsory registration.

In support of this contention reliance was placed on Aput Budgavda v. Narhari Annajec (1), Jagitmdas Jacherdas v. Narayan (2), Morton v. Woods (3), and on Hand v. Hall (4). On referring to those cases, we consider that the contention is well founded. No doubt, the words "enjoy the same at an annual rental of Rs. 4-6-5" and "pay the rent in advance each year" might, if they stood alone, raise a presumption that the tenancy contemplated was, at all events, for more than one year, but the clause "I shall give up possession of the land without raising objection and without claiming any compensation when the Commissioners ask for the same" appear to us to rebut the presumption and to bring the case within the principles of the decisions mentioned above.

This being so, the rent deed cannot be treated as inoperative. We observe that rent was levied for two years under it, and these facts amount to a clear acknowledgment by defendant of the plaintiff's title within a short time before the suit.

As the land has also been found to be the property of the Municipality, we are of opinion that plaintiff is entitled to succeed.

The decrees of the Courts below must be reversed, and there must be a decree that plaintiff recover the ground site sued for, but with liberty to defendant to remove the structure thereon, if any, within a month of the receipt of this decree in the Lower Appellate Court.

The plaintiff is entitled to his costs throughout.

[274]

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

NUNNU MEAH (Defendant), Appellant v. KRISHNASAMI (Plaintiff), Respondent. [16th April and 9th May, 1890.]

Hindu widow—Interest in immovable property—Proper of alienation.

A Hindu testator, leaving a grandson by adoption him surviving, besides certain moveable property, bequeathed to his wife T. a house "on account of her maintenance."

 Held, confirming the decision below, that though it was competent to testator by apt language to clothe his widow with a power of alienation, yet in the absence of such words, regard being had to the surrounding circumstances and to the ideas which Hindus have regarding the interest ordinarily enjoyed by women in immovable property, it must be presumed that testator only meant to bequeath a life-interest:

 Held, also, that the heir-at-law was not liable to make good moneys expended on the premises by one holding under the widow with knowledge of the contents of the will.

* O.S. Appeal No. 8 of 1889.

APPEAL from the judgment of Mr. Justice SHEPHERD sitting on the original side of the High Court in civil suit No. 106 of 1888.

Gerray Parthasaradi Chetti, son of Gerray Veerasawmi Chetti, died on the 16th May 1842, his father being then alive. Gerray Parthasaradi Chetti had in his lifetime given his widow, Rookmani Ammal, authority to adopt a son. The widow in due course adopted the plaintiff in the present suit, and this adoption was consented to by Veerasawmi Chetti. Gerray Veerasawmi Chetti died on or about the 20th February 1846, leaving Gerray Thayammal, his widow, him surviving.

On the 6th February, previous to his death, Veerasawmi Chetti made a will in favour of his wife and grandson by adoption, the plaintiff Krishnasawmi. The portion of the will material for the elucidation of the matter in dispute ran as follows:

"As I have now married a third wife (Thayammal) and have no sons by her, and my said wife should bear sons, such boys and [275] my grandson by name of Krishnasawmi who is hereinafter mentioned shall apportion the remainder estate in equal shares after that which shall have been spent.

"If my third wife does not bear sons give to her and send away on the 15th day after my death property in all amounting to Rs. 7,500, such as jewels for my said wife named Thayar (thereby meaning the said Thayammal) amounting to Rs. 3,860 cloths, &c., and brass household utensils amounting to Rs. 350, also the aforesaid house No. 6047 of Rs. 3,290 situate on the south side of Pondicherry Appasawmi Pillai's house in Varada Muttoappan's street on account of her maintenance."

Thayammal, Veerasawmi's widow, remained in possession of the premises demised till November 1886, when she sold and delivered possession thereof to the defendant Salar Nunu Meah Sahib. Thayammal died on or about the 6th February 1888, leaving plaintiff, as he contended, entitled as reversioner to the said premises amongst other property.

The most important question as to which the parties were at issue was regarding the construction of the portion of Veerasawmi's will already set out. The plaintiff, Krishnasawmi, asserted that Thayammal, Veerasawmi's widow, took only a life-estate; the defendant on the contrary contended that the will contained an absolute bequest to her. The defendant further contended that, even if Thayammal took only a life-estate, he had a valid lien on the premises for certain expenditure incurred thereon.

SHEPHERD, J., decreed for plaintiff with costs.
Defendant appealed.
Mr. Norton and Mr. R. F. Grant, for appellant.
The Advocate-General (Hon. Mr. Spring Branson), for respondent.

JUDGMENT.

The only two questions argued before us on the hearing of this appeal were (1) whether defendant's vendor, Thayammal, took under the will of her husband, G. Veerasawmi Chetti, an absolute estate in the house in question in this suit or only a widow's estate; and (2) whether plaintiff is bound to make good to defendant any and what sum for repairs and improvements alleged to have been made to the house by defendant.
As to (1) it is argued by the learned Counsel for appellant that the restriction upon the power of alienation by a Hindu wife of immovable property given to her by her husband as stridhanam [276] has no application to gifts to a widow by will, that in the case of a gift by will, therefore, unless there are express words of limitation, the widow takes an absolute estate, and that in this case there were no words limiting the gift, and, therefore, Thayammal took an absolute estate. In support of the distinction contended for between a gift by a husband to his wife inter vivos and a gift to his widow by will, we are not referred to any express authority, and we observe that it is opposed to the decision in Koonjbehari Dhar v. Premchand Dutt (1), but we think that we are not called upon to determine the question in this case. It was assumed by the learned Judge in the Court below that the testator could have given his widow an absolute estate with full power of alienation, but it was held that on the proper construction of the will he had not done so, and upon a careful consideration of the words of the will, read by the light of the surrounding circumstances, we are of opinion that the learned Judge was right in the construction he put upon it as to the house in question.

We are not concerned now with the moveable property bequeathed to the widow by the will. All we have to decide is what was the intention of the testator in giving her this house on account of her maintenance, and we entertain no doubt that in so doing he did not contemplate her selling or otherwise alienating the house, but intended that she should either live in it, or take the rents and profits for her maintenance, and that after her death it should still form part of his estate. It was competent to him, no doubt, to use the words of the judgment in Bhujanga v. Ramayamma (2) "by apt language to clothe her with a power of alienation," and words conferring such power frequently find a place in Hindu wills and deeds of gift. In the absence of any such words, and taking into consideration the ideas which a Hindu would have as to the nature of the interest to which a woman is ordinarily entitled in immovable property, it seems to us a fair presumption that testator in this case did not intend his widow to have any power of alienation over the house except of course such as she would have had if the property had come to her as his widow. And we agree with the learned Judge in the Court below that the endorsement by the testator on the Collector's certificate of the house does not show any other intention.

[277] The words of the endorsement are merely "according to the will, &c., my wife after my death should enjoy."

As to the second question we also agree with the decision of the Court below. This is not a case of a man standing by and allowing another in ignorance of his rights to add to the value of his property. The plaintiff, as the reversioner, could not, as long as the widow was alive do anything to interfere with what she, or the defendant by her permission, chose to do with the property, and the defendant seems to have known perfectly well the nature of the widow's title and the provisions of the will. If he took a mistaken view of the extent of her interest under that will, it was his own fault, and the plaintiff is not to blame for it. He did warn defendant as soon as he knew of the sale to him, but apparently without any effect. Even if the money in question was bona fide advanced by the defendant for the repairs and improvement of the house, as to which there seems to

---

(1) 5 C. 684.
(2) 7 M. 387.
be reason for considerable doubt, we agree with the Court below that the defendant has no legal claim for its repayment.

The appeal fails and is dismissed with costs.

Branson & Branson, attorneys for plaintiff.

Champion & Short, attorneys for defendant.

14 M. 277 = 1 M.L.J. 220.

APPELLATE CIVIL.

Before Mr. Justice Muttasami Ayyar and Mr. Justice Best.

GURUSAMI (Defendant No. 3), Appellant v. VENKATASAMI

AND OTHERS (Defendants Nos. 1 and 2, Plaintiffs), Respondents.

[8th, 9th September and 13th November, 1890.]

-Civil Procedure Code, Sections 276, 305.

Section 303 of the Civil Procedure Code contemplates a mortgage or lease or private sale only where "the amount of the decree" can be thus provided for. A Court executing a decree can neither grant a certificate under this section, nor confirm a mortgage or other alienation of property, unless it appears that by such alienation the decree will be satisfied in full. It is not sufficient that after grant of a certificate, a mortgage by the judgment-debtor is, as between him and his [278] mortgagees, bona fide, nor can it affect the lien acquired by the judgment-creditor under Section 276.

[R., 32 A. 479 (484) = 7 A.L.J. 409 = 6 Ind. Cas. 113.]

SECOND appeal against the decree of H. T. Ross, Acting District Judge of Madura, in appeal suit No. 428 of 1888, confirming the decree of C. Venkobachariyar, Subordinate Judge of Madura (West), in original suit No. 31 of 1887.

The facts, out of which this second appeal arose, appears sufficiently for the purposes of this report in the following judgments:

S. Subramanya Ayyar and P. Subramanya Ayyar, for appellant.

Mahadeva Ayyar, for respondents.

JUDGMENTS.

BEST, J.—The appellant (who was the third defendant in the Court of First Instance) is the holder of the decree in original suit No. 57 of 1880 on the file of the Subordinate Court of Madura, (West). He is a minor under the guardianship of his mother Lingammal.

The property of the judgment-debtors was attached and about to be sold in execution of the decree when they put in a petition (No. 636 of 1886), asking for postponement of the sale and a certificate under Section 305 of the Code of Civil Procedure, and, on 11th December 1886, they were granted the certificate (Exhibit E), authorizing them to raise the balance of the decree amount by private sale, mortgage, &c., of the properties under attachment within the 20th December 1886. On the 22nd December 1886, the first defendant was granted a second certificate (Exhibit D) in the same words, but extending the time to "within two months from this date."

Exhibit B is the petition of first defendant (dated 22nd December 1886) in compliance with the request contained in which the second certificate was granted. From B it is seen that Rs. 4,000 were then produced as obtained from the present third and fourth respondents (plaintiffs in the

* Second Appeal No. 1323 of 1899.
Court of First Instance) with whom, it is stated, "a contract has been negotiated requiring them to pay the balance and satisfy the decree in full." Hence the certificate B.

The time allowed by this certificate expired on 22nd February 1887, but no further payment was made into Court till 7th September 1887, when the petition (Exhibit A) was filed by the pleader of the third and fourth respondents, stating that the judgment-debtors had executed to the plaintiffs a document mortgaging the attached property for a sum of Rs. 5,000 (including the Rs. 4,000 already paid) and tendering the balance Rs. 1,000 with a prayer for an order that this sum of Rs. 1,000 be received and the mortgage-deed accepted and for stay of the sale, which was fixed for the 26th of that month.

On the same day that A (dated 3rd September 1887) was filed by the plaintiffs, the petition C (dated 6th idem) was also filed by defendant No. 1 (judgment-debtor) objecting that the mortgage bond had been obtained by the plaintiffs fraudulently—the Rs. 4,000 first paid being, in fact, the money of the judgment-debtors themselves and not of the alleged mortgagees, and praying that the bond be not accepted.

These two petitions were disposed of by the order at the foot of Exhibit A, rejecting the mortgage for the reasons (1) that the judgment-debtors objected to it as having been fraudulently obtained, (2) because "the petitioners have not complied with the provisions of Section 305," and (3) "as neither the balance nor the deed itself was produced within the time limited by the certificate."

Hence the scit out of which this second appeal has arisen, (a) for cancellation of the order last referred to, and (b) for a declaration that the mortgage (filed as Exhibit F) executed by defendant No. 1 (who is also the guardian of defendant No. 2, a minor) is true and valid. Both the Lower Courts have decreed in favour of the plaintiffs.

The present appeal is by the third defendant, the decree-holder, who contends (inter alia) that the Lower Appellate Court "did not sufficiently distinguish between the case of the first defendant and that of the third defendant."

This is, I think, a valid objection to the decree not only of the Lower Appellate Court, but also to that of the Court of First Instance, for, it by no means follows that because the mortgage is found to be good and valid as against defendants Nos. 1 and 2, the judgment-debtors, it must therefore, be held to be good in toto, also as against the decree-holder, defendant No. 3. I say in toto, because in the circumstances of this case, the mortgage to plaintiffs must, I think, be upheld even as against defendant No. 3, in so far as it gives the plaintiffs a lien on the property for the Rs. 4,000 found to have been paid by them and which has been accepted as part satisfaction of the decree. To this extent, plaintiffs are, I think, entitled to a declaration that they have 'a lien upon the property, and, that the Rs. 4,000 paid by them in satisfaction of the third defendant's decree is a first charge on the property. But this is, I think, the utmost relief to which the plaintiffs are entitled as against defendant No. 3. Section 305 expressly states that "no mortgage, lease or sale under this section shall become absolute, until it has been confirmed by the Court;" and it is quite clear that the Court could not confirm under the section any mortgage lease or sale, unless it satisfied the decree in full. It is only if there is reason to believe that the "amount of the decree," may be raised by mortgage or lease or private sale that the Court is authorized to give time and grant a certificate under Section 305, and, as a matter of fact,
both the certificates granted in this case (D and E) expressly state that it is for paying the "balance of the decree amount" by the sale, mortgage, &c., of the property attached that sanction for a private arrangement is thereby granted. It has been held that in acting under Section 305 of the Code of Civil Procedure, the Court should exercise a reasonable discretion and should not postpone the sale, unless the judgment-debtor can show that the creditor will not suffer—Ram Ruttun Neogy v. Land Mortgage Bank of India (1), and even then the postponement should be only for a reasonable period—Rednum Achutaramuuya v. Dada Sakit (2). Three or six months have been held to be reasonable, but a year has been held to be unreasonable—see Pyzoodeen v. Giraudh Singh (3). Such being the case, the arrangement under Exhibit F, by which, after only partly satisfying the judgment-debt, the mortgages are given the property to possess it for ten years must certainly be held to be far beyond the limits of what is a reasonable time. The District Judge is in error in thinking that defendant No. 3 "stood and looked on at all that was being done in the matter of the mortgage." It is seen from the Sub-Judge's order in Exhibit IV that her Vakil "strongly opposed" the application of defendant No. 1 (dated 6th December 1886) on which the certificate E was granted; and by her petition (Exhibit V), dated 9th April 1887, she prayed that, before any arrangement of the kind was sanctioned, notice should be given to her. I see no reason for allowing the appellant's contention that the suit brought by plaintiff for a declaration was not maintainable.

The issues of fact as against the judgment-debtors (now respondents Nos. 1 and 2) have been found in favour of the plaintiffs (respondents Nos. 3 and 4) and are neither objected to by them, nor do I think they are open to objection; but the case of the judgment-creditor, the appellant, is not identical with that of the judgment-debtors. Against the latter, the mortgage bond F may be held to be binding as a whole, but as against the appellant it cannot be held to be good only in so far as it makes the Rs. 4,000 paid by plaintiffs in satisfaction of the appellant's own decree, a charge and a first charge on the land mortgaged. But only to this extent can it be held to affect the appellant's right to proceed against the said property in execution of her decree.

I would, therefore, modify the Lower Court's decrees as above, and direct the respondents Nos. 3 and 4 (plaintiffs) to pay the appellant's costs throughout. Defendants Nos. 1 and 2 must pay the plaintiffs' costs in the two Lower Courts and bear their own costs in both those Courts and also in this Court.

MUTTUSAWMI AYYAR, J.—The appellant is the decree-holder and respondents Nos. 1 and 2 are the judgment-debtors in original suit No. 57 of 1880, and the question of law arising for decision upon the facts found by the Courts below is whether the mortgage executed by the latter in favour of respondents Nos. 3 and 4 for Rs. 5,000 on 24th January 1887 can be upheld as against the former. Both the Lower Courts have found that the mortgage was true, that the consideration money was paid, and that it was a bona fide transaction. Upon those findings, the mortgage would no doubt be valid as between the mortgagors and the mortgagee, but they are clearly not sufficient to support the transaction as against the appellant who was no party to it and who was proceeding in execution against the mortgaged property. It must appear

(1) 17 W.R. 193. (2) 5 M.H.C.R. 272. (3) 2 N.W.P. 1.
further that the mortgage was concluded in strict conformity to the provisions of Section 305; that the property in question was attached by the appellant in execution of his decree so early as 1881; that the attachment continued in force when the mortgage was concluded, and that the decree-debt remained to be paid to the extent of more than Rs. 10,000, are facts about which there is no dispute. The substantial question for decision was whether the Court authorized the mortgage which was actually concluded under Section 305, and whether the order of the 7th September 1887 refusing to confirm the mortgage was in contravention of the authority previously granted by the Court. Section 305 ought to be read together with Section 276 of the Civil Procedure Code, and, when so read, it is clear that when property is attached in execution, any private alienation of the same is void against any claim enforceable under the attachment, unless such alienation is specially authorized under Section 305. It must be remembered that under Section 276, the decree-holder has a lien on the property under attachment in respect of the whole of the decree-debt and not simply of a part of it. It is therefore provided by Section 305 that when there is reason to believe that the amount of the decree may be raised by private alienation of the property advertised for sale, or of some part thereof, or of any other immovable property of the judgment-debtor, the Court may postpone the sale of the property comprised in the order for sale in view to enable the judgment-debtor to raise the amount. In such a case, the section proceeds to direct the Court to grant the certificate authorizing the judgment-debtor to make the proposed mortgage, and to provide that no such mortgage shall become absolute until it has been confirmed by the Court.

The intention is to prevent the sale of the attached property when the whole decree can be satisfied within a reasonable period by private alienation, and, at the same time, to protect the lien which the judgment-creditor has under Section 276 by prescribing two conditions, viz., that the mortgage actually concluded must be previously proposed to, and authorized by, the Court, and that the mortgage must be confirmed after it is concluded. The real question was whether the facts of this case show that the mortgage concluded was the mortgage proposed to, and authorized by, the Court under Section 305. The first certificate granted by the Subordinate Court is Exhibit E, dated 11th December 1886. It recites that there is reason to believe the balance of the decree amount might be raised by private alienation and then purports to authorize the judgment-debtor to make the proposed alienation within 20th December 1886 to raise the said amount. The second certificate granted on the 22nd December 1886 is Exhibit D. It is in the same terms as Exhibit E with this difference, viz., that two months' time was granted from that date, the mortgage authorized being still a mortgage of the attached properties, whereby there was reason to believe that the balance of the decree amount might be raised. Again, Exhibit B is the petition upon which the certificate was granted. It was in these terms:—"A contract was entered into with Subba Naik, Ramasami Naik and Guruvappa Naik, sons of Velappa Naik, residing at Naikkarapatti, to mortgage defendant's immovable properties mentioned in the sale notice, in accordance with the certificate granted by the Court, and Rs. 4,000 has now with difficulty been produced through them.

"A contract has been negotiated with the said persons requiring them to pay the balance and satisfy the decree in full; and they, consenting
"to the same, and making their properties security therefor, have undertaken to make the necessary arrangements."

"This defendant intends to mortgage his immovable properties, after appropriating the produce now raised on the properties under attachment and the summer produce thereof."

"An order is therefore prayed for directing that the Rs. 4,000 now deposited be accepted; that payment be entered in the decree; that a time be prescribed for paying the balance of the decree amount, and that a certificate be granted giving permission to make private alienations of properties referred to in the sale notice within the prescribed time."

It is clear that the representation made to the Court was that negotiations were in progress whereby the whole balance of the decree debt would be paid up if time was granted.

What was the transaction since concluded and what was its result? The mortgage which the Court was asked to confirm was a mortgage for Rs. 5,000, which was considerably below the balance due under the decree and no other arrangements were made for satisfying the decree in full, it being represented on one side that no larger amount could be raised on the properties attached, and on the other that the mortgage was fraudulent. It appears to me to be open to no doubt that permission to raise money by mortgage was asked for with the representation that the balance of the decree debt would be paid in full either by means of the mortgage or by any other arrangements in progress and that permission was granted to make the mortgage on the assurance that the whole decree debt would be satisfied.

The order therefore refusing to confirm the mortgage is perfectly correct for the simple reason that the condition subject to which the certificate was granted, viz., satisfaction of the decree in full was not complied with either by the mortgage or otherwise as represented to the Court. The question of the validity of the mortgage is not one of bona fides between the mortgagor and mortgagor but one of statutory authority sufficient to take away the prior lien which the appellant had.

For these reasons, I am also of opinion that the mortgage cannot be upheld against the appellant.

I am further of opinion that the plaintiff must be declared to be entitled to have a charge upon the property in dispute for Rs. 4,000 paid into Court on account of the appellant's decree between the date of their application for a certificate under Section 305 and the order of the 7th September 1887. This declaration is necessary to restore the parties to their original position, and the appellant can only set aside the mortgage and make the property available for his decree subject to that charge.

I agree, therefore, to the decree proposed by my learned colleague.
APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

IN APPEAL NO. 187 OF 1888.

GOVINDA AND OTHERS (Defendants Nos. 1, 3 and 4, and First Defendant's Representative), Appellants v. MANA VIKRAMAN (Plaintiff), Respondent.¹

IN APPEAL NO. 188 OF 1888.

MANA VIKRAMAN (Plaintiff), Appellant v. GOVINDA AND OTHERS (Defendants), Respondents. [3rd September and 5th December, 1890.]


A suit for recovery of a mortgage debt, with an alternative prayer for sale of the mortgaged property, is not a suit for the recovery of immovable property within the meaning of Section 44 of the Civil Procedure Code.

A suit seeking to enforce liability for a mortgage debt on a Malabar tarwad is not barred by a previous personal decree obtained against certain members of the tarwad for the same debt.

[F., 16 M. 335 (339); R., 27 M. 157 (158).]

APPEALS against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in original suit No. 17 of 1887.

Defendants were members of a Marumakkatayam tarwad. In 1881 their Karnavans executed to plaintiff a mortgage of certain property as security for a loan. A portion of the property mortgaged, viz., items 1 to 16, was at the same time leased by the plaintiff to the mortgagors. No rent having been paid, the plaintiff sued the mortgagors in original suit No. 232 of 1883 and obtained a decree. In execution thereof he attached certain movables of the tarwad. The defendants resisted, denying the liability of their tarwad for the debt, and, failing in their attempt, brought original suit No. 71 of 1884. The final result of this suit, on appeal, was that the former decree was declared to be merely personal against the Karnavans. The plaintiff now sued to recover his mortgage debt together with arrears of rent.

The defendants, among other defences, pleaded that there was a misjoinder of causes of action, viz., of a claim to recover a mortgage debt with one for arrears of rent. They also pleaded that the claim for rent was res judicata by a decree obtained by plaintiff in original suit No. 232 of 1883 for arrears of rent against Raman Menon and Kannan Menon, the original mortgagors, members of defendants' tarwad.

Sankara Menon, for appellants in appeal No. 187 and for respondents in No. 188 of 1888.

Sankaran Nayar, for appellants in appeal No. 188 of 1888 and for respondents in appeal No. 187 of 1888.

JUDGMENT.

This was a suit to recover a debt together with arrears of rent due by the defendants upon a mortgage deed and a lease, dated the 31st August 1881. The documents in question were executed by two persons, named Raman Menon and Kannan Menon, on behalf of the defendants' tarwad and as its representatives. The instrument of mortgage (Exhibit A)
purports to mortgage 29 items of land for a debt of Rs. 5,000, and to transfer, in lieu of interest due upon it, possession of items 1 to 16 yielding an annual rent of 750 paras of paddy. The lease purports to be a lease of those 16 items by the mortgagee to the mortgagee for the above rent payable at the end of each year. Out of the mortgage debt sum of Rs. 300 was left with the mortgagee to be applied in discharge of an encumbrance on items 1 to 13, and it was admitted by the plaintiff in the Court below that he did not so apply the amount. No rent having been paid according to the terms of the lease, the plaintiff obtained a decree against Raman Menon and Kannan Menon in original suit No. 232 of 1883 for arrears of rent due until April 1883, amounting to Rs. 721-12-1, and attached in its execution certain moveable properties belonging to the defendants’ tarwad. The defendants, however, repudiated the liability of the tarwad, preferred a claim, and prayed for the attachment being cancelled. Their claim being disallowed, they brought original suit No. 71 of 1884 in which it was finally decided by the appellate Court that the attachment must be raised on the ground that the decree was personal to Raman Menon and Kanan Menon. The mortgagees being dead, the plaintiff’s case was that the mortgage debt was a tarwad debt, and that the defendants were liable to pay it and the arrears proportionate to Rs. 4,700 actually advanced by him. The Subordinate Judge decreed the claim, but directed that in default of payment, items 1 to 16 be sold on account of Rs. 2,300 out of the mortgage debt and proportionate rent, and items 17 to 29 on account of the balance. To this decree both the plaintiff and the defendants objected—the former in appeal No. 188 and the latter in appeal No. 187.

Appeal No. 187.—Four preliminary objections are urged in support of this appeal. As regards the first, viz., the alleged misjoinder of a claim to recover the mortgage debt and a claim to recover arrears of rent, we are of opinion that the Subordinate Judge properly disallowed it. It was open to the respondent under Section 45 of the Civil Procedure Code to unite in one suit several causes of action against the same defendants jointly, and we do not think that the alternative relief claimed in the plaint, viz., the sale of the mortgaged property in default of payment renders this a suit for the recovery of immovable property within the meaning of Section 44.

As regards the second objection, viz., that the suit is not maintainable so far as it relates to items 1 to 16 under Section 67 of the Transfer of Property Act, we consider that it is also untenable. Act IV of 1882 came into force in July 1882, whilst the usufructuary mortgage sued upon was concluded on the 31st [287] August 1881, and even if the Act applied, which it does not, there is an express covenant to repay the debt in the instrument of mortgage—Chathu v. Kunjan (1).

The next objection, viz., that the claim is res judicata so far as it has reference to rent due from 31st August 1881 to 11th July 1883, is also one which cannot be supported. The present suit is instituted against the defendants’ tarwad, whilst original suit No. 232 of 1883 was brought against Raman Menon and Kannan Menon, and the liability now litigated is that of the tarwad, whilst the liability decreed on the previous occasion was, as urged by these very defendants and as held by the Appellate Court in appeal suit No. 622 of 1884, the personal liability of the two individuals who executed the original lease.

(1) 12 M. 109.
It is next argued by the appellants' pleader that the plaintiff ought to have joined all the members of their tarwad in original suit No. 232 of 1883 and that his omission to do so precludes him from instituting a second suit in respect of the same claim of rent. We are not prepared to accede to this contention either. The decree in original suit No. 232 of 1883 was not satisfied, and its execution against tarwad property was obstructed by the defendants, and it failed on the ground that the decree was personal to Raman Menon and Kannan Menon. If the usufructuary mortgage is really binding on the tarwad, we see no reason why the plaintiff should not be permitted to sue the tarwad in respect of rent also which is not barred, as the pattam chit was a registered document as appears from Exhibit XV, and consequently the limitation period is six years under Article 116 of Schedule II of Act XV of 1877, see Vythilinga Pillai v. Thachanamurti Pillai (1) and Umesh Chunder Mundul v. Adarnoni Dasi (2).

Passing on to the merits, it was first contended for the appellants that the mortgage was concluded neither for tarwad necessity nor for its benefit; and, secondly, that by reason of a family karar, Raman Menon and Kannan Menon were not competent to execute the mortgage otherwise than in conjunction with the other members of their tarwad. As regards the second question, it is dealt with by the Subordinate Judge in paragraph 10 of his judgment, and we concur in his opinion that the karar [288] was not acted upon, but was finally cancelled by the appellants' family. The evidence referred to by him sufficiently warrants the conclusion at which he has arrived. As to the first question, as already observed, Rs. 300 were not advanced by the respondent, and the Subordinate Judge has upheld his claim only to the extent of Rs. 4,700. The appellants' case was that Rs. 2,300 were paid in cash, and that Rs. 2,400 were credited towards the purchase money due to the respondent by Raman Menon for the sale of item 17 to 29 under Exhibits E and Q.

It appears from the evidence that the purchase was made by Raman Menon for the benefit of defendant No. 3, Narayani Amma, the female member of the appellants' tarwad, on the assurance of her husband that he would make good the purchase money for her benefit; but the assurance proved ineffectual owing to his death. Thus, the purchase was made for the benefit of the female representative of the tarwad, and the property purchased is still in its possession. The vendor has clearly a lien for the unpaid purchase money at least on the property sold. As to the remaining Rs. 2,300, it is conceded by the appellants' pleader that the decree debt evidenced by Exhibit B is binding on the tarwad, and that it was satisfied out of the money advanced by the plaintiff. The payment on account of that debt amounts to Rs. 1,261-3-11 and there remains a balance of Rs. 1,038-12-1.

As regards the decree debt due to Ramakrishna Putter, the respondents' case was that he advanced the money bona fide to prevent the impending sale of property purchased by Raman Menon as the karnavan of the tarwad. The appellants' contention was that the property was actually sold in execution, and that the payment alleged by the respondent was really not made. The Subordinate Judge found that the advance was really made, and that the creditor was not responsible for the misapplication, by the karnavan of the borrowed money. Two witnesses deposed that the money was advanced, and the Subordinate Judge has accepted

(1) 3 M. 76. (2) 15 C. 221.
their evidence, which we see no reason to descredit. Moreover, there is no evidence for the appellants to show that the sale under Exhibit IX was not subsequent to Exhibit A, or to indicate collusion between the respondent and Ramakrishna Putter. It is true that they did not go into the witness-box; but it was open to the appellants to have cited them as witnesses, and they have not done so. Upon the evidence in the case we cannot say that the [289] Subordinate Judge has not come to a correct conclusion. The remaining portion of the mortgage debt for which no tawwad necessity is distinctly proved is small; and there is no ground for the suggestion that the plaintiff did not lend it bona fide. For these reasons, we think that this appeal cannot be supported and must be dismissed with costs.

Appeal No. 188.—It is contended in this appeal that the Subordinate Judge was in error in charging Rs. 2,400 and proportionate rent only on items 17 to 29. As observed they were purchased for the benefit of defendant No. 3 on the assurance by her husband that he would pay the purchase money; but the assurance proved ineffectual in consequence of his death. The property was acquired by the senior female through whom the other members of the tawwad derive their title to the tawwad property, and they are in possession also of the property thus acquired. There is therefore no reason why the whole tawwad property should not be made liable for this debt.

In allowance therefore of this appeal of the plaintiff, the Lower Court's decree will be modified by directing the defendants to pay this amount and its proportionate rent and interest as a tawwad debt, and defendants will also pay plaintiff's costs in the Lower Court on this amount, as also plaintiff's costs of this appeal.

14 M. 289.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SANKU AND OTHERS (Defendants Nos. 1 to 4), Appellants v. PUTTAMA AND ANOTHER (Plaintiff and Defendant No. 5), Respondents. * [29th and 30th September, 6th, 7th, 8th, 9th October and 5th December, 1890.]

Aliyasantana Law—Inheritance—Uncongenital insanity—Suit by an unadjudged lunatic by the Agent of the Court of Wards as guardian—Authority of the Court of Wards—Regulation V of 1804—Estates of Lunatic subject to Mufusal Courts—Act XXV of 1858—Code of Civil Procedure, Section 461.

A Jain, who was subject to the Aliyasantana law, made a will, whereby he disposed of the property of his family in favour of certain persons, and died. The [280] plaintiff, a female, was the sole surviving member of the testator’s family but it was admitted that she was, and for more than fifty years had been, a lunatic, though she had not been declared to be so under Act XXXV of 1858; it appeared that her lunacy was not congenital. She sued by the Collector of South Canara, the agent for the Court of Wards:

Held, (1) that the plaintiff was not excluded from inheritance by reason of lunacy under Aliyasantana law, and the will, in favour of the defendants, was invalid;

(2) that the court of Wards had power to take cognizance of the plaintiff's case under Regulation V of 1804:

* Appeal No. 80 of 1887.
(3) that although the Court of Wards should ordinarily obtain a declaration under Act XXXV of 1858 in cases where the lunacy of a ward is open to question their failure to do so in the present case was not fatal to the suit;

(4) that Civil Procedure Code, Section 464, was accordingly applicable to the case;

(5) that the appointment of the Collector, as guardian to the plaintiff, was legal and valid.

In deciding what was the extent of the property which the plaintiff was entitled to inherit under the above rulings, certain documents adduced as evidencing partition of the family property were held to evidence merely arrangement for separate enjoyment.

[R., 22 C. 864 (1869); 10 O.C. 373.]

APPEAL against the decree of C. Venkobachariyiar, Subordinate Judge of South Canara, in original suit No. 20 of 1885.

The plaintiff, Puttamma, was sole surviving member of a wealthy Jain family known as the Konda family, governed by the Aliyasantane law. The last member of the family, who had possession and management of the family properties, was one Manjappa Shetti alias Mallanna Shetti, who died on the 18th November, 1882. A few days before his death he made a will bequeathing all the properties in his possession to his wife and children. Sanku, defendant No. 1, was Mallanna's widow, and defendants Nos. 2 to 4 were his children, defendant No. 2 being a son by a former wife, and defendants Nos. 3 and 4, his daughter and minor son by defendant No. 1. Defendant No. 2 was enjoined by the will to protect the plaintiff who was therein described as a person of unsound mind.

The present suit was brought by the Collector of South Canara as agent of the Court of Wards, on behalf of the plaintiff who was admitted by all parties to have been a lunatic for many years past and who still was of unsound mind. It appeared that, in May 1883, the Collector petitioned the District Court to make an inventory of the effects of which Mallanna died possessed and to transfer them to his control, but no order for transferring possession to the Collector was passed. The plaintiff alleged that [291] the property bequeathed to the defendants was vested solely in the plaintiff, that the deceased had merely a right of maintenance therein, and that he was incapable of transferring the same by will. The suit was for recovery of this property.

The defendants pleaded that as plaintiff, who had long been, and continued to be, a lunatic, had not been adjudged a lunatic by the District Court in accordance with the provisions of Act XXXV of 1858, the Court of Wards' Regulation did not apply to her case; that, since the passing of the above Act, it was not competent for the Court of Wards or any person to bring a suit on behalf of a lunatic, until the question of lunacy had been adjudicated upon, and the Court of Wards or such other person had been appointed manager under the Act; that the question of plaintiff's lunacy had not been so adjudicated on, nor had the Collector been appointed agent or manager in conformity with the provisions of the Regulation. It was further pleaded that as plaintiff had been a lunatic for a period of 50 years, she was under a disability which debared her right to the estate or to the possession thereof, and that consequently Mallanna Shetti had the right, as last surviving member of the family, to dispose of the property by will. It was also alleged that a division had taken place in the family in 1844 and again in 1866, whereby the interests of plaintiff's branch were severed from those of the branch represented by
Mallanna Shetti. It was further contended that only a portion of the
plaint property belonged to the Konda (plaintiff's) family, a considera-
ble portion being the self-acquisition of Mallanna. The parties were, lastly, at
issue on minor questions regarding the ownership of some of the items of
property claimed in the plaint which are not of importance for the pur-
poses of this report.

The Subordinate Judge passed a decree for the plaintiff.

Defendants Nos. 1 to 4 preferred this appeal.

Mr. Johnstone, Bashiyan Ayyangar and Narayana Rau, for appellants
The Advocate-General (Honorable Mr. Spring Branson); Sankaran
Nayar, Krishnasawmi Ayyar and Gopala Rau, for respondents.

"JUDGMENT."

This is an appeal by defendants Nos. 1 to 4 from the decree of the
Subordinate Judge of South Canara awarding [292] to plaintiff possession
of extensive properties, moveable and immoveable, to which the Subor-
dinate Judge has found that plaintiff is entitled as sole owner, she being
the last surviving member of an Aliyasantana family.

The appellants are the wife and children of one Manjappa alias
Mallanna Shetti, the last surviving male member of plaintiff's Aliyasantana
family, who died in 1882.

Plaintiff is a lunatic whose estate has been taken charge of by the
Court of Wards under the orders of Government, and the suit was brought
on her behalf by the Collector of South Canara as Agent of the Court of
Wards.

The first objection taken by the appellants is that "the Court of
Wards' Regulation V of 1804 is inapplicable to the plaintiff's case, the
sections relating to lunatics therein not being in force." This objection
rests on the fact of Sections 6 and 7 of Regulation V of 1804, so far as they
related to lunatics and idiots, having been repealed by Act XXXV of 1858,
which prescribes the procedure to be adopted for ascertaining whether a
person alleged to be a lunatic is such or not. Section 2 of Regulation V of
1804, which gives the Court of Wards "full power and authority to take
cognizance of all cases of property devolving to heirs incapacitated by
minority, sex or natural infirmity" from administering their own affairs,
has not been repealed. That the phrase "natural infirmity," as used in
the Regulation includes also lunacy and idiotism, is apparent from Sec-
tion 5, which declares incompetent to manage on their own behalf persons
"incapacitated by lunacy, idiotism or other natural infirmity." Moreover
Section 9 of Act XXXV of 1858 expressly recognizes the authority of the
Court of Wards to take charge of the estate of a lunatic.

In ordinary cases, where the lunacy might be open to question, the
Court of Wards ought no doubt, in the first instance, to get a declaration
under Act XXXV of 1858. But where, as in this case, it is admitted on
all hands that plaintiff is a lunatic, their not having done so cannot be held
to be fatal to the suit.

The next objection taken by the appellants is that "the reason alleged
in the plaint for making the provisions of the Regulation applicable to the
plaintiff, viz., that she is disqualified to manage her own affairs by reason
of her sex, is inconsistent with the allegation that she is governed by
Aliyasantana Law." As to this, it is to be observed that though the mere
fact of plaintiff being a female [293] would not be sufficient for holding
her to be disqualified to manage her affairs; at the same time, the mere
fact of a woman being governed by Aliyasantana Law is no reason for holding that she might not be disqualified by sex alone within the meaning of the Regulation. It must depend in each case on the capacity to manage. If an Aliyasantana woman is not possessed of sufficient capacity to manage her estate, the estate can be taken under the management of the Court of Wards on the simple ground of incapacity by sex. In the present case, however, there is admittedly incapacity by lunacy; and this circumstance is sufficient, as has been held above, to give the Court of Wards power to assume management of the estate with the sanction of Government. The second objection need not, therefore, be further considered.

It is next contended that "plaintiff who is admittedly a lunatic not having been adjudged so under Act XXXV of 1858, she cannot sue," and, it is added, "Section 461 of the Code of Civil Procedure has no application." It has already been held above that as plaintiff "is admittedly a lunatic," the mere absence of a formal adjudication to that effect need not, in the circumstances of this case, be held to invalidate the charge assumed by the Court of Wards with the sanction of Government; and Section 464 of the Code of Civil Procedure expressly excludes from the operation of Sections 460 to 462, and consequently also of Section 463 "any minor or person of unsound mind, for whose person or property a guardian or manager has been appointed by the Court of Wards,"—and the Collector by whom the present suit is brought on behalf of the lunatic plaintiff, is the guardian so appointed.

It is, however, next objected on behalf of defendants that "the appointment of the Collector as guardian is not legal and valid, and the plaintiff not being properly represented, her suit is not maintainable."

We see no reason for holding that the appointment of the Collector as guardian of the lunatic plaintiff is not legal and valid. A similar objection seems to have been taken before PARKER, J., in Beresford v. Ramasubba (1), and was overruled for reasons to be found at page 199 of the report. This objection must, therefore, also be disallowed.

The next objection is that as plaintiff has been "of unsound mind" for more than fifty years before the date of the suit, she has lost all her right to inheritance, or to the possession of the plaint properties, or to succeed to their management.

There is no question here of the plaintiff's right to manage the properties. She is admittedly incapacitated for that. The only question is whether the property is hers, and such as should be managed on her behalf by the Court of Wards. Her right to the property of the Aliyasantana family, of which she and the deceased Mallanna Shetti were both members, accrued at the time of her birth.

Her insanity is admittedly not congenital. Consequently no question arises as to whether she is disentitled to the property in consequence of having been born a lunatic. It having once vested in her, she cannot be held to have been divested of it by her subsequent lunacy.

This disposes of all the preliminary objections.

We now have to consider what is the family property to which plaintiff is entitled.

And the first question is, do Exhibits I and M evidence final and absolute divisions of the family property between plaintiff's branch and that of Mallanna Shetti? The earliest of these in date is Exhibit I (7th

(1) 18 M. 197.
It is divided into two parts marked respectively Exhibits 1a and 1b. The former showing how the debts due to the family were divided, and the latter the immovable property, namely, into three shares, one share being allotted to be enjoyed by Manjappa Shetti, another by his nephew Nema Shetti, and the third by his sister Chandappamma. The circumstance of Manjappa Shetti, a brother, being given a share, is of itself favorable to the supposition that the division was for peaceful and separate enjoyment merely, and not a final and absolute partition of the property. However, this is further apparent from the stipulations in Exhibit 1b against any of the sharers wasting the property "under any circumstances," and that, should any sharer sell such properties, he shall make up for the same by buying other properties; and that in case of any of the properties held in mortgage being redeemed, other suitable property shall be acquired with the redemption money. Moreover, it is expressly provided in Exhibit 1b "that the property enjoyed by Manjappa Shetti or property enjoyed by Nema Shetti shall be enjoyed together, after the male descendants of both, by the descendants of the female Chandappamma." It is pointed out on behalf of appellants that the present plaintiff, Puttamma, is not even mentioned in Exhibit 1b and was in fact excluded, because only the male members of the two branches are mentioned as entitled to possession of the shares allotted to Nema Shetti’s branch just as is done in the case of Manjappa Shetti’s share. It must here be noticed that the Manjappa Shetti referred to in Exhibit I was the grand-uncle of the lately-deceased Manjappa alias Mallanna Shetti, who will hereafter always be spoken of in this judgment as Mallanna Shetti: also that plaintiff Puttamma is a niece of the Nema Shetti mentioned in Exhibit I. It is no doubt true that no mention is made of the plaintiff in Exhibit I, and her very existence is ignored in so far as she might have been an obstacle to Chandappamma’s branch’s right to possession of the share allotted to be enjoyed by Nema Shetti concerned. But plaintiff was not, and, being a lunatic, could not be a party to the document in question. It is not denied that she has all along been maintained as a member of the family. Consequently her not being mentioned in Exhibit I is of no consequence one way or the other. Exhibit I was held by this Court in 1863 (see Exhibit A) to be "plainly an agreement simply for the separate management by each of the three contracting parties of a separate portion of the family property," and, as was then remarked, "the provisions in the agreement against waste and alienation, for the postponement of the succession of Chandappamma’s issue until the decease of the males, and the right of survivorship reserved to them, show with abundant clearness that there was no division." The above was the finding of this Court in an appeal preferred by the deceased Mallanna Shetti from an order of the Civil Court of South Canara granting to Nemaya Shetti (a party to Exhibit I and one of the above Mallanna Shetti) the certificate under Act XXVII of 1860 for collection of debts due to Doddra Manjappa Shetti, who was also a party to Exhibit I. The decision of this Court in Exhibit A was that the grant of the certificate to Nemaya Shetti was right, "the two opposing claimants being members of an undivided family."

Exhibit M is the other document on which defendants rely as evidencing partition. It is dated 16th December 1866. The parties to it are the abovementioned Nema Shetti and his nephews Brahmaya Shetti and Nemaya Shetti on the one part, and Chandappamma’s daughter Devappamma and the latter’s sons Manjappa Shetti (i.e., Mallanna Shetti
now deceased) and Aparajita Shetti on the other part. It refers to the prior agreement Exhibit I and to the disputes that had arisen and the death of the senior Manjappa Shetti (see Exhibit A above noticed), and then says "after Manjappa Shetti one of us, Nema Shetti, is now Yajaman of the family" and entitled to manage all the religious ceremonies, keeping in his possession the lands set apart for that purpose in the former Tahanama (agreement). It then divides between the two contracting parties the lands, which were in the enjoyment and under the management of the deceased Dodd Manjappa Shetti at the time of his death," providing, however, that "the kudtala for the assessment of all these lands shall be in the name of the Yajaman Nema Shetti" though each party is to pay to the Government separately the assessment of the lands in the possession of each. It next provides that "in case of alienating under urgent necessity" either the lands then dealt with "or any of the lands existing at present in the family, except lands alienated and given upon redemption from mortgage out of the family lands mentioned in the former Tahanama (Exhibit Ib), all should join and make the alienations." It is then stipulated that each branch shall separately enjoy the lands now divided, as also "those previously" divided, and awarded to each, and that "during the lifetime of the members of one branch there shall be no obstruction from the members of the other branch;" but in case of lands held on mortgage being redeemed from either branch, it is provided just as in Exhibit Ib that "from the mortgage amount recovered" other land shall be acquired, and that if any of the multi lands are sold in conformity with the above Tahanama," other land proportionate in extent shall be acquired; "but these amounts shall not be wasted;" and, finally, there is a provision for all the members of the two branches joining together in making an adoption for the purpose of continuing the family in case an adoption should be found necessary for the purpose. No doubt paragraph 5 of Exhibit M reserves to the members the exclusive right of disposing of its self-acquired properties; and such "self-acquisitions" are also referred to in paragraph 6. But it is clear that the properties divided under Exhibit M, viz., the properties of which Dodd Manjappa Shetti was possessed at the time of his death, were dealt with, and were intended to be retained as family property; and plaintiff, the now sole surviving member of the family, is entitled to all the properties divided under Exhibits Ib and M, and also to any properties that may have been since acquired in lieu of such of those lands that may have been sold under urgent necessity or with money received in redemption of any such lands which may have been held in mortgage.

Before leaving Exhibit M, it must here be noticed that it expressly provides (paragraph 8) for the present plaintiff, Puttamma, being maintained by Nema Shetti and his nephews "who are her brothers."

The same paragraph of Exhibit M also provides that Arakamma, the younger sister of Chandappamma, should be maintained by her niece Devappamma and the latter's children. This Arakamma is also not mentioned in the earlier Tahanama, Exhibit Ib. It is not alleged that she was a lunatic. Consequently there is no reason for holding non-mention in Exhibit Ib to mean exclusion as has been suggested with regard to plaintiff. Exhibit M, like Exhibit I, is evidence merely of an arrangement for separate enjoyment, and not a final partition.

The next question for consideration is whether any, and if so, which of the properties specified in the schedules attached to the plaint are
"self-acquisitions" either of Nema Shetti or of defendants Nos. 1 to 4, to which these appellants are entitled.

The items of debt and property, respectively, claimed by defendant No. 2 as his own self-acquisitions are dealt with by the Subordinate Judge in paragraphs 23 and 24 of his judgment.

Of the debts, item No. 47 is found to have been part of assets due to plaintiff's branch of the family to which Mallanna succeeded on the death of plaintiff's brother. Debt item No. 54 and property item No. 122 were acquired by defendant No. 2, after his father's death, and when he was in possession of the family property; and defendant No. 2 has not proved that the money paid was his own. The above items, as also Nos. 23, 28, 33, 35, 46, 47, 55, 68 and 104 of the debts, have not been pressed at the hearing of this appeal; and as to the remaining items, both of debts and properties, the Subordinate Judge has given sufficient reasons for his finding, that the documents were in fact obtained by Mallanna in his son's name, the money being that of Mallanna's family.

Item No. 1 of the debts is a sum of Rs. 39,999 due under Exhibit CCLXI. This amount is claimed by defendant No. 1, in whose name the document stands. But it is seen from the document itself that no less than Rs. 24,478, of the Rs. 39,999, constituted a pre-existing debt due to first defendant's husband, Manappa Shetti alias Mallanna. There is, as observed by the Subordinate Judge, no evidence of the amount having been paid by defendant No. 1 to her husband; and as to the remaining Rs. 15,521, which is alleged to have been paid in cash, the Subordinate Judge is justified in finding that it must also have been the first defendant's husband's money, as first defendant's story of her having obtained this money from her mother is not at all entitled to credit.

The next question is whether any, and, if so, which of the plaint items were the self-acquisitions and separate property of Mallanna? And in this connection, it has first to be considered whether it is a fact, as contended by defendants, that even subsequent to the karar of 1844; and till his death in 1860, Dodda Manappa Shetti continued in management of the share allotted to his sister Chandappamma. The question has been discussed at length in the Subordinate Judge's judgment, and we see no reason for differing from the conclusion arrived at by him, viz., that it was not Dodda Manappa Shetti, but Mallanna who managed on behalf of Chandappamma. It is admitted that Mallanna was the manager from 1860. The burden of proving that property acquired by Mallanna subsequent to 1844 was acquired independently of funds belonging to the family on behalf of whom he was managing is, therefore, doubtless on the defendants. As to Mallanna's having been possessed of capital of his own, being the sale-proceeds of a gold ornament worth about Rs. 1,000, given to him by his father, as observed by the Subordinate Judge, there is only one witness who deposed to this effect, and good grounds are stated for disbelieving his evidence. The only other indication of Mallanna's being possessed of money prior to 1844 is to be found in Exhibit CXXX, which is the judgment in a suit brought by the said Mallanna in 1848 to recover from one Matterjiga a sum of Rs. 90-2-0 as due under a bond dated 1841. The defendant in that suit denied the debt. However, a decree was passed against him. As far as the evidence goes, this is the only transaction in money had by Mallanna prior to 1844; and as he did not obtain his decree till some five or six years after he began to manage the property of his branch of the family; and as there is no evidence that that money even if realized (as to which also there is no
evidence), was applied to the purpose of acquiring any of the plaintiff properties; and also considering the smallness of the amount, the evidence afforded by CXXX proves nothing: and the Subordinate Judge is justified, therefore, in holding that none of the property or outstanding debts alleged by defendants to be Mallanna's self-acquisition is proved to have been acquired by him by means other than what he was possessed of as manager of his branch of the family.

It is next contended on behalf of the defendants that the lands Nos. 100, 123, 126, 128, 130, 132, 135 and 139 to 144 in Schedule I being self-acquisitions of Dodd Manjappa Shetti and lands Nos. 1, 2, 9, 10, 13, 14, 25, 28, 29, 43, 47, 49, 51, 55, 56, 63, 81 to 86, 88, 94, 106, 107 and 112 being the self-acquisition of Dodd Nema Shetti and his nephews, the plaintiff, who was admittedly a lunatic when succession opened out to her with respect to all these properties, has no right whatever to them. No authority has been shown in support of the contention that a lunatic is excluded from inheritance under the Aliyasanta Law. Even under the Hindu Law there is a difference of opinion as to whether in order to exclude from inheritance lunacy must not be congenital. In any case, the test in such cases under the Hindu Law is whether the defect is such as would be sufficient to prevent the claimant from offering the proper funeral oblations. Right of succession under the Aliyasanta Law is in no way dependent on capacity to offer funeral oblations. This objection must therefore be held to be invalid. For the same reason the contention that Mallanna's will ought to be upheld on the ground that he was sole owner of the properties dealt with theretofore must fail; for plaintiff's lunacy not being a disqualification for inheritance, Mallanna was not sole owner, and as a result there is no power to dispose of the family property by will.

The next objection to the decree is as to Rs. 1,000 directed to be paid by defendants on account of moveables alleged to have come into their possession. The appellants contend that there is no evidence of their being in possession of these moveables. This contention appears to be well founded. This part of the Lower Court's decree must be set aside.

The arrangement evidenced by Exhibit CCLXII is open to all the objections stated in paragraphs 72 and 73 of the Subordinate Judge's judgment. Moreover it cannot be binding on plaintiff who was not a party to it.

The objections taken in paragraphs 12 and 16 of the memorandum of appeal are withdrawn as no longer existent, the decree having been corrected in the Lower Court. Those mentioned in paragraphs 14 and 16 are not pressed at the hearing. There then only remains the objection as to costs, appellants contending that they ought to have been allowed their costs on the portion of the plaintiff's claim which was disallowed. No reason has been given for disallowing these defendants the costs now claimed, to which they seem to be entitled. The Lower Court's decree must be altered accordingly.

As to the additional grounds of appeal, the first is disposed of by the finding alone that Mallanna's acquisitions were made when he was manager on behalf of the family; and the other, as to the calculation of costs, was not pressed at the hearing.

This disposes of the appeal.

There remains for consideration the objection taken by the respondent under Section 561 of the Code of Civil Procedure to that part of the decree which disallows plaintiff's claim to lands Nos. 104, 105, 125, 127, 131 and 138 in Schedule I. These lands were, it appears, acquired by
Mallanna’s younger brother. Sajip Nema Shetti, a junior member living apart from the family. The mere fact of Dodd a Manjappa’s land being at the time under the management of this Nema Shetti is not sufficient to justify our holding that these lands were acquired with family funds. It is quite as likely that the acquisitions were made out of the allowances made to him by Dodd a Manjappa, as remuneration for his management of his property. The burden of proof is clearly on the plaintiff and we agree with the Subordinate Judge in finding that she has failed to make out a case entitling her to these lands.

Being Sajip Nema Shetti’s self-acquisitions, they became on his death the property of his branch of the family; and Mallanna, as the last member of that branch, could make a valid disposal of the same. This objection of the respondents must therefore be disallowed.

[301] The Lower Court’s decree must be modified by striking out the part which directs defendants to make over to plaintiff movable properties to the value of Rs. 1,000; and also by awarding to defendants their costs on the amount of the claim that has been disallowed (including these Rs. 1,000), and directing these costs to be paid out of the estate in dispute. It will be confirmed in other respects.

Each party must pay the other’s costs of this appeal proportionate to the amounts now allowed and disallowed and plaintiff must pay defendant’s costs of opposing the objections taken under Section 561.

14 M. 301 (F.B.)

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Wilkinson.

KRISHNAN (Plaintiff), Appellant v. VELOO AND OTHERS
(Defendants Nos. 1 to 3), Respondents.*

[19th December, 1888, 10th January, 1889 and 13th March, 1891.]

Civil Procedure Code, Section 13—Res judicata— Mortgage—Transfer of interest—Appointment of a creditor as agent to collect rents and appropriate part towards the debt.

In a suit to redeem a kanom on certain land, the jenu of a devasom in Malabar, it appeared that the plaintiff held a melkumom in respect of the same land executed to him (subsequently to the date of the kanom sought to be redeemed) by defendant No. 3, the samudayam of the devasom. Defendant No. 3 represented one Chitimaram, in whose favour the Uralers had, in 1741, executed a document appointing him samudayam and stating that they had received from him a kanom of 18,000 fanams on the devasom properties and providing that he should appropriate part of the rents towards the loan. It appeared that in a suit to eject tenants, the Uralers had sued as co-plaintiffs with the samudayam; in subsequent suits, however, two of the Uralers had sued other tenants for rent and the samudayam for an account; both of these suits were dismissed on second appeal, and in the judgments of the High Court the samudayam was described as a mortgagee in possession:

Held, (1) on its appearing that no opinion was expressed in the former suits as to the construction of the document of 1741 that the former decisions had not the force of res judicata;

[302] (2) in view of the conduct of the parties and on the terms of the document of 1741 that the samudayam was not thereby constituted a mortgagee in possession and that the melkumom set up by the plaintiff was invalid.

[F., 14 M. 812.]

* Second Appeal No. 40 of 1888.
SECOND appeal against the decree of V. P. deRozario, Subordinate Judge of South Malabar, in Appeal Suit No. 563 of 1887, reversing the decree of V. Kelu Eradi, District Munisif of Nedunganad.

Suit to redeem a kanom on certain land, the jenm of a devasom, in Malabar. The kanom was dated 21st Karkitagom 1023 (A.D. 1848) and was executed on behalf of the devasom by one Chitambara Pattar, deceased, to the predecessors in title of defendants Nos. 1 and 2. The plaintiff claimed title under a melkanom deed in respect of the same land dated 2nd July 1885 (20th Mithunam 1060) and executed to him by defendant No. 3, the brother and representative of Chitambara Pattar.

Chitambara Pattar and defendant No. 3 were successively samudayams of the devasom, and it was claimed that they had power to create the melkanom now sued on by virtue of an instrument dated 916 (A.D. 1741) and therein described as a “test granted by the Uralers to Chitambara Pattar.” In this instrument, the terms of which are set out in the second paragraph of the following order of reference, Chitambara Pattar was stated to be appointed samudayam of the devasom and a loan by him to the Uralers “on the devasom properties” was recited, and it was provided that part of the rents of the properties should be appropriated by him towards the interest on the loan.

The plaintiff contended that the above instrument constituted Chitambara Pattar a mortgagee with possession of the lands in question, and relied in support of this contention upon certain judgments of the High Court (summarized by their Lordships as appears below), in which the samudayam was so described. In the cases then before the Court the Uralers were the plaintiffs, and in the one certain tenants and in the other Chitambara Pattar’s successor were the defendants, but no opinion was therein expressed upon the construction of the instrument of 916 (A.D. 1741.)

The defendants contended that the instrument in question did not create any mortgage lien in favour of Chitambara, and gave him no power either to execute a valid kanom over the devasom properties nor to eject tenants. It appeared that in 1839, when [303] it was sought to obtain a decree to eject a tenant, the Uralers and the samudayam sued as co-plaintiffs.

The District Munisif passed a decree as prayed, which was reversed on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and Desikacharyar, for appellant.

Mr. Wedderburn, for respondents.

This second appeal having come on for hearing before Kernan and Wilkinson, JJ., their Lordships made the following order of reference to the Full Bench:

Order of Reference to the Full Bench.—The plaintiff (appellant) alleges that a melkanom in respect of certain lands was granted to him by defendant No. 3 on the 2nd July 1885, Exhibit A, and seeks to redeem an alleged prior kanom of the same lands dated Karkitagom 1023, (A.D. 1848) vested in respondents Nos. 1 and 2, granted by Chitambara Pattar, on behalf of the Puthukulangarai devasom.

The lands are the jenm of the devasom. In 916 (A.D. 1741) the Uralers of the devasom borrowed 18,000 fanams from Chitambara Pattar, and executed to him a document in the following terms:—

"Test granted by the Uralers to Chitambara Pattar. You are appointed samudayam of Puthukulangarai devasom and we have received
from you a kanom of 18,000 fanams on the dehasom properties; you are to appropriate from the rents 1,800 paras, for interest on the money due to you, and after deducting the amount and the interest of 400 paras allowed to tenants for their kanom amount (8,000 fanams) from the gross rent of 2,850 paras of paddy due to dehasom, with the balance defray the expenses of the dehasom, and keep the accounts." After the execution of that document Chitambahara Patter acted as samudayam until his death, and as the debt of 18,000 fanams has not been redeemed, the interest of Chitambaharam is now claimed by respondent No. 3, who represents Chitambaharam's estate.

The respondents Nos. 1 and 2 contend that the document of 916 (A.D. 1741) was not a kanom, that is a mortgage, and gave no power to Chitambaharam to execute a kanom on the lands over which he was appointed samudayam nor any power to eject tenants, and that under it Chitambaharam had only power to receive [304] rents and apply them to pay the expenses of the dehasom, and to apply the surplus to pay his debt, fanams 18,000 and interest.

The document is not in the form of an ordinary kanom. It does not purport to grant or convey any lands or estate in land to Chitambaharam. The Uralers apparently reserved the estate and only gave Chitambaharam power to receive and apply the rents. No doubt Chitambaharam's representative has a right to retain the receipt of the rents as long as his debt is not fully paid off. There is even no hypothecation of the lands and there being no grant of the lands or of any estate in them, the question is, had defendant No. 3 any power to grant a melkanom to the plaintiff, and thus enable him to evict the tenant in possession and to substitute a new tenant? It is contended by the appellant (plaintiff) that the effect of the document of 916 (A.D. 1741) was that Chitambaharam was thereby made mortgagee in possession. If such was the effect of the document, then apparently respondent No. 3 would have had power to grant the melkanom to the plaintiff. In two cases decided by the High Court on second appeal, the samudayam, claiming under the document of 916, (A.D. 1741) was treated as mortgagee in possession. But it is necessary to state shortly the facts of each case and see what was really intended to be decided.

The first case was Muppil Nayar v. Shathanatha Patter (1). There two of the Uralers were plaintiffs and stated a demise in 1028 to two persons, defendants, of certain lands (not those now sought possession of, but others) and to recover rent and possession of the lands. Defendants Nos. 1 and 2 in that suit were the tenants. Defendant No. 5 there was the son of Narayana representing the interest in the document of 916 (A.D. 1741). Defendants Nos. 1 and 2 set up title under Chitambaharam. Defendant No. 5 set up a title as the mortgagee under the document of 916 (A.D. 1741). The Munisif having held that Chitambaharam was only entitled to recover the rents, made a decree for payment of rent to defendant No. 5, samudayam, and for possession to be given to the plaintiff and defendant No. 5 jointly. On appeal the District Judge on the 23rd of August 1880 dismissed the suit holding that Chitambaharam was entitled to continue in the receipt of rents until his debt was paid. In Muppil Nayar v. Shathanatha Patter (1) this Court [305] in giving judgment said that the position of defendant No. 5, as proprietary samudayam, did not out the right of the Uralers to redeem the kanom demise to defendants Nos. 1 and 2 in that

---

(1) Second Appeal No. 816 of 1880, unreported
suit but that defendant No. 5 is found to be mortgagee in possession under the document of 916 (A.D. 1741), and the plaintiffs, Uralers, would not be entitled until that mortgage was redeemed to grant tenancies or mortgages with possession on the same properties and added:—Defendant No. 5 as mortgagees in possession would be alone entitled to exercise the right of a landlord upon the property. On this ground they say the contention raised is unsound. The appeal was dismissed.

It may be questioned whether this Court was right in deciding that Chitambaran had been found to be mortgagee in possession or that he was so in aw or fact. It is also open to question whether such decision was necessary in the case as Chitambaran was clearly entitled to retain possession until his debt was paid.

The next case is Muppil Nayar v. Shathanatha Patter (1). In that case, original suit No. 47 of 1884, two Uralers of the devasom sued defendant No. 3 in this case and two others of his family for an account of the receipt of rents under the document of 916 (A.D. 1741). The defendants then set up the decision in Muppil Nayar v. Shathanatha Patter (2) that they were mortgagees and possession and that this debt was not paid and they were entitled to retain possession until paid. The Subordinate Judge and District Judge on appeal dismissed the suit on the ground that though the plaintiffs were entitled to redeem, they should have sued for that relief and not merely for account and injunction. Both Courts treated the document of 916 (A.D. 1741) as a mortgage, probably acting on the judgment in Muppil Nayar v. Shathanatha Patter (2). In Muppil Nayar v. Shathanatha Patter (1), the Court gave judgment as follows, 5th August 1886:

"The main ground of contention is that the District Judge has treated the matter as res judicata that defendants are mortgagees in possession and that such is not the case. The plaintiffs say that no mortgage was created by Exhibit I and that defendants are not mortgagees in possession, but agents bound to render an account of their trust."

[306] "We do not find that the District Judge has treated the matter as res judicata, but he has found as a fact upon the evidence that defendants are mortgagees in possession and this we think he was entitled to do. On reading the judgments of the District Munisif and District Judge which gave rise to Muppil Nayar v. Shathanatha Patter (1), we find that it was never really denied by the plaintiffs that defendant No. 5 was mortgagee in possession. On the contrary they brought evidence to show that the mortgage amount had been satisfied and that defendant No. 5 had resigned the samudayamship and his rights under Exhibit I, supporting these pleas by documents which the Court found to be forgeries. It is not open to them now to come into Court and say defendants are merely agents bound to render accounts of their trust, tracing back defendants' title to Exhibit I.

"We think the decision of the Courts below was right and dismiss this second appeal with costs."

In this judgment also it is open to question whether this Court was right in deciding that the Judge found the defendants are mortgagees in possession, and if he did, whether this Court was right in holding that the District Judge was entitled so to do, and likewise it may be doubted whether such decision was necessary on the facts, as it was clear that the

(1) Second Appeal No. 299 of 1886, unreported.
(2) Second Appeal No. 816 of 1880, unreported.
Uralers were not entitled to sustain the suit for account alone without offering to redeem.

In neither of the above cases does it appear that the attention of this Court was brought to another decision of this Court in Satta Nathan Patter v. Kunhunni (1), dated 7th March 1873. That was an appeal in original suit No. 131 of 1872, in which the plaintiff therein stated that his deceased brother, Chitambaran, demised to certain of the defendants on kanom certain lands, that the samudayamship was hereditary in the family, and that he had managed the business and he sued to recover rents and possession of the lands demised. The tenant, defendant, denied the plaintiff's right to eject upon the ground that the original document only constituted Chitambaran a collector of the rents. Both the Lower Courts decided on the terms of the document of 916 (A. D. 1741), that the plaintiff, the successor of Chitambaran, was not entitled to evict a tenant, but was only entitled to recover the rent. The plaintiff in that suit appealed to this Court in Satta Nathan Patter v. Kunhunni (1), but that appeal was dismissed on the 7th of March 1873.

The question for the Full Bench is whether respondent No. 3 the samudayam, had power, under the instrument of 916 (A. D. 1741), to create the alleged melkanom of the 2nd July 1885 sued on in this suit.

This case having come on for hearing before a Full Bench (The Honorable Mr. Justice Muttusami Aiyar, the Honorable Mr. Justice Parker and the Honorable Mr. Justice Wilkinson) the Court delivered judgment as follows:—

JUDGMENT.

The question for the Full Bench is whether the third respondent, the samudayam of Puthukulangarai devasom, had power under the instrument of 916 or A.D. 1741 to create the melkanom of the 2nd July 1885 upon which this suit was brought. The appellant (plaintiff) sued to recover from the first and second respondents ten items of lands together with arrears of rent. The lands in question belong to a Hindu temple called Puthukulangarai Bhagavathi devasom in the Nedunganad taluk of South Malabar. In 1741 the Uralers or trustees of the institution executed in favour of the third respondent's predecessor, a "teet" or document in respect of devasom properties and their management, and in July 1885 the third respondent granted a melkanom to the appellant. The first and second defendants are the parties in possession of the lands in dispute which have been demised to them on kanom on behalf of the devasom. Unless the document of 1741 created a mortgage with possession, the third respondent, it is conceded, would not be competent to grant a melkanom which always presupposes a kanom. The point therefore for consideration is whether the document of 1741 created a kanom or a mortgage with possession. It is in these terms:—

"Teet granted by the Uralers to Chitambara Patter: You are appointed samudayam of Puthukulangarai devasom and we have received from you a kanom of 18,000 fanams on the devasom properties. From the gross rent of 2,850 paras of paddy due to the devasom, you are to appropriate 1,800 paras to [308] interest on the money due to you and after deducting the amount and 400 paras of paddy allowed to tenants for interest on their kanom amount, 8,000 fanams, you are to

(1) Second Appeal No. 806 of 1872, unreported.
defray the expenses of the devasom with the remainder and keep accounts."

The document is not framed like an ordinary kanom document and there are no words of demise on kanom and there is no indication of any intention to transfer property or right of possession. It refers first to Chitambara Patter's appointment as samudayam, and as such it was his duty to collect the rent due to the devasom, to pay such charges as the Uralers might direct him to pay, to appropriate the balance to the requirements of the devasom and to keep accounts. The document proceeds to authorise him only to do those things which a samudayam may do and is bound to do. It refers next to receipt of a kanom of 18,000 fanams on devasom properties and thereby certainly shows an intention to create a charge for the amount in favour of the samudayam. But the word kanom signifies, in its primary sense, only an advance made to a proprietor of land as security for rent or patom, and it is only when the context shows that it is used as a word of tenure in connection with demise of land, that it is accepted, according to local usage to denote, in its secondary sense, an intention to create a mortgage with possession at least for a term of twelve years. The material words in the document are "received a kanom of 18,000 fanams on devasom properties" and they do not show that the term kanom is used as a word of tenure. The document does not authorise the samudayam to grant, renew or redeem kanoms or to eject tenants in his own right, nor does it attach to the transaction any other recognised incident of a demise on kanom.

A samudayam may become a creditor of the devasom and his debt may also be secured on devasom properties. If the loan were subsequent to his appointment as samudayam, his right to collect rent, and even his possession as samudayam, could not be referred to his position as creditor so as to improve it into that of a mortgagee with possession. In the absence, then, of a clear indication of an intention to grant a kanom, it could make no difference that the loan and the appointment as samudayam were simultaneous, the test being always the true intention of the parties so far as it could be ascertained from the language of the instrument and the nature of its provisions.

[309] Apart from his interest as samudayam, the only beneficial interest which Chitambara Patter acquired by virtue of his loan consisted in its being charged on devasom properties and in the constitution of the rent which he was required to collect as samudayam into a fund from which he might pay himself the interest accruing due every year on the money lent by him. This may place the Uralers under an obligation to repay the debt before determining Chitambara Patter's power to collect the rent due to the devasom; but it is by no means sufficient to create between them the legal relation of mortgagor and mortgagee with possession.

In connection with the interpretation of ancient documents, it is usual to look at the conduct of the parties concerned under them when there was no disagreement between them. In this view it is not unimportant to refer to the allusion made by the Subordinate Judge to both the Uralers and the samudayam having jointly instituted a suit, so early as 1839, to eject a tenant.

As to the observations of the Court in the second appeals mentioned in the Order of Reference, the decision in Satta Nathan Patter v. Kuwhunni (1) is in accordance with the construction which we put on

(1) Second Appeal No. 800 of 1872, unreported.
the document of 1741. In that case both the Lower Courts held that on the terms of that document, the successor of Chitambaram was not entitled to eject a tenant, but was only entitled to collect the rent, and the High Court affirming their decisions, dismissed the second appeal.

As to Muppiy Nayar v. Shathanatha Patter (1) it arose from a suit instituted by two of the Uralers to recover rent from certain tenants and possession of the devasom land cultivated by them. The ground of claim was that as Uralers, they were entitled to collect rent and to eject tenants on behalf of the devasom. The Court of first instance held that under the document of 1741, the right to collect rent vested exclusively in Chitambara Patter and his successors, whilst the right to eject tenants vested jointly in the Uralers and Chitambara Patter. The Lower Appellate Court placed the same construction on the document adding, however, that equity would certainly require that before the samudayam [310] was ousted from his office, he should be repaid the advance made by him. But on second appeal, this Court observed that defendant No. 5 (samudayam) was found to be a mortgagee with possession under the document of 1741, and that he alone would be entitled as mortgagee in possession to exercise the right of a landlord and on that ground it dismissed the second appeal. In his judgment the District Judge referred to the suit of 1872 and adverted to the decision therein that the samudayam could not himself eject the tenants of the devasom under the document of 1741, remarked that it did not follow that the Uralers alone had that right. The remarks of this Court which adopted the finding of the District Judge went beyond its scope in describing the samudayam as a mortgagee in possession with the right of a landlord over the devasom property. The District Judge, as far as it can be gathered from his judgment, only found that the status of Chitambara Patter’s successor was substantially that of a samudayam with power as such to collect rent united to an equitable claim to be repaid his advance before that power was taken away from him. Nor was it necessary to say more for the requirements of that case.

As regards Muppiy Nayar v. Shathanatha Patter (2) it arose from a suit instituted by two of the Uralers against Chitambaram’s successor for an account of receipt of rents under the document of 1741 and for an injunction restraining the defendant from further interference with the management of devasom property. The suit was dismissed by the High Court and by the Lower Courts on the ground that as the Uralers were entitled to redeem, they should have sued for redemption and not simply for an account and for an injunction. The contention in the High Court was that the District Judge treated the matter as res judicata, that the then defendants, Chitambaram’s representatives, were mortgagees in possession whilst in reality they were mere samudayams bound to render an account to Uralers, and not mortgagees in possession under the document of 1741. This Court overruled the contention on three grounds, viz., (1) that the District Judge did not treat the matter as res judicata; (2) that he found as a fact upon the evidence that the defendants were mortgagees in possession, [311] and (3) that after bringing evidence to show, in the suit which gave rise to Muppiy Nayar v. Shathanatha Patter (1), that the mortgage had been satisfied, that defendant No. 5, Chitambaram’s legal representative, had

---

(1) Second Appeal No. 816 of 1890, unreported.
(2) Second Appeal No. 339 of 1880, unreported.
resigned his samudayamship and his rights under the document of 1741, and after supporting those pleas by documents which were found to be forgeries, it was not open to the Uralers to come into Court and say again that the then defendants were merely agents bound to render accounts of their trust, tracing back their title to Exhibit I (the document of 1741). Now, none of the three grounds touches the question of construction which is at present under our consideration; indeed no opinion was expressed upon it in that case. As regards the first, this Court only held that the matter was not declared to be res judicata by reason of the decision in Muppil Nayar v. Shathanatha Patter (1), and as to the third ground, it decided in substance that after the false averments referred to, the Uralers were not at liberty to get behind the prior decision and insist on the liability to account without repaying the amount advanced. With reference to the second ground, the finding of the District Judge was arrived at in advertence to the observations of the High Court in Muppil Nayar v. Shathanatha Patter (1) which, as already stated, went beyond the scope of the District Court's finding which it was intended to adopt in second appeal. As none of the prior decisions has the force of res judicata or is conclusive on the question of construction, we consider that the question referred for our opinion must be answered in the negative. [This second appeal having come on for final disposal, the Court held melkanom to be invalid and dismissed this second appeal with costs.]

18 M. 312.

[312] APPELLATE CIVIL.

Before Mr. Justice Muttasami Ayyar and Mr. Justice Best.

RAMAN AND ANOTHER (Plaintiffs), Appellants v. SHATHANATHAN AND OTHERS (Defendants), Respondents.*

[26th and 27th August, 1890.]

Civil Procedure Code, Section 13—Res judicata—Limitation—Creditor of a devasam placed in possession as samudayam.

In a suit brought by the Uralers of a devasam in Malabar to recover certain land in the possession of the defendant, it appeared that the defendant held under an instrument, dated 1741, whereby his predecessor in title was appointed samudayam and was authorized to appropriate part of the rents of the devasam properties to the interest on a loan made by him to the Uralers. Two of these Uralers had brought a previous suit against the defendant for an account of the rents received by him and for an injunction: that suit was dismissed on second appeal when the High Court described the defendant as a mortgagee in possession, but the question whether or not he was a mortgagee with or without possession was not then directly and substantially in issue:

Held, (1) that the status of the defendant was not res judicata, by reason of the judgment in the previous suit;

(2) that the Court having held, following Krishnan v. Veloo (3), that the defendant was not a mortgagee in possession under the instrument of 1741, the suit was not barred by limitation.

[R., 44 P.R. 1908.]

APPEAL against the decree of V. P. de Rozario, Subordinate Judge of South Malabar, in original suit No. 33 of 1887.

* Appeal No. 14 of 1889.

(1) Second Appeal No. 816 of 1890, unreported.

(2) 14 M. 301.
The plaintiff sued to recover, on behalf of himself and the defendant No. 52, as Uralers of the Puthukulangara Bhagavati devasom, certain lands the property of the devasom. He alleged that in M.E. 916 (A.D. 1741) the ancestors of plaintiffs and defendant No. 52 received from Chidambara Patter, the ancestor of the defendants Nos. 1 and 2, 18,000 fanams, that they appointed the said Chidambara Patter samudayam of the aforesaid devasom, with power to collect rents and pay himself interest on the advance, that the said Chidambara Patter was appointed to perform the devasom ceremonies, and to keep and render accounts, that accounts were actually rendered up to M.E. 1012 (A.D. 1837), but that, the affairs of the devasom being no longer properly managed, and the defendants refusing to render accounts, the plaintiffs were entitled to recover the property.

Defendant No. 1, amongst other defences, pleaded that the suit was barred by limitation, he being not only a samudayam but also a mortgagee under an instrument executed by the Uralers in favour of his predecessor in 1741.

The terms of this instrument of 1741, the construction of which was in question in Krishnan v. Yeloo (1) were as follows:—

"You are appointed samudayam of Puthukulangara devasom, and we have received from you a kanum of 18,000 fanams on the devasom properties. You are to appropriate from the rents 18,000 paras for interest on the money due to you, and after deducting the amount and the interest of 400 paras allowed to tenants for their kanum amount (8,000 fanams from) the gross rent of 2,850 paras of paddy due to the devasom with the balance defray the expenses of the devasom and keep the accounts."

It was also contended for the defendant that this status as mortgagee in possession was res judicata, by reason of the judgment of the High Court in Muppi Nayar v. Sathanatha Patter (2), in which he was so described. In that case two of the Uralers sued him for an account of rents received by him under the document of 1741 and for an injunction restraining him from further interference with the management of the devasom properties: that suit was dismissed, no opinion being expressed as to the construction of the abovementioned document.

The other defendants were in possession of the land as tenants.

The Subordinate Judge dismissed the suit holding that it was barred by limitation. The portion of his judgment, which is material in this connection, was as follows:—

"If this be treated as a suit falling under Article 148 of the second schedule of the Limitation Act against a mortgagee to redeem or to recover possession of immovable property mortgaged the suit is barred by Limitation as more than 60 years have elapsed since the date of the mortgage and there has been no written acknowledgment of the mortgage within this period. But it is contended that the mortgagee is also a samudayam or [314] agent, and that the suit therefore is really a suit by the Uralers of temple to recover the temple property from their agent who holds a mortgage on the property, that such a suit falls under Article 144 of the Limitation Act for possession of immovable property or any interest thereon not hereby otherwise specially provided for, and time begins to run when the possession of the defendant became adverse to the plaintiff, and that the possession of the agent with a subsisting

(1) See 14 M. 301.
(2) S.A. No. 239 of 1886, unreported.
"lien on the property was not hostile as long as the lien lasted and became hostile only when the amount of the lien was tendered and refused at the time of the suit, that to treat first defendant as a mere mortgagee is to ignore his liabilities as samudayam, that as mortgagee, he is not liable to surrender, 60 years having elapsed, as samudayam he is bound to surrender though twice 60 years and more have elapsed, that the samudayamship has not become merged or absorbed by the mortgage, that Article 148 of the Limitation Act therefore does not apply to this suit against defendant who is not merely a mortgagee but is also a samudayam, and that, as there is no special provision in the Limitation Act for a suit for recovery of immoveable property from a defendant who is a mortgagee as well as an agent, Article 144 applies and the suit is not barred.

I am unable to assent to this argument; first defendant is a samudayam who holds a kanom on the devasom property. If there were no bar by Limitation his liability to surrender in either capacity or both would be undoubted. But by the laches of the Uralers and the operation of the statute first defendant’s liability to surrender the properties which he held on mortgage ceased long ago. I can see no reason for saying that the fact that first defendant is a samudayam deprives him of his full rights as mortgagee. He is in the same position as any other mortgagee of devasom property who has been in possession for more than 60 years. I am of opinion that plaintiff’s claim to recover the devasom properties is barred. If plaintiff’s claim to recover the property is barred, his claim to recover the income is equally barred.

On the well known maxim, that the accessory follows the principal."

The plaintiff preferred this appeal.

Sankaran Nayar, for appellants.

Bhashyam Ayyangar and Sundara Ayyar, for respondents.

JUDGMENT.

[315] It is argued for the appellant that the suit is not barred by Limitation as found by the Subordinate Judge, and that Exhibit I did not create a mortgage with possession. In this connection our attention is also drawn to the decision of the Full Bench of this Court in Krishnan v. Veloo (1).

As regards the construction of Exhibit I we follow the decision of the Full Bench and hold that it did not create the relation of mortgagor and mortgagee with possession. Although the present plaintiffs—the Uralers—were not parties to that case, the reasons assigned in support of the opinion apply with equal force to the present case. The intention of Exhibit I clearly was, while appointing the first and second defendant’s grandfather as samudayai and authorizing him as such samudayai to collect the rent due to the devasom, to permit him to pay himself the interest due on the money borrowed from him. Under these circumstances no question of Limitation arises. Compare judgment of Morgan, C.J., in Valia Tamburatti v. Vira Rayan (2).

It is contended for the respondents that it has been decided in Muppi Nayak v. Sathanatha Patter (3) that first and second defendants are mortgagees with possession, and that consequently the question of construction is res judicata. This point was considered both by the Division Bench and Full Bench in the case above referred to and it was held that the

(1) See 14 M. 301.  (2) 1 M. 228.  (3) S. A. No. 239 of 1896, unreported.
matter directly and substantially in issue in the former suit was merely whether, on the facts there found, the then plaintiffs were entitled to eject defendants and ask for an account, without offering to pay the money due to the latter, and not whether they were mortgagees with or without possession. It was not then disputed that defendants Nos. 1 and 2 were samudayis. Their contention was that they were not mere samudayis, but that they also had a kanom right. It could not have been intended by the decision in that case to determine the status of samudayis, but only to concede to them the right of continuing to apply a portion of the rent received by them as such in payment of the amount due to them. See also Parthasuradi v. Chinnakrishna (1). We find therefore that the suit is not barred by Limitation.

As regards the account to be taken between the parties we have not been referred to any evidence which would justify us in disturbing the Subordinate Judge's finding on the 12th and 15th issues. The omission of the plaintiffs for so long a period to ask for an account supports the Subordinate Judge's finding.

We set aside the Lower Courts' decree and direct that on payment by plaintiffs to defendants Nos. 1 and 2 of the sum of Rs. 5,142-13-9, the latter do surrender the plaint property. We modify the Lower Courts' decree as above and confirm it in other respects except as to costs.

Under the circumstances of the case each party is directed to bear his own costs throughout.

---

14 M. 316 = 1 M.L.J. 89.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

VENKATAKACHARYULU (Plaintiff), Appellant v. RANGACHARYULU
AND ANOTHER (Defendants), Respondents.* [16th October and 18th November, 1890.]

Hindu Law—Marriage—A Brahman bride given in marriage by her mother without her father's consent.

A Vaishnava Brahman girl was given to the plaintiff in marriage by her mother without the consent of her father who subsequently repudiated the marriage. It appeared that the mother falsely informed the Brahman, who solemnized the marriage, that the father had consented to it.

Held, that the plaintiff was entitled to a declaration that the marriage was valid and to an injunction restraining the parents from marrying the bride to any one else.

[R., 19 A. 515 (516); 35 A. 265 (269) = 11 A.L.J. 272 = 18 Ind. Cas. 927; 22 D. 812 (817); 35 M. 728 (733) = 11 Ind. Cas. 570 (573) = 21 M.L.J. 500 = 10 M.L.T. 57 = (1911) 2 M.W.N. 285 (289); 16 C.P.I.R. 46 (49); 24 P.R. 1897.]

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 160 of 1889, reversing the decree of M. Ramayya, District Munsif of Bapatla, in original suit No. 376 of 1888.

The plaintiff alleged that the defendants' daughter was his wife and sued for an injunction restraining the defendants from marrying her to any one else.

* Second Appeal No. 1596 of 1889.

(1) 5 M. 304.
The parties to this suit were Vaishnav Brahman, and it appeared that defendant No. 2, who was the wife of defendant No. 1, had, without her husband’s permission, bestowed their daughter in marriage on the plaintiff; the marriage ceremony [317] was duly performed in a temple, the Brahman who officiated having been falsely informed by the mother that the father had consented to the marriage. The father since repudiated the marriage. It was found that the mother acted bona fide in the interest of her daughter and as her natural guardian desiring to provide her with a suitable husband.

The District Munsif passed a decree for the plaintiff as follows:

"This Court doth hereby order and decree that plaintiff is not entitled to have the present custody of his legally-married wife, the minor Venkatarangamma, till she attains her puberty; that she must now be under the charge and care of her parents, the defendants; that defendants be restrained from re-marrying her to any other person; and that each party do bear his or their own costs."

This decree was reversed on appeal by the District Judge who held that the marriage was void as being fraudulent by reason of the false statement made by the mother to the officiating Brahman.

The plaintiff preferred this second appeal.

Pattabhirama Ayyar, for appellant.

Mr. Ramanasami Raju and Krishnasami Ayyar, for respondents.

JUDGMENT.

This is a second appeal from the decree of the District Judge of Kistna who dismissed the appellant’s suit for an injunction restraining the respondents from marrying their daughter Venkatarangamma to any one else. The second respondent is the first respondent’s wife, and their daughter Venkatarangamma is a child aged now nine years. In June 1884 the mother bestowed the girl in marriage on the appellant and the marriage ceremony was duly solemnized in Narasimhaswami temple at Mangalagiri. The father, however, was not present during the marriage nor had the mother his permission to marry their daughter to the appellant. There was an averment in his plaint that such permission was granted, but both the Lower Courts have found that it is not proved. There was also some evidence in the case to show that the father was present when the girl first proceeded to the appellant’s house after the marriage and what is commonly known as the grihpravesam ceremony was performed, but the District Munsif discredited the evidence and the Judge apparently concurred in his opinion. The respondents [318] reside in the village of Srirangapuram and it appears that the father went on a visit to his disciples about June 1884 when the mother took the child to Mangalagiri and there married her to the appellant as stated above. The District Munsif considered that she acted as she did because she was probably not willing that the girl should be married to the boy named by her father’s mother and that the appellant was a more suitable husband, and on this ground, he was of opinion that the marriage was not fraudulent. But the Judge referred to the evidence that the mother represented falsely to the officiating Brahman at Mangalagiri that she had her husband’s permission and concluded from it that the marriage was a fraud upon the father. Upon these facts the question arising for decision is whether the marriage is one which ought to be recognized under the Hindu Law.
There can be no doubt that a Hindu marriage is a religious ceremony. According to all the texts it is a sanskaram or sacrament, the only one prescribed for a woman and one of the principal religious rites prescribed for purification of the soul. It is binding for life because the marriage rite completed by saptapadi or the walking of seven steps before the consecrated fire creates a religious tie, and a religious tie, when once created, cannot be untied. It is not a mere contract in which a consenting mind is indispensable. The person married may be a minor or even of unsound mind, and yet, if the marriage rite is duly solemnized, there is a valid marriage.

In Sundaramayya v. Bapirazu (1) a Divisional Bench of this Court observed:—"The Subordinate Judge has found that the marriage was valid "according to the rites of the class to which the parties belonged, and "though it is urged before us that the asura form of marriage is forbidden, "we are referred to no authority for holding that a marriage once perform-
ied can be set aside on the ground that there was a contract to pay a "price for the girl." It was also held by the High Courts at Calcutta and Bombay that when the marriage rite was duly solemnized and there was no fraud or force, the doctrine of factum valet applied and the marriage was irrevocable—Brindaban Chandra Karmokar v. Chandra Karmokar (2) and Khushalchand Lalchand v. Bai Mani (3).

[319] That such is the Hindu Law is not denied for the respondents. It is indeed conceded for them that the marriage in the case before us could not be annulled if the girl were given away either by her father or with his consent, and the substantial question then for determination is whether a gift of the bride by the father or her proper legal guardian is of the essence of a Hindu marriage as a religious ceremony.

As a religious ceremony it becomes complete when the saptapadi is performed, and there are several Smrutis to that effect.

Manu says:

"The relation of wife is created by the texts pronounced when the "girl is taken by the hand. Be it known that those texts end, accord-
"ing to the learned, with the texts prescribed for walking seven steps".(a).

Vasishtha says:

"In connection with the formation of the relation of husband and wife, "agreement is first prescribed. Then taking by the hand is prescribed. "It is said that mere agreement is defective, and that of the two, taking "by the hand is indispensable."  

Yama says:

"Not by the pouring of water nor by the words of gift is the rela-
"tion of husband and wife formed, but it is formed by the rite of taking "the bride by the hand and when they walk together the seventh step."

We may here mention that the marriage rite prescribed for Brahmans and now in general use amongst them is what is known as the Brahma marriage, and this is the form customarily adopted even where the father accepts a price for the girl and the marriage is in substance of the "asura" kind. The ritual, so far as it extends to saptapadi, may be divided into three parts—(1) the vagdanam or the promise to give; (2) the actual
1890
Nov. 19.

APPEL-
LATE
CIVIL.

14 M. 316 =
1 M. L. J. 85.

14 Mad. 320 INDIAN DECISIONS, NEW SERIES

[Vol.

Gift of the bride or kanyakadanam, and (3) the marriage rite which commences with taking the bride by the hand (panigrahanam) and ends with the seventh step taken around the consecrated fire (saptapadi). For our present purpose the vagdanam and the kanyakadanam may be treated as forming one essential part and the marriage rite as the other. It must be remembered that the ritual is prescribed for a minor or a child, for, according to Hindu Law and custom, a Brahman girl must be married before she attains her maturity, and, therefore, at a time when she is not in a position to choose a suitable husband for herself. Two principles, therefore, form together the groundwork of the marriage ceremony—(1) a natural or legal guardian acting in the interest of the girl with due regard to her welfare should choose a suitable husband for her, and (2) the choice should be consecrated by the marriage rite and thereby unalterably fixed.

Hence, two propositions of law may be taken to be established beyond controversy, viz., (1) where there is a gift by a legal guardian and the marriage rite is duly solemnized, the marriage is irrevocable, and (2) where the girl is abducted by fraud or force and married, and there is no gift either by a natural or legal guardian there is a fraud upon the policy of the religious ceremony and there is therefore no valid religious ceremony. In support of the second proposition we may refer to the dictum of Norman, J., in Aunjona Dasi v. Prahlad Chandra Ghose (1). In that case the plaintiff, the mother of the girl, sought to set aside her marriage alleging that when the girl visited her sister and was staying with her, the defendant, her sister's husband, forcibly carried the girl away from his house and married her without the mother's consent and without gift from any one. It may also be suggested in support of the dictum that what the public law stigmatizes as a crime cannot be accepted as the source of a legal relation. The third proposition of law which is material to the case before us is that when the mother of the girl acting as her natural guardian in view to her welfare and without fraud or force gives away the girl in marriage and the marriage rite is duly solemnized, the marriage is not to be set aside. This view is supported by authority and is sound in principle. As authority in its favour we may refer to several decided cases. The first case is that of Bai Ruliyat v. Jeychand Rewal (2). In that case the marriage was contracted by the mother irregularly without the consent of the father, but it was held that the marriage was duly solemnized with the ceremonies of vagdan and saptapadi and, therefore, not liable to be [321] set aside. It appears that the question was referred to the Sastries of Surat and of the Sudder Court and decided in accordance with their opinion.

The second case is that Modhoosoodun Mookerjee v. Jadub Chunder Banerjee (3) decided in 1865. The mother gave the girl in marriage during the father's absence to an inferior Brahman on receipt of Rs. 200 and the Court relying on the Vyavastha of a Pandit declined to set aside the marriage. Though the father was a Kulin Brahman, and had, as such, numerous wives and the mother had a greater control over her children than is ordinarily the case, yet the ground of decision was that though the consent of the legal guardian should doubtless have been obtained, yet its absence would not invalidate a marriage otherwise unobjectionable.

(1) 6 B.L.R. 943. (2) 1 Morley's Digest, N. S. 191. (3) 3 W.R. 194.

224
The third case is that of Brindabun Chandra Karmokar v. Chandra Karmokar (1) decided in 1886 by the High Court at Calcutta. In that case the legal guardian was the paternal uncle and it was admitted that he had a right to dispose of the girl in marriage in preference to the mother. A suit for the custody of the girl was pending and an injunction restraining the mother from marrying the girl was also in force. Yet the mother gave away the girl in marriage and the marriage rite was duly solemnized. It was held by Norris and Ghose, JJ., that the marriage rite being duly performed by the mother and natural guardian and there being no fraud nor force, the doctrine of factum valet prevailed and the absence of the legal guardian's consent did not invalidate the marriage.

The fourth case is that of Khusalchand Lalchand v. Bai Mani (2) decided in 1886 by the Bombay High Court. In that case also the mother celebrated her daughter's marriage without the father's consent, though a suit instituted by the father was pending and though an injunction issued by the Court was in force. It appeared, however, that for about eight years prior to the marriage, the father had ceased to live with the mother and the daughter and neglected to take steps to see the girl married though she was 11 years old, that the mother informed him of her intention to marry the girl, and that the father instituted the suit rather to spite the mother than in the interest of the girl. The [322] Court upheld the marriage, the learned Chief Justice reviewing all the authorities bearing on the subject and observing that what is ordinarily called a father's right to give, is rather a duty to be performed under the Hindu Law in the interests of the girl.

The fifth case is Sundaramayya v. Dapira (3) decided by this Court. It is an authority for the position that a marriage once performed cannot be set aside. It differs, however, from the case before us in that the father had prior to the marriage approved of the then plaintiff as a husband for his daughter, the disagreement between him and the mother consisting in that the latter accepted Rs. 400 as a price for the girl whilst the father demanded Rs. 600. It recognizes the principle that what Courts of Justice should consider is not so much whether the father gave the girl away as her legal guardian at the marriage as whether the mother's action was bona fide and substantially in the interests of the minor.

Moreover, several Smruti writers prescribe the gift of the daughter in marriage before majority as the father's duty and not as his right. So Brabaspati enjoins the father to give the daughter in marriage before she menstruates and declares that, if he fails to do so, he is guilty of causing abortion. Narada and Yajnavalkya pronounce him guilty of child murder. Samvarta declares that a disgusting punishment is prescribed in the next world for this dereliction of duty on the part of the father. As regards the doctrine that a marriage rite once duly solemnized is not liable to be set aside, Narada says:—"Once is a partition ordained, once is a girl given in marriage, and once does a man say 'I give'" (a). The author of the Smruti Chandrika forbids a second samskaram or marriage, for the kalyug (b). The theory is that when a legal relation is once consecrated and confirmed by mantra or Vedic texts, it is permanently fixed. Hence

---

(1) 12 C. 140.
(2) 11 B. 247.
(3) Second Appeal No. 566 of 1889, not reported.
(a) See Chap. XII, 18 Jolly's Trans., p. 83.
(b) See Chap. III, 18 Krishnasami Iyer's Trans., p. 45.
it is when a boy is invested with the sacrificial thread and consecrated by Vedic texts as belonging to his father's gotram, he is not eligible for adoption into a different gotram.

There is also another reason why, when the marriage rite is once duly solemnized, the marriage should not be set aside except on clear proof of fraud. The religious theory is that when an adoption or a marriage which is forbidden is consecrated by a [323] Vedic text and the religious ceremony is thereby defiled a servile state supervenes, and not that the prior status remains untainted.

As regards adoption, the author of the Dattakamimansa says in Section IV, Sloka 40, "Should one be adopted on whom the ceremony of tonsure and other rites have been performed, a servile state ensues, not that of a son" (see also Sloka 46) (a). It has however been held by this Court that when an adoption cannot be upheld owing to a legal defect, the adopted boy does not forfeit his status as son in his natural family, and in the same way, it might be held that when a marriage rite is set aside on the ground that it is forbidden by the very law which prescribes the rite, the girl's prior legal status remains without taint, the rite being defiled and being ineffectual on that ground. But the religious theory mentioned above and the social difficulty which may arise from the marriage being set aside is a legitimate ground for recognizing the doctrine of factum valet except in cases of clear fraud or force when the religious ceremony may be presumed to be defiled by fraud upon its policy.

Applying the foregoing principles to the case before us, we think the Judge is in error in setting aside the marriage on the ground that the mother falsely stated to the officiating Brahman that she had the father's permission and thereby committed a fraud upon him. The Judge acted probably on the policy of Lord Hardwicke's Act in England which was passed in a great measure to prevent the marriage of minors without the consent of their parents or guardians and which declares that the marriage of persons willfully intermarried without license from a person having authority to grant the same (the grant of which is forbidden to minors without the consent of parents and guardians) is null and void. The officiating Brahman under Hindu Law is hired for the occasion and is not a person clothed with a statutory authority to be exercised subject to the guardian's consent, and there is no analogy between the English Statute and the Hindu Law. Moreover, it has already been shown that the giving of a daughter in marriage is more a duty than a right, and in the case before us the District Munsif has found that the mother acted bona fide in the interest of her daughter and as her natural guardian desiring to provide her with a suitable husband. This finding, from which [324] the District Judge does not apparently dissent, is, in our opinion, sufficient to validate the marriage.

We may add that the mother is also among the legal guardians, although her place is after the paternal kinsmen, and it has been held that she is entitled to be consulted by the paternal kinsmen in the choice of a bridegroom. During the marriage ceremony the mother pours water into the father's hand when he formally gives away his daughter in marriage. Thus, in religious theory, the gift of the girl is the joint act of both parents,
and in this sense the mother's position is higher than that of other legal guardians.

We must reverse the decree of the District Judge and restore that of the District Munsif. The respondents must pay the appellant's costs here and in the Lower Appellate Court.

14 M. 324 = 1 M.L.J. 529.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

CHANDU (Plaintiff), Appellant v. KUNHAMED (Defendant No. 2), Respondent.* [16th February and 2nd April, 1891.]

Civil Procedure Code, Section 13, explanation V--Res judicata--Suit for possession of a share in the property of a Muhammadan family.

In a suit in 1882 between the members of a family following the Muhammadan law of inheritance, in which the plaintiffs sued as sharers for the recovery of their share in certain property, one of the defendants pleaded that a paramba, part of the property in dispute, was not subject to division, but this plea was unsuccessful, and a decree was passed for the plaintiffs.

The present suit was brought by a mortgagee from one of the defendants in the former suit (who had been ex parte) to recover his share of the above-mentioned paramba, the subject-matter of his mortgage; the mortgagor was joined as defendant, among others, including the defendant who had raised the plea above stated. This plea was repeated by the same person:

Held, (1) distinguishing Venkatarama v. Labai Meera (I.L.R., 13 Mad., 275), on the ground that the parties were governed by the Muhammadan law of inheritance, that the suit was maintainable;

[325] (2) that the claim that the paramba was not subject to division was res judicata by virtue of Civil Procedure Code, Section 13, explanation V.

[Overruled, 28 M. 457 (463)= 14 M.L.J. 404; N F., 1 S.L.R. 133 (139)= 2 S.L.R. 49; 1 S.L.R. 149 (144); F., 15 M. 261 (265); 14 Ind. Cas. 812 (814)= U.B.R. (1909), II Qc., C.F.C., 21; Appr., 13 M. 164 (167)= 4 M.L.J. 282; R., 21 M. 373 (383); 92 T.L.R. 270.]

SECOND appeal against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 451 of 1889, reversing the decree of O. Chathu Nambiar, District Munsif of Nadapuram, in original suit No. 425 of 1888.

Suit by the mortgagee of the share of defendant No. 1 in a paramba for possession of that share.

The paramba in question had been the property of the father of defendant No. 1 and maternal great-grandfather of defendants Nos. 2 and 3. The defendants were governed by the Muhammadan law of inheritance, but the paramba had not been divided, and defendant No. 2 claimed that it was the separate property of his maternal grandmother and after her death that of his mother, and consequently that defendant No. 1 had no share in it.

It appeared that defendant No. 2 had made these allegations by way of defence to original suit No. 521 of 1882 in which certain other persons sued as sharers for the possession of inter alia the paramba now in question, but it was then found that the paramba was liable to be divided and

* Second Appeal No. 529 of 1890.
a decree was passed for the plaintiffs. The first defendant in this suit was a defendant in that suit, but he was ex-parte in both.

The District Munsif passed a decree for the plaintiff, but this decree was reversed on appeal by the Subordinate Judge, who held on a consideration of Parbat Churn Deb v. Ain-ud-deen (1), Bepin Behari Moduck v. Lal Mohun Chattopadhy a (2), Haridas Sanyal v. Pran Nath Sanyal (3), that the suit was in substance a suit for partition and accordingly not maintainable in its present form.

The plaintiff preferred this second appeal.

Sankaran Nayar, for appellant.

Ryra Nambiar, for respondent.

JUDGMENT.

As to the first question decided against the appellant by the Subordinate Court, whether the suit is maintainable, we think the Lower Appellate Court was in error. The case appears to have been treated in the Lower Court as one of partition amongst members of a family governed by Hindu law. But it was stated by the appellant's vakil before us and not [326] denied on behalf of the respondent that defendants Nos. 1, 2 and 3 are governed by the Muhammadan law of succession, and that this is so further appears from the nature of the claim in the former suit, original suit No. 521 of 1882. This being so, the principle laid down in Venkatarama v. Meera Labai (4), and the cases there followed have no application to the present case. A sharer by Muhammadan law has a right to a specific share in each item of property left by the person from whom he inherits and can sue to recover that share from any person in possession of the property. No doubt there might be cases in which a Muhammadan sharer would not be allowed to sue for his share in a particular item of property when he could in the same suit sue for his share in the whole property of the person under whom he inherits. But that is on a different ground to avoid multiplicity of actions. In the present case no other persons but plaintiff, and his mortgagor, defendant No. 1, on the one side and defendants Nos. 2 and 3 on the other, have any interest in the paraiba in dispute, and therefore a division of the properties as yet undivided between defendants Nos. 1, 2 and 3 and their co-sharers could not be made in this suit, the plaintiff having no concern with it. We think, therefore, the suit is not open to the objection that it relates to the first defendant's share in one only of the properties inherited by him and his co-sharers from Kunhamed. On the merits, the second defendant's contention in this case is that the paraiba in dispute was not part of the property of Kunhamed divisible amongst the first defendant and his co-sharers, but was originally the separate property, called stridhanam with that misuse of Hindu Law terms common among Muhammadans on the West coast, of his the second defendant's maternal grandmother and through her became the separate property of his mother on her marriage. He appears to have raised the same defence in original suit No. 521 of 1882 which was brought by other sharers for recovery of their shares in this paraiba and other properties. An issue (the fifth) was raised in that suit whether this paraiba was partible or not, and decided against present defendant No. 2 who was defendant No. 6 in that suit. In this judgment the Munsif observed:

(1) 7 C. 577. (2) 12 C. 209. (3) 12 C. 566. (4) 13 M. 275.
The witnesses examined for the plaintiffs swear that the property No. [327] 25 (the paraumba now in dispute) in the plaint is in the possession of defendant No. 1. Defendant No. 6, who claims these properties adversely to the plaintiffs, has not offered any evidence. I therefore find the third to fifth issues for the plaintiffs." There can be no doubt therefore that the title now set up by defendant No. 2 was decided against him in that suit, and the only question is, was it a judgment inter partes, and therefore conclusive as between the plaintiff and defendant No. 2 in this suit. Defendant No. 1 under whom the plaintif claims was a party, first defendant, to the former suit, but he was ex-parte, and, therefore, the title of defendant No. 2 cannot be said to have been actively contested between the present defendants Nos. 1 and 2, in that suit so as to bring the case within the decision in Venkayya v. Narasamma (1). But the contest in that suit as to this particular paraumba was between the plaintiffs in that suit asserting that it was property in which they and present defendant No. 1 and their other co-sharers were entitled to share, and present defendant No. 2 denying the same and claiming it as his own property, and therefore present defendant No. 1 and the other co-sharers may be said to claim under the plaintiffs in that suit by explanation V of Section 13 of the Code of Civil Procedure. We think, therefore, the decision in that suit adverse to the second defendant's title is res judicata and conclusive against him in this suit, and on this ground the plaintiff is entitled to succeed in this suit.

We set aside the decree of the Lower Appellate Court and restore that of the Court of First Instance. Defendant No. 2 must pay the plaintiff's costs in this and the Lower Appellate Court.

[328] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Weir.

RAMABHADRA AND ANOTHER (Plaintiffs), Appellants v. JAGANNATHA (Defendant), Respondent.*

[26th September and 7th October, 1890].

Civil Procedure Code, Sections 13, 211, 214—Res judicata—Claim as to which judgment is silent—Mesne profits subsequent to suit.

In a suit for the partition of a zamindari, the plaintiffs asked, inter alia, for "ten years' past profits and for subsequent profits." The Judge passed a decree for partition in which mesne profits for three years prior to the suit were decreed to the plaintiffs, but his judgment and decree were silent with regard to the subsequent profits claimed in the plaint.

The defendant appealed against this decree and the plaintiffs preferred a memorandum of objections against part of it, but did not object to it so far as it omitted to provide for subsequent mesne profits. The plaintiffs instituted the present suit to recover from the defendant mesne profits from the date of the above suit:

"Held, that the plaintiffs' claim so far as concerned mesne profits accrued since the decree in the former suit was not res judicata, and the suit to that extent was not precluded by Civil Procedure Code, Section 13."

[Overruled.] 15 M.L.J. 462 (465) (F.B.); F., 32 C. 118 (122); R., 25 B. 115 (120); Disc., 21 A. 425 (435) (F.B.).

* Appeal No. 193 of 1899. 
(1) 11 M. 204.
Appeal against the decree of J. Kelsall, District Judge of Vizagapatam, in original suit No. 37 of 1888

Suit for mesne profits for the years 1883-1889 on the plaintiffs’ share of a zemindari. The facts of the case and the arguments adduced on this appeal, which was preferred by the plaintiffs, appear sufficiently for the purposes of this report from the following judgment.

The Advocate-General (Hon. Mr. Spring Branson), for appellants.

Mr. K. Brown and P. Subramanya Ayyar, for respondent.

JUDGMENT.

The respondent is the Zemindar of Merangi, and the appellants are his paternal uncles. The latter brought a suit against the former in September 1883 for partition of the zemindari and obtained a decree in December 1885 from the District Court of Ganjam for a half-share in the estate. The Zemindar then appealed to the High Court, but the original decree was confirmed in March 1888. At his instance an appeal to Her Majesty’s Privy Council from the decision of the High Court was admitted under Section 603 of the Code of Civil Procedure, and it is still pending. In February 1889 execution of the decree under appeal to the Privy Council was stayed as regards the partition of the zemindari upon security being given by the Zemindar for the appellants’ share of two years’ mesne profits.

The contest in the present suit is as to five years’ mesne profits claimed by the appellants from the date of the partition suit. In their plaint in that suit they asked for ten years’ past profits and for subsequent profits, and the seventh issue recorded therein by the District Court was in these terms:—"Are the plaintiffs entitled to mesne profits for ten years or for what period?" The District Court decreed mesne profits for three years prior to the suit, but said nothing in its judgment or decree about the subsequent profits claimed in the plaint. Though the appellants now before us objected to the decree of the District Court so far as it refused them their costs, they did not object to it so far as it omitted to provide for subsequent mesne profits. On appeal the High Court dealt with the question of costs and said nothing about subsequent mesne profits. In December 1888 the appellants instituted the present suit to recover mesne profits for five years from 1883 to 1888, together with interest thereon, amounting on the whole, to Rs. 61,275 and with costs and subsequent interest. The plaint stated that the District Court made no adjudication in the partition suit in regard to mesne profits subsequent to the suit, and that the cause of action arose in respect of them on the 14th December 1885 when that Court recognized their right to a half-share and decreed partition and possession of such share.

The respondent resisted the claim on four grounds:—

(i) that the mesne profits now claimed must be taken as having been refused by the decree in the partition suit within the meaning of Section 13, explanation 3, of the Code of Civil Procedure;

(ii) that in any case, no mesne profits for more than three years prior to the present suit, could be awarded;

(iii) that no interest was due thereon;

(iv) that the amounts paid to appellants and others for their maintenance during the five years mentioned in the plaint should be set off against the amounts claimed.
Thereupon the Judge recorded the following issues for determination:

(i) "Is it a fact that in the first suit the plaintiffs asked for profits that might accrue subsequent to the institution of that suit? Was that claim refused or not granted? If so, does that stop plaintiffs from now claiming them?

(ii) "Is so much of the claim as relates to faslīs 1293, 1294 and 1295 barred by limitation?

(iii) Are plaintiffs entitled to interest on arrears?

(iv) "What amounts have been paid to plaintiffs from estate funds in these five years?"

On the first issue the District Judge found that the claim to subsequent mesne profits was substantially and directly in issue in the partition suit; that it was not granted, and, therefore, refused; and that the present suit was barred. On the second issue, he held that Article 109 of the Second Schedule of the Limitation Act governed the case, and that, if the appellants were entitled to mesne profits at all, they would be entitled to such profits only for three years before the suit. As regards the third issue, he was of opinion that reasonable interest should be allowed on arrears of mesne profits. As to the fourth issue, he did not consider it necessary to decide it and in the result, he dismissed the appellants' suit with costs on the ground that it was barred by Section 13, Explanation 3. Hence this appeal.

The question which we have to determine is whether the appellants' claim must be taken to have been disallowed under explanation 3, Section 13, Code of Civil Procedure, and, if so, to what extent. A second suit is clearly barred by Section 13 in respect of any matter directly and substantially in issue between the same parties and heard and finally decided in a previous suit by a Court of competent jurisdiction. Explanation 3 states that any relief claimed in the plaint, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused. The plaint in the partition suit prayed for a decree for subsequent profits as part of the relief to which the appellants were entitled by virtue of their right to insist on the partition of the zemudari. It was competent to the District Court under Section 211, Code of Civil Procedure, to have provided in its decree in the former suit for payment of mesne profits from the institution of that suit until partition and delivery of possession to appellants of their half-share. But in fact the decree in the partition suit did admittedly not grant subsequent profits though we are not in a position to say for what reason. It is clear that if subsequent mesne profits were expressly refused by that decree, the claim in respect of them up to date of that decree, would clearly be res judicata, the parties and the title under which the claim is made being the same in both suits. The legal effect then of explanation 3 is that of treating the omission to grant the relief asked for in the plaint as equivalent to an express refusal and the claim thereto in a fresh suit as res judicata. The obvious intention is to prevent parties who once submit their claim for subsequent profits to adjudication in a suit for possession of immovable property based on title, from harassing their opponents with a second suit in respect of the same claim. If the District Court failed to adjudicate upon it, the appellants' remedy lay in rectifying the error by appeal but not in relying on it as the basis of a second suit. It is then said that the cause of action as to subsequent mesne
profits had not arisen at the date of the previous suit, and that the appellants were not bound to insist upon an adjudication thereon. It may be that they were not bound to claim an adjudication in their plaint, and the last clause of Section 214 lends support to that view, but when they once elect to claim an adjudication under Section 211, and by such election make it part of the subject-matter of the suit, they must either withdraw the claim with the express permission of the Court to institute a fresh suit, or be bound by the result of that suit.

As regards the last clause in Section 244, it can only bear the construction that that section does not of itself bar a fresh suit, but not that it contracts or does away either with Section 13 or with explanation 3 which is part of that section. The learned Advocate-General drew our attention at the hearing to the order of this Court staying execution of the decree so far as it relates to partition of the zamindari pending the decision of the appeal to Her Majesty's Privy Council on condition that the Zamindar furnished security for two years' mesne profits, and argued that it implied a recognition of the appellants' title to subsequent profits. But the order in question was made under Section 608 of the Code of Civil Procedure, and it has no reference to the period for which mesne profits are now claimed. The principle on which it rests is that under the decree appealed against, the appellants are entitled to immediate execution and possession, and if the Court interferes with the exercise of their legal right from sufficient cause until the decision of the appeal, it will only do so after seeing that by its action, they are not likely to be damned if the appeal happens to fail. Neither the language of Section 608 nor the principle underlying it has a bearing on the claim now before us. At the hearing, the learned Advocate-General laid stress on the fact that the seventh issue in the partition suit related only to past profits, and that there was no issue as to subsequent profits. The words in explanation 3, Section 13, are, however, "Any relief claimed in the plaint," and it is immaterial whether there was a specific issue or not, inasmuch as it is competent to the Court to direct an inquiry regarding subsequent profits in execution. The decision of the Judge is, therefore, right, so far as it treats the decree in the partition suit on a construction of explanation 3, Section 13, as if it expressly refused subsequent mesne profits.

The further question then arises whether Section 13 affects the claim to mesne profits which accrued due from and after the date of decree in the partition suit. The point for consideration is whether the mesne profits constructively disallowed were those which had accrued up to date of decree, or include also mesne profits which thereafter accrued before actual partition and transfer of possession in execution of the decree.

The material portion of the original decree in the partition suit is in these terms—"It is ordered that the Zamindari of Morangi and other property mentioned in the plaint schedule be divided into four shares, of which one share be given to each of the plaintiffs, together with mesne profits for three years amounting to Rs. 14,250 on account of the share of each of the plaintiffs." The plaint in that suit prayed for a decree for dividing the zamindari and other property, and giving the plaintiffs their share of four shares, for payment of Rs. 95,000 as the amount of mesne profits for ten years from 1873, and for "subsequent profits," and costs with interest. Insert in the decree, with reference to Section 13, explanation 3, the words "subsequent profits are refused," and the question is what is the construction to be placed on the
decree as to the period for which mesne profits were refused? Was it the intention to refuse subsequent profits up to date of decree for all time to come until partition is effected and separate possession is awarded of the appellants' moiety? In ascertaining the intention two things have to be kept in view, viz., (1) the terms of the latter portion of the decree, so that the words inserted with reference to Explanation 3 may fit into it, and (2) the provisions of Section 211 as to the extent to which subsequent profits accruing after suit may be claimed and adjudged.

As regards the construction of the decree, we are of opinion that it would be a contradiction in terms to say "We decree to you immediate partition and possession, but we take away from you the remedy which you may have for obtaining the fruits of such possession." Again, the withholding of possession after decree was wrongful on the part of the respondent and the construction suggested for him would enable him to gain by his own wrong. Turning to Section 211, Civil Procedure Code, it cannot, we think, be maintained that the section is to be taken to be conclusive as to the object-matter of a plea of res judicata founded on Explanation 3, Section 13, of the Code of Civil Procedure. The section is in our opinion only an enabling section and it would be neither unreasonable nor illegal to refuse subsequent profits up to date of decree and decree immediate possession, leaving the party in whose favour the decree is made to his remedy by a regular suit if immediate possession is not had. We are therefore of opinion that the claim is barred by Section 13 only so far as it relates to mesne profits up to date of the decree in the partition suit. viz., 14th December 1888.

As regards the second issue we agree with the Judge that the claim for mesne profits for more than three years before suit is barred by limitation. As observed by him, Article 109 clearly governs the case, and the learned Advocate-General did not press upon us the seventh ground of appeal.

As to the third issue, we also think that the appellants are entitled to interest on arrears of mesne profits, the claim being reasonable and consistent with Section 211, Code of Civil Procedure, explanation. The Judge should, however, be requested [334] to state what he considers to be the reasonable rate at which interest may be allowed.

The Judge has not recorded a finding on the fourth issue, nor has he taken an account as to the amount of mesne profits actually realized by the respondent.

We shall therefore ask the Judge to take an account of mesne profits which accrued during the three years before suit or from 7th December 1888 and of the sums which ought to be deducted from it, and ascertain the half-share payable to the appellants and the interest to be awarded upon it. The finding will be submitted to this Court within six weeks from the date of the receipt of the order by the Lower Court, when seven days after the posting of the finding in this Court will be allowed for filing objections.
14 M. 334 (F.B.) = 1 M.L.J. 343 = 2 Weir 557.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Parker, and Mr. Justice Shephard.

14 M. 334
(F.B.) = 1
M.L.J. 343 = 2 Weir 557.

QUEEN-EMPRESS v. BALASINNATAMBI AND OTHERS.*
(17th October, 1890 and 17th and 25th March, 1891.)

Criminal Procedure Code, Section 437—"Further enquiry"—Revisitional jurisdiction.

It is competent to a Sessions Judge acting under Criminal Procedure Code, Section 437, to direct further enquiry to be held where additional evidence is not forthcoming.


CASE referred for the orders of the High Court under Criminal Procedure Code, Section 438, by R. S. Benson, Sessions Judge of South Arcot.

The facts of this case appear sufficiently for the purposes of this report from the judgment of Muttusami Ayyar, J.

Mr. Parthasaradhi Ayyangar, for the Crown.

Rama Rau, for the accused.

This case having come on for hearing before Collins, C. J., [335] and Weir, J., their Lordships referred the following question to the Full Bench:

"Whether under Section 437, Criminal Procedure Code, it is competent to a District Magistrate, Sessions Court or High Court or any of them to direct further enquiry or a re-trial to be held where additional evidence is not forthcoming."


This case came on for hearing before the Full Bench consisting of Collins, C. J., Muttusami Ayyar, Parker and Shephard, JJ., who delivered the following

JUDGMENTS.

Muttusami Ayyar, J.—This reference arises out of Calendar Case No. 133 of 1890 on the file of the Second-class Magistrate of Cuddalore taluk in the district of South Arcot. There is a place of worship called Muniyar Kovil in the midst of a jungle in the village of Perumathoor in that taluk. One Arunachala Gounden, who was its pujari, died about 19 months ago, and upon his death, a dispute arose between his widow and the second accused as to the right of succession to the office of pujari. There is no temple at the place of worship, but the property of the shrine was secured in a building adjacent to the house of the late pujari's widow, the first witness for the prosecution. Her complaint was that the building was in her possession, and that on the 14th April last, the ten accused assembled together in order to take forcible possession of the property, committed a riot, broke into the building, and breaking open a box containing jewels carried them off. Several witnesses gave evidence in support of her complaint, and the first and second accused produced the property alleged to have been carried away by them and others. The police charged
the accused with offences punishable under Sections 454, 380 and 147, Indian Penal Code. After recording the evidence for the prosecution, the Magistrate discharged the accused on the ground that the evidence was, in his opinion, worthless. The Sessions Judge after examining the record under Section 385, Criminal Procedure Code, came to the conclusion that though very possibly there was no dishonest intention, and if so, there was no theft, yet there was a large body of evidence given by seven witnesses for the prosecution which was materially corroborated by facts not denied, and was in accordance with the probabilities of the case, and that the Subordinate Magistrate had not properly sifted the evidence. The Magistrate, however, recorded the whole of the evidence available for the prosecution, the Sessions Judge has referred for the decision of this Court the question whether under Section 437, Criminal Procedure Code, it is competent to a District Magistrate or a Sessions Court or the High Court to order further enquiry or re-trial when additional evidence is not forthcoming.

On this question, there is, as observed by the Judge, a conflict of decisions. In Queen-Empress v. Amir Khan (1), a Divisional Bench of this Court held that Section 437 authorized further enquiry only in those cases in which other evidence was available or the evidence already taken had not been properly taken. In more recent decisions, however, the High Courts in Bombay and Allahabad and the majority of Judges at Calcutta have held that such enquiry may be ordered though no fresh evidence is forthcoming—Queen-Empress v. Dorabji Hormusji (2), Queen-Empress v. Okuta (3), Hari Dass Sanyal v. Saritulla (4). I do not think that the decision in Queen-Empress v. Amir Khan can be supported. The term "enquiry" is not in its ordinary acceptation restricted to the mere taking of evidence, but it includes also a consideration of its effect in relation to the complaint forming the subject of the enquiry. This being so, it is not clear why the expression "further enquiry" should not signify as well a fresh consideration of the effect of the evidence already recorded as a supplemental enquiry upon fresh evidence.

Again, Section 437 premises a possible miscarriage of the previous enquiry resulting in the discharge of the accused and creates a revisional power to set right what has miscarried. Such being the intention, there is no reason where a perverse finding or a finding which is in all probability wrong or manifestly at variance with the recorded evidence, should not be liable to revision on considerations overlooked by the Subordinate Magistrate and indicated by the revising tribunal. It is also to be observed that the order which is the subject of the revision under Section 437 is an order of discharge and not of acquittal and that there has been no final adjudication on the guilt or innocence of the accused.

This view receives support from Section 435 which mentions "the correctness of any finding" as one of the matters to be considered whilst examining the record of the Subordinate Court.

It may further be noted that a revisional power is conferred by Section 437 in the case of an order of discharge in the same terms upon the High Court, the Court of Session, and the District Magistrate, while Section 439, which relates exclusively to the High Court, declares its revisional powers to be the same as the powers of an Appellate Court, which include a power to set aside a finding on a question of fact.

\* [385 seems to be a misprint for 437—ED.]

(1) 8 M. 386.  (2) 10 B. 131.  (3) 9 A. 52.  (4) 15 C. 606.
Furthermore, it is clear from Sections 378 and 380 that there may be further enquiry without additional evidence. It is true that Section 436, which refers to cases triable exclusively by the Court of Session, empowers that Court or the District Magistrate to order the accused to be committed for trial instead of directing a "fresh enquiry." In this class of cases, certain contingencies may possibly arise; either the evidence already recorded by the Magistrate may warrant a commitment upon the matter in respect of which the accused has been discharged, or some further evidence may be available, or the evidence may prove some other offence if not the offence as to which the accused has been discharged. In the first case, the order of discharge has to be set aside and a commitment ordered; in the second case a supplemental enquiry has to be made; and in the third case, an enquiry has to be directed in regard to a new offence. The words "fresh enquiry" were perhaps considered appropriate as words of reference to the second and third contingencies contemplated by the section. However this may be, there is a clear indication of an intention not to give finality to an order of discharge which has prima facie miscarried, and I am therefore inclined to adopt the view of Mr. Justice Wilson that no substantial distinction is intended to be denoted by the words "fresh enquiry" and "further enquiry."

It is no doubt true that Section 437 of the present Code goes beyond Section 298 of the Code of 1872 under which it was often held that neither the Court of Session nor the District Magistrate was competent to order further enquiry except upon fresh evidence in cases in which the accused has been improperly discharged. On comparing, however, Section 435 of the present Code which formulates the grounds of revisional jurisdiction with the corresponding Section 295 of the Code of 1872, it will be observed that the present Code gives a power to the Sessions Court and the District Magistrate to examine into the correctness of a finding on a question of fact, whilst the Code of 1872 conferred upon them no such power.

The intention seems to be to give a revisional jurisdiction to the Sessions Court and the District Magistrate in cases of improper discharge concurrently with that of the High Court and to include an incorrect finding among the matters liable to revision, and thereby to obviate the expense and inconvenience which the necessity to resort to the High Court might in such cases entail. Though the power thus conferred is wide, yet it must be remembered that it is a discretionary power confined only to the two principal tribunals in each district and that the discretion is a judicial discretion to be exercised subject to the supervision and control of the High Court.

Again, the general scheme of revision embodied in Sections 435 to 439 includes within its scope a reconsideration of the evidence already recorded in cases in which the accused is improperly discharged. An incorrect finding is specified by Section 435 as one of the matters to be examined into on revision. It is again contemplated by Section 436 as the basis of an order for commitment in cases triable exclusively by the Court of Session. The power to order further enquiry in cases in which the accused is improperly discharged is conferred by Section 437 upon the Court of Session and the District Magistrate in common with the High Court, while Section 439 gives to the High Court as a Court of Revision all the powers of an Appellate Court. Section 438 gives to the Court of Session and the District Magistrate power to recommend to the High Court that a sentence improperly passed be reversed. The true construction appears to me to consist first in reading Sections 435
and 439 together as indicating the grounds of revisional jurisdiction and
the tribunal competent to interfere in all cases, and in reading Section 438
as subsidiary to them, secondly in reading Sections 436 and 437 as
contemplating two classes of cases in which a concurrent juris-
[339]
diction is given by way of special exceptions on the ground that when an
enquiry resulting in the improper discharge of the accused has miscarried,
the Court of Session and the District Magistrate should be enabled to
correct the error.

I would, therefore, answer the question referred to us in the
affirmative and intimate to the Sessions Judge that it is competent
to him to order further enquiry under Section 437 in the case reported
for orders.

COLLINS, C.J.—I concur.
PARKER, J.—I concur.

SHEPHERD, J.—The section mentioned in the question referred to
the Full Bench is one of the four which prescribe what action may be
taken on an examination of the record under the provisions of Section
435. The first of the four sections, Section 436 deals with cases exclu-
sively triable by a Court of Session. It gives the Court of Session or Dis-
trict Magistrate power, in cases an accused person having been improperly
discharged, to order him to be committed for trial. Section 437 is not
restricted to any particular class of offences. It refers to the case of
a complaint dismissed under Section 203 or an accused discharged under
Section 209 or Section 253 and authorizes the High Court or Court of
Session to direct a further enquiry. The last of the four sections gives
to the High Court exclusively far wider powers in dealing with cases
including those in which there has been conviction or acquittal called up
by itself or reported for orders under the preceding section. As in exa-
mining the record the Court is to have regard as well to the correctness as
to the legality of the finding under consideration, it seems clear that in
the absence of limiting words in the four succeeding sections, action may
be taken under any one of those four sections, on its appearing that the
finding on the evidence is erroneous in point of fact. Thus on its appear-
ing that a Magistrate has owing to a misappreciation of the evidence
wrongly discharged a person accused of an offence triable by the Court of
Session only, the District Magistrate may take action under Section 436.
He may order the committal of the accused "instead of directing
a fresh enquiry." In a similar case it is clear from the terms of this
section he may take the alternative course of directing a fresh en-
quiry. Except for cases mentioned in clause (b) of Section 436 there
is no provision for this fresh enquiry other than that [340] which
is found in the next section. There is the change of expression
"further" being substituted for "fresh"; but otherwise there is no
apparent reason why the enquiry, which may be thought requisite
for a case coming under Section 436, should differ in its nature from that
which may be directed under Section 437 in the case of offences triable by
a Magistrate. If it is expedient that the Sessions Judge should have
power to re-open the enquiry respecting an offence triable by himself only,
it is equally expedient that he should have that power with regard to an
offence which may or may not be tried by him. In neither of the cases
supposed has there been any final judgment which can be pleaded in bar
to fresh proceedings and therefore it is not necessary to set aside the order
of discharge.
The only argument in favour of a distinction between the enquiry provided for in Section 437 and that mentioned in Section 436 is derived from the change of expression, the epithet "further" being substituted for "fresh." It is said that a further enquiry presupposes additional evidence, whereas a fresh enquiry may mean nothing more than a reconsideration of the original evidence. This construction of Section 437 would practically go so far as to limit the application of it to cases in which the officer or Court calling for, and examining, the record was set in motion by some party interested in the proceeding and did not act motu suo, for usually the record itself would not disclose the possibility of further evidence being adduced. In all other cases, however gross might be the misapprehension of the evidence, although the inferior Magistrate might have failed to draw obvious inferences of fact, the revising officer could do nothing but report the case for orders to the High Court.

In my opinion the two epithets may be used indifferently to denote the same sort of enquiry, and it is reasonable to suppose that some more distinctive expression would have been used if it had been intended to limit the scope of Section 437 in the way suggested. We cannot lose sight of the fact that the Legislature, in disregard of the rule which enjoins adherence to the same word unless a change in the sense is intended, frequently change the expression without any intention of changing the meaning, their object as observed by a learned Judge being as would seem "to improve the graces of style and to avoid using the same words over and over again." With regard to the authorities [341] on the question, the only one adverse to the view above taken that needs to be considered is Amir Khan's case (1). In that case Turner, C.J., draws a distinction between the expressions "further enquiry" and "fresh enquiry" and justifies his conclusion by reference to the cases cited by Prinsep under Section 253 of the Criminal Procedure Code, cases decided with reference to the Code of 1872.

There is, however, a noticeable difference in the language of the present Code as compared with that of 1872. In Sections 294 and 295 of the latter, there is not, as there is in Section 435 of the present Code, any mention of the correctness of the finding in Section 296, which in a measure corresponds to Section 436 and Section 438 of the present Code, it is only when the judgment or order is contrary to law or the punishment too severe or inadequate, that a case may be reported for orders of the High Court. It was only in the case of dismissals of complaints under Section 147 (corresponding to the present Section 203) that power to direct an enquiry or a further enquiry as it is called in the section as amended was given. It was held upon this Code that in cases not coming within Section 296, i.e., cases exclusively triable by a Sessions Court, the District Magistrate could not order a fresh enquiry except in cases in which further evidence was forthcoming.

Considering the altered language of the present Code, I think that the inference rather is that it was intended to alter the law and give more latitude to the Sessions Court and District Magistrate in dealing with cases of improper discharge of accused persons. I agree that the term "further enquiry" means "an enquiry in addition to that which has already been held," but I do not understand why it should necessarily involve the taking of additional evidence; for an enquiry means more than the taking of evidence. It means also the consideration of the evidence taken. I

(1) 8 M. 396.

-238
would adopt what Wilson, J., says with regard to the expression in Hari Dass Sanyal v. Saritulla (1). As is pointed out in the judgment in Queen Empress v. Dorabji Hormasji (2) the Code itself shows that there might be a further enquiry without additional evidence (see Sections 375 and 380).

For these reasons I would answer the question referred in the affirmative.

14 M. 342 (F.B.) = 1 M.L.J. 458 = 1 Weir 802.

[342] APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, and Mr. Justice Shephard.

QUEEN-EMpress v. FISCHER.*

[15th and 16th January and 3rd March, 1891.]

Marriage—Indian Christian Marriage Act—Act XV of 1872, Sections 5, 68—Marriage solemnised by an unauthorised person—"knowingly"—Presence of a Marriage Registrar.

The lay trustee of a Church in which the banns of marriage between Christians had been published, solemnised a marriage between them according to the rites of the Church of England. The Marriage Registrar attended the ceremony in a private and unofficial capacity. The person who solemnised the marriage was not of any of the classes of persons authorised to solemnise a marriage in the absence of a Marriage Registrar and he was convicted of an offence under Act XV of 1872, Section 68:

Held, that the conviction was right.

APPEAL against the conviction and sentence of J. Twigg, Acting Sessions Judge of Madura, in Sessions case No. 80 of 1890.

The appellant was convicted of committing an offence under Indian Christian Marriage Act, 1872, Section 68. The material circumstances of the case were stated by the Sessions Judge as follows:

"The Rev. Mr. Wansbrough, the incumbent, was away on duty at Kodaikanal in April and May last. In his absence the Native Pastor published the banns of the marriage, but left Madura three days before the marriage was to take place, in spite of urgent requests that he should stay and perform the ceremony. In this emergency recourse was had to Mr. Fischer, who, as Lay Trustee, was taking the services in Mr. Wansbrough's absence.

"Mr. Fischer had doubts whether he was competent to celebrate a marriage, but thinking that since laity could christen and bury, they might also, in emergencies, marry, and being fortified in this opinion by Mr. Johnson, who had been for 17 or 18 years Marriage Registrar for the town of Madura, he came to the conclusion that he was competent to officiate and consented to do so. He wrote at once, however, to Mr. Wansbrough, detailing the circumstances, and giving his reasons for consenting to perform the marriage. The letter reached Mr. Wansbrough, in due course, at midday on 7th May in time for him, had he wished, to have stoeoped the marriage by telegraph. He did not telegraph, however, as he was himself uncertain of the law on the subject.

* Criminal Appeal No. 472 of 1890.
At 5 P.M. on the 7th May Mr. Fischer solemnised the marriage
in St. George's Church according to the Church of England ritual.
Mr. Johnson was present, not as Marriage Registrar, but as uncle of the
bride to give her away.
Mr. Wedderburn, for the appellant.
There is little or no dispute about the facts in this case, and the only
question is whether they establish that an offence was committed under
Act XV of 1872, Section 68. The section is obscure, and, if the punc-
tuation is preserved, the result is absurd; for the Act having, in Section 5,
authorised marriages "in the presence of the Marriage Registrar" by
any one the parties may select, then says, in Section 68, whoever solem-
nises such a marriage not being a minister, &c., who can solemnise in the
absence of the Registrar, i.e., those mentioned in Section 5, (1), (2), (3),
(5), is liable to ten years' imprisonment and fine. The Sessions Judge,
therefore, altered the punctuation. If he was wrong in so doing the error
must be taken against the Crown—Proctor v. Manwaring (1), and the sec-
tion is a brutum fulmen. See as to the importance to be attached to
punctuation and marginal notes—Maxwell on Statutes, p. 52. Claydon v.
Green (2), Attorney-General v. Great Eastern Railway Company (3), and
contra in re Venour's Settled Estates (4).

The next difficulty in the section is to ascertain to whom the section
applies. Are Ministers exempted from the penal clause even if they do
not observe the rites of their Church as required by Section 5; or, are they
liable if they solemnise contrary to the rules of their Church? In other
words does this section profess to deal with all unauthorised marriages or
[344] only those performed by laymen, i.e., marriages purporting to be
solemnised under Clause 4 of Section 5? A Clergyman of the Church of
England is authorised to solemnise a marriage in the absence of the
Marriage Registrar, provided he observes the rites, &c., of his Church.
Suppose he disregards the rubric and does not read the exhortation, is
the marriage good or bad?

In the first penal enactment introduced into India (Act V of 1852, Sec-
tion 14), a person performing a registry marriage, knowingly and wilfully
in the absence of the Marriage Registrar, was punishable with the same
penalties as appear in Section 68. This suggests that Section 68 may be
only a clumsy edition of Act V of 1852, Section 14, on this point, i.e., that
Section 68 was intended only to apply to a registry marriage.
The case in 6 M.I.C.R. App. 20 (5), in which the corresponding
section was held to be a general one was not argued, and the Court was
not at one. Moreover the original draft of the Bill of 1862 shows that
clergymen were meant to be excluded altogether from the operation of the
penal section corresponding to Section 68. If the statement of objects
and reasons published in 1862 is regarded, it is quite clear that the inten-
tion was not to punish priests who did not conform, but persons who
falsely pretended to have authority to marry knowing that they had not
such authority.
The next difficulty in the Act is this: Section 4 requires marriages to
be solemnised in accordance with the provisions of Section 5 only, and
Section 5 says a marriage may be performed (by any one) in the presence
of the Marriage Registrar without requiring any formality whatever.
The marriage here complied literally with Sections 4 and 5. Now,

according to English Common Law, a priest was not necessary for the
solemnisation of a valid marriage. His presence was desirable as a witness
and also perhaps to prevent persons marrying who were not competent to
marry—Beamish v. Beamish (1). A priest is not necessary in Scotland or
generally in Western Christendom (Wharton Private International
Law, 172), and was not necessary in India until 1864—Maclean v.
Cristall (2). The Marriage Registrar did [346] not go to the place, as such,
in the present case, but he was there and was a very good witness and
signed the register in the Church.

Then a difficulty arises as to why the words “in the absence of
the Marriage Registrar” appear in Section 68 at all. They are out of
place in a section penalising all unauthorised marriages. If the section is a
general section, of what use are they? They have no significance, except
in one form of marriage, viz., the registry marriage. The section of the
Act of 1852 seems to have been copied into the Act of 1864 without the
necessary alterations. The Judge says the words are wanted to exclude
the case of a layman solemnising a valid registry marriage from the opera-
tion of Section 68. But that is an authorised marriage, therefore he is
excluded already by the previous words, “whoever not being authorised by
the Act.” The layman in question is as much authorised as the priest.

The next difficulty is to understand what is meant by “knowingly
solemnising.” A man cannot well perform the marriage service without
knowing what he is doing; it was remarked in Ellis v. Kelly (3) “a man
cannot call himself a doctor accidentally.” The charge there was that
the defendant wilfully and falsely called himself a doctor contrary to the
statute thereto provided and it was held that wilful falsity was intended.
When people intermarried without due publication of banns contrary to an
English statute it was never doubted that “knowingly” meant knowing
they were breaking the law.

Again the severity of the punishment shows that the offence was
considered equivalent to felony which it is called in the Act of 1852.
The mental element of most crimes is marked by such words as know-
ingly, &c.

The Judge says that if the word “wilful” had not been omitted from
the section in the present Act (it was in the section from 1852 to 1873)
he would have acquitted. “Wilful” is a term not known to the Penal
Code and was probably omitted as surplusage as “knowingly” implies
intention as a rule. Considering all these ambiguities the rule to be adopt-
ed in construing Section 68 is the rule in Heydon’s Case (see Queen v.
Castro (4)).

In determining what is the right construction of the section the
following questions arise:—What was the common law [346] before
the first penal section, on which Section 68 is based, was enacted? What
was the defect for which the common law did not provide? What remedy
did the Legislature provide to cure the defect?

The law prior to 1850 is laid down by Sir Erskine Perry in Maclean
v. Cristall (2). Priests were never necessary in the days of the Company.
They could not be had, and Collectors and Judges acted as their sub-
stitutes. To understand the Indian Statute Law it is necessary to see how
the law stood in England prior to 1852. Opinions are divided as to whe-
ther a priest was ever necessary under the common law of England. In
1753 Lord Hardwicke's Act 26, Geo II., c. 33, contained certain penal clauses against clandestine marriages. In 1828, Geo. IV., c. 76, and in 1837, Lord John Russell's Act were passed. Would Mr. Fischer's act have been punishable under any of the English Statutes? Apparently not. See Stephen's Digest of Criminal Law, p. 199; Stephen's Commentaries, Vol. II., p. 245.

14 & 15 Vic., c. 40, introduced the registry marriage of 1837 into India; it contained no penal clause at all about solemnising in the absence of the Registrar. That was introduced by Act V. of 1852, Section 14. The offence was a felony. Act XXV of 1864 began life as a bill in 1862. In that year 14 & 15 Vic., c. 40, could, for the first time, be repealed by the Government of India. The statement of objects and reasons and the debates in the Council show, as clearly as possible, that a particular evil was intended to be met by the penal section, corresponding to Section 68 of the Act of 1872. The Court here has ruled against the right of Council to refer to such proceedings, but in Mothura Kont Shaw v. The India General Steam Navigation Company (1), Queen-Empress v. Kartick Chunder Das (2), and in Hebbert v. Purchas (3), Ridsdale v. Clifton (4) this was done by the Court.

The preamble to an English statute can always be read and the statement of objects and reasons, at any rate, is analogous. The history of the Bill in Council shows that there never was any intention to alter the original draft. The section originated in a particular case: a schoolmaster at Buckergunge pretended he had authority to marry people and the Government found the penal law could not reach him. The original section was intended to punish people who married others under a false pretence of authority. (Statement of objects and reasons by Mr. Ritchie, 1862.) It is hardly likely that a new and grave departure from existing English law would be adopted without a trace being found in the debates. The report of the Select Committee is silent as to any change in the section. Drafting Acts of Parliament is apparently not an easy task, per Bramwell, L. J., in Cowdrosdale v. Charlton (5). The Act of 1872 was only intended to consolidate not to alter the law. In the English Acts a clear distinction is drawn between penal Acts and Acts which render the marriage void. Here assuming the marriage to be void, it does not follow that the parties are liable to punishment. To enact that marriages not conforming to the Act shall be void is surely enough to put a stop to them, and so thought the authors of the Act of 1864. If an English Clergyman married parties according to the Roman Catholic ritual the marriage might be void, but it is doubtful if he could be punished under Section 68. The original words of the section were "whoever not being a priest, &c.," and "whoever not being authorised," are apparently only intended to convey the same meaning, but in labouring to be brief the draftsman has become obscure. If the offence aimed at was the offence of falsely pretending to be authorised, then the English law has a parallel provision, for persons who pretend to be priests and marry others commit a felony. It is a presumption that the Legislature does not intend to alter the law beyond what it expressly declares. Wear Commissioners v. Adamson (6), River Wear Commissioners v. Adamson (7), and Maxwell on the Interpretation of Statutes, page 107. The section should be restricted so as to make

(1) 10 C. 166 (193). (2) 14 C. 721 (738). (3) 6 L.R. 3 P.C. 688.
punishable false pretenders only. The nature of the punishment is inconsistent with the theory that the section was intended to punish an innocent mistake. Mens rea should be an ingredient of the act. Ellis v. Kelly (1), Comperts v. Kensit (2), Taylor v. Newman (3), Meirelles v. Banning (4). Penal statutes must always be construed strictly and the degree varies with the severity—Maxwell on Statutes, pp. 319-321.

The Queen v. Tolson (5), Henderson v. Sherborne (6), [348] Elliott v. Majendie (7). The more reasonable construction of this section is to confine it to cases of intentional breach of the law, to acts done felonious.

If the mischief aimed at is the false pretence of authority then it is plain only all priests should be, and in the draft were, excluded from the section. It is submitted that the ruling in 6 M.H.C.R., App. 21(8) is wrong, and that is why a Full Bench was asked for in this case.

To hold that Section 68 makes punishable all persons who marry others with authority but not in accordance with the rites, &c., of their church was not only never intended by Mr. Ritchie who introduced the Bill but was never even hinted at in any subsequent debate, bill or proceeding of the Legislative Council.

The Government Pleader (Mr. Powell), for the Crown.

The arguments adduced in support of the conviction appear sufficiently for the purpose of this report from the judgments.

JUDGMENTS.

COLLINS, C.J.—This is an appeal by Mr. Robert Fischer, a Barrister-at-Law, who has been convicted under Section 68 of the Indian Christian Marriage Act of 1872.

The facts of the case appear to be as follows:—Mr. Robert Fischer is a Lay Trustee of St. George's Church, Madura, and in April and May last the Native Pastor of that Church published the banns of marriage between Samuel Louis Ormsby and Miss Bibiana Elizabeth O'Connor, both of whom profess the Christian religion. A day was appointed for the marriage ceremony to take place; but the incumbent of the Church was away on duty at Kodaikanal and the Native Pastor left Madura apparently on some private business three days before the marriage was to take place in spite of urgent requests that he would stay and perform the ceremony. Mr. Fischer was then asked to perform the ceremony, as he was a Lay Trustee of the Church. Mr. Fischer sent a letter to Mr. Wansbrough, the Incumbent, informing that gentleman that he intended to perform the marriage ceremony and gave as a reason that Mr. Johnson, the Marriage Registrar, had told him that there were precedents for such a course, and further, that the mother of the bride had gone to considerable expense in making preparations, and great inconvenience would ensue if the service did not take [349] place on the day appointed. Mr. Johnson, the Marriage Registrar, in his evidence says, that Mr. Fischer asked him on 5th May 1890 whether laymen could marry people, and that he replied he thought they could, and gave as an instance the marriage of his grandmother. On the 7th May 1890, Mr. Fischer solemnised a marriage between Mr. Ormsby and Miss O'Connor according to the rites of the Church of England, and the question to be decided is, has Mr. Fischer committed an offence.

---

(1) 30 L.J.M.C. 35.  
(2) L.R. 13 Eq. 379.  
(3) 32 L.J.M.C. 185.  
(4) 2 B. & A. 909.  
(6) 2 M. & W. 286.  
(7) L.R. 7 Q.B. 429.  
(8) Proceedings, dated 21st March 1871. [Case begins at p. 20—Ed.]
against the provisions of Act XV of 1872, Section 68. The section is as follows:— "Whoever, not being authorised under this Act to solemnise a marriage in the absence of a Marriage Registrar of the district in which such marriage is solemnised, knowingly solemnises a marriage between persons one or both of whom is or are a Christian or Christians, shall be punished with imprisonment which may extend to ten years or (in lieu of a sentence of imprisonment for seven years or upwards) with transportation for a term of not less than seven years and not exceeding ten years, or, if the offender be an European or American, with penal servitude according to the provisions of Act No. XXIV of 1855 (to substitute penal servitude for the punishment of transportation in respect of European and American convicts, and to amend the law relating to the removal of such convicts), and shall also be liable to fine."

It was contended on behalf of the appellant that no offence has been committed—

(1) because Section 68 can only refer to marriages that were intended to be solemnised by or in the presence of a Marriage Registrar—sub-Section 4 of Section 5;

(2) because the Registrar was, in fact, present when the ceremony was performed;

(3) because there was no proof that the accused knowingly committed a wrongful act and the section requires such proof.

Act V of 1852 refers solely to civil marriages and contains sections similar to those found in the Act of William IV., which first allowed a marriage before a registrar and made it an offence to solemnise a marriage under the Act without the presence of a Marriage Registrar.

The next Act of importance (Act XXV of 1864 was repealed by Act V of 1865) was Act V of 1865: the preamble of that Act states that it is expedient to provide further for the solemnisation of marriages in India of persons professing the Christian religion and applies to all marriages of Christians whether solemnised by a minister of religion or a Marriage Registrar. The sixth section of the Act enacts who are authorized to solemnise a marriage and Section 56 provides a penalty against unauthorised persons performing such ceremony in these words:—

"Whoever, not being authorised under the sixth section to solemnise a marriage shall, from and after the commencement of this Act, in the absence of a Marriage Registrar of the district in which such marriage is solemnised, knowingly and wilfully solemnise a marriage between persons, one or both of whom shall profess the Christian religion, shall be punished with imprisonment of either description, as defined in the Indian Penal Code, which may extend to ten years, and shall also be liable to fine; or in lieu of a sentence of imprisonment for seven years or upwards, to transportation for a term of not less than seven years and not exceeding ten years; or if the offender be an European or American, to penal servitude according to the provisions of Act XXIV of 1855 (to substitute penal servitude for the punishment of transportation in respect of European and American convicts, and to amend the law relating to the removal of such convicts)."

In 1872 Act XV was passed to consolidate and amend the law relating to the solemnisation in India of the marriages of the persons professing the Christian religion. It repeals so much of the Act of 1852 as had not already been repealed and with an unimportant exception, the Act V of 1865, and Section 5 of the Act of 1872 provides who may
solemnise marriages in India between Christians, and Sections 66 to 76
enact penalties against those persons who commit any offence against the
 provision of the Act.

It appears to me therefore that these sections apply to all persons, who
are not authorised to do so, solemnising a marriage between Christi-
ans and do not apply simply to marriages that are to take place before a
Marriage Registrar.

With regard to the contention that no offence has been committed,
because a Marriage Registrar was, in fact, present, it is clear that the Act
means that the Registrar must be present qua [351] Registrar and Sections
88 to 89 provide that certain notices, publication of notices and other
formalities shall take place before a marriage can be solemnised either by
or in the presence of a Marriage Registrar. It is not pretended that any
of these provisions were complied with. Mr. Johnson did not attend as
Registrar, but was in attendance merely as a relation of the bride for the
purpose of giving her away; it is impossible to believe that under these
circumstances the marriage had taken place in accordance with sub-
Section 4, Section 5 of this Act.

The third objection was the one most strenuously urged by the learn-
ed Counsel. He contended that there was an entire absence of proof that
Mr. Fischer had any guilty intention or knowledge that he was doing
wrong when he solemnised this marriage; that he thought he was author-
ised to perform a marriage under the circumstances being a Lay Trustee
of the Church; that he was utterly unaware of the provision of Act XV of
1872 and it is necessary for the prosecution to prove that he knew he was
not authorised to perform a marriage, and that his statement made before
the Committing Magistrate is true, wherein he says he believed he was
authorised by law to perform the marriage, and that, as Lay Trustee,
acting for Mr. Wansbrough, it was his duty to do so. I regret to say that
I cannot accept this statement—it is impossible for me to believe that a
Barrister of many years standing thought that it was his duty to solemnize
a marriage in a Church according to the rites of the Church of England,
because he happened to be a Lay Trustee of that Church and the incum-
bent happened to be away. In his letter, dated 11th July 1890, to the
Registrar of the Diocese (Exhibit C), he says he told the mother of the
bride, that he thought he had no power to marry, but that the Registrar
had said he had known of instances where Lay Trustees had performed
the ceremony; that he advised the bride and bridegroom to go through
the ceremony again when the incumbent returned or to get married before
the Registrar, and that it was the urgency of the case and the earnest
entreaty of Mr. Johnson and Mrs. O'Connor that induced him to perform
the ceremony, though unwillingly. I am of opinion, therefore, that
Mr. Fischer did not believe he was only performing a duty or that he was
authorised by law to celebrate such a marriage. I believe he acted
with great recklessness, and, as stated by the Sessions Judge, with a
[382] culpable want of care and caution in performing this marriage not
knowing that he was authorised to do so. The appellant, if he had looked
at Act XV of 1872, Section 5, would have seen at once that he was not
one of the persons authorised to perform a marriage ceremony; and
Mr. Fischer's assumed or real ignorance of the law cannot avail him and
I must hold Mr. Fischer liable for his act. It may well be that he was
not aware he was committing so grave an offence carrying with it such a
severe penalty as is provided in Section 68. In some exceptional cases
ignorance of the law may be pleaded as in the cases of *Ellis v. Kelly* (1) and *Taylor v. Neuman* (2), cited by Mr. Wedderburn; but those cases were decided upon the words of particular statutes and do not apply to this case. In *Reg. v. Prince* (3), the law as to guilty knowledge is very fully discussed and supports the view I take. In the case of *Reg. v. Bishop* (4), the defendant was tried before Mr. Justice Stephen for receiving more than two lunatics into a house not duly licensed, upon an indictment on 8 and 9 V. c. cap. 100, Section 44. It was proved that the defendant did receive more than two persons whom the Jury found to be lunatics into his house believing honestly and on reasonable grounds that they were not lunatics. The Judge held that this was immaterial having regard to the scope of the Act and the object for which it was apparently passed, and the Court upheld that ruling. I am further of opinion that the only facts necessary to support a conviction under Section 68 are these—first, it must be proved that the accused was not authorised under the Act to solemnise a marriage in the absence of a Marriage Registrar, and secondly, that he knowingly solemnised a marriage in the absence of such Registrar between persons one or both of whom was a Christian or Christians. Both these points have been proved by the prosecution in this case.

The Act XV of 1872 is, as stated by both the learned Counsel who appeared in the case and that statement is acquiesced in by the Judges, very badly and clumsily drawn; but I am of opinion that the word "knowingly" only applies to the fact that the person so solemnising the marriage is aware that he is solemnising a marriage and that the person or persons he is professing to marry is or are a Christian or Christians.

[353] I am of opinion, therefore, that the conviction of the appellant was right, and I would dismiss this appeal.

MUTTUSAMI AYVAR, J.—The appellant, Mr. Robert Fischer, has been convicted under Section 68 of Act XV of 1872. As to the facts of the case, there is no dispute. On the 5th May 1890, Mr. Fischer solemnised a marriage between two Christians in St. George's Church at Madura according to the rites of the Church of England. At that time Mr. Fischer was a Lay Trustee of the Church, and Mr. Johnson, a Marriage Registrar of the district, was present on the occasion, not in his official capacity as Marriage Registrar but as a relative of the bride. It is clear that Mr. Fischer is not one of the four classes of persons mentioned in Clauses 1, 2, 3 and 5 of Section 5 of the Act. Nor was the marriage a civil marriage solemnised in the presence of the Marriage Registrar within the meaning of the Act. According to Section 4, a marriage between persons one or both of whom is or are a Christian or Christians is void if it is not solemnised in accordance with the provisions of Section 5. It is provided by Section 68 that "whoever, not being authorised under this Act to solemnise a marriage in the absence of a Marriage Registrar of the district in which such marriage is solemnised, knowingly solemnises a marriage between persons one or both of whom is or are a Christian or Christians shall be punished with imprisonment which may extend to ten years or (in lieu of a sentence of imprisonment for seven years or upwards) with transportation for a term of not less than seven years and not exceeding ten years." The question for decision is whether Mr. Fischer has been properly convicted under Section 68. It is first urged that Section 68 applies only to marriages performed by the

---

(1) 30 L.J.M.C. 35.
(2) L.R. 2 C.C.R. 154.
(3) 32 L.J.M.C. 166.
(4) L.R. 5 Q.B.D. 259.
Marriage Registrar, but this contention appears to me to be obviously untenable. Section 68 ought to be read together with Sections 4 and 5, and when it is so read, there appears no reason for limiting the scope of Section 68 to civil marriages. The words "in the absence of a Marriage Registrar" have to be read together with Clause 4, Section 5, and far from being words of limitation, they appear to me to be intended to include unauthorised civil marriages. The history of previous legislation which is set out by Mr. Justice Shephard in his judgment, the nature of the Act of 1872 as a consolidating Act, and the intention suggested by Section 4, Section 5 and Section 68 when [354] they are read together, lead me to the conclusion that Section 68 is of general application.

Another contention is that the presence of Mr. Johnson at the marriage takes this case out of Section 68. The proper construction of the words, "in the absence of the Marriage Registrar" is that in order that there may be a valid defence, he should be present in the exercise of his statutory authority as Marriage Registrar, and that they do not include a case in which he is present as a mere spectator or as a relative of the bride. It is clear in the case before us that the marriage solemnised was not intended to be solemnised as a civil marriage; nor was the procedure prescribed by the Act in connection with such marriage either followed or intended to be followed. Those words ought to be construed as well in the light thrown upon them by Part V as by Section 5.

The substantial question for decision is what effect is to be given to the word "knowingly" used in Section 68 and how far it is necessary to prove in order to support a conviction under this section that the offender knew in fact that he was doing an unauthorised act. The Judge finds, upon the evidence, that Mr. Fischer had not guilty knowledge, but that the absence of such knowledge was due to gross negligence or carelessness on his part. The absence of such knowledge is due in the case before us to his omission to refer to the Act of the Legislature of which Section 4 and Section 5 are as plain as any provision of law can be, as to a marriage being void if solemnised otherwise than by persons enumerated in Section 5, or by or in the presence in his official capacity of a Marriage Registrar. It is true that there must be "a mind at fault before there can be a crime." But in applying this principle, it must be remembered that every man is presumed to be cognizant of the statute law of the country and construe it aright; that if any individual should infringe it through ignorance or carelessness, he must abide by the consequence of his error; that it is not competent to him to aver in a Court of Justice that he was ignorant of the Criminal Law of the land, and that no Court of Justice is at liberty to receive such a plea. There may be some important ingredient of a particular offence independently of the mere ignorance of law, such as dishonest intention in the case of theft, which may be shown not to exist owing to an error in applying the law to the facts of a particular [355] case. But in the case before us, we are asked to presume that the very knowledge of the existence of the statute law must be proved as a matter of fact and to assume that the Legislature framed Section 68 on that view. I do not think that I can accede to such a suggestion. Starting then with the presumption that Mr. Fischer must be presumed to have been aware of the law, I am unable to refer the word "knowingly" to a knowledge of the existence of the law. I can only refer it to the other fact mentioned in Section 68 as constituting the offence, viz., the status of the parties or one of them being a Christian.
or Christians. Neither the Post Office case (Meirelles v. Banning (1),) nor Ellis v. Kelly (2), nor the Pigeon Shooting case (Taylor v. Newman (3),) goes further than to show that a person may be mistaken as to the application of a known rule of law to certain special circumstances and as to the manner in which such erroneous application affected him in the particular case. They do not warrant the contention that ignorance of the existence of a penal provision of law is pleadable as a good defence.

I agree with the learned Chief Justice in holding that it is sufficient to support the conviction under Section 68 to show that Mr. Fischer was not authorised by the Act to solemnise the marriage, and that he solemnised the marriage in the absence of the Marriage Registrar in his official capacity, knowing that the parties between whom he solemnised the marriage were Christians. I am also of opinion that the conviction must be upheld and the appeal dismissed.

Shephard, J.—The appellant has been found guilty of doing an act which renders him liable to punishment under Section 68 of the Indian Christian Marriage Act. It is proved, and not denied by him, that he, not being a member of the classes of persons authorised to solemnise marriages under Section 5, Clauses (1), (2), (3) and (5) of the same Act, did solemnise a marriage between two Christians in an English Church and according to the rites of the Church of England. At the marriage, Mr. Johnson, an uncle of the bride, who happens to be Marriage Registrar, appointed under the Act, was present, and he attested the marriage register. It is clear that he did not attend the marriage in any official capacity.

[356] It was contended on behalf of the appellant that the act done by him did not amount to an offence within the meaning of the section—

1. because the section was only intended to apply to marriages performed by the registrar;

2. because the section requires proof of knowledge on the part of the accused that he was committing an unauthorized and wrongful act, and that such proof was wanting, and

3. because the absence of the registrar is an element of the offence, and, in point of fact, the registrar was present.

This last point may shortly be disposed of by the remark that the presence of the registrar can only be material when he appears in his official capacity and that it cannot be intended that his mere physical and perhaps accidental presence in the Church can save from penal consequences the act of one who is otherwise guilty of an offence under the section.

The argument on the first point was based on the history of the Act of 1872. Previously to 1852 there was no statute law relating to Christian marriages in this country. In that year was passed on the authority of the Statute 14 & 15 Vict., c. 10, the Act V of 1852. This Act refers solely to civil marriages and does not touch marriages solemnized in English Churches or by ministers of religion. It contains a section similar to that found in the Statute of William IV., which introduced the registrar’s marriage, making it penal for any person knowingly and wilfully to solemnize a marriage under the provisions of the Act of Parliament in the absence of a registrar of the district. In 1862 a Bill was introduced with the object of making further provision for the solemnization of

(1) 2 B. & A. 909.  (2) 30 L.J.M.C. 85.  (3) 39 L.J.M.C. 186.
marriages between Christians. This Bill became law under the title of Act XXV of 1864 for which in the next year was substituted Act V of 1865. This Act was intended to cover the whole field, not already covered by the Act of 1853. It provided for licenses to solemnize marriages being granted to ministers of religion, not being persons episcopally ordained or Clergymen of the Church of Scotland, and for the granting of licenses to grant certificates in the case of Native Christians. It prescribed rules for the solemnization of marriages by ministers of religion and rules as to the time when such marriage or marriages performed by ordained Clergymen or Clergymen of the Church of Scotland might be solemnized, and it also prescribed rules as to the registration of all marriages except those solemnized under the statute and the Act of 1852.

In the chapter relating to penalties was a Section (the 56th), running as follows:

"Whoever, not being authorized under Section 6 to solemnize a marriage shall, from and after the commencement of this Act, in the absence of a Marriage Registrar of the district, in which such marriage is solemnized, knowingly and wilfully solemnize a marriage between persons, one or both of whom shall profess the Christian religion, shall be punished with imprisonment of either description, as defined in the Indian Penal Code, which may extend to ten years, and shall also be liable to fine; or in lieu of a sentence of imprisonment for seven years or upwards, to transportation for a term of not less than seven years and not exceeding ten years; or, if the offender be an European or American, to penal servitude according to the provisions of Act XXIV of 1865."

Looking to the scope of this Act and to the fact that concurrently with this section there was in force the above-mentioned section of the unrepealed Act of 1852 making it penal for any person knowingly and wilfully to solemnize a marriage under the provisions of the Act of Parliament in the absence of the registrar of the district, I think there can be no doubt that the 56th Section of the Act of 1865 was not intended to refer exclusively to marriages which might be solemnized by or in the presence of a Marriage Registrar. The object of the section clearly was to make the solemnization of a marriage by an unauthorized person a punishable offence, and, at the same time, to exempt from its operation the case of marriages solemnized in the presence of a registrar; that this was the view with which the section was framed is confirmed by the statement of objects and reasons to which Mr. Webberburn called our attention. In 1872 the Act now in force was passed; it is a consolidating Act—it repeals the statute 14 & 15 Vic., c. 10, and the Acts V of 1852 and V of 1865, which, up to that time, had been concurrently in force. In this Act, in the chapter relating to penalties, the 68th Section takes the place occupied by the 56th Section in [358] the Act of 1865; and, as the latter section must be construed as applicable to marriages other than those which might have been solemnized under the statute, so the section now in force must have a similar construction put upon it. Its operation cannot be restricted to the case of civil marriages.

Assuming then that Section 68 is aimed at the case of a person who, like the appellant, not being authorized to solemnize a marriage does solemnize a marriage in a Christian Church and according to the rites of the Church of England, it has to be seen whether in other respects the facts necessary to constitute an offence under the section have been proved. There was a great deal of discussion as to the construction of the section,
It was said that as the section is punctuated, it would notwithstanding the presence of the registrar, render punishable any person who, not belonging to any of the four classes denoted by the first, second, third, or fifth clauses of Section 5 solemnized a marriage of the kind described in Part V of the Act. Obviously this cannot have been intended, for an ordinary layman is under the provisions of Part V at liberty to solemnize a marriage in the presence of the registrar. In order, therefore, to make the section applicable to the case of a marriage of that class, it must be supposed that the absence of the registrar was intended to be an ingredient of the offence. In other words the section must be read, as if there were a comma in the first line after "marriage." It was thus that the punctuation stood in the section of the Act of 1865 of which the present section is a reproduction. In the present case it is not necessary to pursue this discussion, because, on the literal reading of the section, the appellant is clearly a person not authorized under the Act to solemnize a marriage in the absence of the registrar, and, on the other hand, if by an altered punctuation the absence of the registrar is made an ingredient of the offence, the registrar in his official capacity was absent.

The more important and difficult question remains to be considered, viz., what is the effect to be given to the word "knowingly." It was contended on behalf of the appellant that in construing the section, regard should be had to the fact that in the original section, as framed in the Act of 1852, the act for which punishment was prescribed was stigmatized as a felony, and that, in the present section, the punishment is [359] extremely severe. It was said that it could not have been intended to make an act a felony or prescribe imprisonment for ten years unless it were shown that the offender had acted with a consciousness of doing wrong. Reference was made to the objects and reasons published on the introduction of the Bill of 1861 as showing that it was cases of false pretence which it was sought to render punishable by legislation. With regard to the grammatical construction of the section, it was insisted that the word "knowingly" should be read as relating to the antecedent words, and that, in order to constitute an offence, there should be on the offender's part knowledge as well of the absence of authority as of the fact that the parties are Christians. If this construction were adopted and the finding of the Sessions Judge that Mr. Fischer did not know that he was not authorized or that he was doing wrong is accepted as correct, Mr. Fischer would be entitled to an acquittal.

To ascertain what effect must be given to the word "knowingly" we must examine first the language of the section itself, and regard must also be had to the use of the word in other sections of the same Act or of other penal enactments. There can be little doubt that if the word had been omitted in the section under discussion, the inference would have been that it was intended to make the mere act of solemnization penal independently of proof that the offender did not know that he was not authorized or that the parties were Christians. It may be that an honest belief on the offender's part that he was, as a matter of fact, authorized, or that the parties were not Christians would have afforded him a good defence; but it is at least clear that the burden of proving this defence would have been on the accused person. The effect of the introduction of the word "knowingly" would then be to throw the burden of proof, so far as relates to the matter referred to by that adverb, on the prosecution (see observations
of Brett, J., in *Reg. v. Prince* (1). Is it then correct to say that the word relates back to the antecedent sentence? Reading the section by itself I should say that that was not the meaning. The section makes it an offence for a person, not belonging to certain classes, knowingly to do a certain act. Surely it is in respect of the doing of the act that [360] knowledge is required. To do the act in ignorance of its nature or in ignorance of the religion of the parties would be no offence. This construction gives full effect to the word, and is, in my opinion, consistent with the manner in which the word is used in other sections. The expression "knowingly" in conjunction with "wilfully" is used in several other sections of Part VII of the Act. In Section 71 (1) it is made an offence knowingly and wilfully to issue any certificate for marriage or solemnise a marriage without publishing the notice required by the Act. In Section 72 it is made an offence for a registrar knowingly and wilfully to issue a certificate for marriage after the expiration of three months after the notice has been entered by him as required by the Act. In these instances it is tolerably clear that the knowledge intended is nothing more than consciousness of the character of the act done in the one case without the publication of a notice, in the other after the expiration of a certain time. In the clauses of Section 71 other than the first, the words "knowingly and wilfully" do not appear, though in the corresponding section of the Act of 1865 the words govern the whole section, and there is no apparent reason why any distinction should be made between the cases provided for by the various clauses. In the original section of the Act of 1852 in which the first traces of the present Section 68 may be found, punishment is prescribed for any person who knowingly and wilfully solemnises a marriage under the Act of Parliament in the absence of a registrar. Here again it is only with reference to the character of the act done that the phrase can have been used. The language of Section 66, the corresponding section of the Act of 1865, certainly does not favour the contention that, in order to prove an offence under it, knowledge of want of authority was required to be proved positively. Whatever was the intention expressed in the objects and reasons framed in 1861, I think the Legislature has not used the language they might have been expected to use, had their intention been to limit the operation of the section to cases of false representation. And it is the less likely that the Legislature did entertain this intention because ordinarily there could be no doubt as to the absence of authority to solemnise a marriage and any mistake in the matter could only be due to a misapprehension of the law. It is not necessary to say what would be the effect of a mistake in fact on the part of a person charged under the section. It may be that in such a [361] case it would be held as it was in the Post Office case *(Meirelles v. Banning* (2)) that no offence had been committed; but in the present case the mistake, if any, was a mistake of law (ignorance of the provisions of a statute) and the appellant's case requires that the Legislature should have been supposed to intend to exempt from the penal consequences of the section, those of whom it could be proved that they were ignorant of the law or rather those of whom the prosecution failed to prove that they knew the law. There are doubtless cases in which ignorance of law may be a material ingredient in the defence to a criminal charge and the cases cited, are illustrations of this. In the Post Office case the defendant had

---

2. 2 B. & A. 909.
delivered letters to the wrong person, but he had done so, bona fide, and in conformity with a long established practice.

In Ellis v. Kelly (1), the defendant had, before the passing of the Act, assumed the title of doctor and practised medicine and was possessed of a diploma from a German University. It was held that there was no reasonable evidence that he had wilfully and falsely called himself or pretended to be what he was not. In the Pigeon Shooting case it was held that the statute was not intended to apply to a case where the pigeons were shot by a man in the course of protecting his corn from the injury done by the pigeons—Taylor v. Newman (2).

These cases were decided with reference to the particular state of things with which the statute had to deal and with reference to the language of the statute. They may be authority for showing that under certain circumstances a man may defend himself by showing that he was mistaken as to the manner in which he was affected by a given statute; but they do not justify the proposition that entire ignorance of the existence of the law making the act criminal may be pleaded.

In the present case the Act declares that any marriage not solemnised in accordance with the provisions of the 6th Section shall be void. The marriage solemnised by Mr. Fischer not being solemnised under the provisions of Part V of the Act and not being solemnised by an ordained Minister or by a Clergyman of the Church of Scotland or by a person licensed under the Act, was clearly void. In order to prevent marriages being solemnised otherwise than in accordance with Section 6, Section 65 was enacted, having, as it appears to me for its object, to make the act of solemnising a marriage in defiance of the enacted law an offence. This object would be defeated if it were held that the section applied only to persons who had read the Act or had otherwise become aware of its provisions, and I do not think the language is such as to justify our placing such a construction upon the section.

In my opinion the Judge, on the facts found by him, rightly convicted the appellant, and I would dismiss the appeal.

Ordered accordingly.

14 M. 362.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

MICHAEL (Plaintiff) v. BRIGGS AND ANOTHER (Defendants).*
[7th October, 1890.]

Club—Goods supplied to a member—Suit on behalf of club—Parties.

An action to recover the price of goods supplied to a member of a non-proprietary club, or on his responsibility cannot be brought in the name of the secretary of the club.

CASE referred under Civil Procedure Code, Section 617, by G. Ramachandra Rau, District Munsif of Masulipatam.

The facts of the case appear sufficiently for the purposes of this report from the judgment.

Counsel were not instructed.

* Referred case No. 3 of 1890.

1) 30 L.J.M.C. 35. (2) 32 L.J.M-C. 167.
The question is whether an action to recover the price of goods supplied to the member of a club or on his responsibility can be brought in the name of the secretary of the club. The club is not a proprietary club such as was in question in Raggett v. Musgrave (1) and Raggett v. Bishop (2), but a mere association of gentlemen for social purposes, managing its affairs by a committee and a secretary. The goods, the price of which it is sought to recover, belonged to the club, and not to the secretary; and therefore it is not to him that the price is due.

[363] It may be convenient that the secretary should collect the moneys due to the club, and he may have authority to do so, but, if the money is not due on a contract made with him, an arrangement that he should sue cannot be recognized as giving him a right of action. (See Evans v. Hooper (3) and Gray v. Pearson (4).

We are of opinion that the question above stated must be answered in the negative.

---

14 M. 363 = 2 Weir 571.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Weir.

THANDAVAN (Complainant), Petitioner v. PERIANNA (Accused),
Counter-Petitioner.* [7th August, 1890.]

Criminal Procedure Code; Sections 435, 439, 440—Petition to revise a judgment of acquittal.

An appeal against an acquittal by way of revision is not contemplated by the Code, and it should, on public grounds, be discouraged.

[R., 23 C. 975 (979); 4 Cr.L.J. 37 = 89 P.L.R. 1906; 13 Cr.L.J. 457 (459) = 15 Ind.
Cas. 89 = U.B.R. (1911) 4th Qr., 100 (103) ; U.B.R. (1897-1901) 91 (99) ; Expl.,
2 Weir 571.]

PETITION under Criminal Procedure Code, Sections 435 and 439, praying the High Court to revise the proceedings of L. A. Campbell, Sessions Judge of Coimbatore, in Calendar Case No. 1 of 1890, acquitting Perianna Asari on the charge of perjury.

Mr. Wedderburn, for petitioner.
Mr. W. Gawn, for accused.

JUDGMENT.

This is a petition to revise the judgment of the Sessions Court of Coimbatore acquitting a person accused of an offence under Section 471 of the Penal Code. In cases of acquittal by a Sessions Court, the law allows an appeal on behalf of the Government and the reason for such a provision is obvious. The present is, however, the case of a private prosecutor seeking to put the Court in motion to revise an acquittal deliberately arrived at by the Sessions Judge concurring with the assessors. An appeal against an acquittal by way of revision is, in our opinion, not

* Criminal Revision Petition No. 121 of 1890.

(1) 2 C. & P. 556.
(2) L.B. 1 Q.B.D. 45.
(3) 2 C. & P. 343.
(4) L.B. 5 C.P. 568.
contemplated by the Code, and it should, we think, on public grounds, be discouraged.

Acting, therefore, under the discretionary power given in Section 440, Criminal Procedure Code, we decline to hear the learned Counsel who appears to support the petition, and we dismiss the application.

14 M. 364 = 1 Weir 241.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

QUEEN-EMPIRESS v. THANDAVARAYUDU.* [28th January, 1891.]

Penal Code—Act X LV of 1560, Sections 109, 209—Nuisance—Keeping a gaming house
—Abetment.

The lessee of a house, who permitted disorderly people to use it for gambling and thereby caused annoyance to the public, was convicted of an offence under Penal Code, Section 290; it appeared, however, that the accused had not engaged the house with the object of letting it out as a gaming-house:

Held, that the conviction was right.

PETITION under Criminal Procedure Code, Sections 435 and 439, praying the High Court to revise the proceedings of the Acting Head Assistant Magistrate of Godavari, in appeal case No. 11 of 1890, confirming the sentence of the Second-class Magistrate of Ellore, in calendar case No. 421 of 1889.

Venkataramayya Chetti, for the petitioner.
The Government Pleader and Public Prosecutor (Mr. Powell), for the Crown.

JUDGMENT.

The petitioner has been found guilty of abetting a public nuisance (Sections 290 and 109 of the Penal Code) in that he was the lessee of a house, which he permitted to be used as a common gaming house; whereby nuisance, danger, and annoyance have been caused to the residents in the neighbourhood.

The mere act of gambling in a private house is not per se a public nuisance (see Weir, page 146), but that is not the offence [365] charged or found. The evidence for the prosecution, which both the Lower Courts considered reliable, went to show that the neighbours have been greatly annoyed by the noise which the gamblers frequenting petitioner's house make, that the gamblers throw the ends of cheroots upon the houses, quarrel and fight in the public street, and that people are afraid to go out at night or to pass the house for fear of being assaulted.

Although there is no evidence, that the petitioner did, as the Sub-Magistrate states, engage the house for the purpose of letting it out as a gambling house, the evidence does warrant the finding that petitioner has permitted crowds of disorderly persons to make use of the house, both by day and night, for gambling, and that his doing so has caused considerable annoyance to the public. It is a significant fact that the gambling and annoyance ceased as soon as the present prosecution was instituted.

The absence of the petitioner from the town on a certain date will not exonerate him, as the nuisance is shown to have been continuous for some three months.

The conviction must be upheld and the petition dismissed.

* Criminal Revision Case No. 442 of 1890.

In a suit brought in 1896 by a zamindar to recover an estate granted by his predecessor to the predecessor of the defendant on a service tenure, a small money rent being also reserved, it appeared that in 1864 the right of the plaintiff’s predecessor to rent had been established by suit, but there was no evidence that the service was then dispensed with, but that in 1885, it was intimated to the defendant that the service was dispensed with, and a notice to quit was given to him; the option of holding the estate at an enhanced rent was however given to him at the same time:

Held, (1) that the suit was not barred by limitation, nor precluded by Civil Procedure Code, Section 13 or Section 43;

(2) that the plaintiff was not precluded by any implied contract from increasing the rent;

(3) that the burden of proving the fact that the plaintiff was not entitled to eject lay on the defendants, and had not been discharged.

In computing the time for an appeal to His Excellency the Governor in Council, under the rules made by virtue of Act XXIV of 1839 against a decree passed by the Agent to the Governor, the time necessary for procuring copies of decree and judgment appealed against may be deducted.

[F., 22 C. 398 (942) ; 2 M.L.J. 217 (219) ; 10 M.L.T. 391 = (1911) 2 M.W.N. 406 (409) ; R., 18 M. 99 (108) ; 23 M. 329 (356) 26 M. 403 (409) ; 7 Ind. Cas. 202 (205) = 8 M.L.T. 258 ; 7 Ind. Cas. 401 = 8 M.L.T. 82.]

APPEAL against the decree of H. G. Turner, Agent to the Governor of Fort Saint George at Vizagapatam, in original suit No. 2 of 1886, referred to the High Court by His Excellency the Governor in Council in the order, dated 12th August 1889, No. 1385, Judicial, under Rule XXII of the revised rules, framed under Act XXIV of 1839.

Suit to recover possession of the estate of Kalyana Singarore together with arrears of rent and mesne profits.

The plaintiff, who was the Maharaja of Jeypore, alleged that the above estate formed part of the jercayati lands in his zamindari; that it was granted by his predecessor in title on the condition of service tenure and the payment of rent to the father-in-law of defendant No. 1, Mukunda Dev, after whose death it passed into the possession of the husband of defendant No. 1, Krishna Dev; that Krishna Dev refused to acknowledge the title of the plaintiff who accordingly sued him in original suit No. 22 of 1864 on the file of the Court of the Agent to the Governor, Vizagapatam, and obtained a decree establishing his title to the estate and to receive rent from the defendant at the rate of Rs. 5,000 per annum; that Krishna Dev paid rent as above from the date of the decree till his death in February 1884; that the estate passed on the death of Krishna Dev into the possession of defendant No. 1, who had paid no rent; and that, on 29th July 1885, defendant No. 1 was informed that her service was not required and notice to quit in six months was given to her.

* Appeal No. 103 of 1889.
but it was, at the same time, intimated to her that, on application made, a lease of the estate would be granted to her for the following fasli at the rent of Rs. 20,000: and that defendant No. 1 neither quitted the estate nor paid the enhanced rent.

[367] Defendant No. 1 set up hereditary right to the permanent occupancy of the estate, and denied that it had been granted on service tenure, and pleaded that the suit was precluded by Civil Procedure Code, Sections 13, 43 by reason of the proceedings in original suit No. 22 of 1864, and further that the notice to quit was bad.

Defendant No. 2 was the adoptive son of defendant No. 1.

The decree in original suit No. 22 of 1864 was affirmed on appeal by the High Court in appeal suit No. 57 of 1864, and the decision of the High Court was upheld in the following judgment of the Judicial Committee of the Privy Council on 25th July 1870:

The respondent is the Zemindar of Jeypore, apparently a very large estate, in the nature of a principality, situated in the Northern Circars, which was permanently settled with his grandfather, Ramachandra Dev, in 1803, under Regulation XXV of 1802 of the Madras Code. The deed of permanent property, which is dated the 21st of October 1803, by which the property in the zemindari was then assured to Ramachandra Dev subject to the revenue permanently assessed upon it, is one of the exhibits in the cause. It shows, on the face of it, that the zemindari then included Pergunnah Singapurum, and the original statement of the respondent, at page 2, seems to admit that a specific sum of money was then assessed upon that pargunnah as part of the Government revenue payable in respect of the whole zemindari.

The appellant is the holder of six taluks, constituting or forming part of Pergunnah Singapurum, and the suit has been brought by the appellant, as zemindar, against the respondent, treating him as under-tenant, to enhance the rent of those taluks.

The first decision of the Governor's Agent, who appears to exercise judicial functions in the district where the property is situated, was in favour of the respondent. Against this the appellant appealed to the High Court of Madras (1) and, on the 6th of November 1865, that Court remanded the case for re-trial upon the issues stated at page 6 of the record, directing the Governor's Agent to return to the Court his findings upon those issues with the evidence upon which they were founded, the Court, in the meantime, reserving its final judgment upon the appeal.

The issues are the following:—(1) "Has the family of defendant held these six taluks under a claim of ownership, and consequently by a possession hostile to the family of plaintiff ever since the permanent settlement? (2) Were the taluks, at the period of the permanent settlement, in possession of the defendant's family on such claim of right? (3) What rights of ownership have the plaintiff's family exercised over the taluks? (4) Has the possession of defendant been for any, and, if so, for what period, adverse?"

It seems to have been assumed that the burden of establishing the affirmative of at least the first, second and fourth of these issues lay upon the appellant; and their Lordships conceive that that assumption was correct, because, after it appeared that [368] the zemindari included the pargunnah amongst its "mal" assets, or revenue-paying lands, it lay upon

the appellant, as defendant in the suit, to establish the grounds on which he disputed the zamindar’s claim to an enhanced rent.

The appellant accordingly filed an additional statement on the 20th of February 1866, to which, on the following day, the respondent put in his answer, both of which documents are at page 8 of the record.

The appellant’s case was that he and his ancestors had enjoyed the Singapuram Pergunnah as a mahaul separated from the rest of the zamindari, and as lakhiraj from a period anterior to the permanent settlement; that his great-grandfather, Lala Krishna Dev, being Raja both of Singapuram and Jeypore, had bestowed the whole of his possessions, with the exception of Pergunnah Singapuram, upon his younger brother Vikrama Dev, the grandfather of the respondent; that the appellant and his ancestors, for four generations, had since enjoyed Singapuram without disturbance; and that, therefore, the respondent was not at liberty to bring such a suit for the possession enjoyed by a member of his family.

The respondent’s case was that, before and since the permanent settlement, Pergunnah Singapuram had been enjoyed by the respondent and his ancestors as part of the zamindari; that the appellant’s title to the taluks originated with his father, Mukunda Dev, to whom, about forty years before, the then Maharaja Vikrama (the respondent’s father) had granted them to be held partly on a money rent, partly on service; that Mukunda had paid rent for them; that on his death his widow and his son, the appellant, being in distress, were allowed, for some time, to discontinue the payment of rent, but that in 1860 the appellant himself had acknowledged the respondent’s title, and made some payment in recognition of it. The nature of the payment it will be more convenient afterwards to consider.

Both parties went into evidence. The Governor-General’s Agent found all the issues in favour of the respondent, and there was then an appeal to the High Court, which Court adopted, after argument, the findings which were sent up. It then proceeded to consider the original appeal, and dismissed that, confirming the original decree in the respondent’s favour.

It lies on the appellant to satisfy their Lordships that these decisions are erroneous, and I need not repeat what has been so often stated at this board, that their Lordships will not take upon themselves to disturb the concurrent findings of two Indian Courts upon issues of fact, unless they are clearly satisfied that there has been some very grave miscarriage, either in the trial of the cause, or in the appreciation of the evidence.

In the present case, the appellant labours under the additional disadvantage of having set up and undertaken to prove a case which it is almost impossible to reconcile with the uncontroverted and incontrovertible facts of the settlement of 1803. His case is that, when his ancestor made over the rest of the zamindari to his younger brother, he retained Singapuram as the separate property of his (the elder) branch of the family, by which it has ever since been enjoyed rent free.

Now it may be admitted that both the appellant and the respondent descend from a common ancestor, and that the appellant belongs to the elder branch of the family. It may be further admitted, for that fact seems to have been found by the Governor’s Agent, that, at one period, the whole of the zamindari was in the appellant’s ancestor, Lala Krishna Dev, but there is not the slightest proof of the alleged transfer
by Lala Krishna Dev, or of the alleged retention (when the whole zemindari passed from one branch to the other) of pergunnah Singapuram, whilst, on the other hand, the deed of permanent settlement (a document which is clearly above suspicion) establishes that the settlement was made with and the property confirmed to the plaintiffs' grandfather, as the person then in possession of the whole zemindari, and that the zemindari then included Pergunnah Singapuram. It is also found by the Governor's Agent, who can hardly be mistaken upon such a fact, and it is indeed admitted by the appellant, in his first written statement, that the permanent revenue of Rs. 1,050 per annum, or upwards, was assessed specifically on Singapuram on the occasion of the settlement.

From these facts there arises the strongest presumption against the truth of the appellant's case; for if, as he says, Singapuram was held in 1802 by Sundara Dev as a distinct separate property, that person would presumably have settled for it with Government, and would have taken a deed of permanent property, assuring to him that separate estate. Such would have been the natural course of things, unless the whole pergunnah were, as between the possessor of the land and Government, lakhiraj. But this it certainly was not, since we find it clearly proved that it was treated as maguzari land, and Government revenue assessed upon it.

On the other hand, there is also a strong presumption that the zemindar of Joyapore would not have settled for this land, as he did, unless he had been in the receipt of the collections from it, or of some rent payable in respect of it.

To these very strong presumptions, what does the appellant oppose? He may be taken to have proved two copper grants of small parcels of land, one in 1747, another in 1786; but those, if treated as acts of ownership by the owner of the zemindari, or the owner of the pergunnah, really prove nothing with reference to the present contention, because they bear date at a time when the whole zemindari may have belonged to Lala Krishna Dev, or the other party by whom the grant purports to have been made, both being anterior to the date of the settlement at which time we find the respondent's ancestor, the undisputed possessor of the zemindari. The Governor's Agent has also treated the second grant as of little importance, even if it were inconsistent with respondent's case, because, where small grants of land like this are made to Brahmans of repute, the alienees are generally undisturbed.

Then the learned Counsel, for the appellant, have referred into several of the letters and documents which, they say, are inconsistent with the respondent's case. Amongst them are the two letters, out of which this suit is said to have originated, the letter of the respondent to the appellant, and the letter of the Governor's Agent; but really these establish no such inconsistency. The case now made by the respondent is that the tenure granted to Mukunda was granted on a small money-rent, and a considerable service-rent, the latter consisting of the obligation to keep up a number of paiks, or armed men. This correspondence only shows that the circumstances of the country had altered in two particulars; that the Government, for some reason or another, had prevented the zemindar from levying certain cesses or taxes which he seems theretofore to have levied; that his revenues had been thereby diminished, and that he had found it necessary to enforce his right of enhancement against under-tenants. There is no inconsistency in that with the case made, because, if the circumstances of the country no longer required
those armed men to be kept up, the zemindar would naturally say to his tenant—"If you are relieved from that service, I have a right to enhance my money-rent, and I come into Court for that purpose."

[370] Again the letter at page 57, upon which a good deal of comment has been made, seems to their Lordships to be in no degree inconsistent with the respondent’s case. It is a letter written to the Governor’s Agent after the death of Mukunda Dev, and it describes Mukunda Dev as “the Mokkasadar of Singapuram attached to my zemindari,” clearly treating him as a tenant upon some terms of the zemindar. It alludes to the interference of another woman, Srikondanuma Dev, the widow of another member of the elder branch, with the rights of his son and widow; and it seems to their Lordships to be just such a letter as the superior and the head of the family might, under the circumstances described, write to the Governor’s Agent. It is certainly more consistent with the existence of a sub-tenure granted by the zemindar to Mukunda Dev, than it is with the case now set up by the appellant.

Then a good deal has been said as to the insufficiency of the evidence; but, with the exception of the copper grants, the Governor’s Agent has discredited the whole of the evidence for the appellant, and has given particular reasons for discrediting some of his witnesses. On the other hand, he has given credit to the witnesses for the respondent, witnesses who, although they do not prove perhaps very satisfactorily or in detail the terms of the grant, do prove the general fact that Mukunda Dev obtained possession of this pergunnah as an act of favour from the zemindar, and that generally rent and service were paid upon that footing.

There are two witnesses who prove distinctly the payment in 1860. They treat it as a payment of rent. It is entered in the accounts, which are clearly admissible, as constructive evidence, as a payment of rent. The Governor’s Agent finds that it was a payment of rent. Their Lordships do not find in the record any trace of any particular complaint against that finding, on the ground that it is inconsistent with the description given in the statement of the respondent, and that the payment was rather in the nature of a nuzzur or free-will offering, than of a payment on account of rent reserved.

Their Lordships think that it would be improper for them now to open this question on this alleged inconsistency. They also think that, where the Governor’s Agent has discredited certain witnesses and given credit to certain other witnesses, it would be contrary to the practice of this Committee and to sound reason to say that he ought to have believed the one and disbelieved the other, unless there were far stronger grounds than any that have been here shown for the conclusion that he was wrong.

Again, with respect to the reception of evidence, their Lordships do not find that any objection was formally taken in the Court below to the reception of the accounts; and they think it would be mischievous if they were now to allow that exception to be taken in the final Court of Appeal. There was, no doubt, some question raised in the High Court, and the High Court seems also to have taken this view. Their Lordships are further of opinion that, looking to the burden of proof which lay on the appellant to make out his exemption from this increased rent, looking to the case that he made, and his utter failure to establish that case, the decision may be clearly supported without falling back upon or calling in aid these accounts.
Upon the whole case, their Lordships are of opinion not only that no sufficient ground has been made for saying that the decisions below are wrong, but that upon the evidence in this record those decisions were right. They must, accordingly, advise Her Majesty to dismiss the appeal. The respondent has not appeared. Therefore it is not necessary to say anything about costs.

[371] The Agent to the Governor, on 18th March 1889, passed a decree for the plaintiff against which the defendants, on 26th June 1889, preferred this appeal, which was referred to the High Court as above. It appeared that, if the time necessary for obtaining copies of the decree and judgment of the agent was deducted, the appeal was presented within three months of the Agent’s decision.

Rama Rau and Mahadeva Ayyar, for appellants.

The Government Pleader (Mr. Powell) and Mr. J. G. Smith, for respondent.

JUDGMENT.

The plaintiff is the Maharajah of Jeypore in the Vizagapatam district. He instituted the present suit to recover possession of the Kalyana Singarpore Pergunna with arrears of rent. The plaint set forth that the pergunnah was granted by the plaintiff’s ancestors to the father-in-law of the first defendant on condition of service tenure, and the payment of rent; that in consequence of the denial of the plaintiff’s title by the first defendant’s husband, the plaintiff instituted original suit No. 22 of 1864 to establish his right to the pergunnah, and to recover rent at the rate of Rs. 5,000 per annum, that the suit was decided in his favour, and that Rs. 5,000 were paid annually until the death of the first defendant’s husband in 1884; that in July 1883 the plaintiff gave notice to the first defendant that her services were no longer required, and that she should either execute an agreement to take the pergunnah on lease for the annual sum of Rs. 20,000, or give up possession, and that the defendant had neglected and taken no notice of the said notice. The first defendant (the second defendant is her adopted son and a minor) pleaded inter alia that the plaintiff was only entitled to recover Rs. 5,000 per annum by executing the decree in original suit No. 22 of 1864; that the pergunnah was not held on service tenure, but on a permanent lease, and that the plaintiff had no right to eject.

The Lower Court gave the plaintiff a decree for possession and mesne profits at the rate of Rs. 20,000 per annum from fasli 1295 to date of possession.

The defendants appealed to the Governor-in-Council who has, under Rule XXII of the revised rules, framed by Government under Act XXIV of 1839, referred the appeal for the decision of this Court.

[372] The learned Government Pleader, on behalf of the minor plaintiff (the original plaintiff having died during the course of the suit), who is represented by his guardian, the Collector of Vizagapatam, raises the preliminary objection that the appeal is out of time. His argument is that the time allowed for an appeal being three months, and there being no provision in the rules for the deduction of the time requisite for obtaining a copy of the decree and judgment (a copy of the judgment not being in fact necessary for an appeal) this appeal is out of time. The argument proceeds on the assumption that Rules XXI and XXII must be read together and that the proviso in Rule XXI applies also to Rule XXII, it being unreasonable, it is argued, to suppose that no limit would be fixed.
for the presentation of an appeal to the Governor-in-Council, when a limit is prescribed for the presentation of an appeal to this Court. On the other side, it is contended that the Governor-in-Council having admitted the appeal, and referred it to this Court for decision, the question as to whether the appeal is in time, does not arise, that there is no time fixed by Rule XXII within which an appeal must be presented to the Governor-in-Council, and that, even if it be held that the appeal must be preferred within three months after the Agent’s decision the general provisions of the Limitation Act apply, and the time necessary for obtaining copies of decree and judgment must be deducted. The decree bears date 18th March 1889. The copy was applied for on the same date, and was furnished on the 28th March. The appeal was presented to Government in the usual way in which petitions are presented on the 26th June 1889. If the time occupied in obtaining copy be deducted, the appeal was presented within three months after the Agent’s decision.

As remarked in Kullayappa v. Lakshmipathi (1) “it has been several times decided that the general sections of the Limitation Act from 5 to 25 are applicable to suits for which periods of limitation are prescribed other than those described in the second schedule to the Limitation Act” and, if the period in this case is three months, we are of opinion that, under Section 12 of the Limitation Act, the time requisite for obtaining a copy of the decree must be excluded.

But, in our judgment, no time is fixed within which an appeal [373] must be preferred to the Governor-in-Council. Rules XXI and XXII of the rules above referred to are as follow:—

Rule XXI.—“From all decrees upon original suits passed by the Agent (with the single exception specified in the next following rule), an appeal shall lie to the Sadr Court to be disposed of as provided in Section 6, Act XXVI of 1839; provided such appeal is preferred either to the Agent or the Sadr Court within three months after the Agent’s decision; or after that period, if sufficient cause can be assigned to the Sadr Court for any delay which may have occurred by petition on the prescribed stamp, and subject to the other rules required in other appeals to the Sadr Court, as provided in the Madras Code and Acts applicable to that Presidency.”

Rule XXII.—“From decrees of Agents in suits wherein the landed possession of a zemindar, bissoye, or other feudal hill chief may have formed the subject of litigation, an appeal will lie to the Governor-in-Council alone, who may refer any such appeal for the decision of the Sadr Court, provided that the decree of the latter Court shall not be carried into execution without the permission of the Governor-in-Council.”

A distinction is clearly drawn between suits in which the landed possession of zemindar forms the subject of litigation, and other suits cognizable by the Agent. In the former the appeal lies to the Governor-in-Council, in the latter to this Court. Appeals to this Court will not lie unless presented within three months after the Agent’s decision. But there is no such proviso with reference to appeals to the Governor-in-Council. We can see no reason why the proviso to Rule XXI should be held applicable to Rule XXII. It is not denied that in this suit the landed possession of the zemindar forms the subject of litigation. Government,
in the exercise of the power conferred on them in Rule XXII, have admitted the appeal and referred it to this Court for decision.

The preliminary objection must be overruled.

On behalf of the appellants it is argued that the Agent was in error in holding that the defendants' occupants are "yearly tenants at will."

There appears to have been some slight confusion in the mind of the Judge as to the nature of the defendants' tenure.

In the former suit between the parties (original suit No. 22 of 1864), it was found by the Agent that there had been no hostile possession on the part of the defendants, who had made payments in acknowledgment of tenancy, and that "the plaintiff's father granted the pargannah to the defendant's father, partly for the grantee's maintenance, and partly on rent; that the grant was further conditioned for service, and that such service was, from the circumstances of the country, a bona fide requirement." On appeal, the High Court concurred in the view taken by the Agent of the evidence, and considered that there was satisfactory proof of a holding as tenant under the plaintiff. The case then went on appeal to the Privy Council, who held that it was proved that the grantee obtained possession as an act of favour from the zamindar, and that rent and service were paid upon that footing. It follows, therefore, that the defendant's tenure is not of a "yearly tenant at will," but has been rightly described in the plaint as one granted on condition of service and payment of rent. This, it appears clearly from the judgment of the Privy Council (page 16 of the printed papers), was the plaintiff's case in the former suit, and there the Privy Council held that "after it appeared that the zamindar included the pargannah among its revenue-paying lands, it lay upon defendant to establish the grounds on which he disputed the zamindar's claim to an enhanced rent." Enhancement of rent was not claimed in that suit on the ground that service was dispensed with, but because the revenues of the zamindar had been diminished in consequence of Government having prevented him from levying certain cesses or taxes. In this Court it has been advanced that no service was rendered by first defendant's husband; but, although it was denied in the written statement that the pargannah was held on service tenure, no issue was recorded, nor was any evidence let in on that point. It has been suggested by the appellant's pleader that in the previous case the Privy Council decided that plaintiff was entitled to enhance his money rent, because he had relieved the defendant from service. We do not think that the Privy Council did so decide. They put, as a hypothetical case, what has now actually occurred. The plaintiff has dispensed with the defendants' obligation to keep up a number of paiks or armed men, and claims, in consequence, to raise the rent. It lay upon the defendants to prove that service had been dispensed with in 1864, or that the increased rent paid between 1864 and the date of this suit was paid in place of service. No such evidence has been adduced.

Then it is argued that if the grant was a grant for maintenance, it is not resumable. It is true that in the former suit the Agent regarded the grant as made "partly for the grantee's maintenance," but this view was not supported by the judgment of this Court, nor was it the view taken by the Privy Council. The grant was one for service and payment of rent. It may be that in fixing the rent the relationship of the grantee was taken into account and a more favourable rent fixed than would have been the case had the grant been to a stranger, but there is no evidence on the record to support the contention that the grant was
made with a view to maintenance. On the other hand everything points to the conclusion that the grant was one for payment of a low rent on the condition of certain service being rendered. Now it is admitted, on behalf of the appellants, that, if the land was held on service tenure, it is resumable at the will of the zamindar for the time being in possession Unida Rajaha Raje Bommarautze Bahadur v. Ponnasamy Venkatadry Naidoo (1), Sitaramaraju v. Ramachendraraju (2), Sanniyasi v. Salar Zemindar (3). It was alleged in the plaint that the respondent was entitled to determine the tenure when he dispensed with the appellant's services. The appellants, in their written statement, denied that the land was held on service tenure and the ninth issue ran as follows:- "Whether the plaintiff has the right to recover the pergunnah." It was incumbent upon the appellants to adduce evidence in support of their plea, but they failed to do so, and we are therefore of opinion (though not for the reasons assigned by the Lower Court) that the Lower Court was right in holding that the respondent was entitled to resume. The appellants were offered the option of holding the pergunnah as tenants paying an enhanced rent in lieu of services which were dispensed with, but that offer the appellants rejected.

It is then contended that the suit is barred by limitation, the appellants' possession being adverse to respondent for more than twelve years, because in 1884 and since the appellants have asserted a right to hold on payment of rent free from the liability to be ejected. We cannot see that any question of limitation arises. The first appellant has paid rent regularly as a tenant in accordance with the decision in the former suit. There is nothing to show that the first appellant or his predecessors in title ever set up a right to hold on permanent tenure until the institution of the present suit. In the former suit, the first appellant's proprietary right was negatived and her position as tenant affirmed, and as tenant rent has been paid ever since.

It is then contended that, as the plaintiff has acquiesced in the decision in the former suit and collected Rs. 5,000 per annum from that date, there is an implied contract that plaintiff would collect that sum and no more, and that therefore there is no cause of action for the present suit, plaintiff not claiming increased rent in consequence of improvements effected by himself.

The cause of action in the present suit arises from the respondents having dispensed with the appellants' services, and having given notice to the appellants either to take a lease at enhanced an rent or to give up possession. The respondent received rent at the rate of Rs. 5,000 per annum from the date of the decree in the former suit, because that was the amount of rent claimed and decreed; but the receipt of rent at a certain rate for so many years cannot be construed to imply a contract always to receive rent at the same rate, or a contract not to raise the rent under altered circumstances.

Finally, it is contended that the Judge was in error in finding that the present income of the estate is Rs. 40,000, and that he should have found that the annual income did not exceed Rs. 20,000 and that the increase was due to improvements effected by appellants' predecessor. The Agent relied on the evidence of the plaintiff's first witness, V. Sitaramayya, a Government servant, who has been manager of the pergunnah for nineteen months, corroborated, as it was, by the evidence of the plaintiff's

(1) 7 M I A. 123.  (2) 3 M. 367.  (3) 7 M. 266.
second witness, who had been dewan of the estate for five years during the first appellant’s husband’s lifetime, of the plaintiff’s third witness who had been a gumastah in the estate for about fifteen years, and by the demand accounts, Exhibits G—J, of which Exhibit G, the demand account for 1884—85 was written by the defendants’ third witness, an accountant of the [377] estate. From the oral and documentary evidence, it appears that the total demand in money and kind amounts to about Rs. 37,000. There is, however, no evidence as to the collections, the plaintiff’s first witness stating that no collection accounts are forthcoming. Against the demand has to be set off the expenses which appears to amount to, about Rs. 10,000. This would only leave a margin of Rs. 7,000, supposing the whole demand were collected and the defendant’s rent raised to Rs. 20,000. Better evidence should have been forthcoming as to the actual income and charges of the estate, but, from the evidence on record, we think, the rent demanded was too high and would reduce the mesne profits awarded from Rs. 20,000 to Rs. 15,000 per annum. In other respects we would confirm the decree of the Agent. The plaintiff will get proportionate costs on the sum allowed and the defendants on the sum disallowed.

14 M. 377.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

VENKATARAMANNA AND OTHERS (Plaintiffs) V. VENKAYYA (Defendant).* [14th April, 1890.]

Succession Certificate Act—Act VII of 1889, Section 4—Suit by undivided son of deceased creditor.

A Hindu is not entitled to sue on a bond executed in favour of his undivided father, deceased, without the production of a certificate under Act VII of 1889, unless it appears on the face of the bond that the debt claimed was due to the joint family, consisting of the father and the son.

[F. 20 M. 232 (234); R. 17 A. 573 (580); 19 B. 338 (339); 17 M. 108 (117); 9 C.P.L. R. 65 (66); 12 C.W.N. 145 (150); D., 17 M. 147 (149).]

CASE referred, for the opinion of the High Court, under Civil Procedure Code, Section 617, by J. L. Narayana Rau, District Munsif, Rajahmundry. The case was stated as follows:—

"Plaintiff in this case seeks to recover a debt due upon a bond executed by the defendant to his undivided father, who is now dead. [378] The defendant pleads, inter alia, that this Court cannot proceed with the case until the plaintiff can produce an heirship certificate as provided by Section 4 of the Indian Succession Act VII of 1889. The question, which I beg to refer for the authoritative opinion of the High Court, is whether the plaintiff, who is admittedly an undivided son of the deceased creditor, is bound to produce the succession certificate before he can proceed with the case?

"In my opinion, however, such certificate is not necessary in case of an undivided co-parcener where the right of survivorship prevails.

* * * * *

"No doubt the head of the family, whether in his capacity as father or as manager, must necessarily have a large control over the

* Referred Case No. 23 of 1889.
estate, so that his actions in just cases may bind those under his management. But, after the death of that manager, the survivors take the estate in entirety subject to the result of the just liabilities created by the manager and the deceased co-partner loses all interest in the joint estate and leaves nothing behind him to be claimed by the others.

The plaintiff in this case does not therefore claim anything left by the deceased father, but claims the money to which he was entitled by right of his birth even during the lifetime of his father, and which devolved upon him by right of survivorship upon the death of the manager. He is not, therefore, required to produce a succession certificate under Section 4 of Act VII of 1889.

That section applies to cases in which the property was held in severalty either as being a share of a divided member or as being the separate acquisition of one who was still living in the 'state of union.' Counsel were not instructed.

JUDGMENT.

It appears that the suit was brought upon a bond executed by defendant to plaintiff's father, who is now dead, and there is nothing to show that on the face of the bond the debt is described as being a debt due to the joint family consisting of the father and the son. It may be that the money was advanced from the father's private funds. A son is prima facie taken to succeed to a debt due to his father by right of inheritance, unless his succession by survivorship is indicated on the face of the bond creating the debt. Though Act VII of 1889 applies only to cases of succession, it states in the preamble that it is intended to afford protection to parties paying debts to the representatives of deceased persons. It would naturally impair the protection intended to be afforded by the statute to throw in every case on the debtor the obligation of making an inquiry at the time of payment, whether the person claiming to recover the debt claims by right of survivorship or of inheritance. Our answer, therefore, to the question referred to us is that defendant is entitled to insist on the production of a certificate under Act VII of 1889, unless it appears on the face of the bond that the debt claimed was due to the joint family consisting of the father and the son.


APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

CHELLAM NAIDU (Accused) Petitioner v. RAMASAMI (Complainant).*
[23rd January and 3rd February, 1891.]

Criminal Procedure Code — Act X of 1892, Sections 198, 345 — Defamation of a wife — Complaint by husband.

When a married woman is defamed by the imputation of unchastity, her husband is a person aggrieved, upon whose complaint the Magistrate may take cognizance of a complaint under Criminal Procedure Code, Section 198.

[F., 26 B. 151 (157); 2 Cr. L.J. 381 = 15 M.L.J. 224.]

* Criminal Revision Case No. 585 of 1890.
CASE referred, for the opinion of the High Court, under Section 432 of the Criminal Procedure Code, by J. M. Maskell, a. Presidency Magistrate, Black Town, in his letter, dated 24th November 1890, No. 219.

The case was stated as follows:—

"The complaint in this case was laid by one Varanasi Ramasami Naidu. He charges the accused, who is the printer and publisher of a vernacular paper called the Ayurveda Bhashaka [380] with having defamed his (complainant's) wife Rukmani Ammah by printing and publishing concerning her in the issue of the above paper of the 1st October last a paragraph, of which the following translation is given in the complaint:—

"Shameful news—That M, an officer living in Madras, had for a long time been on criminal intimacy with the wife of N, another officer, is a fact too well known to all persons of that street. A young girl, the wife of another officer, V, living in the same house, who was daily witnessing the lovers thus being in criminal intimacy for a long time, with a desire to possess the gallant and acquire kappu (bracelets), kammal (ear ornaments) and other jewels that she wanted, wrote a letter to that gallant to which he agreed, &c., &c.

"Brammahadeva,

"Wellwisher of Poli Street."

"Complainant alleges in his complaint that the initials V and N mentioned above refer, respectively, to himself and to one Numberumal Naidu, both of whom with their wives lived at 36, Kappal Poli Chetti Street, and that the initial M refers to Manavaloo Naidu, who lived elsewhere in the same street and who used to visit Numberumal Naidu. Complainant further alleges that the statement in the paragraph in question as to the existence of a criminal intimacy between V's wife and M was pointed at, and intended to apply to complainant's said wife Rukmani Ammah and the said Manavaloo Naidu.

A summons was granted on the above complaint by the Junior Magistrate of this Court, and the case came on for hearing before me on the 19th instant, when Mr. M. O. Parthasarathy Ayyangar instructed by Mr. Biligiri Ayyangar appeared for the complainant and Mr. Jagga Row for the accused. Mr. Jagga Row raised the preliminary objection that the Court was precluded from taking cognizance of the offence by reason of Section 198 of the Criminal Procedure Code, which enacts, inter alia, that no Court shall take cognizance of an offence falling under Chapter XXI of the Indian Penal Code except upon a complaint made by some person aggrieved by such offence. He urged that in a prosecution for defamation, where the imputation was defamatory of the wife, the wife alone and not the husband was competent to complain. On the other side, [381] it was contended that the reputation of a husband is so intimately connected with that of his wife, that he is as much aggrieved by a defamatory imputation against his wife as though his own reputation had been assailed, and that he is consequently a competent person to initiate the prosecution. As the matter appears to be res integra, the authorities cited on both sides having really no bearing on the point at issue, I beg to submit the following question for the opinion of the High Court:—

"When on imputation, which is defamatory under Section 499 of the Indian Penal Code, is made against a married woman, imputing unchastity to her as V's wife, but not referring otherwise to V himself, whether
"V is competent to institute a prosecution as 'some person aggrieved by such offence' within the meaning of Section 198 of the Criminal Procedure Code?"

Mr. Parthasarathi Ayyangar, for the complainant.
The Crown Prosecutor (Mr. W. Grant), for the Crown.

**JUDGMENT.**

**MUTUSAMI AYYAR, J.**—The question referred, for our opinion, is whether in cases in which a married woman is defamed by the imputation of unchastity, her husband is a person aggrieved by the defamation, upon whose complaint the Magistrate may take cognizance of the offence under Section 198 of the Code of Criminal Procedure. I am of opinion that our answer must be in the affirmative. The words, "some person aggrieved by such offence," include the husband in their ordinary meaning, and his reputation is so intimately connected with that of his wife that it would be unreasonable to hold that the defamation would ordinarily not be as hurtful to his feelings as it is to those of his wife. It is true that under Section 345 the wife may, without the consent of the husband, and even contrary to his wish, compound the offence as "the person defamed," thereby rendering the complaint made by the latter liable to be dismissed. But it must be observed that generally the husband and the wife will act in concert, and that the difference in the language used in Section 345 and Section 198 is, therefore, not a sufficient ground for putting a narrower construction on Section 198. I answer the question in the affirmative.

**WILKINSON, J.**—I am of the same opinion, and would only add that in this case it was charged that the article had been [382] published with the intention of injuring the reputation of the husband as well as of his wife. He was entitled to a finding on the charge of defamation against himself, and that charge no one but himself could compound.

**APPELLATE CIVIL.**

Before Mr. Justice Mutusami Ayyar and Mr. Justice Shephard.

**PERIANAYAKAM (Petitioner) v. POTTUKANNI AND ANOTHER (Respondents).** [24th October, 1890.]

Native Christian—Hindu convert to Christianity—Divorce Act—Act IV of 1869.

A parish, who had been converted to Christianity, presented a petition of divorce under Act IV of 1869 on the ground of adultery committed by his wife before his conversion:

Hold, that the Court had no jurisdiction to entertain the petition.

[R. 17 M. 235 (210) (F.B.); U.B.R. Civil (1893—1896) 333 (341).]

Case referred under Act IV of 1869, Section 9, by R. S. Benson, District Judge of South Arcot, in his letter, dated 22nd September 1890, No. 90, in the matter of original suit No. 7 of 1890, on his file.

The case was stated as follows:

"The petitioner, Perianayakam, was married to the respondent, Pottukanni, eleven years ago, according to the ritual usual among

* Referred Case No. 23 of 1890.
pariabhs, to which class both then belonged. Petitioner alleges that the respondent, in December 1888, committed adultery with the co-respondent, Murthi Naik, and has since been living under his protection and has borne a child to him. Subsequent to the adultery, petitioner became a Christian, and for about a year past has professed that religion according to the Roman Catholic form. He now petitions under Act IV of 1869 for a divorce from respondent on account of her adultery, and for damages from the co-respondent.

The question on which I ask for a ruling of the High Court is whether, under such circumstances, the suit is maintainable? In other words, does the petitioner's conversion to Christianity [388] give this Court jurisdiction to dissolve his marriage entered into before he was a Christian and in accordance with non-Christian ritual, on account of adultery committed by his wife before his conversion?

I am of opinion that these questions must be answered in the negative, but as they have, I believe, never been decided and are not free from difficulty, I think it best to ask for an authoritative ruling.

It is argued for the petitioner that he is now a Christian and, therefore, entitled to the relief available to Christians in the event of a wife's adultery. It is argued that, as a Christian, he cannot marry another wife unless he is divorced from his present wife, and that if this Act does not apply to him he is unable to obtain a divorce, while the fact of his Christianity bars his marrying another wife, a remedy which, although not complete, was still substantial and was available to him as long as he remained a Hindu. It is argued that the Legislature could not have intended to place a Hindu convert at such a disadvantage, and that there is no ground in reason why the Act should not apply to his case. Such a dissolution of marriage in the present case would affect not only the husband but the wife, who continues to be a Hindu and who did not, when the marriage was effected, contemplate (either personally or through her guardians, if, as is probably the case, she was then a minor) that her marriage and its incidents would ever be governed by any but the Hindu law to which she was then subject. In this view it may, I think, be doubted whether the petitioner, having elected to be a Christian, should not be left to bear the inconveniences which may flow from his resolve, rather than that he should be relieved from them by the application of a law not contemplated by either party as applicable at the time of the marriage. Prior to 1869 the remedy provided by the Act did not exist even for persons who were married as Christians and continued so up to the time of proceedings (Devasagayam Pitchamathoo v. Naiyagam (1) ) and it is not impossible that the Legislature, in providing relief for such persons, may have omitted to extend such relief to persons converted to Christianity subsequent to the marriage sought [384] to be dissolved. It seems to me that such was the intention of the Legislature. The preamble to the Act says, 'Whereas it is expedient to amend the law relating to the divorce of persons professing the Christian religion.' Strictly speaking these words, as they stand, imply that both the persons to be divvolved should be, at the time of the proceedings, persons professing the Christian religion, but that the scope of the Act is not thus limited is clear from Section 2, Clause (c), which contemplates the case of the husband having been perverted from Christianity prior to the proceedings. The

(1) 7 M. H. C. R. 284.
fact that the Act expressly contemplates such a case but omits all reference to the converse case suggests that the omission was deliberate and that the Legislature did not intend the Act to apply to any but marriages entered into between Christians.

This conclusion derived from the terms of the Act appears to be also in accordance with the only reported ruling which, so far as I am aware, bears on the question. That is the case of Zuburdust Khan v. His wife(1). In that case a Muhammadan convert to Christianity sued under the Act for a dissolution of his marriage contracted before conversion on account of his wife's adultery after their conversion and the learned Judges described the matter for decision as one which presented features of extraordinary difficulty. I think that the case might have been decided on the very simple ground that as apostacy under Muhammadan law, ipso facto, dissolved the marriage, there was no marriage subsisting between the parties when the adultery took place, and consequently no matrimonial injury wherein to found the suit, nor any marriage in existence by the dissolution of which the Court could give relief. In the case of a Hindu, however, conversion to Christianity does not operate as a dissolution of the union—see Administrator-General of Madras v. Ananda Chari (2), and I take it that the same rule applies to pariahs, like the present parties, since they are, for the most part, governed by Hindu law and have no special custom by which marriage is dissolved by a change of religion.

The above ground would, therefore, have no application to the present case. The learned Judges, who gave the ruling in the case of Zuburdust Khan v. His wife (1) proceeded on wider grounds than [385] those I have ventured to suggest above as sufficient for the decision of that case, and I think, that those grounds apply, though not in their entirety, to the present case. It cannot be said that the marriage of a Hindu is "a polygamous contract" in the sense that a Muhammadan marriage is so. The Hindu idea of marriage approaches more nearly to the Christian idea. It has in it a sacramental and religious element, and cannot be dissolved for any cause whatever according to the best authorities, and certainly not at the mere will of the husband, as can a Muhammadan marriage. Still it permits of polygamy, and therein differs vitally and essentially from the Christian marriage. It gives the wife no remedy for matrimonial wrongs against which she would in Christian courts be relieved. If the marriage of a Hindu is, on his conversion to Christianity, to become subject to the matrimonial jurisdiction of Christian Courts, what is the course to be pursued when the Hindu has a number of legal wives, a state of things which could not exist in the case of a Christian and for which the Christian law, therefore, makes no provision? Section 7 of the Act requires the Court to act and give relief on principles and rules which are, as nearly as may be, conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England acts and gives relief. In the case of Hyde v. Hyde (3) the English Court refused to deal with a marriage between Mormons on the ground that the law administered in that Court was wholly inapplicable to polygamous marriages. The reasoning in that case was approved and followed in Zuburdust Khan's (1) case as applicable to Muhammadan marriages. I think it is also applicable to the marriages of Hindus.

---

(1) 2 N.W.P. 370. (2) 9 M. 466. (3) 35 L.J.P. & M. 57.
"I would, therefore, dismiss the present suit on the ground that my Court has no jurisdiction to entertain it."

Mahadeva Ayyar, for petitioner.

Krishnasami Ayyar, for respondent.

Mr. Subramanyam, for co-respondent.

**JUDGMENT.**

We see no reason to doubt that the Act only applies to Christian marriages. The Judge has discussed the question at considerable length, and we agree with the conclusion at which he arrives.

---

**14 M. 386.**

**[386] APPELLATE CIVIL.**

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

**EALES (Plaintiff) v. MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS (Defendants).** [7th May, 1890.]

City of Madras Municipal Act—Act I of 1884, (Madras), Section 433—Statement of cause of action—Address of intending plaintiff.

In a suit against the Municipal Commissioners of the City of Madras for damages sustained by the plaintiff by reason of an accident occasioned to his horses through the ill-repair of a road within the limits of the Municipality, it appeared that at the close of a correspondence between the plaintiff and the President of the Municipality, the plaintiff, in a letter headed "Madrass," stated that he had directed auctioneers to sell the horses, and that he would "proceed against you by law to recover such loss or damage as I may have sustained," and added "kindly consider this as notice of claim under Section 433 of Municipal Act No. I of 1884," and that the plaintiff's attorneys, in a subsequent letter, demanded payment of Rs. 1,000, "being the damages sustained by our client by reason of the neglect to keep in proper repair that portion of the road, &c.," and stated that if the sum claimed were not paid, the plaintiff would be "compelled to have recourse to law to recover the same without further notice":

**Held** (1) that the two letters should be read together;

(2) that the cause of action was stated sufficiently in the second of the above letters;

(3) that the plaintiff's address was sufficiently given in the first of the above letters.

**[Appr., 13 M.L.J. 426 (427); R., 11 C.P.L.R. 35 (40).]**

CASE referred under Section 69 of Act XV of 1882 by P. D. Shaw, Acting Chief Judge of the Small Cause Court, Madras, in suit No. 19529 of 1889.

The case was stated as follows:—

"The plaintiff claims damages to the extent of Rs. 1,000 sustained by reason of the negligence of the defendants in failing and neglecting to keep in proper repair a certain road in Madras, whereby the plaintiff's horses fell and were injured without fault or negligence on the part of the plaintiff."

**[387]** "Among other pleas put forward by the defendants is one that the plaintiff has not given sufficient and legal notice of action according to the provisions of Section 433 of Madras Act I of 1884."

"The deficiency in the notice is contended to be that it does not show the name and place of abode of the intended plaintiff and his attorney."
The defendants contend that Exhibit G is the notice which purports to be given within the terms of the said section, while the plaintiff says that Exhibits G and J, together, if not separately, constitute a good and valid notice.

The facts of the case admitted for the purpose of deciding this plea are these, that plaintiff's horses fell while being driven along a road under the care of the defendants on the 28th April 1889; and that on 8th May 1889 (Exhibit A) the plaintiff brought the fact to the notice of Col. Moore, the President of the Municipality, stating he had no desire to enter into litigation, and suggesting that Col. Moore should depute some one to inspect the road with the plaintiff, with the view to assessing any damage he (Col. Moore) might decide to offer. This letter is written upon paper, on which is printed in the top of the left hand corner 'W. J. Eales and Co.,' and below it 'address for telegrams Eales, Madras.' In the top of the right hand corner is printed the word 'Madras,' and the date, 8th May 1889, is filled up in writing.

Correspondence then passed between Col. Moore and plaintiff (Exhibits B, B, C, D and E) with reference to inspection of the locality. On the 22nd May 1889 (Exhibit F,) Col. Moore officially, as President of the Municipality, informed the plaintiff 'that the Municipality can accept no responsibility for the injuries sustained by your horses.'

Exhibit G, dated 28th May 1889, and written on paper bearing the same headings as Exhibit A, commences by referring to Exhibit A and other correspondence, and also to Exhibit F, and gives notice that plaintiff had sent his horses to be sold by auction for account of whom it might concern, and that, after their sale, 'I shall proceed against you by law to recover any or such loss as I may have sustained.' A postscript to it is '[388] kindly consider this as notice of claim under Section 433 of Municipal Act I of 1884.'

On 7th June 1889, Messrs. Chauhan and Short, attorneys for plaintiff, write on paper headed ' 27 and 28, Second Line Beach, Madras, 7th June 1889,' to the President, Municipal Commission, referring to, and confirming the correspondence between plaintiff and Col. Moore and the notice of claim of 28th May 1889, and claiming Rs. 1,000 as damages for the injuries sustained by plaintiff's horses and set out the negligence attributed to the defendants and give notice that if the amount claimed is not paid, plaintiff will have recourse to law to recover the same.

The defendants have not raised any question as to the sufficiency of the statement of the cause of action in the alleged notice, their contention is that neither in Exhibit G or any other exhibit is the place of abode of the intended plaintiff and his attorney explicitly stated. They say, through their counsel, that the headings of Exhibit G show the address of Eales & Co. to be Madras, and that the place of abode of W. J. Eales does not appear therein, but that even if it does it is not explicitly described, in other words, that 'Madras' is not sufficient. It seems to me that Exhibit G, which is signed by W. J. Eales (the plaintiff) and not by W. J. Eales & Co. does show 'Madras' to be his place of abode; Exhibit A on which the correspondence between Col. Moore and plaintiff took place is headed exactly the same, and the correspondence shows that for all practical purposes the defendants knew where to communicate with plaintiff (Exhibit F). As to the sufficiency of 'Madras' alone without giving any street or house number, I think 271
"the case of Osborn v. Gough (1) where an attorney's address was given "as Birmingham' is an authority for saying that 'Madras' is sufficiently explicit as the place of the abode of the intended plaintiff.

"There is also no doubt that plaintiff's attorneys' place of abode "is explicitly stated in Exhibit J.

"I hold therefore that the defendants' plea fails; that Exhibit G by "itself or G and J constitute a valid notice of action [389] within the "provisions of Section 433, Madras Act I of 1884, and that plaintiff's "suit is maintainable.

"I have been required by the defendant's Counsel to refer to the "High Court the question of law:—

"Whether upon the facts above stated and the Exhibits A to G and J, "the plaintiff can be held to have given a valid notice of action to the "defendants within the meaning of Section 433, Madras Act I of 1884.

"My opinion is that he has done so for the reasons above set out."

The letters referred to as Exhibits G and J were as follows:—

Exhibit G.

W. J. EALES & Co.

Address for Telegrams
Eales.
Madras.

COLONEL G. M. J. MOORE,
President, Municipal Commission,
Madras.

MADRAS, 28th May 1889.

SIR,

"Referring to my letter of 8th and 13th instant, and your final decision "disavowing all responsibility, I hereby give you notice that the Madras "Stable Company (Limited), have been authorised, as per enclosed copy, "to sell at their auction on Saturday, 1st proximo, without reserve, and "for account of whom it may concern the pair of chestnut Waler horses, "and I shall, after such sale, proceed against you by law to recover any "or such loss as I may have sustained."

I am, Sir,
Your obedient servant,
(Signed) W. J. EALES.

"Kindly consider this as notice of claim under Section 433 of Munici- "pal Act No. I of 1884."

(Initialled) W. J. E.

Exhibit J.

CHAMPION & SHORT,
Solicitors.

27 & 28, SECOND LINE BEACH,
MADRAS, 7th June 1889.

TO

COLONEL G.M.J. MOORE,
President, Municipal Commission,
Madras.

SIR,

"Referring to the correspondence between you and Mr. W. J. Eales, "and to the notice of claim, dated the 28th ultimo, which we hereby confirm,

(1) 3 B. & P. 550.

272
we are [390] now instructed to demand payment of the sum of Rs. 1,000, being the damages sustained by our client by reason of the neglect to keep in proper repairs that portion where Harris Road is intersected by Lubbai street, and by reason whereof, and without any fault or negligence on the part of our client, or his coachman, our client’s horses while being driven along the said road on the 28th April last stumbled and fell in the way described in our client’s letter to you of the 8th May 1889. Unless the said sum of Rs. 1,000 and Rs. 3-8-0 our charges are paid forthwith, our client will be reluctantly compelled to have recourse to law to recover same without further notice.”

Yours faithfully,

(Signed) CHAMPION & SHORT.

Mr. W. Grant, for plaintiff.
Mr. K. Brown, for defendants.

JUDGMENT.

In answer to the question referred by the Chief Judge of the Small Cause Court, we are of opinion that a sufficient notice within the meaning of Section 433 of Act I of 1884 has been given.

Two objections have been taken to the notice which is said to be conveyed by two letters marked G and J, the first objection being that the cause of action was not explicitly stated and the second that the abode of the plaintiff was not sufficiently described. With regard to the first objection, we have felt no doubt that it was not maintainable for, the cause of action is stated with sufficient clearness in the second of the two letters.

The other objection presents more difficulty, for the only address given in Mr. Eales’ letter is “Madras,” and it is only by reading his letter with the letter of his solicitors that any complete notice stating the plaintiff’s abode is made out.

The latter letter refers to Mr. Eales’ letter, and we think that they must be read together. It was argued that, insomuch as the Act is a local one, and it is required that the abode of the intending plaintiff should be given, it must be intended that something more than “Madras” should be mentioned, and it was urged that there was a distinction between local and general Acts in this matter. For this supposed distinction, we find no authority. The clear intention of the Legislature was to give the defendants notice of the threatened action and afford them an opportunity of making amends. If, under the circumstances, the notice sufficiently intimates to the defendants the place where the plaintiff is to be found, the intention of the Act is so far fulfilled. Adopting the language of Pollock, C.B., we must import a little common sense into notices of this kind—Jones [391] v. Nicholls (1). We may also refer to the observations of the Judges in Osborn v. Gough (2) which is a strong case, because the defendant was a Magistrate, and no address beyond “Birmingham” was given. Having regard to the two objections raised, we are of opinion that the Chief Judge of the Small Cause Court was right in his ruling.

Champion and Short, attorneys for plaintiff.
Barclay and Morgan, attorneys for defendants.

---

(1) 18 M. & W. 868.
(2) 3 B. & P. 550.
Civil Procedure Code, Sections 600, 602—Appeal to Privy Council—Enlargement of time for making deposit.

The Court may enlarge the time for making the deposit required by Civil Procedure Code, Section 602, for cogent reasons under the rule in Burjore and Bhawani Prasad v. Mussumat Bhagana (1), but those reasons must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from doing so not owing to absence and the difficulty of getting funds, but owing to some circumstances accidental or otherwise over which he had no control or owing to mistake which the Court would consider not unreasonable or caused by negligence.

[Disr., 6 Ind. Cas. 723=44 P.R. 1910=118 P.L.R. 1910=70 P.W.R. 1910 ; F., 14 C.W.N. 420=5 Ind. Cas. 814.]  

APPLICATION for the admission of Civil Miscellaneous Petition No. 314 of 1890, which prayed for an extension of the period of six weeks within which the petitioner had been directed to make the deposit prescribed in Civil Procedure Code, Section 602, in the matter of an appeal sought to be preferred by him against the decree of the High Court in appeal suit No. 38 of 1887, and for an order that the officer of the Court do receive the deposit.

The facts of the case appear sufficiently for the purposes of this report from the following judgments.

[392] Rama Rau, for petitioner.

Mr. Subramanyam, for respondent.

JUDGMENTS.

MUTTUSAMI AYYAR, J.—I took part in both the decisions to which my learned colleague refers in his judgment, and the observations made in Venkatachaliam v. Mahalakshamma (2)

* Civil Miscellaneous Petitions Nos. 314 and 611 of 1890.

(1) 11 I A. 7=10 C. 557.

14 M. 391

(2) Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

VENKATACHALAM v. MAHALAKSHAMMA.

JUDGMENT.

"The plaintiff in this suit, the petitioner, applies to have an appeal to the Privy Council admitted, under Section 603, Civil Procedure Code.

"On the 30th of July 1888 petitioner obtained a certificate after notice to the respondent under Section 600, and had six weeks' time, expiring on the 31st of August to perform the requisition of Section 602, amongst other things to deposit Rs. 4,500. On the 31st August 1888, petitioner tendered at the Registrar's office Rs. 2,000, but was informed such sum could not be received as the proper sum was Rs. 4,500. On the 31st of August the petitioner applied to the Court to extend the time for making the deposit, offering security on the property of one Bheebiraun for the amount, but he was not then prepared with a mortgage on that property. On the 11th September, the Court, however, allowed petitioner (as he lived in Vizagapatam) three weeks' time to file affidavits explaining the delay.

"Afterwards, the Court allowed a further period of three weeks to file such affidavits."
[393] were made with reference to the length to which the decided cases
had proceeded. The period for making the deposit is prescribed by the

"Affidavits and a petition were filed on the 19th of October 1898. In his affidavit
the petitioner says that on the 4th of August he was made aware by letter from
his Counsel that Rs. 4,500 should be deposited by the 31st of August, but he says he
was unwell from the 15th July to the 15th of August, and he could not go to
Vizagapatam to get help from his friend Sankaraya who helped him in the suit,
until he became better. He says that on the 15th August he got to Vizagapatam,
and then found that Sankaraya had gone to his village a long way off where there
was no Post office, and he applied to persons, whom he names, for assistance, but
they said they could do nothing without the security of Sankaraya, that he was
told by first grade pleaders, whom he names, that as he had already deposited
Rs. 2,500 for security for defendant's costs he need only deposit Rs. 2,500
more. He states that he raised Rs. 2,000 on jewels of some of his relatives and
started for Madras on the 24th of August and brought Buchariraz, a rich man,
with him to stand security for any other sum required, but that the money
already tendered was refused and he started for Vizagapatam and got the addi-
tional money from Sankaraya, and on the 7th September he produced Rs. 4,500
to the Registrar who refused it, but the Court allowed the Registrar to receive
the money pending his furnishing an affidavit to explain the delay.

Rajanna and Ramajegi say they agreed to lend Rs. 2,500 to the plaintiff,
but refused to do so except on the security of Sankaraya, and ultimately on the
6th September, gave that sum to petitioner.

Sankaraya says he has assisted the petitioner with money and advice in this
suit, and that he was away from Vizagapatam at his village from the 12th of
July until the end of August, and that when he got there he found petitioner
had gone to Madras, and that in September he became security for the petitioner
and got him the loan of Rs. 2,500.

[393] The plaintiff states that he was suffering from an ulcer until about the 12th
of August, but in his first petition to this Court on the 31st of August he did not men-
tion the fact that he had been ill.

Section 602 provides that within six months from the date of the decree com-
plained of or within six weeks from the grant of the certificate, the appellant should
deposit the amount required to defray the expenses of translating, &c., and that time
expired on the 31st of August. It has been held by the Privy Council in Barjore and
Bhawani Pershad v. Bhaguna (1) that the provision in Section 602 is directory, and it
was held there that the money was brought within time to be deposited but owing to
wrong information the amount was brought to a District Court instead of to the Court
of the Commissioner, the time was rightly extended so as to enable the appellant to
have deposited the money in the Court of the Commissioner.

This case was pressed, as showing that as the petitioner acted as to the amount
in error, owing to the wrong information given by the Vakis in Vizagapatam, the
same principle should be applied in this case as in the case in the Privy Council. But
in the case in the Privy Council the appellant was prepared with his deposit before the
last day, and would have lodged it, and went to a Court to lodge it in due time. It
was merely owing to an error in respect of the right Court that the money was not de-
posited. Even suits brought in Courts erroneously but bona fide when there is no
jurisdiction are excluded from the limitation in certain cases.

The Privy Council agreed with the decision in re Sivamuruth Koer (2) that dis-
scretion was allowed both to be exercised only for cogent reasons. Cogent reasons referred
by the Privy Council must be such as would lead the Court to believe that the party
was diligent in due time to be prepared to lodge the deposit within the limited period,
and that he was prevented from making his deposit, not owing to absence or diffi-
culty of getting funds, but owing to some circumstance accidental or otherwise over
which he had no control, or owing to mistake which the Court would consider not
unreasonable or caused by negligence.

Here the petitioner probably made some enquiries before the certificate to en-
able him to raise money and may then have been promised help if he gave security.
But although he was aware on the 4th of August that Rs. 4,500 should be deposited,
he did not, owing as he says to illness, take any active step to get the money until
the 14th or 15th of August. Although he may have been unwell he could have
written to his friends or some of them and made preparation to get money when he
went to Vizagapatam. It is not illegal, though suggested, that his letter would not
probably reach Sankaraya if written immediately after the 4th of August. When he

(1) 10 C. 557 =11 I.A. 7.  
(2) 2 C. 372
Legislature with reference to all cases, and it is [394] at all events necessary for the petitioner to show "that he was diligent in due time to be prepared to lodge the deposit within the limited period." But the affidavit before us does not show that he used due diligence for procuring the necessary funds before the 25th March last.

Though it was urged at the hearing that he had letters in his possession from certain persons who promised to lend if he waited till the jaggery season in the local market, yet no affidavits were filed by them. Nor is there anything to show that he had applied to them for loans in sufficient time before the expiration of the prescribed period. It does not appear to me that a promise by the petitioner's friends to lend on the arrival of a particular season in the local market is a sufficient cause for extending the prescribed time or cogent reason within the meaning of the Privy Council decision, especially when regard is had to the facts of the case with reference to which the Lords of the Judicial Committee used the expression.

It is true that the petitioner was permitted to sue in the Original Court and to appeal to the High Court in forma pauperis, but the prescribed period of six months from the date of the appellate decree and of six weeks from the date of the certificate is ordinarily sufficient for raising funds on credit. This is not a case in which any arrangement made within the prescribed time for obtaining a loan proved impracticable from some unforeseen cause.

I am therefore of opinion that no sufficient cause or cogent reason is shown for granting the application. I would refuse the application.

[395] Best, J.—Petitioner was on the 12th February 1890 granted a certificate under Section 600 of the Code of Civil Procedure to enable him to appeal to the Privy Council, and had under Section 602 of the Code to give security and make a deposit of money for costs incidental to the appeal within six weeks from the above date (i.e.) by the 26th March. On the 25th March he put in the petition No. 314 asking that the time for giving the security and making the deposit might be extended two months on the ground that he is "nor and unable to procure the necessary funds within the time prescribed." This petition came before a single Judge on the 25th April, and was then ordered to be posted before a Bench of two Judges. The vacation began on the 12th May and nothing more was done in the matter till petitioner filed his second petition No. 611 on the 14th August, in which he explains that he had "employed as his Vakil the late Mr. T. Subba Rao, and proceeded to his native place to collect the necessary funds to furnish the necessary security in this Honourable

"arrived at Vizagapatam the appellant found that he could not get money without "Sankaraya's security. He acted on the advice of Vakis who told him that only "Rs 2,000 was required, but this was contrary to the advice of his own Counsel in "Madras. He got Rs. 2,000 in time and [394] brought with him, he says, a rich friend "who would help him to raise money, and so far was to some extent diligent, but was "not in due time, for when he got to Madras he had not the full amount and could not "then get the residue. No doubt Vizagapatam is a very great distance from Madras, "and it is suggested that people of his class are generally dilatory and perhaps careless "of the activity necessary to comply with rules prescribing times for complying "with Court rules. But the provision contained in the Civil Procedure Code cannot be "departed from to meet such circumstances. We feel we cannot, upon the ground "stated in the petition and affidavits, consider the time should have been extended "beyond the 31st of August.

"The result is the appeal is not admitted. The appellant is to pay the re-"plicant's costs of this petition. The Registrar will return the money to the "petitioner." [This case is followed in 14 M. 391.]
Court, and also to prosecute the appeal before the Privy Council, that he "did not receive any information from his said Vakil, and upon enquiry learned that Mr. T. Subba Rao had died." He, therefore, requests that, under the circumstances, orders may be issued to the Registrar to receive the sum of Rs. 4,500 which he has now produced. That petitioner is a poor man is apparent from the fact of his having been allowed to prosecute the suit throughout in forma pauperis, and there is no difficulty in believing the truth of his statement that he was unable to raise this sum of Rs. 4,500 within the six weeks mentioned in Section 603. It has been held by the Privy Council that the time may be extended, but not without cogent reason.—See Burjore and Bhooani Pershad v. Mussunat Bhagan (1). I should certainly have held the reasons alleged by the petitioner to be sufficiently cogent had it not been for the decision of this Court in Venkatachalam v. Mahalakshmiamma (2), in which it was held that the "cogent reasons referred to by the Privy Council must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from making his deposit not owing to absence or difficulty of getting funds, but [396] owing to some circumstances accidental or otherwise over which he had no control, or owing to mistake which the Court would consider not unreasonable or caused by negligence. This decision of a Division Bench of this Court was followed in a subsequent case Subba v. Ramasami (3). It seems to me that absence of funds or difficulty in raising the same, if true, is very cogent reason for granting an application such as the present one for extending the time and accepting the money now brought into Court; but the decisions above referred to are binding on me. I must therefore defer to the opinion of my learned colleague.

14 M. 396.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Weir.

KAVERI (Petitioner), Appellant v. VENKAMMA (Defendant), Respondent.* [5th November, 1890.]

Limitation Act—Act XV of 1877, Schedule II, Article 179, Clause 6—Decree for periodical payments.

If it can be gathered from a decree that payments are directed to be made on dates or at periods which are sufficiently indicated by the terms of the decree the requirements of Limitation Act, Schedule II, Article 179, Clause 6, are satisfied.

[F., 30 M. 504 (505) = 17 M.L.J. 402; Rel., 22 P.R. 1905 = 57 P.I.R. 1905; D., 15 Ind. Cas. 389 (391) = 15 O.C. 99.]

APPEAL under Letters Patent, Section 15, against the judgment of SHEPHERD, J., on appeal against appellate order No. 59 of 1889.

The above appeal was preferred against an order of J. W. Best, District Judge of South Canara, on Civil Miscellaneous Petition No. 13 of 1889, confirming the order of M. Mundappa Bangara, District Munsif of Mangalore, on Civil Miscellaneous Petition No. 23 of 1889.


(1) 11 L.A. 7 = 10 C. 557.
(2) 14 M. 392.
(3) O.M.P. No. 623 of 1889 unreported.
petition one Kaveri Amma, the representative of the defendant in original suit No. 349 of 1855, on the file of the Munsif's Court at Mulki, prayed that the application of Venkamma, the plaintiff for the execution of the [397] decree therein, be dismissed as being barred by limitation. The material portion of the decree was as follows:

"That the defendant now, and that afterwards, the plaintiff's husband's son Ramachandra, who is under defendant's guardianship on attaining his majority, do pay plaintiff the balance of Rs. 28-8-0 mentioned in the plaint due to her on account of maintenance till the 10th Bhadrapada of Rakhsa year (5th October 1855), and at the rate of Rs. 3 per mensem from the date of filing of the plaint till the marriage of plaintiff's daughter, and after her marriage till the lifetime of plaintiff at the rate of Rs. 2 per mensem, on the responsibility of the aforesaid properties admitted by defendant to belong to plaintiff's husband; that the said Ramachendravya, who is under defendant's guardianship, immediately on attaining his majority do give plaintiff's daughter in marriage spending to the extent of Rs. 50 on it, and that in the event of her failing to do so, and on the girl attaining 8 years of age, the plaintiff do cause her marriage to be celebrated spending Rs. 50 on it by taking out execution, on the responsibility of the said property. And it is further ordered and decreed that the defendant do pay plaintiff's costs and bear his own."

Venkammal the plaintiff in the above petition now claimed under that decree her maintenance from 6th November 1855 to 5th September 1888.

The petition was dismissed by the District Munsif on the authority of Lakshmibai Bapuji Oka v. Madhavrao Bapuji Oka (1) and his order was upheld on appeal by the District Judge. The appeal against the order of the District Judge came on before Shepherd, J., who delivered judgment as follows:

"It is contended that no certain date has been fixed within the meaning of Article 179 (6) of the Limitation Act. I am not convinced that this contention is sound. The payments were directed to be made at the rate of Rs. 3 from the date of filing the plaint, and at the reduced rate of Rs. 2 from the date of the plaintiff's marriage. If there is a doubt as to whether the first payment was to be made on the day of filing of the plaint or at the end of a month from that day, there can be no doubt as to the day on which all subsequent payments [393] where to be made, and the reduction of the amount in marriage makes no difference in this respect. My view of the decree is supported by the decision of Parker, J., in Suppulu v. Gopala Krishna Yyan (2). I dismiss the appeal with costs."

The petitioner presented this appeal under Letters Patent, Section 15, from the above judgment of Shepherd, J.

Mr. Subramanyam, for appellant.

Respondent was not represented.

JUDGMENT.

From the reported cases Sabhanathia v. Lakshmi (3), Yusuf v. Sirdar (4) it appears to us that what has to be determined is whether the sum is payable by an ascertained date. This is a question purely of construction.

(1) 12 B. 65.
(2) C.M.S A. 6 of 1889, unreported.
(3) 7 M. 80.
(4) 7 M. 88.
Although a decree may not in express terms fix a specified date, yet if it can be gathered from the decree as a whole that payment is directed to be made on dates or at periods which are sufficiently indicated by the terms of the decree, the requirements of Article 179, Clause 6 of the Schedule to the Limitation Act are satisfied.

In this view we see no ground for admitting the appeal, and we accordingly reject it.

14 M. 398 = 2 Weir 651.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Handley.

RAMAYER in re." [20th August, 1890.]

Criminal Procedure Code—Act X of 1852, Section 459—Maintenance.

A Magistrate has no power under Criminal Procedure Code, Section 489, to make an order for maintenance at a progressively increasing rate, but the fact that the child has grown older might constitute a change in the circumstances calling for a variation in the rate.

[F. L. B. R. (1893-1900) 398 (394).]

CASE reported for the orders of the High Court by J. A. Davies, Sessions Judge of Tanjore.

The facts of the case were stated as follows:—

"The petitioner, the concubine of the defendant, applied for maintenance for herself and her female child about six months [399] old under Section 458 of the Code of Criminal Procedure. The defendant admitted that he was the father of the child, and the Magistrate, finding that he neglected to maintain it, awarded a sum of Re. 1 per mensem for its maintenance till it attains the age of five years, and a sum of Re. 1-8 from and after that date, until the child is old enough to leave her mother."

Counsel were not instructed.

JUDGMENT.

We think that the ruling in Upendra Nath Dhal v. SoudaminiDasi. (1) is right, and that the rate of maintenance must be fixed, subject only to any possible alteration under the provisions of Section 459. With regard to that section, we think that the fact that the child has grown older would no less constitute "a change in the circumstances of the person receiving the allowance," than would the death of the child or the birth of another, and therefore the rate can be varied from time to time on application being made as the child gets older. We think the order ought to be modified by setting aside that part of it which directs a prospective increase of the rate.

* Criminal Revision Case No. 348 of 1890.
(1) 12 C. 535.
14 M. 399 = 2 Weir 688.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

TAMAN CHETTI (Petitioner) v. ALAGIRI CHETTI
(Respondent)* [9th December, 1890.]

Criminal Procedure Code—Act X of 1882, Sections 17, 528.

A Magistrate, who is subordinate to Sub-Division Magistrate, is also subordinate to the District Magistrate within the meaning of Criminal Procedure Code, Section 528.

PETITION under Sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of the District Magistrate of Madura of the 7th October 1890, whereby a case pending against the petitioner on the file of the Taluk Magistrate of Perieiulam was transferred to that of the Sub-Magistrate of Kodaikanal.

[400] The facts of the case appear sufficiently from the following judgment:

Mr. Wedderburn, for petitioner.
The Government Pleader and Public Prosecutor (Mr. Powell) contra.

JUDGMENT.

In this case the Acting Joint Magistrate of Madura transferred a complaint of a coffee theft from the Second class Magistrate of Kodaikanal to the Taluk Magistrate of Perieiulam. But the Acting District Magistrate being of opinion that there were no sufficient grounds for the transfer, but that on the contrary there were very good grounds against it, withdrew the case from the file of the Taluk Magistrate and transferred it back to that of the Kodaikanal Sub-Magistrate. It is contended that the District Magistrate had no jurisdiction to order the retransfer under Section 528, Criminal Procedure Code.

We are, however, of opinion that a Magistrate, who is subordinate to a Sub-Division Magistrate, is also subordinate to the District Magistrate within the meaning of Section 528. Neither Section 17, which declares such Magistrate to be subject only to the general control of the District Magistrate, nor Schedule III which specifies the ordinary powers of a District Magistrate, can be so construed as to take away the special power conferred by Section 528. We decline to interfere and dismiss this petition.

14 M. 400 = 1 M L.J. 163 = 1 Weir. 195.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

QUEEN-EMPRESS v. SAMINATHA.† [4th December, 1890.]

Penal Code, Section 214—Screening an offender.

The accused agreed to give Rs. 10 to Saminatha Pillai in consideration of his not giving evidence against Kolundavelu, who was charged with the offences of housebreaking by night and theft in a building. Saminatha Pillai gave evidence

* Criminal Revision Case No. 519 of 1890.
† Criminal Revision Case No. 499 of 1890.
against [401] Kolundavelu who was, however, acquitted. The accused was charged under Penal Code, Section 214, but was acquitted:

_Held, that the acquittal was right._


CASE of which the records were called for by the High Court in the exercise of its powers of revision.

The facts of the case appear from the following judgment of the Sessions Judge:

"It has been found against the appellant in this case that he agreed to give one Saminatha Pillai, a namesake of his, Rs. 10 in consideration of the said Saminatha Pillai not giving evidence against one Kolundavelu, who was charged with house-breaking by night and theft in a building. The Magistrate has held that the offence thereby constituted was one under Section 214 of the Penal Code, the object being to screen the said Kolundavelu from legal punishment for the commission of the offence of house breaking and theft. He has convicted the appellant accordingly and sentenced him to three months' imprisonment.

"In appeal the correctness of the finding of the Magistrate on the question of fact is first disputed. But I am quite satisfied that the appellant committed the act attributed to him. It was so fully proved that the appellant deposited his own finger-ring with the said Saminatha Pillai, as (according to the evidence for the prosecution) a guarantee for the performance of his promise of a present of Rs. 10, that the appellant himself could not deny the fact of the deposit, but urged in defence an absurd story that the ring was given to the witness as a token that he was being sent upon a certain errand by the appellant, although, as a matter of fact, be never went. Now the Magistrate has found that there was no reason to send Saminatha Pillai upon this errand, because, in the first place, another man had already been sent upon it, and there was no immediate hurry for despatching another messenger, and, in the second place, that, if a second messenger had been required, Saminatha Pillai was the last man to be pitched upon because he was then waiting as a witness in attendance at the Magistrate's Court. The ring having admittedly been given to the said Saminatha Pillai, the whole question for determination was whether Saminatha Pillai's version of how he came by it or that of the appellant was the true one. And I entirely [402] agree with the Magistrate's finding in favour of the case for the prosecution.

"But on the other ground of appeal, as to the legality of the conviction, I am unable to find that the facts found against the appellant constitute an offence under Section 214 or any other section of the Penal Code. Section 214 seems to me clearly to imply that an offence has either been committed by, or established against, the person who is to be screened from legal punishment thereafter. Now, in this case, the Kolundavelu, whom the charge says it was intended to screen from legal punishment, was found to have committed no offence, for he was acquitted of the house-breaking and theft by this very same Magistrate prior to his enquiry into the present charge, in spite of Saminatha Pillai having given evidence against him without succumbing to the temptation of the bribe. Further, assuming that Saminatha Pillai had, at the instigation of the appellant, falsely withheld his evidence against
1890

Dec. 4.

APPEL.

LATE

CRIMINAL

14 M. 400

1 M.L.J. 163

= 1 Weir 195.

"Kolundavelu, and that Kolundavelu had, in consequence, been acquitted,
"even then I would hold that the offence committed by the appellant
"would have been the abetment of giving false evidence—subornation
"of perjury—and would not constitute the offence under Section 214
"of screening a person from legal punishment for an offence. What is
"contemplated by that section I consider to be the rendering of some
"material assistance to a person to enable him to escape from legal punish-
"ment inflicted or about to be inflicted upon him. I do not think it refers
"to a case of false-swearing whereby the offender escapes conviction, for
"the giving of false evidence is punishable otherwise. If it were to be
"held that Section 214 was applicable to such a case, the result would be
"that every venal false witness for a defendant would be liable under this
"section to punishment if the accused were in consequence of such false
"evidence to be acquitted; so that on these two grounds—first, that there
"must be an offence before a screening, and, secondly, that the giving of
"false evidence is not such a screening as is contemplated, I hold that
"Section 214, under which the appellant has been convicted, is not applica-
"ble to his case.

"Nevertheless, I think, the appellant might appropriately be convicted
"of the abetment of giving false evidence, provided it was established
"that the evidence that Saminatha Pillai gave [403] against Kolundavelu
"was true, because, in that case, the appellant instigated him to give
"false evidence, and it is immaterial whether the offence was committed
"or not according to explanation 2, Section 105 of the Penal Code. It
"is no offence to bribe a man to refrain from giving false evidence which
"is what leads me to say it is essential to find that the evidence Sami-
"natha Pillai gave against Kolundavelu was true. There is nothing
"on the record, however, to prove its truth, while, on the contrary,
"it was found untrustworthy, and hence Kolundavelu's acquittal.
"At the best, it is doubtful whether it is true or not; so that in the
"absence of proof of its truth, it cannot be said that the appellant insti-
gated the giving of false evidence. As this appears to me the only
"other possible offence the appellant could have committed, and as that
"will not stand, I must, in reversal of the Lower Court's conviction,
"direct his acquittal, and immediate release from jail. Ordered accordin-
gly."

Subramanya Ayyar, for accused.
The Government Pleader and Public Prosecutor (Mr. Powell) contra.

Besides the cases mentioned in the judgment, the following authorities were referred to in the argument:—Queen v. Bhohisan Mahatoo (1); Queen v. Hurdut Surma (2); Empress v. Amirudddeen (3); Stephen's Digest of Criminal Law, Art. 142 (b), p. 100; 1 Hawkins' Pleas of the Crown, p. 64; 1 Russell on Crimes, p. 265.

JUDGMENT.

We consider that the accused was properly acquitted. It is not

 denied that Kolundavelu Pillai was acquitted of the offences of house-

 breaking and theft, and that he was not liable to legal punishment. But

 it is contended that it is not necessary that an offence should be actually

 committed, or that the person charged should be really liable to be punish-

 ed for such offence. We do not, however, think that it was the intention

 of the legislature to punish the giving of gratifications, under a delusion

(1) W.R. (1864) Cr.R. 3 (4).
(2) 8 W.R. Cr.R. 68.
(3) 3 C. 412.
that an offence had been committed or that a person was guilty of such offence. The words "concealing an offence" and "screening any person from legal punishment for any offence" appear to us to presuppose the actual commission of an offence, or the guilt of the person screened from punishment.

[404] The cases cited by Mr. Mayne under Sections 213 and 214, Indian Penal Code (Regina v. Best (1), Rex v. Richard Goutley (2) were decided under 18, Elizabeth, Chapter V, Section 4, in which the words "upon colour or pretence of any matter of offence" were used. We are of opinion that the decision Empress of India v. Abdul Kadir (3), Queen-Empress v. Fath Suh Singh (4), and Matuku Misser v. Queen-Empress (5), which have reference to the construction to be placed upon similar words in Section 201 apply to this section also. The Public Prosecutor draws our attention to Queen v. Hurdut Surma (6) wherein the same expression was differently construed with reference to Section 218 of the Indian Penal Code, but that section has reference to public servants who disobey a direction of law.

As pointed out by Jackson, J., in Queen v. Joynarain Patro (7), we think the intention was to discourage mispractices, when offences have really been committed, or when persons really guilty are screened, and not to ensure general veracity on the part of the public in regard to imaginary offences or offenders. We therefore decline to interfere.

14 M. 404.

APPELLATE CIVIL.

Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

ABDOOL AND OTHERS (Creditors), Appellants v. MAHAMED
(Insolvent),Respondent. 9  [23rd February, 1891.]

Insolvent Act—11 & 12 Vict., Cap. 21, Sections 72 and 73—Appeal—Limitation—Evidence.

Certain creditors of an insolvent appealed against an order declaring him entitled to his personal discharge. The appeal time expired during the vacation of the Court and the appeal petition was presented on the day when the Court re-opened. During the insolvency proceedings evidence was not recorded under Section 72, and the appellant sought on appeal to use the Commissioner's notes of evidence:

[405] Held, (1) that the appeal was not barred by limitation; (2) that it was not competent to the Court to refer to the Commissioner's notes.

APPEAL against the order of Sir Arthur J. H. Collins, Chief Justice, dated 14th April 1890, made in the Court for the relief of Insolvent Debtors at Madras, in case No. 88 of 1888.

Sundara Ayyar, for appellants.

Mr. Johnstone, for respondent.

JUDGMENT.

Two preliminary objections are taken.

As to limitation we observe that the appeal time expired during the annual vacation of the High Court, and the appeal petition was presented

* Original Side Appeal No. 24 of 1890.

(1) 9 Moody, C. C. 124.  (2) Russ & R. 84.  (3) 3 A. 279.
(4) 12 A. 432.  (5) 11 C. 619.  (6) 8 W. R. Cr. R. 68.
(7) 20 W.R. Cr. R. 86.
on the first day the Court re-opened. It is, therefore, in time—Reference under Forest Act V of 1882 (1).

The next objection is that no evidence was recorded under Section 73 of the Insolvent Act, and under Section 73 we are not at liberty to refer to the notes of evidence taken by the learned Commissioner.

It has been so held in several cases—by this Court in Best & Co. v. Kaliana Chetti (2), and by the High Court of Calcutta in re Ajudhia Prasad (3), and by the Bombay High Court in re Lakhmidas Hansraj (4), and Kallibandas Kriparam v. Trikamalal Gulabrai (5).

The second objection must be allowed.

The appellants' vakil admits that unless he is permitted to refer to the notes of evidence, he cannot support the appeal. The appeal, therefore, fails, and we must dismiss it with costs.

Wilson & King, attorneys for respondent.

14 M. 406.

[406] APPELLATE CIVIL.

Before Mr. Justice Muttsami Ayyar and Mr. Justice Parker.

VANANGAMUDI (Plaintiff), Appellant v. RAMASAMI (Defendant), Respondent.* [9th and 12th February, 1891.]


In a suit in a Small Cause Court for rent due in respect of two pieces of land, the Court passed a decree in favour of the plaintiff. The defendant preferred a petition to the High Court under Civil Procedure Code, Section 622, which came on for hearing before one Judge. He held that the Small Cause Court had failed to give effect to a former decree between the parties in respect of one piece of land, and made an order reversing the decree as to that, and calling for a report of what was due on the other piece of land. The plaintiff preferred an appeal under Letters Patent, Section 15:

Held, (1) the above-mentioned order was subject to appeal as being a judgment;

(2) even if the Subordinate Judge had failed to give effect to the previous decree, the error was not such as to give the Court jurisdiction to revise his proceedings under Civil Procedure Code, Section 622.

[R., 35 M. 1 = 8 Ind. Cas. 340 = 31 M.L.J. 1 (19) = 8 M.L.T. 453; D., 20 M. 407 (411); 22 M. 68 (95) (F.B.) = 9 M.L.J. 231]

APPEAL under Letters Patent, Section 15, against the judgment of Shephard, J., in civil revision petition No. 218 of 1888.

The above-mentioned petition was preferred under Civil Procedure Code, Section 622, against the decree of T. Kanagasabai Mudaliar, Subordinate Judge of Tanjore, in small cause suit No. 379 of 1887, in which the plaintiff sought to recover Rs. 449-0-3 from the defendant for the rent of certain lands. The Subordinate Judge passed a decree in favour of the plaintiff, whose claim he found to be in accordance with previous decrees between the parties. The defendant's petition proceeded on the grounds that he had no jurisdiction to entertain the suit as a small cause suit; that he was wrong in holding that the nature of the correct patta was determined in a former suit between the parties.


(1) 10 M. 210. (2) Appeal No. 36 of 1890, unreported. (3) 7 B.L.R. 74.


284
The civil revision petition came on before Shephard, J., who, on the 1st November 1889, made the following order:—

It now appears that in the suits under the Rent Act, the terms of the patta as to the village of Pulithivayal were determined and therefore as to it the decree can be sustained. As to Koornur, there was no suit under the Act, and I cannot think that the decree in the civil suit No. 331 settled all questions as to the terms of the patta. The Subordinate Judge must be asked to report what is the amount due in respect of Pulithivayal. So far as regards the rent due for the other village, the decree must be reversed. Proportionate costs throughout.

The plaintiff preferred this appeal.

Mr. K. Brown, for appellant.

Subramanya Ayyar and Subrahmanya Ayyar, for respondent.

**JUDGMENT.**

It is contended for the respondent that the order appealed against is not a final order and that no appeal lies under Section 15 of the Letters Patent. We do not consider that this contention can be supported. The effect to be given to the word "Judgment" in Section 15 was considered by Mr. Justice Bittleston in Desouza v. Coles (1), and it was held that the word has the general meaning of any decision or determination, whether final or preliminary, affecting the rights or the interest of any suitor or applicant. It was also pointed out that that meaning is suggested by the language of the Charter in clauses 15, 39 and 40. Though the order now before us called for a report from the Subordinate Judge, yet it contained the preliminary adjudication that the appellant was not entitled to recover any rent for the village of Koornur, and that the decree of the Subordinate Judge must be reversed so far as it related to that village.

On the merits, we are unable to support the order of the learned Judge. We find on the record a decision of the Deputy Collector in summary suit No. 34 of 1888, settling the terms of the patta to which the respondent was entitled for fasli 1293 under Act VIII of 1865. This being so, the Subordinate Judge has jurisdiction to decree the claim for rent, and, even assuming that the decree in original suit No. 331 declared that the appellant was entitled only to a money rent in respect of two items of land and not to varum, and that the Subordinate Judge had failed to give due effect to it, the error, if any, is not one by reason of which he assumed a jurisdiction which he did not possess. We are of opinion that it was not competent to the learned Judge to revise the decree of the Subordinate Judge under Section 622 of the Code of Civil Procedure.

(408) We set aside the order appealed against, and restore the decree of the Subordinate Judge. The respondent will pay the appellant's costs in this Court and of the proceedings in the Court below under Section 622.

---

(1) 3 M.H.C.R. 384 (387).
INDIAN DECISIONS, NEW SERIES

14 M. 408 (P.B.) = 1 M.L.J. 603.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Shephard.

RANGASAMI (Plaintiff), Appellant v. KRISHNAYAN AND OTHERS (Defendants), Respondents.

[17th March and 21st April, 1890, and 26th January and 2nd and 14th April, 1891.]

Hindu Law—Suit by the purchaser of an undivided share of family property—Time when the share is ascertained.

The purchaser from a member of a joint Hindu family of his share of a house which belonged to the family, sued for the partition and delivery of possession of the share purchased by him. The number of persons entitled as co-owners to the property of the family had increased between the date of the purchase and that of the suit. It did not appear whether the house constituted the whole or only part of the property of the family, and no question was raised as to the competency of the plaintiff to sue for a partial partition.

Held, by the Full Bench, that the share to be awarded to the plaintiff should be computed with reference to the state of the joint family at the date of the suit; by the Divisional Bench, that the decree appealed against, by which the plaintiff was to recover, the value of the share of the house computed as above and not the share itself, was right.

Second appeal against the decree of K. R. Krishna Menon, Subordinate Judge of Tanjore, in appeal suit No. 397 of 1888, varying the decree of W. Gopalachariar, District Munsif of Tiruvadi, in original suit No. 425 of 1887.

Suit for partition and possession of a one-third share in a house belonging to the undivided Hindu family, of which the defendants were members, claimed by the plaintiff under a sale-deed in respect of it executed to him by defendant No. 2 in 1875. At the date of the suit, defendant No. 2 would have been entitled on partition to a one-tenth share only of the house, and the District Munsif held that the plaintiff could enforce his purchase [409] to that extent only and decreed accordingly. On appeal, the Subordinate Judge varied this decree of the District Munsif by awarding to the plaintiff the money value of this share.

The plaintiff preferred this second appeal.

Sankara Menon, for appellant.
Mr. Johnston, for respondents.

This second appeal having come on for hearing before Handley and Weir, JJ., their Lordships made the following order of reference to the Full Bench:

Order of reference to Full Bench.—"This is a suit to recover one-third share of a house and ground, the property of an undivided Hindu family consisting at present of a father (defendant No. 1), four sons (defendants Nos. 2, 3, 4 and 5), and a grandson (defendant No. 6), son of defendant No. 2. The share is claimed under a sale made by defendant No. 2 before the birth of defendants Nos. 1, 5 and 6. The only questions raised in second appeal are to what share of the house is the plaintiff entitled, and is the Lower Appellate Court right in giving him the money value of the share instead of the share itself. Both the Lower Courts found the plaintiff entitled

* Second Appeal No. 678 of 1889.
only to one-tenth of the house and ground, that being the share to which his vendor (defendant No. 2) would now be entitled if he were seeking partition, and the Lower Appellate Court has awarded him Rs. 21, being one-tenth of the value he himself put upon the property. It does not appear from the record whether the property in question is the whole of the family property, but no question has been raised in this suit as to the competency of the plaintiff to sue for a partial partition.

The main question is does a purchaser of the undivided share of a Hindu in the family property acquire the share of his vendor as it is at the time of the sale or as it is at the time when he seeks to enforce his purchase. The point has not been expressly decided by any of the other High Courts, as far as we can discover, and Mr. Mayne in his work on Hindu Law (4th Edition, § 336) treats it as an open question. We were disposed to hold upon the principles which have been laid down by this Court, as regulating alienations by members of an undivided family of their shares in the family property, that the lower Courts were right in holding that the share to be taken by the plaintiff under his purchase from defendant No. 2 is the share to which his vendor would now be entitled on partition. The case is not governed [410] by Section 44 of the Transfer of Property Act, because the sale was made before the Act came into operation, though we think it would have made no difference if that section had applied, for it does not, in our opinion, purport to enlarge the right of alienation previously possessed by a member of an undivided family, and, if it did do so, its operation in that direction would be restricted by Section 2, clause (d) of the Act, which saves any rules of Hindu law from being affected by it. The extent to which alienation by a member of an undivided family has been allowed in Madras, we understand to be that he cannot alienate any specific item of the family property, though less in value than his own share in the whole property, nor can he detach any portion of the family property and hand it over to his alienee; but he can, for valuable consideration, transfer his interest in the whole or in any part of the family property, and thereby he puts his transferee in the same place as himself, i.e., gives him a right to immediate enjoyment jointly with the other coparceners of each item of the family property, and a right to demand partition at any time—Viraswami Gramini v. Ayyaswami Gramini (1), Venkatachella Pillay v. Chinnaia Mudaliar (2), Villa Butten v. Yamenamma (3). He cannot put his alienee in a better position than himself, and thereby prejudice his coparceners, and the alienee, therefore, must be liable, until he obtains partition, to the same fluctuations in the amount and value of the share caused by changes in the number and circumstances of the family, as his alienor would have been liable to, had the alienation not taken place. It was pressed upon us in argument that if this be so, the purchaser might in some cases take nothing, for his vendor might die before anything was done to enforce the purchase, and also that if the purchaser is to be liable to have what he has purchased diminished by changes in the family he must also have the benefit if such changes should increase the share of his vendor. It seems to us that both these consequences logically follow from the legal position which the alienee occupies, and we do not see that they involve any absurdity. He who purchases the interest of a member of an undivided family in the family property purchases that which is from its nature uncertain, and the

1891
APRIL 14.
Bench.
14 M. 408
(F.B.)
1 M.L.J. 603.

(1) 1 M.H.C.R. 471.
(2) 5 M.H.C.R. 166.
(3) 8 M.H.C.R. 6.
purchase must always partake of the nature of a speculative transaction; but
he knows perfectly well what he is buying, and is not to be pitied if he gets less than he hoped for, any more than he is to be blamed if he gets more. The cases as to attachment of the share of a member of an undivided Hindu family in execution of a mortgage decree against him, seem to show that the Courts have recognized the liability of an alienee of such a share to be defeated by the death of his alienor before the alienation is enforced—Swaraj Bansi Koir v. Shro Proshad Singh (1), Krishna Rau v. Lakshmana Shenbhogue (2).

In the first of these cases, which was a case of a mortgage by a father, a sale in execution was allowed to the extent of the father's share, on the ground that the proceedings in execution had gone so far as to constitute in favour of the judgment-creditor a valid charge on the land to the extent of the father's share, which could not be defeated by his death before the actual sale, implying that but for such proceedings it would have been so defeated. In the last case, their Lordships of the Judicial Committee, say that they are not disposed to extend the powers of alienation of an undivided share in ancestral estate beyond the decided cases, which rest not on an admitted principle of Hindu law but on an exceptional doctrine established by modern jurisprudence. It was argued before us, on behalf of plaintiff that even assuming that the principle adopted by the Lower Courts in ascertaining what share plaintiff is entitled to was right, they have wrongly applied it. They hold that if a partition were now made, defendant No. 2 would only be entitled to one-tenth, because he has a son (defendant No. 6), who became by birth equally interested with him in the family property, and whose rights could not be affected by the sale by defendant No. 2, which is not shown to have been for family necessities. To this it is objected that defendant No. 6 was not born at the time of the sale by his father, and therefore cannot question that sale; that he acquired by birth only an interest in such part of his ancestral property as his father had not alienated before his birth, and therefore that he acquired no interest in his father's share in this particular property, and plaintiff is therefore entitled to one-fifth of the property in question.

In our opinion the principle contended for in this argument is inconsistent with those which, as we have stated above, we consider are to be deduced from the decisions of this Court as to alienations for value by a member of an undivided family of his share in the family property. It appears to us upon these principles that defendant No. 2 could not put the purchaser in a better position than he was in himself, and, therefore, that, as his share was liable to be diminished by the birth of a son before partition, the interest, which the purchaser took, must be equally so liable.

We should, therefore, have held, upon the principles above discussed, that the Lower Courts were right in declaring that plaintiff was only entitled to one tenth share in the property in question.

We were, however, referred in the course of the argument to the judgment in Srinivasa v. Gurnurti (3). In that case a hypothecation by an undivided father was declared to be enforceable after his death against the family property to the extent of his share at the time of the hypothecation. The judgment is short and does not quote any authorities, and it appears to us to be in conflict with the principles which, as

(1) 6 I.A. 88. (2) 4 M. 302. (3) Second Appeal No. 49 of 1888 unreported.
stated above, we think are to be deduced from previous decisions of this Court.

We think, therefore, that this case should be referred for the decision of a Full Bench.

The question which we would refer to the Full Bench is,—

To what share in the property in question is plaintiff entitled?

The case came on for hearing before a Full Bench, consisting of Collins, C.J., Muttusami Ayyar, Parker and Shephard, JJ.

Sankara Menon, for appellant.

Mayne in § 336 expresses his views on the question, referring to Villa Butten v. Yamenammana (1), in which it was alluded to incidentally only—see end of page 11 of the Report. I submit that the moment when an alienation takes place, the joint tenancy is severed and the purchaser becomes a tenant in common. This view is supported by Vasudeva Bhut v. Venkatesh Shambhap (2), where the question was whether an undivided coparcener is [413] entitled to alienate his share: compare also the opinion of Colbrooke there cited, and see Mahabalaya Bin Paranay v. Timaya Bin Appaya (3).

[Muttusami Ayyar, J.—The question there raising is settled now. The coparcener’s interest is a vested and so an alienable interest. Here the question is whether the purchaser took the property as it stood.]

Ballabh Das v. Sunder Das (4) decided that a purchaser is not a coparcener; that was in the case of an auction purchase which it was held broke up the family. The sale-deed says “my one-third share”—Pandurang Amurda v. Bhaskar Shadashik (5).

[Muttusami Ayyar, J.—If a father loses his sons and sells all his property, but the next day a son is born ?]

The son could do nothing, the coparcener’s interest vests only on his birth—See Mayne, § 316—Girdharoo Lall v. Kuntoo Lall.(6)

[Muttusami Ayyar, J.—If here all the three coparceners sold all the family property, and the purchaser did not sue till more people were born ?]

Collins, C.J.—The Privy Council case was under the Dyanbha Law.

[Muttusami Ayyar, J.—Have you any Mitaksha case ?]


[Collins, C.J.—Why was the property sold, for a debt or what ?]

It seems to have been for cash in hand, he says “for my expenses.”

[Muttusami Ayyar, J.—Thoro are two texts in Mitaksha as to a coparcener taking on his birth, and a quotation from Vyasa as to the accrual of a right of maintenance—Deendyal Lal v. Jadsep Narain Singh (11) indicates doubt as to whether the latter text is not a total bar to alienation.]

But Yekayamian v. Aquiswarian (12), says it is only a moral precept, only directory, see page 309 of the Report.

[Collins, C.J.—Is there any ruling by the Privy Council that son can set asid a sale made by his father before his conception ?]

I know of none. To revert to Mahabalaya Bin Paranay v. Timaya

(7) 1 M.H.C.R. 471. (8) 2 M.H.C.R. 148. (9) 1 M.H.C.R. 60.
Ein Appaya (1) the Court approved the principle laid down in Vasudev Bhat v. Venkatesh Shanbhav (2) as to the ascertainment of shares.

[Collins, C.J.—Referred to Venkatachella Pillay v. Chinnaiya Muddaliar (3).]

The Bengal and Allahabad Courts take a different view on the question from those of Madras and Bombay; yet in order to protect the equities of the purchaser, they come to much the same conclusion.

[Shephard, J.—Was there other property besides the house?]

It does not appear. The price paid (Rs. 70) indicates it was one-third actually he was going to buy. Even the Bengal Courts makes the price an equitable charge—Mahabees Pershad v. Ramad Singh (4) approved in Madho Parsad v. Mehrban Singh (5). Again, if we take period of suit, supposing members of the family die, the alienee would take a greater share than he bargained for, but it would be absurd for me to claim more than the one-third.

[Muttusami Ayyar, J.—Did he bargain for and buy a certain or an uncertain share? Vita Butten v. Yamenamma (6) says the coparcenary interest is uncertain and fluctuating; what if a purchaser is foolish enough to buy from one coparcener a certain fixed share?]

The new members cannot object, because there is a severing of the coparcenary interest on the sale according to the Bombay cases.

[Collins, C.J.—You say they all become tenants in common of all the property.]

Yes.

[Collins, C.J.—If a son is born, is he a tenant in common or a joint tenant?]

[415] On the one hand there are the members of the family, and on the other hand the purchaser—the new man.

[Collins, C.J.—You are limiting your proposition.]

The members of the family are joint inter se, but not so quoad the new purchaser.

[Parker, J.—His share cannot be reduced, though the share of members of the family can by subsequent births you say.]

Yes. The Bombay cases go to that.

[Muttusami Ayyar, J.—A family consists of three, one sells a third to a stranger—are those three tenants in common?]

The answer is given in Vasudev Bhat v. Venkatesh Shanbhav (2). I do not go beyond that.

[Collins, C.J.—The Chief Justice there says only a sort of tenant in common and explains his meaning.

Muttusami Ayyar, J.—Suppose a co-pareener sells and re-buys, can he claim more than his ordinary share on partition?]

No. Another principle would come in then. The coparcener might have brought his suit for partition at any time; if he waits he must bear the risk.

[Muttusami Ayyar, J.—Does the purchaser stand in a better position than the vendor?]

The position of the vendor changes. Ballabh Das v. Sunder Das (7) shows the stranger cannot stand in the same position as his vendor in the coparcenary.
Muttusami Ayyar, J.—There are two principles—(1) A purchaser gets his vendor's right to a partition quod the thing bought; (2) if he buys an exact share, he cannot get more. I think these principles must govern the case.

Subject to the principles laid down in the Bombay cases, where, however, it does not appear whether any new members were born. In any case the money I paid will be a charge on the rest.

Mr. Johnstone, for respondents.

The plaintiff did nothing for twelve years, meanwhile the other members of the family were born. Moreover, there is other family property, so he would not be entitled to partition in the family house anyhow.

As to the purchaser's right to partition, see Sadabart Prasad [416] Saku v. Footbhash Koer (1), where the meaning of partition is given and explained with reference to Appooor v. Rama Subba Aiyar (2) and see page 44 of the Report per Peacock, C.J., as to the nature of the tenancy, whether common or joint.

Collins, C.J.—Is that in accord with Vitla Batten v. Yamenamma (3)?

The reasoning substantially approved there as far as necessary for me, though the decisions are not the same. One member of the family cannot alienate any specific part of the property until it is ascertained. As to Vasudev Bhat v. Venkatesh Shanbhav (4) and Mahabatya Bin Parmaya v. Timaya Bin Appaya (5) neither is applicable. The observations quoted from Ballabha Das v. Sunder Das (6) were unnecessary and Pandurang Anandav v. Bhaskar Shadashiv (7)—see note on page 75 of the Report affecting the authority of Vasudev Bhat v. Venkatesh Shanbhav (4) bears out my proposition that a share must be ascertained before it is alienable.

Shephard, J.—If three members constituted a family, and one conveyed away his one-third share and afterwards others are born?

The ascertainment still could only take on partition, and on partition the new members could share. If they agreed together by selling by one deed, &c., the agreement would be tantamount to partition.

Shephard, J.—One man might successively buy three-thirds, would he not be entitled to the whole?

No, because that would not be the agreement—see Madho Parshad v. Mehrban Singh (8) as to power of a coparcener to alienate.

The case having stood over for consideration, Collins, C.J., read the following judgment which he said was the judgment of himself and Muttusami Ayyar, J.

JUDGMENT OF THE FULL BENCH.

Collins, C.J.—As purchaser of the second defendant's coparcenary interest in a house and ground belonging to his joint family, the appellants (plaintiff) claimed a third share therein as the allotment due to him by right of purchase. At the time of the sale, the joint family consisted of the vendor (defendant [417] No. 2) and of his father and brother (defendant Nos. 1 and 3), but at the date of the suit defendant No. 1 had two more sons (defendants Nos. 4 and 5), and defendant No. 2 had a son, viz., defendant No. 6 in the suit. If the vendor claimed partition immediately

(1) 8 B.L.R.F.B. 31 (41).
(2) 11 M.I.A. 75.
(3) 8 M.H.C.R. 6.
(4) 10 B.H.C.R. 138 (147).
(6) 1 A. 429.
(7) 11 B.H.C.R. 72.
(8) 17 I.A. 191.
before the sale, his allotment would be a third share, but if he claimed partition at the date of the suit, it would be reduced to a tenth share. The question referred for the opinion of the Full Bench is whether the share to be awarded to the purchaser ought to be computed with reference to the number of coparceners constituting the joint family at the time of the purchase or at the time of the suit.

In Veeravasami Gramini v. Ayyasvami Gramini (1), it was held, in 1863 by Sir Colley Scotland, C.J., and Mr. Justice Bittleston that, according to Hindu law current in Madras, the member of an undivided family may alien the share of the family property to which, if a partition took place, he would be individually entitled. That decision was followed by another Division Bench in 1870 in Venkatachella Pillay v. Chinnaia Mudaliar (2). The principle on which these decisions rest is that the vendor could confer a valid title not to "any specific portion of the joint family property, but only to his beneficial estate as an undivided coparcener with the incidental right of partition." Again in Vitta Butten v. Yame-namma (3) decided in 1874 the same principle was recognized as settled by a long course of decisions, but it was held to be subject to this limitation, viz., that when the alienation is by will, the will is of no effect, and the right of survivorship being in conflict at the moment of death with the right by devise, the former, as the prior title, prevails against the latter. In Appovier's case (4) the Privy Council observed that according to the true notion of a joint Hindu family, no individual member of that family, while it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. Again in Deendyal Lal v. Jugdeep Narain Singh (5), the Judicial Committee held that the right of a purchaser at an execution sale of a coparcener's interest must be limited to that of compelling the partition which his debtor might have compelled, had he been so minded, before the alienation of his share took place. They observed that the partner of a firm could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser, at the execution sale, acquires the interest sold with the right to have the partnership account taken in order to ascertain and realize its value. Their Lordships observed that the same principle ought to be applied to shares in a joint and undivided Hindu estate, but that it ought to be applied without unduly interfering with the peculiar status and rights of the coparceners in such an estate. Moreover, the definition of partition contained in Chapter II, Section I, Verse 4 of the Mitakshara throws light on the nature of a coparcener's estate both prior and subsequent to partition. Partition or Vibhaga, says the Commentator, is the adjustment of diverse rights regarding the whole (of the joint estate) by distributing them on particular portions of the aggregate. According to the Mitakshara law then, by which the vendor's family in the case under reference is governed, each coparcener acquired by birth a joint interest in family property, and while it may be alienated for value, the specific allotment into which it is to be converted, is liable to variation according as existing coparceners die or new coparceners are born, until it is adjusted by partition and a specific allotment is severed from the joint estate and converted into specific individual property. Such being the case, the purchaser, who can only take what can be lawfully sold, must be taken

(1) 1 M.H.C.R. 371. (2) 5 M.H.C.R. 166. (3) 8 M.H.C.R. 6.
(4) 11 M.I.A. 76. (5) 4 I.A. 247.

292
to purchase an uncertain and fluctuating interest with the right of converting it at any moment after the purchase by partition into definite separate property. In the case before us, the delay in suing for partition is imputable to the purchaser, and as new coparceners have meanwhile come into existence, the share to be awarded to him must diminish pro tanto on the simple ground that what he could lawfully purchase was an uncertain interest to be computed into a definite share with reference to the coparcenary law at the time of partition. As to the question that if the interest purchased is liable to diminution by changes in the family subsequent to the sale and prior to partition, it must be taken to increase when there is a diminution in the number of coparceners, it is not necessary to determine it for the purpose of this reference. In the case before us the coparceners increased and did not diminish in number. If they diminished in number, and if it appeared that what was bargained and paid for by the purchaser was a specific share or quantum of interest, and not the vendor's coparcenary interest, such as it might be when partition was effected, it may be open to the vendor to say that the purchaser could not claim more than what he intended to buy and actually bought. As regards the contention that, if the vendor dies before the purchaser effects a partition, the purchaser will take nothing, it is also one which does not arise on the facts of the case before us. If it is necessary to notice it as an objection to the rule of decision indicated above, the answer is that the interests carved out by the sale vest in the purchaser at once and that the vendor being competent to sell, his subsequent death is an event which cannot divest the interest which has once vested; and for the purpose of giving effect to his contract of sale, the purchase must be dealt with as if the seller were alive when the purchaser demands partition. We answer the question referred to us by saying that the share to be awarded to the purchaser is to be computed with reference to the state of the joint family at the date of the present suit.

PARKER, J.—I concur.
SHEPHERD, J.—I concur.

This second appeal having come on before the Divisional Bench, after the determination of the above reference by the Full Bench, the Court delivered judgment as follows.

Mr. Subramanyam, for appellant.
Mr. Johnstone, for respondent.

JUDGMENT OF THE DIVISIONAL BENCH.

The decision of the Full Bench is that plaintiff is entitled only to one-tenth share of the house. It is argued that what was the actual share was not the question before the Full Bench, but we observe that the Division Court, which referred the case, distinctly held that one-tenth and not one-fifth was the share to which plaintiff was entitled, and this was expressly stated in the order of reference, and must have been considered by the Full Bench.

We refuse to interfere with the decree of the Subordinate Judge, giving Rs. 21, the value of the tenth share of the house, to plaintiff and not the share of the house itself.

The second appeal is dismissed with costs.
14 M. 420 = 1 M.L.J. 540

APPELLATE CIVIL.

[420] APPELLATE CIVIL.

[16th, 20th and 30th April, 1891.]

PRICE (Plaintiff) Petitioner v. BROWNE (Defendant), Respondent.*

Custom of trade—Notoriety and definiteness of custom—Requirements of a binding custom of trade.

Suit for damages for breach of a contract to let horses on hire. The plaintiff hired a pair of horses at Ootacanam to the defendant for a period of six months, and on one occasion drove them beyond the Municipal limits of the station; on their return the defendant took away the horses from the plaintiff, which was the breach complained of. The defendant pleaded that the plaintiff’s user of the horses as above was contrary to the local custom of the trade.

 Held, that since the alleged custom was not shown to be either certain or invariable or so notorious that persons should be held to enter into agreements with reference to it, it formed no defence to the action.

PETITION under Provincial Small Cause Court’s Act, Section 25, praying the High Court to revise the decree of W. E. T. Clarke, Subordinate Judge, Nilgiris, in small cause suit No. 226 of 1890.

Suit to recover Rs. 102-8-0 as damages for breach of contract. The plaintiff, by his wife, hired a pair of horses from the defendant, a Livery Stable-keeper, for a period of six months from 1st April 1890. On 7th May the defendant took away the horses from the plaintiff, which was the breach complained of. The defendant admitted the contract, but alleged that by a local custom of trade, a condition was imported into it to the effect that the horses were not to be driven beyond the local and municipal limits of the station, and that the plaintiff had driven the horses in question beyond such limits on 6th May, and that he had, on that account, removed the horses.

The Subordinate Judge found that the custom alleged by the defendant was established by the evidence, but that it was not shown that the plaintiff or his agent had direct notice of the condition alleged to be imported thereby into the contract. He held that the second of these findings did not avail the plaintiff on the authority of Juggamohan Ghose v. Manickchund (I) and ruled that the defendant was justified in removing the horses, although apart from the custom there was nothing improper and unreasonable in the plaintiff’s user of the horses, and accordingly dismissed the suit.

The plaintiff preferred this petition.

Mr. Michell, for petitioner.—The Subordinate Judge finds that the use of the horses by the plaintiff on the occasion in question was a reasonable use; therefore on this finding alone he should have decreed for the plaintiff, for the defendant himself, in his written statement, says the horses could, by the contract, “only be used within local or other reasonable limits.” It is true he adds “and not for journeys,” but it is not shown by any evidence what distance amounts to a “journey” and what not, and the only limit which can be reasonably taken is a reasonable distance. The defendant’s wife herself says it was permissible to drive to the Lawrence Asylum, which is a long way outside the Municipal limits and back. Then where is the line to be drawn? How is the

* Civil Revision Petition No. 406 of 1890.

(1) 7 M.T.A. 263.
biter to know what drive will be considered of a permisible distance, and what not so? Surely the only line which can be drawn is that which separates a reasonable from an unreasonable distance. If not, however, then the custom, which formed the alleged implied condition of the hiring, was an unreasonable custom, and also a vague custom, and therefore void: The case of Tanistry (1), Raitt v. Mitchell (2), Nelson v. Dahl (3). Further, a custom, to be binding, must be well known, or, as was said in Nelson v. Dahl (3), “notorious.” The evidence for the defendant fails to show this, and plaintiff’s witnesses deny that there was any such custom as that set up, when horses were hired for a month or longer, whatever might be the case when the hiring was for the day. The defendant’s allegation that he always sends with horses when hired, a card of rules by which driving outside Municipal limits is prohibited, is against him, for it tends to show that the alleged custom was not notorious. Moreover, the plaintiff was not a permanent resident, but a visitor at the place, and when it is sought to bind such a person by a local custom, knowledge of the existence of the custom must be brought home to him, which has not been done in this case: Ex parte Powell, In re Matthews (4), In re Hill (5), Kirchner v. Venus (6), Stewart v. Cauty (7), Bartlett v. Pentland (8), Scott v. Irving (9), Easton v. London Joint Stock Bank (10).

Mr. Johnstone, for respondent.—The evidence proves the existence of the local custom alleged by the defendant. The Subordinate Judge sitting as a Small Cause Court has found that it exists, and his finding on the fact is conclusive. There is nothing unreasonable in such a custom. The limits fixed by the custom are not indefinite. They do not include long drives outside Octacanund. Wellington is clearly beyond those limits. Plaintiff must be presumed to have known of the existence of the custom, but even if he did not know of it, he was bound by it: Wigglesworth v. Dallison (11), Sutton v. Tatham (12).

JUDGMENT.

The facts of the case are as follows: the plaintiff hired from the defendant at Octacanund a pair of carriage horses for six months from the 1st of April 1890. On May 6th the horses were driven to Wellington and back. On May 7th the defendant took away the horses from the plaintiff’s stables, on the ground that the plaintiff had broken the conditions of the contract of hiring by driving the horses beyond local and Municipal limits. The plaintiff denies that there was any such condition in the contract and sues for damages on account of the trouble and expense caused to him by the defendant taking away the horses.

The Subordinate Judge found that it was not proved that the plaintiff had any express notice of the condition set up by the defendant at the time the contract was made, and also that the drive to Wellington and back was not under the circumstances an unreasonable distance to take the defendant’s horses; but he held that the defendant had established by evidence a valid trade custom as prevailing at Octacanund by which it was generally understood that horses hired by the day or month could not be used beyond the local and Municipal limits of the station, and that this condition was impliedly imported into the

(1) Davies Irish Rep 78. (2) 4 Camp. 146. (3) L.R. 12 Ch. D. 569.
The only two resident examiners, Mr. Smith and Mr. Jones, spoke.

The point here is that the defendant was convicted for fraud and advised to the defendant. On this ground he did not understand the agreement.

With reference to it, we must assume that the agreement was made by him and that the agreement was made by him.

The agreement is properly executed by the parties, and no one questions that the parties were bound by it. We agree with the defendant that the agreement was made by him and that the agreement was made by him.

The parties were bound by it. The evidence is in point of fact and the evidence is in point of fact.

The points before us are (1) whether the answers are legal evidence of a valid contract between the plaintiff and the defendant. On this ground he did not understand the agreement.
not consider it unreasonable with a good pair of horses to take them to Wellington and back if they had good rest and food.

This is all the evidence in support of the defendant's case. On the other hand witnesses were called to prove that persons in Otoacampum were in the habit of taking their horses to Wellington and back in the course of the same day, and that it was generally understood that persons who hired horses by the mouth might use them within any reasonable distance and were not confined to the limits of the Municipality.

The Subordinate Judge has, however, found that the use was not unreasonable provided the use was not excluded by the custom. As to this we are constrained to hold that the evidence adduced by the defendant does not establish the conditions we have enumerated above, and which are the legal requisites of a valid and binding custom. The alleged custom is not shown to be either certain or invariable. The restriction is not found to be reasonable when applied to this particular class of contracts of hiring for a specific number of months; nor is it shown to be so notorious that all persons so hiring can be held to enter into the contract with knowledge and notice of the custom.

We may further observe that even if the evidence had established a local custom as to hiring by the day or month, it [425] is by no means clear that the contract in this particular case could be held to have been made with reference to such custom. The general rule of law is that where the term to be implied from the usage of trade is either inconsistent with or expressly excluded by the contract it cannot be implied. The defendant's wife stated in her evidence that the agreement was for six months certain and that, contrary to the usual practice, the horses were not to come back at night to the livery stables, but were to be kept by the hirer who promised to look after them as her own. It is evident that such an arrangement must give the hirer a very full control over the horses, and if the promise to 'treat them as her own' implies reasonable use as well as physical care, the plaintiff will be entitled to as full a reasonable use as he would have over his own horses, and the Subordinate Judge has found that the use was not unreasonable.

We must therefore set aside the decree and remand the suit for a determination of the second issue as to the amount of compensation to which the plaintiff is entitled. The petitioner is entitled to his costs in this Court and the costs of the Subordinate Court will abide and follow the result.

Barclay, Morgan and Orr, Attorneys for petitioner.
1891
JULY 28.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

APPU AND OTHERS (Defendants Nos. 5, 6 and 8), Appellants v.
RAMAN AND OTHERS (Plaintiffs Nos. 1 to 5), Respondents. *

[13th, 16th and 28th July, 1891.]

Malabar Law—Specific Relief Act—Act I of 1877, Section 56 (b)—Suit by junior members of a tarwad—Injunction restraining execution of a decree obtained in a suit against plaintiffs' karvanan.

In a suit brought in a Subordinate Court by the junior members of a Malabar tarwad against their karvanan and others, the plaintiffs prayed for a declaration of the uraima right of their tarwad in a certain devasom, and for an injunction to restrain the defendants, other than the members of the plaintiffs' tarwad, from executing a decree of a District Court, passed on appeal from a Munsil's Court, whereby certain lands of the devasom were decreed to be surrendered to them in [426] the character of uralers; it appeared (1) that plaintiffs' karvanan was a party to the suit in which the abovementioned decree was passed, (2) that the plaintiffs' tarwad was otherwise entitled to the uraima right by adverse possession, if not immemorial title:

Heid, (1) that the plaintiffs were entitled to maintain the suit without proof of fraud and collusion on the part of their karvanan in the previous suit; (2) that the injunction sought was not precluded by Specific Relief Act, Section 56 (b); (3) that the plaintiffs were entitled to the decree as prayed.

[R., 18 M. 398 (341); 12 C.L.J. 86 (90)=14 C.W.N. 878=6 Ind.Cas. 444 (445).]

APPEAL against the decree of C. Gojalan Nayar, Subordinate Judge of North Malabar, in original suit No. 19 of 1888.

The plaintiffs sued, with the permission of the Court, obtained under Civil Procedure Code, Section 30, as representing all the junior members of their tarwad, of which defendant No. 2 was karvanan and defendant No. 3 was a member. Defendants Nos. 1 and 4 were members of another tarwad, which, however, originally formed one tarwad with that of the plaintiffs. It was alleged that these two tarwads possessed a common uraima right over the Pareskoth devasom, and that the actual management of the devasom had always been in the hands of one or both of their karvanans. Defendants Nos. 5, 6 and 7 belonged to other tarwads, representatives of which had been joined as defendants in a suit brought against the karvanan of the plaintiffs' tarwad in 1854, and had then denied the uraima right of the plaintiffs' tarwad above mentioned. That suit was dismissed. In 1887 these defendants obtained a decree in appeal suit No. 215 of 1887 on the file of the District Court of North Malabar, to which defendants Nos. 1 and 2 were parties, for the restoration of certain lands of the devasom to them in the character of uralers. The plaintiffs now alleged that that decree was obtained "owing to the first defendant's incapacity and collusion, and the second defendant's culpable negligence."

The prayers of the plaint in the present suit were for a declaration that neither defendants Nos. 5, 6 and 7 nor their tarwad had any uraima right to the devasom in question and for a perpetual injunction restraining them from executing the last-mentioned decree.

* Appeal No. 20 of 1890.
The Subordinate Judge passed a decree as prayed. Defendants Nos. 5, 6 and 7 preferred this appeal.

Ramasami Mudaliar and Govinda Menon, for appellants.

Sankaran Nayar and Pyru Nambiar, for respondents.

JUDGMENT.

[427] The plaintiffs (respondents) are junior members of the Payyan Puthen Vittil tarwad, of which defendant No. 2 is the karnavan. Defendant No. 3 is also a member of this tarwad. Defendants Nos. 1 and 4 are members of Payyan Kandan Chirakkal tarwad. All these were originally members of one tarwad, but at present there is only Ataladakkam right between the members of these two tarwads. Defendants Nos. 5, 6 and 7 (the appellants) are members of distinct tarwads who have obtained a decree awarding to them as uralers of the Parakoth devasom, the right to recover possession of certain devasom lands. The plaintiffs ask for a declaration that neither defendants Nos. 5 to 7 nor their tarwads have any uraima right in the Parakoth devasom, and that, if they ever had such right, they have lost it by lapse of time. They also seek a perpetual injunction to prohibit defendants Nos. 5 to 7 from executing the decree they have obtained.

The Subordinate Judge found that defendants Nos. 5 to 7 had not made out their uraima right, that if they ever had any such right, they have lost it by non-user for about 100 years, and that plaintiffs' family have had hostile possession since 1857. He, therefore, gave plaintiffs the declaration and injunction sought.

It will tend to elucidate matters if we first review the different suits between the parties. Admittedly, the management of the devasom has, for the last century or more, vested in the tarwad, of which plaintiffs and defendants Nos. 1 to 4 were members. The earliest suit was original suit No. 181 of 1854, which was filed by one Kamaran Nambiar to recover from the then karnavan of the plaintiffs' tarwad certain wet land which had been demised to a third party (the second defendant in the suit). The present defendant No. 1 and defendants Nos. 5 and 6 or their representatives came in as supplemental defendants. The karnavan of the plaintiffs' tarwad pleaded that the land was the jennm of the Parakoth devasom. The representatives of defendants Nos. 5 and 6 alleged that the land was the jennm of the devasom, but that defendant No. 1 (plaintiffs' karnavan) was not an uralan but a samudayam. The Court found that the land was the jennm of the devasom, dismissed the suit and referred the parties who disputed the uraima right to a civil suit. This was in March 1857. The next suit was original suit No. 663 of 1855 instituted by one Krishnan Nambudiri to recover land demised to the [428] devasom. Among the defendants were the representatives of all the parties to this suit, who were imploed as uralers of the devasom. The representative of the present fifth defendant's tarwad denied the uraima right of the present plaintiffs' representative, and pleaded that the property was the jennm of the devasom. Plaintiffs' representative relying on the decree in the former suit (which had been passed before he put in his written statement) denied the uraima right of the present defendants Nos. 5, 6 and 7. The representative of the present sixth defendant also denied the uraima right of the plaintiffs' representative and asserted that the only uralers of the devasom were defendants Nos. 1, 5, 6 and 7. The Court found that the property sued for was the jennm of the then plaintiff; that the present plaintiffs' representative was the chief uralan of the
devasom; that he managed the affairs and performed the ceremonies of the
temple, and directed payment of the kanom amount to the plaintiffs'
representative, and to the present first defendant as his direct karnaVan.
The other claimants, i.e., the present defendants Nos. 5, 6 and 7 were
referred to a suit to establish their uraima right.

In 1882 the present defendants Nos. 1, 5, 6 and 7 instituted a suit
(original suit No. 387) against the present second defendant for an account
of the monies due to the devasom for the years during which he had been
in management under the present first defendant. The defendant (second
defendant here) denied that the plaintiffs were uralers and asserted that
he was the sole and absolute uralan. It was held both by the Court
of First Instance and by the Appellate Court (Exhibits XLIII and XLIV)
that the present first, fifth, sixth and seventh defendants were uralers, and
that the defendant (present second defendant) was a junior member of
the present first defendant's tarwad and liable to account.

In 1886 defendants No. 5, 6 and 7 brought a suit (original suit
No. 499, Exhibit XLI to recover certain devasom lands and arrears of rent.
The present first defendant was, along with the tenant, a defendant. There
was an issue whether the plaintiffs were uralers of the devasom, and it
was found by both Courts that they were, and they obtained a decree for
possession and rent.

It is first argued that the plaintiffs cannot maintain a suit for
a declaration; that they cannot assert an uraima right unless [429]
they can prove fraud and collusion on the part of defendants Nos. 1
and 2, who were parties to Original Suit No. 387 of 1882, and reliance
is placed on the decision in Khal v. Paidel (1). That case however is not on
all fours with the present. There, a suit had been brought by a third
party against all the uralers of the devasom, and property of the devasom
had been sold. Certain anandravas of the uralers then brought a suit to
set aside the sale, and the Court held that the decree was binding on all
futures representatives of the devasom unless set aside on the ground of
fraud or collusion. That is a very different case from the present. The
ground of decision in that case was that the property of the devasom is
vested in the uralers. The question in the present suit is not as to the
property of the devasom, but as to the real status of the respondents. It
is stated in the plaint that, owing to the first defendant's incapacity and
collusion and to the culpable negligence of the second defendant, who
failed to set forth a true plea, a decree was passed in favour of the respond-
ents, as uralers. It seems to us that the interests of the respondents,
as reversioners, are sufficient to enable them to maintain the suit without
proof of fraud or collusion on the part of defendants Nos. 1 and 2.

It is then argued that the decree of the Lower Court is contrary to
law, inasmuch as it grants an injunction to stay proceedings in a Court not
subordinate to the Court of the Subordinate Judge (Specific Relief Act,
Section 56 (b)). By the decree of the Lower Court, the appellants are
prohibited from executing the decree in appeal suit No. 215 of 1887 on the
file of the District Court. We do not consider that this can be held
to be an injunction to stay proceedings in the Court of the District
Judge. Clause (b) of Section 56 is apparently taken from Section 24
(5) of the English Judicature Act of 1873 which was as follows:—

"No cause or proceeding at any time pending in the High Court of Justice,
or before the Court of Appeal shall be restrained by prohibition or
injunction." The object of the enactment appears to have been to do away with the use of injunctions as a means for controlling proceedings in other Courts, and it has been adopted in Act 1 of 1877 to prevent in the Courts of this country the use of any such jurisdiction. But the [430] effect of the injunction granted by the Lower Court is to prevent the appellants from applying to the Court to execute its decree. No application for execution has yet been made, and so long as the injunction is in force none can be made, and therefore no pending proceeding of a Court is restrained by the injunction.

With reference to the merits, we are of opinion that the Subordinate Judge has rightly decided (1) that the appellants have not made out their uraima right, and (2) that the possession of plaintiffs' tarwad as uralers since 1857 has been adverse to the appellants.

No reliance can be placed on the temple pynsh of 1818 (Exhibit XLIII), in which, moreover, only the representative of the fifth defendant's tarwad is to be found. This pynsh is not signed by any responsible officer, nor is there anything to show by whose orders or in what manner it was prepared.

Now, this is the only document relied on by the appellants prior in date to the decree in original suit No. 663 of 1855, in which their claim to be recognized as uralers was not acknowledged. We have, however, been referred to a number of documents executed subsequent to the decree in the above suit as showing that one or other of the appellants has exercised uraima right by paying the wages of a drummer of the devasom, (Exhibits XVI, XVII and XXV) and by dealing with land belonging to the devasom (Exhibits XIII, XXIV and XL). Admittedly, there is no evidence to connect the lands referred to in these exhibits with the devasom, and in the fifth defendant's written statement they are referred to as "tarwad properties set apart for the devasom." It is not shown that Puthen Vittil tarwad has ever acknowledged the right of the appellants to deal with devasom lands, or to remunerate temple servants. The sole management has admittedly been from time immemorial in the Puthen Vittil tarwad, so that it is difficult to see what reliance can be placed on a few isolated transactions such as these, all of which took place after the alleged right of the appellants had been openly repudiated. Moreover, the evidence of the defendants' eleventh witness whose elder brother executed Exhibit XXIV and of the twelfth witness whose brother executed Exhibit XL shows clearly that these documents were not bona fide transactions. Defendant No. 6, who was examined as plaintiffs' sixth witness, admits that he has no documents to show [431] that the lands which he assents are held by him as uralan are devasom lands, or are held by him as such.

As to the performance of certain ceremonies, we concur with the Subordinate Judge that there is no reliable evidence to connect the performance of Kaliattom ceremonies with the rights of an uralan. There is evidence to show that such ceremonies are performed by many who have no claim whatever to the uraima right.

But even if it be admitted for the sake of argument that the tarwads of defendants Nos. 5, 6 and 7 once had the right claimed, it is clear that the plaintiffs' tarwad had been in adverse possession for more than 12 years, when original suit No. 387 of 1852 was instituted. Had Exhibits A and B (the judgments in original suit No. 181 of 1854 and original suit No. 663 of 1855) been filed in that suit by the present first or second defendants, the Court would have seen that the appellants' claim to be
regarded as uralers had been openly repudiated by the only managing uralan nearly 30 years before and that the respondents were in no sense agents of the appellants.

The decree of the Lower Court must be confirmed, and this appeal dismissed with costs.

14 M. 431.

APPELLATE CIVIL.

Before Mr. Justice Mulusami Ayyar and Mr. Justice Wilkinson.

KARUNAKARA MENON (Plaintiff), Appellant v. SECRETARY OF STATE FOR INDIA (Defendant), Respondent.*

[18th November, 1890 and 24th February, 1891.]


In a suit to declare the plaintiff's title to a shrottism village which was included in the jaghire granted in 1763 by the Nabob of the Carnatic to the East India Company, it appeared that the village in question had been previously granted by the Nabob free of assessment to the Kazi of Madras as an endowment for his office, and afterwards to the son of the first grantee personally without condition of service. In 1779 the British Government confirmed the village in perpetuity to the second grantee on account of the office of Kazi which he filled, and to his direct heirs who should be fit for that office. In 1862 on failure of the direct male line, the grantee's grandson by a daughter was nominated to the office of Kazi with the approval of Government, who directed he should hold the village, adding that it had been assigned as an endowment for that office. In the same year the Inam Commissioner confirmed it as a personal inam, enfranchised it and granted a title-deed to the holder. In 1866 Government ordered that the village should be registered as an endowment of the Kaziship and the title-deed cancelled, and in 1866 notified in the Gazette that the title-deed which was not produced was cancelled. Between the dates of the above order and notification the Kazi transferred the village to the plaintiff under a deed of perpetual lease, and placed him in possession. But in 1873 Government resumed the village and subsequently directed that the whole of its net revenue be paid to the Kazi. The Kazi, from whom the plaintiff claimed, died in 1868. An inam of certain Menkaval lands, which had formerly been allotted to the village watchman as inam, had been granted to the Kazi in 1802-3 they were cultivated by raiyats who paid varam to the inamdar. The order of resumption in 1873 had no reference to these lands, but in 1877 Government issued pattas to the raiyats:

Held, (1) that the grant of 1779, the original document not having been produced by the plaintiff, was sufficiently proved by a translation produced from official custody and certified by the Collector in 1839 to be correct and attested by the Persian Translator to Government;

(2) that it was competent for the Government in 1779 to alter the nature of the grant of 1761 as an act of State;

(3) that on the right construction of Regulation IV of 1831 and Act IV of 1862, and in view of the facts that the plaintiff must have been aware of the nature of the tenure and of the contents of the grant of 1779 and the cancellation of the inam title-deed, the Government was not acting ultra vires in cancelling the enfranchisement, &c.;

(4) that the Kazi through whom the plaintiff claimed having died in 1868 there was no reason to question the resumption in 1873;

(5) that the plaintiff was entitled to possession of the menkaval lands, the action of Government in issuing pattas to the raiyats being ultra vires.

Issues first framed on appeal as to the plaintiff's claim to mirasi rights and menkaval lands. Evidence of mirasi rights considered.

* Appeal No. 94 of 1897.
KARUNAKARA MENON v. SECRETARY OF STATE 14 Mad. 434

APPEAL against the decree of S. T. McCarthy, District Judge of Chingleput, in original suit No. 10 of 1885.

Suit for the declaration of the plaintiff's right to and for possession of a certain village being "an enfranchised inam village including menkaval maniem lands" and "all rights and privileges attached to the inam and mirasi rights aforesaid."

The facts of this case appear sufficiently for the purposes of this report from the judgment of the High Court.

[433] The District Judge dismissed the suit and the plaintiff preferred this appeal.

Mr. Nelson, Bhashyam Ayyangar and Sankaran Nayar, for appellant.
The Government Pleader (Mr. Powell), for respondent.

JUDGMENT.—{PRELIMINARY}.

This was a suit brought by the appellant to establish his title as against the Crown to the shrotrem village of Coromandel in the District of Chingleput. The village was included in what was originally called the late East India Company's jaghiro which was ceded by His Highness the Nabob Wallajah to the British Government in 1763. In 1760 the Nabob granted the village free of assessment and with all sources of revenue to one Fakruddin Mohamed Abubakar, Kazi of Madras, as an endowment for his office. In 1761 the Nabob re-granted it to the said Kazi's son, Mohdin Abubakar, for his personal benefit and that of his descendants without the condition of service. In 1779 the British Government, referring to the first grant, confirmed the village in perpetuity to Mohdin Mohamed Abubakar and such of his direct heirs of suitable qualification and fitness on account of the office which he filled. Mohdin Mohamed Abubakar since held the office of Kazi and died in 1808, and his son Mohamed Abubakar then succeeded to the office and to the inam village. Mohamed Abubakar died in 1862 and left no direct male heirs. There were then several claimants for the office and the Government approved of the nomination of one Abdul Kadir, a daughter's son of the original grantee, and directed that he should hold the village, adding that it was originally assigned as an endowment for the support of the Kaziship (Exhibit I). In November 1862 the inam inquiry was extended to the village and the Inam Commissioner considered that the grant was apparently for the personal benefit of the holder, and confirming it accordingly as a personal inam in ignorance of the previous orders of Government on the subject, enfranchised it and issued a title-deed (Exhibits F and G). In 1865 the matter came to the notice of Government and after calling for a report, the Government held that the right of the Kazi to the village depended on the British parvana or grant of 1779, and on 20th February 1866 directed that the title-deed issued by the Inam Commissioner, be cancelled, and that the village be registered as an endowment of the Madras Kazi ship (Exhibit IV). In September 1867 the new Kazi transferred the village to the appellant under an instrument of perpetual lease and a deed of sale and placed him in possession. The title-deed, which the Government directed to be cancelled not being produced, it was notified in the Fort St. George Gazette of the 27th May 1868 that it had been cancelled. In 1872 the appellant claimed the wrecks within the limits of the village of Coromandel under the parvana or grant of 1760 and rejected certain terms offered by the Government in settlement of his claim on the ground that there was

1891
FEB. 24.
APPEL-
LATE
CIVIL.
14 M. 431.

303
no law to compel him to accept them. On the 3rd April 1873 the Government referred to the perpetual lease granted by the late Kazi, as unauthorized and as nullifying to a considerable degree the intention of Government in continuing the gift of the late Nabob, and observing that there will always be a liability of the same thing happening so long as the endowment consists of an interest in land, resolved to resume the grant and to pay the Kazi, for the time being, a monthly allowance equivalent to the net income derivable by the inamdar of the village per annum. The village was accordingly resumed in April 1873, and in October 1876 the Government directed that the whole of its net revenue be paid to the then Kazi.

The appellant's case was that the tenure on which the village was held was personal, that the Inam Commissioner was right in enfranchising it as a personal inam, and that even if he was in error, it was not competent for the Government to cancel the title-deed once issued by him and to resume the village. He denied that the British Government issued any parvana in 1779 superseding that of 1761, and pleaded that even if it did, it was not competent for it to do so. On the other hand it was contended for the Crown that the British parvana of 1779 was genuine, that it superseded that of 1761, that the village was thus confirmed only as an endowment for the Kazi'ship of Madras on service tenure, that it was upon that grant the Kazi's right to the village descended, that its alienation to the appellant was improper and tended to defeat the purpose with which the grant was made, and that the village was therefore lawfully resumed on the 3rd April 1873, the net income derived from it being thenceforward paid to the Kazi of Madras for services rendered. The Counsel for the Crown suggested also in the Court below that the resumption of the village was an act of State and applied for a separate issue in regard to it; but the Judge considered that the question was embraced in the second issue, viz., whether the resumption of the inam by the Government is invalid and ultra vires. The Judge upheld the contention for the Crown and dismissed the suit with costs. Hence this appeal.

It will be observed that three parvanas are referred to in connection with the original grant of the village, but none of them is now forthcoming; and as they were issued more than 100 years ago it might be presumed, as alleged, that they had been lost. The finding of the Judge is that all the three parvanas were genuine, that they were issued in 1760, 1761 and in 1779; that by the first the Nabob Wallajah granted the village on service tenure; that by the second he granted it as personal inam, and that by the third the British Government confirmed the village subject to the terms of the first grant, viz., on the condition of the grantee and his heirs performing the duties of Kazi in the town of Madras. So far as the first two grants are concerned, the finding is not questioned in appeal and it is also sufficiently supported by Exhibits C, D, E, and IV, of which the substance is accurately stated by the Judge in his judgment. The contest in appeal is restricted to the British parvana of 1779. But that a British parvana did once exist and that it was relied on and accepted as the basis of title to the village there can be no doubt. The recital in Exhibit B, which evidences the perpetual lease granted to the appellant by the Kazi of 1867 is that "the village was granted as inam to my ancestors by Nabob Wallajah in the year 1760 to be enjoyed by them hereditarily by sons and grandsons and confirmed by the Madras Government in the year 1779." Again, in 1838, the then Kazi claimed compensation for certain sources of revenue in the inam village of which the collection
had been resumed by the Government, and actually produced the British parvana, among other documents, in support of his claim. The correspondence which took place on that occasion between the Collector, the Board of Revenue and Government shows, beyond doubt, that the then Kazi produced the British parvana of 1779, relied upon it as authentic and alleged that he once pledged it with one Sabapathy Madali and since redeemed it, that at the instance of Government, the Collector then forwarded it for inspection, that from 1838 to 1840 it remained with the Government, and [436] that in January 1841 it was returned to the Collector for delivery to the then Kazi (Exhibits XI, XIII, XIV to XVII).

Another point which is urged upon us is that it was not competent for the Madras Government in 1779 to alter the nature of the grant made by the Nabob Wallajah in 1761, two years prior to the cession of the Jaghir and that the position of the East India Company was at that time that of a mere Jaghirdar. An ordinary Jaghirdar has no sovereign power and it is not correct to liken his status to that of the East India Company in 1779. The relation between the Company and the Nabob Wallajah was of a political character regulated by sannads issued by him, and any act done by them by virtue of that relation was clearly an act of State and governed by the principle laid down by the Privy Council in the case of the East India Company v. Syed Ally (1).

As regards the contention that the resumption of the village in 1873 was an act of State, we consider it sufficient to state for the purposes of this appeal that the alienation by the appellants vend of the endowment of his office cannot be upheld at all events beyond his lifetime. As he died in 1868 we see no reason to question the resumption in 1873.

The only point which remains for us to consider is the claim set up by the appellant to certain Mirasi rights and Menkaval lands in the village. No issue has been framed and no information is to be had from the original judgment on the subject. Exhibit A purports to convey to the appellants for value "the single cropr village Miras" with all its income whilst Exhibit B evidences a perpetual lease of the Melvaram right and the income pertaining to it. And Exhibit B, which is a copy of the order whereby Government resumed the village, directed that it be struck out of the Inam Register and classed under Jirayati, adding however that under that order there was to be no disturbance of the occupancy rights of any landlord, that the full assessment payble was to be levied and credited to Government and that that was all. Whilst thus the apparent intention was to levy the full assessment and not to interfere with any occupancy right, there is the averment in the written statement that the village has been in the defendant's possession since the [437] date of the resumption. It is by no means clear whether under Exhibits A and B, the appellant is entitled to any and what Mirasi rights and Menkaval lands and if so, whether his claim thereto is good as against the Crown and whether the Crown in any way interfered with it. We are unable to dispose of this part of the case without further inquiry and we shall direct the Judge to try the following issue and return a finding within one month from the date of the receipt of this order. Both parties are at liberty to adduce fresh evidence if so advised. Seven days after the date of the posting of the finding in this Court will be allowed for filing objections.

(1) 7 M.I.A. 555.
Issue.—Whether the plaintiff has any and what Mirasi rights and Menkaival lands in the village of Coramandel—and, if so,

Whether he has any cause of action as against the defendant and whether he is entitled to any and what decree in respect of such Mirasi right and Menkaival lands.

[The District Judge having returned findings on the above issues, the appeal came on for hearing again and the Court delivered judgment as follows.]

JUDGMENT (FINAL).

On the issues sent down the Judge has returned the following finding

(1) that a certain mirasi perquisite known as Reddi Morai did attach to the Inam and was collected by former Inamars; but that such miras formed part of the Inam and was liable to resumption, and that plaintiff has no cause of action in respect of such mirasi perquisite; and (2) that certain Menkaival lands do exist, separate and distinct from the Inam lands, and that plaintiff has a right to recover them from the defendant.

The plaintiff-appellant has put in a Memorandum of Objections to the findings as to the Mirasi rights, and the defendant-respondent takes objection to the finding as to the Menkaival lands.

With reference to the Menkaival lands it appears from the record that 47-11-0 cawries of land were formerly allotted as an Inam for the Head watchman of the village, that in Fasli 1212 the said Inam was resumed and made over to the Inamdar, the Kazi for the time being of the mosque, a quit-rent of Rs. 213-11-8 per annum being fixed thereon. This quit-rent was paid by the Kazi for the time being and by the plaintiff up to the year 1873 when Government resumed the grant of the village. The [438] Melvaram of the said Menkaival lands was paid by the cultivators first to the Kazi and then to his assignee, the present plaintiff. The defendant’s 4th witness was karnam of the village of Coramandel from 1877 to 1886. He deposes that before the resumption of the village the raiyats who cultivated the Menkaival lands paid varam to the Inamdar, that the Inamdar paid to Government a fixed amount for the Menkaival lands, whether the lands were cultivated or not, the Government having nothing to do with the raiyats who cultivated the said lands before 1877 when they issued pattas to them. The order of resumption makes no reference to the Menkaival lands, but directs the resumption of the village which was originally granted as the endowment of the Kazi and the payment to the Kazi of a monthly allowance equivalent to the net annual income of the village.

The grant of the Menkaival Inam to the Kazi in Fasli 1212 was an act entirely distinct from the grant of the village as an endowment of the Kazi and appears to have been an act of grace by the then Government. That grant never having been resumed or cancelled the issue of pattas to the raiyats was ultra vires. Government are entitled to the sum of Rs. 213-11-8 per annum from the plaintiff who alone can deal with the cultivators of the Menkaival lands.

With reference to the plaintiff’s claim that the village is a Mirasi village and that he has a right of occupancy in the whole village, we observe that there is no satisfactory evidence of the exercise of any Mirasi right by any of the plaintiff’s predecessors in title. We have been referred to Exhibits G, VIII and XX as showing that the Kazi exercised Mirasi rights. Exhibit G is an extract from the Inam Register, 1862,
and contains a remark made by the Inam Deputy Collector that the Shrotriemdares are the Sub-Mirasidars of the village. What the meaning of this statement is not apparent, but it is a mere expression of opinion and is of no value as a piece of evidence. Exhibit VIII is an extract from the Minutes of Consultation of the Madras Government, dated 26th September 1854, and shows that Government repudiated the right of the Kazi to dispose by sale of any of the lands included in the Inam village of Coramandel, on the ground that the grant was a service and not a personal grant. Exhibit XX is the report of the T absorbed to the Collector in February 1874. In that report he states that the Inamdar and the Izzadar had [439] received Reddi Merai at the rate of 2 measures per kalam and that as the Inamdar appears to have sold land, which he could not have done, if he were entitled to Melvaram alone, the T absorbed concludes that the Inamdar possessed the Kudivaram right also. We cannot attach any weight to this vague expression of opinion in the face of the strong oral evidence adduced by the defendant to show that the village is not a Mirasi village and that the Inamdar possessed no Mirasi rights.

The plaintiff will be entitled to a decree for possession of the Mensval lands. In other respects the decree of the Lower Court is confirmed and the appeal dismissed with costs.

**14 M. 439 (P.C.).**

**PRIVY COUNCIL.**

**PRESENT:**

Lords Watson, Hobhouse, Macnaghten, and Morris and Sir J. Couch.

[On petition relating to an appeal from the High Court at Madras.]

---

**Srimantu Raja Yarlagaddu Durga (Petitioner) v. Srimantu Mallikarjuna (Decree-holder).**

[28th February, 1891.]

Privy Council—Practice—Refusal of rehearing—"Res noviter."

The judgment of the Judicial Committee reported to and confirmed by Her Majesty in Council cannot be re-opened only for the reason that new evidence is forthcoming.

In re Appa Rao (1) referred to.

Petition for rehearing an appeal from a decree (18th August 1885) of the High Court.

In Srimantu Raja Yarlagaddu Mallikarjuna v. Srimantu Raja Yarlagadda Durga (2) on the question of the partibility or impartibility of a raj estate, the judgment of the High Court was reversed on appeal to Her Majesty in Council in March 1890.

The District Judge of Kistna dismissed the suit which the present petitioner brought in 1880 to have the Devarakota Zemindari declared partible. That was the principal matter; but he also, as to a money claim declared the right of the plaintiff [440] to a third share, amounting to Rs. 1,806. The High Court reversed his decision holding the ordinary law to be applicable to the zemindari. As to the money the parties by consent accepted on the appeal a decree for Rs. 2,210 instead of the above. On the appeal to Her Majesty in Council, the judgment
of the High Court was reversed, and the estate was declared to be impar-
tible, the decree of the Subordinate Judge being restored in its entirety.

Mr. J. Rigby, Q. C. (with whom was Mr. J. H. A. Branson) support-
ed the petition on notice to the decree-holder for a rehearing of the
appeal on the ground that since the decision, documents affecting the
merits had been found to be in the custody of the Board of Revenue at
Madras. It was also added that the effect was that the part of the
decree of the High Court made by consent, viz., as to the Rs. 2,310, had
been set aside, and the amount decreed by the first Court, viz.,
Rs. 1,806, had been substituted.

LORD WATSON referred to the refusal to re-hear the Nazvid case in
re Appa Rao (1), and that a judgment of their Lordships reported to
and confirmed by Her Majesty in Council could not be re-opened merely
because new evidence was forthcoming. A rehearing of an appeal decided
by the Judicial Committee and followed by the order of Her Majesty in
Council could only be granted in the cases referred to in the above decision,
and in the event of some misprision having occurred, as for instance, the
terms of the decree adjudicating something which had not been in the
view of their Lordships' Board, or which they had not had the means of
deciding, or where the decree did not carry out the terms of the judgment.
In this case nothing of that kind had arisen, and as the litigation had
been going on for years, it seemed hardly credible that documents of great
moment in the custody of a public office could only have been discovered
after three judgments.

Counsel said that it had been stated in an affidavit that his clients did
not know of the existence of these documents until September last; and they
seemed to disclose new matter. He referred to Agnew v. Dunlop (2) in
which, in the year 1822, after a decision of the House of Lords, the suit
was remitted to the [441] Court of Session in Scotland for inquiries to be
made upon evidence.

LORD WATSON said that the second ground in the petition, as to a
variation between the amount in the decree consented to, and that in the
decree which had been restored, involved only about £30; far less than
what the costs would be.

Mr. J. D. Mayne for the decree-holder was not called upon.

JUDGMENT.

LORD WATSON in giving judgment said that their Lordships had come
to the conclusion that, so far as the petition referred to the production of
new evidence and a rehearing of the case on the merits, the application
was altogether incompetent. So far as regarded the other point there
was a difference; but, looking to the small amount involved, they would
not be warranted in recommending Her Majesty in Council to remit this
case for a rehearing. Under the circumstances they would make no
order as to costs.

Solicitors for the petitioners: Messrs. Richardson and Sadleir.
Solicitors for the decree-holders: Messrs. R. and T. Tasker

(1) 10 M. 73.
(2) House of Lords' Journals, A, 1822, 3 Geo. IV. vol. 55, p. 475.
RAMAYYAR v. VEDACHALLA

14 M. 441 (F.B.) = 1 M.L.J. 661.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Parker, and Mr. Justice Shephard.

RAMAYYAR (Defendant), Appellant v. VEDACHALLA (Plaintiff), Respondent.* [13th December, 1890.]

Rent Recovery Act—Act VIII of 1865 (Madras), Sections 3, 4, 7, 8, 9, 87—Suit to enforce exchange of patta and muchalka—Amendment of patta.

 Held by Collins, C.J., Muttusami Ayyar and Parker, J.J. (Shephard, J., diss.) that an ordinary Civil Court has jurisdiction to entertain a suit to enforce acceptance of a patta and execution of a muchalka. Held further that if the patta which has been tendered is found not to be a proper one, such a Court cannot amend it and direct the tenant to execute a muchalka corresponding with it as amended, but can, in a suit properly framed for that purpose, pass a decree declaring what is a proper patta.

[F., 17 M. 1 7(7); Appr., 27 M. 483 (F.B.); R., 21 M. 482 (485, 488) (F.B.); 27 M. 13 (15); 13 Ind. Cas. 566 = 15 O.C. 117 (120.).]

SECOND appeal against the decree of S. T. McCarthy, District Judge of Chingleput, in appeal suit No. 33 of 1889, confirming [442] the decree of C. Sury Ayyar, District Munsif of Chingleput, in original suit No. 510 of 1887.

Suit by a landlord against his tenant to enforce the acceptance of a patta tendered by him or any patta which the Court may deem proper and the execution by the defendant of a corresponding muchalka. The defendant admitted tender of a patta, but pleaded that it was not such a patta as he was bound to accept. The District Munsif directed that the patta should be amended and decreed that the defendant should accept it as amended, &c. The District Judge on appeal confirmed this decree. The defendant preferred this second appeal.

This second appeal having come on for hearing before Collins, C.J. and Bost, J., their Lordships made the following order of reference to the Full Bench:

ORDER OF REFERENCE TO FULL BENCH.—It is objected, on behalf of the appellant, that the suit should have been dismissed on its being found that the patta tendered was not a proper one and that the District Munsif had no power to amend the patta.

This contention is in accordance with the dictum in Norasimha v. Suryanarayana (1), where, in remanding a suit (for enforcement of acceptance of patta and execution of a corresponding muchalka) for disposal afresh after amendment of the plaint by the addition of a prayer for a declaration of the plaintiff's title, it is said that plaintiff can only be entitled to such declaration "if he succeeds in proving that he has before suit tendered a patta in the form in which the defendant was bound to accept it," and it is added "it is not competent to the Court trying this question to exercise the power of amending the patta which the Collector has under Section 20 of the Act," i.e., Madras Act VIII of 1865.

On the other hand, in Easwara Doss v. Pungarana Chari (2), it has been held that a Civil Court has jurisdiction to modify a patta when it is found improper, and to enforce the execution of a corresponding muchalka.

* Second Appeal No. 1632 of 1889.

(1) 19 M. 481.

(2) 19 M. 381.

309
The former case was considered in the latter and held to be reconcilable with the decision in the latter, on the ground that the observation in the former that the Court was not at liberty to amend the patta, "had reference to the frame of the plaint in that particular case and the form in which a declaration ought to be made with reference to it," and [443] it is added "we also find that Karim v. Muhammad Kedar (1) was not cited and overruled in Narasimha v. Suryanarayan (2)."

"Karim v. Muhammad Kedar (1) merely decided that a suit to enforce acceptance of a patta is maintainable in the ordinary Civil Courts. The further question whether the Civil Courts can amend the patta sought to be enforced was not then under consideration. Further, it does not seem to us that the observation in Narasimha v. Suryanarayan (2) as to the correctness of the ordinary Civil Courts to amend a patta can be given the restricted meaning assigned to it by the learned Judges who disposed of the subsequent case. Eswara Doss v. Pungwana Chiri (3). There is thus, in our opinion, a conflict of decisions which requires a reference to a Full Bench of the question "whether an ordinary Civil Court has power to amend a patta." We think it would be as well to refer to the Full Bench at the same time the question "whether an ordinary Civil Court has jurisdiction to entertain a suit for acceptance of patta and execution of muchalka."—as to which a doubt has been expressed in Narasimha v. Suryanarayan (2), and the correctness of the decision on the point in Karim v. Muhammad Kadar (1) is not free from doubt.

This second appeal came on for hearing before the Full Bench consisting of COLLINS, C.J., MUTTUSAMI AYYAR, PARKER and SHEPHERD, JJ.

Parthasaradhi Ayyangar, for appellant.
Srirangachariar, for respondent.

JUDGMENT.

MUTTUSAMI AYYAR, J.—The first question referred for our decision is whether a suit to enforce the acceptance of a patta can be maintained in a Civil Court, and I think it should be answered in the affirmative. So early as 1879, it was held by a Division Bench of this Court in Karim v. Muhammad Kadar (1) that the suit is cognizable by a Civil Court. In 1889, however, another Divisional Bench expressed a doubt in Narasimha v. Suryanarayan (2) as whether the suit would lie in a Civil Court inasmuch as the duty of accepting a patta and giving a muchalka was one imposed by statute and a special remedy for enforcing it was prescribed by the same statute. It was, however, observed that the object of Act VIII of 1865 in requiring the exchange [448] of patta and muchalka was to insure the existence of evidence of the terms of the holding, and as a landlord could, on a proper occasion arising, certainly maintain a declaratory suit, so, in such suit, he might obtain by way of consequential relief, the delivery of a muchalka corresponding to the patta tendered by him.

The ground of this reference is the doubt expressed as stated above.

In the recent case of Villance v. Fulle (4), it was pointed out by the Court of Queen's Bench that the question to be considered in cases of this description is whether provisions and the object of the particular enactment under consideration disclose an intention to create a general right, which may form the subject of an action or to create a duty.

(1) 2 M. 89. (2) 12 M. 481. (3) 13 M. 361. (4) 13 Q.B.D. 109.
protected by a particular remedy. *Beckford v. Hood* (1) stated the general rule to be this—where a statute creates a new offence or gives a new right and prescribes a particular penalty or special remedy, no other remedy can, in the absence of evidence of a contrary intention, be resorted to; but where a statute is confirmatory of a pre-existing right, the new remedy is presumed as cumulative or alternative, unless an intention to the contrary appears from some other part of the statute. The learned Judges, who decided the case *Karim v. Muhammad Kadar* (2), appear to me to have kept in view the foregoing principles. After referring to Section 3 of Act VIII of 1865 and to the value of a patta as the pre-appointed evidence of a tenancy and its terms, they say that, when the action of the tenant precludes the landlord from doing what the law enjoins upon him, and without which he is disabled from making use of any of the summary remedies under the Act, he will have his right of action to compel the tenant to do that which will enable the landlord to conform to the law, unless such right of action is taken away by the other provisions of the law.

Again Section 7 of Act VIII of 1865, which was held to be of general application by a Full Bench in *Gopulaswamy Mudelly v. Mukkee Copley* (3), constitutes the acceptance of a patta by the tenant or the tender by the landlord of a proper patta into a condition precedent to the right to enforce the terms of a tenancy. Thus, the right which the section deals with is the [446] orinary civil right to recover rent or to enforce the other terms of the tenancy, and the jural relation of which the contents are to be evidenced by the patta is that of landlord and tenant. Both the right and the jural relation are not created by Act VIII of 1865, but are a pre-existing civil right, and a legal relation over which the Civil Courts have always exercised jurisdiction. Again, the duty to exchange patta and muchalka was not first created by Act VIII of 1865, but it was created in 1802 by Regulation XXX of 1802. Nor is the relation of that duty as a pre-requisite of the right to recover rent the creature of the Rent Act, inasmuch as Section 9 of Regulation V of 1822, directed that suits for arrears of rent be dismissed where no patta had been granted.

The question then before us is one of an act of the Legislature dealing with a pre-existing civil right and confirming it together with a pre-requisite of the right of action by which that right is protected. It is therefore governed by the general rule that, when a statute confirms a pre-existing right, the new remedy is to be considered as an alternative one in the absence of a provision of law to the contrary.

Turning again to the nature, the object and the provisions of Act VIII of 1865 there are distinct traces of an intention to create a cumulative remedy only. It will be noted that both Sections 8 and 9, which prescribe suits to be instituted before Collectors, declare them to be summary suits. Seeing that by Regulation V of 1822 summary jurisdiction was conferred upon Collectors without taking away the jurisdiction exercised by the Zillah Courts, and seeing also that Act VIII of 1865 purports to consolidate and improve the pre-existing rent law, the inference is that the word 'summary' negatives an intention to take away the jurisdiction, which the Civil Courts had theretofore exercised and denotes on the contrary an intention to create an alternative or expeditious remedy. There is another reason which appears to me to confirm this view. Section 7, which is of general application, makes the exchange of patta and muchalka, a

---

(1) 7 T.R. 620.  (2) 2 M. 89.  (3) 7 M.H.C.R. 312.
condition precedent not only to the landlord pursuing the special remedies available under the Act, but also to his instituting suit for arrears of rent and for rates of rent which are declared by Section 87 to be cognizable by Civil Courts. If the view that Sections 8 and 9 create an exclusive jurisdiction in Collectors over suits to enforce the acceptance of a patta were to prevail, it would contravene the ordinary rule that, when a Civil Court has jurisdiction in respect of a civil right, a suit to enforce a condition precedent for the purpose of preserving that right is as much a suit of a civil nature as a suit to recover the produce of that right, or to recover compensation for its infringement after it has become actionable. As regards the suggestion that Collectors may have been considered to possess a special aptitude for dealing with rent suits and determining rates of rent with reference to the provisions of Section 11, I do not attach weight to it, first, because appeals are declared by the Act to lie from the decisions of Collectors to the District Courts; and secondly, because Section 87 expressly saves the right of the landlord to sue in the Civil Courts for arrears of rent and for settling rates of rent. The strongest reason in support of the view that the remedy is cumulative is the history of rent law in this Presidency prior to the enactment of 1865. In *Gopala Saway Mudelley v. Mukke Gopatier* (1), which is a Full Bench decision, the learned Judges discussed at length the relation of Act VIII of 1865 to the prior state of law on the subject, and all the Judges agreed in the opinion that Act VIII of 1865 created only an alternative remedy and did not oust the regular jurisdiction of the Civil Courts. Mr. Justice Holloway observed that the key to the construction of Act VIII of 1865 is the existence of two coincident processes, one called summary and the other regular. Again Mr. Justice Innes, who took part in the Full Bench case, said in *Karim v. Muhammad Kadar* (2) that the language of Section 9 appeared to be merely permissive of the right of the landlord to adopt the summary remedy and not to shut him out from the remedy by regular suit, and that the remedy by summary suit was originally given as an alternative, and that there is nothing in Act VIII of 1865 to show that the landlord is debarred the remedy by regular suit.

The improvement introduced by the Act consists only in allowing appeals from the decisions of Collectors and thereby giving a finality to such decisions instead of allowing them, as was previously the case, to be reversed in regular suits, thus converting, what was under the prior law, a summary remedy in its strict sense into an alternative remedy.

Furthermore, it is incumbent on a Civil Court whenever the landlord sues to recover rent to ascertain by reason of Section 7 that the landlord has tendered a proper patta and to decree rent or dismiss the claim according as it finds that the patta tendered is or is not a proper one. This being so, it is not clear why the landlord cannot sue to have it declared that the patta tendered is a proper one and to claim the execution of a muchalka, as the only consequential relief which he is at the time of suit in a position to demand.

Again it was open to the landlord under the Regulation of 1802 to eject a tenant for non-acceptance of a patta and to the tenant to claim damages for non-tender of a patta, and this shows that the observation in *Narasimha v. Suryanarayana* (3) that it was Act VIII of 1865 that created a duty to accept a patta and execute a muchalka can be supported only to the extent that it recognized a pre-existing duty and provided

---

(1) 7 M.H.C.R. 312.  
(2) 2 M. 89.  
(3) 12 M. 481.
summary suits as alternative remedies available for its enforcement. The conclusion to which I come is that the exchange of patta and muchalka is a statutory pre-requisite of the right to enforce the terms of a tenancy, that the duty to effect such exchange is an incident of the relation of landlord and tenant, that the suits prescribed by Sections 8 and 9 of Act VIII of 1865 are declared summary in the sense that they do not oust the ordinary jurisdiction of Civil Courts, and that these tribunals are competent to entertain suits for the acceptance of a patta on the ground that it is a specific relief necessary to keep alive the landlord’s ordinary civil right to enforce the terms of the tenancy.

The second question referred for our decision is whether the Civil Courts are competent to amend the patta tendered when it is not a proper patta. The ground of reference is the conflict between Narasimaha v. Suryanarayana (1) and Easwara Doss v. Puppatana Chari (2). The only form in which Civil Courts can award specific relief under the general law is by passing a declaratory decree when no consequential relief can be demanded. Under Section 7 of Act VIII of 1865, it is competent to ask for a declaration that the patta tendered is a proper one as part of a decree for arrears of rent. Under the concluding [448] part of Section 87 of the same Act, suits may be instituted in Civil Courts regarding rates of rent. It is also competent to a landlord to institute a suit to have it declared that a patta tendered is a proper one under Section 42 of the Specific Relief Act. In suits in which it has to be decided whether a patta tendered is a proper one, it is often necessary to come to a finding as to what a proper patta is. If the plaintiff asks for a declaration that the patta tendered is a proper one, and if not what a proper patta is, there is no apparent reason why the Court should not make the alternative declaration if necessary. But it is only by making a declaration that the Civil Courts can indicate the necessary amendment, although they are not at liberty to direct under the general law that the patta be amended in a particular manner and that the tenancy do execute a muchalka corresponding to the amended patta. Under the general law, the tenant is under no obligation to execute a muchalka until a proper patta has been tendered, and the power to substitute for the patta actually tendered a proper patta and thereafter to direct the execution of a muchalka corresponding to it, is a statutory power conferred only on Collectors as a matter of procedure prescribed by Section 10.

I would therefore answer the second question by saying that a Civil Court can declare what a proper patta is in a suit properly framed for that purpose, but cannot amend the patta and direct the tenants to execute a muchalka corresponding to the amended patta.

Collins, C. J.—I concur in the above opinion of Mr. Justice Mutussami Ayyar.

Parker, J.—The questions referred to the Full Bench are:

(1) Whether an ordinary Civil Court has jurisdiction to entertain a suit for acceptance of patta and execution of muchalka?

(2) Whether an ordinary Civil Court has power to amend a patta?

The reference has become necessary in consequence of the decision in Narasimha v. Suryanaraya (1) that a Civil Court had not the same power to amend a patta, as a Collector has under Section 10, Madras Act VIII of 1865—which appears to be in conflict with the course of decisions in this Presidency. The [449] duty of exchanging pattas and

---

(1) 12 M. 461.  (2) 13 M. 861.
muchalkas was not first imposed by the Act of 1865, but was a statutory obligation first imposed on landholders by Regulation XXX of 1803, Section 14, such landlords being by that section rendered liable to suit in the ariawlut for failure to comply with the obligation. Regulation XXX of 1802 authorized a prosecution in the Court for refusal to deliver a patta. Regulation XXVIII of 1802 dealt with recovery of arrears of rent by summary process, and powers of summary inquiry and by regular suit were vested in the Zillah Courts. Regulation V of 1832 enabled Collectors for the first time to take primary cognizance of summary suits cognizable by Zillah Courts and made the tender of a proper patta, a pre-requisite of the right to recover rent, but the jurisdiction of the Zillah Courts was not taken away. These Regulations were repealed by Madras Act VIII of 1865, the preamble of which states that it is expedient to "consolidate and simplify" various laws which have been passed relative to landholders and their tenants, and to provide a uniform process for the recovery of rent. There is no section in the Act which expressly takes away the jurisdiction hitherto vested in the Civil Courts, and Section 87 expressly reserves the right to sue in the Civil Courts for arrears of rent or revenue. The concluding part of the section, moreover, clearly indicates that there is another class of suits (other than suits for arrears of rent or revenue), which will still remain cognizable by the Civil Courts, viz., suits regarding rates of rent, and it is difficult to see what class of suits can be here referred to, unless it be suits to settle or declare the terms of a tenancy, in other words to decide on the correctness and propriety of a patta.

The whole history of the rent laws in this Presidency seems to me to show the intention of the Legislature has been to provide alternative remedies—summary and by regular suit; and it is difficult to suppose that if the Legislature in 1865 intended to take away a remedy which had been in existence for half a century, it would not have done so in express terms instead of leaving the matter obscure and to be gathered by mere inference and implication. The purport of the Act was merely to consolidate and simplify existing laws and to provide a uniform process for the recovery of rent. The providing of a uniform process to recover rent was clearly regarded as consistent with the alternative remedy of suits for rent in a Civil Court (Section 87).

[450] I can see no reason to dissent from the principles laid down by the Full Bench of this Court in 1874, Gopalaswamy Mudelty v. Mukklee Gopolier (1), and since followed in Karim v. Muhammad Kadar (2), which decisions do not appear to have been brought to the notice of the learned Judges who decided Narasimha v. Suryanarayana (3). I would answer the first question referred in the affirmative.

Upon the second question I agree with Muttusami Ayyar, J., that if the patta which has been tendered is found not to be a proper one, a Civil Court cannot decree that the landlord shall tender an amended patta, but should simply pass a declaratory decree.

SHEPHARD, J.—The questions raised by this reference turn on the construction to be placed on the Act VIII of 1865 and the Regulations superseded by that Act. By Sections 3 and 4 of the Act of 1865 the duty is imposed on the zamindar on the one hand and the tenant on the other of exchanging written engagements in the shape of pattas and muchalkas. Sections 8 and 9 indicate the remedy available to the tenant in case of the

(1) 7 M.H.C.R. 312. (2) 2 M. 89. (3) 12 M. 481.
landlord's default and to the landlord in case of the tenant's default, the remedy in either case being by summary suit before the Collector. The following section declares the course to be adopted by the Collector in dealing with suit suits. The three sections taken together show that the aggrieved party is to have his remedy by way of specific relief. If the patta or muchalka tendered by the aggrieved party is not a proper one, there is to be an inquiry in the manner prescribed in the 11th section, according to which in the absence of evidence of express or implied contract or of usage the Collector is, in setting the terms of the holding, to have regard "to the cases established or paid for neighboring lands of similar description and quality." The patta thus settled by the Collector, the defaulting party is to be directed to accept. Considering the Act by itself and without reference to previous legislation, I think there can be no doubt that the specific relief provided for by the sections just mentioned was intended to be sought only in the Court of the Collector. In view of the peculiar nature of the inquiry (Mahasingavastha Ayyar v. Gopala Ayyan (1)) which may include the question what, under the circumstances of the case, is a fair and just rate of rent, one can well understand that the duty of entering upon it should be cast upon the Collector and not upon a Civil Court. In Gopalsawmy Mudelly v. Mukkee Gopalier (2), where the applicability of Section 7 of the Act to suits for rent in a Civil Court was considered, there was in favour of the view adopted by the majority of the Court the strong circumstances that, in the section itself, there were no words indicating an intention to restrict the operation of the section, and on the contrary Section 87 expressly saves the jurisdiction of the Civil Courts in the case of suits for rent. In the present case it is otherwise, for the Collector is named in each one of the sections mentioned and there is no such saving clause. It is to be remembered that it is not the ordinary remedy for the breach of a statutory duty that is in question. It may well be that a landlord has his action for damages on the tenant's refusal to accept a proper patta and that for that purpose the Civil Court is open to him, while it is only the Collector that can be called upon to adjudicate on the questions which may be raised under Section 11 of the Act and make certain between the parties the terms of the holding, which terms may previously have been utterly indefinite. The cases turning on the construction of statutes, prescribing a penalty for the breach of some duty imposed thereby, have not therefore much bearing in the case. The previous legislation is contained in the Regulations XXVIII and XXX of 1802 and V of 1822, all of them repealed by the Act of 1865, which Act, according to the preamble, was passed in order to consolidate and simplify various laws which have been passed relating to landlords and their tenants.

The Regulations XXVIII and XXX of 1802 were passed on the same day, and the object of the latter was the protection of the tenants. For that purpose it was provided by Section 2, as it is in Section 3 of the present Act, that zamindars and their tenants should exchange pattas and muchalkas. In the case of the tenant refusing to perform this duty, it was provided that the proprietor should be entitled to grant the land to other persons (Section 10). In the case of default on the part of the landlords, provision was made in Section 8 that they shall "be liable to prosecution in the Court and shall, on proof of such refusal or delay, be also liable to pay such damages, &c."
The next section provides a rule for the settlement of disputes about rent, similar to that now provided in Section 11. The Court named in the Regulation was the Adawlut of the Zillah, the only Court of Original Jurisdiction then in existence. There is nothing to show that the form of action, or the remedy contemplated by Section 10, was any other than the ordinary remedy of an action for damages, similar to that mentioned in other sections of the two Regulations of 1802 (see Sections 17, 29, 40 of Regulation XXVIII and Section 14 of Regulation XXX). The action was not of a summary nature, such as that provided in Section 34 of Regulation XXVIII. There was no corresponding provision for an action for damages against the tenant.

By * 1822 it was found that the Regulation of 1802 was insufficient for the due protection of the raiyats, inasmuch as the powers they vest in landholders are prompt and summary, while efficient redress for the abuse of those powers must frequently be sought by the institution of a regular suit, to the expense of which the means of raiyats in general are inadequate; and it was deemed expedient to invest Collectors with authority to take primary cognizance of all cases which, under the provisions of those Regulations, were cognizable by summary suits in the Courts of Adawlut. By this Regulation a clear distinction is made between the jurisdiction of the Zillah Court and the Collector, and an appeal to the Judge from the decision of the Collector passed under the Regulation is granted. By Section 2, Collectors were authorized to take primary cognizance by summary process of all cases, which, under the Regulation of 1802, were summarily cognizable by the Zillah Courts. Except in Section 8, there is no provision for an inquiry into the rates of rent and under that section the inquiry is to be conducted by the Collector. There was no such provision in the Regulation of 1802, nor was there any absolute necessity for a suit having for its object the ascertainment of the terms of the tenant’s holding, because the landlord had his remedy by ejectment and the tenant his remedy in damages, and under those Regulations the exchange of patta and muchalka was not made a condition precedent to the maintenance [553] of a suit for rent. If, then, it is the case, as I think it is that the particular proceeding indicated by Sections 8 and 9 of the present Act originated only with the Regulation of 1822, it may be said that the Legislature has been consistent throughout in making the Collector the tribunal, before which such proceedings are to be conducted. If this is not the case, I would still say that the evident intention of the Legislature has been to give the Collector exclusive cognizance in proceedings having for their object the ascertainment of the terms of the tenant’s holding. It may be said that this intention was not effectively carried out by Section 2 of the Regulation of 1822, because it does not appear that any of the suits mentioned in Regulation XXX were summary suits, and because the language used in Section 2 does not positively take away pre-existing jurisdiction. With regard to this latter point there is in favour of the view that the Collector was intended to have exclusive jurisdiction in summary suits the circumstance that, while Section 2 expressly gives him primary cognizance of the suits that were theretofore cognizable by the Zillah Courts, a later section gives to the latter an appeal from his decision. It is hardly to be supposed that the Zillah Court, not then any longer the only Court of Original Jurisdiction, should have been intended to retain the primary cognizance of suits, in respect of which when tried by a

* [Reg. V of.—Ed.].

316
Collector an appeal lay to it. With regard to the question as to what suits it was intended to transfer to the Collector under Section 2 of the Regulation of 1822, it is not necessary in my opinion to consider it. In framing the consolidating Act of 1865, it would appear that the Legislature either assumed that the Collector had hitherto had jurisdiction in the suits mentioned in Sections 8 and 9 of the Act, or designed to give the Collector such jurisdiction. In either view I think it is clear that it was intended that the jurisdiction should be exclusive.

I have already referred to the significant provision made by Section 67 of the Act saving the jurisdiction of the Civil Courts in suits for arrears of rent or revenue only. In my opinion a consideration of the previous enactments strengthen the view, which I should have taken on a perusal of the Act of 1865 taken by itself.

By the question "whether an ordinary Civil Court has jurisdiction to entertain a suit for acceptance of patta and execution of muchalka," I understand that it is asked whether the suit provid'd for in Section 8 or Section 9 of the Act can be entertained by a Civil Court. That question, I think, for the reasons given, should be answered in the negative.

[It follows that the second question must also be answered in the negative.]

14 M. 454.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

JANAKI (Plaintiff), Appellant v. DHANU LALL AND ANOTHER
(Defendants), Respondents.* [23rd February and 2nd April, 1891.]

Succession Act — Act X of 1865, Section 187—Hindu Wills Act—Act XXI of 1870, Section 2
—Estate of deceased Hindu—Legal representative.

A Hindu, who was one of the defendants in a suit, died leaving a will. The executors appointed by the will did not take out probate; and the property of the deceased came into the possession of his divided brothers, who were thereafter brought on to the record of the suit as the representatives of the deceased defendant. A decree was passed for the plaintiff by consent. The mother of the deceased who would, apart from the will, have been his legal representative, now sued to set aside the above decree, having previously obtained a declaration that she was entitled to the property of the deceased in a suit against his brothers above referred to:

 Held, that the plaintiff was not entitled to maintain the suit.

[Ref.: 30 C. 1044 (1058); 20 M. 446 (447); 33 M. 91 (92) = 3 Ind. Cas. 475; 2 C.L.J.
484 (487); 5 C.L.J 719 (721) = 11 C.W.N. 1078; 8 C.W.N. 843 (857); 10 C.W.N.
566 (570); 3 N.L.R. 123 (125); Expl., 33 M. 6 = 4 Ind. Cas. 1059 = 19 M.L.J.
671 = 6 M.L.T. 269.]

APPEAL against the judgment of Best, J., in civil suit No. 188 of 1889, on the file of the High Court, Original Side.

The plaintiff was the mother of one Ghulab Singh deceased, to whom certain houses had been allotted on a partition between him and his half-brother. At the time of Ghulab Singh’s death a suit (civil suit No. 296

* N.B.—The sentence in the rectangular brackets forms a portion of the Judgment though omitted in the I.L.R. series ED.

Appeal No. 36 of 1890.
of 1887 on the file of the High Court) was pending, in which Dhanu Lall, the present defendant No. 1, sued Gholab Singh and his half-brother Muni Singh upon a promissory note. On the death of Gholab Singh, who died childless, it appeared that he left a will appointing Muni Singh and three others to be his executors. None of them, however, took out probate, and Muni Singh and one Govinda Singh, who had come into possession of his property, were brought on to the record as his legal representatives. The plaintiff obtained a decree by consent, and in execution brought to sale the above-mentioned houses, of which defendant No. 2 became the purchaser. The present suit was brought by the plaintiff, as legal representative of Gholab Singh, to set aside the above decree as fraudulent and recover the houses, &c., and one of the issues raised the question whether the plaintiff was entitled to maintain the suit. She had already obtained a decree against Muni Singh and Govinda Singh in civil suit No. 195 of 1888, by which she was declared to be entitled to the property of Gholab Singh.

Best, J., delivered judgment dismissing the suit on the grounds stated in the judgment of the Divisional Court.

The plaintiff preferred this appeal.

Subramanya Ayyar, for appellant.

Mr. R. F. Grant, for respondent No. 1.

Visvanadha Ayyar, for respondent No. 2.

JUDGMENT.

The plaintiff sues to set aside a decree obtained by defendant No. 1 in civil suit No. 226 of 1887 on the Original Side of this Court as having been obtained by fraud. In that suit, the defendant No. 1 had sued (1) Muni Singh and (2) his half-brother, Gholab Singh, upon a promissory note jointly executed by them. Gholab Singh died on January 25th, 1888, while the suit was pending, after which his half-brothers, the above-mentioned Muni Singh and Govinda Singh, were brought on the record as his personal representatives and a decree passed against them accordingly. It appears that Gholab Singh was reported to have left a will, and, in February 1888, the solicitors of defendant No. 1, endeavoured to ascertain from the four executors named therein whether they intended to apply for probate. Nothing was done, however, to prove the will. Two of the executors were unwilling to come forward and one died; the brother Muni Singh took no steps. The result was that the two half-brothers were brought in as personal representatives and a decree by consent passed against them. The effect of this procedure was to ignore the plaintiff, the mother of deceased, altogether, and, as Gholab died unmarried and was divided from his half-brothers, his mother was his proper personal representative in the absence of a will. The decree was passed on August 2nd, 1888.

The plaintiff then sued Muni Singh and Govinda Singh in September 1888 (civil suit No. 195 of 1888) to establish that she was entitled to the property of her late son. Her step-sons replied setting up the will, but allowed the suit to be decided ex parte against them on trial. This decree was passed on 11th January 1889.

The plaintiff then, on 27th July 1889, brought this present suit to set aside the decree obtained by defendant No. 1 in civil suit No. 226 of 1887. The defendants (defendant No. 2 being the purchaser of some of the property in execution) resisted the claim on the ground that, in consequence of Gholab having left a will, plaintiff is not his personal
representative, and, therefore, cannot sue, and, further, that there had been no fraud or collusion in obtaining the decree. The learned Judge held that it was proved Ghulab had left a will, though no probate had been taken thereof, and hence that plaintiff, not being an executrix, had lost her position of legal representative. He further held that there had been no fraud or collusion in obtaining the decree, and that plaintiff had had knowledge of the proceedings in that suit (civil suit No. 226 of 1887). Against this decree the plaintiff appeals.

The first point argued in appeal before us is that defendant No. 1 is precluded by the terms of Section 187 of the Succession Act from proving the existence of the alleged will, since no probate has been taken thereof. By Section 2 of the Hindu Wills Act (XXI of 1870) the provisions of Section 187 have been made applicable to the wills of Hindus in the town of Madras, see Shaik Moosa v. Shaik Essa (1), and it is contended that, until probate has been granted to some one, the alleged existence of the will should be ignored. The decree has only been obtained against the brother of the deceased as his personal representatives and not as executors, and since plaintiff has established her rights as against them, it is contended she can claim to have the compromise entered into by them set aside.

It is admitted that, assuming the existence of a will, the decree has not been obtained against the right persons as legal representatives. The question, however, is whether the plaintiff can claim to have that decree set aside.

(457) In the case before us Muni Singh applied for probate in October 1888, but has not prosecuted his application. The plaintiff denied that any will was executed at all, and practically no one is seeking probate. It was urged that the defendant No. 1, as a creditor, could have asked for letters of administration with the will annexed, and should have done so; but this is a mistake since Section 206 of the Indian Succession Act has not been extended by the Hindu Wills Act to the town of Madras. Had the estate been that of a European British subject, the case would have been different. If, therefore, the creditor is precluded from bringing in any one as the personal representative of the deceased, until some one has proved his will, his just claims would be liable to be defeated by the simple expedient of refusing to apply for probate until the debt had become barred. This certainly cannot have been the intention of the law. It appears to us that, though the executors can establish no right without taking probate, the existence of the will cannot be ignored for all purposes whatsoever.

We are of opinion that the decision in Prosunno Chunder Bhutta- charjeee v. Kristo Chyutunno Pal (2) is applicable, and that the persons, who took possession of Ghulab's estate upon his death, were liable to be treated by the creditor (first defendant) as his representatives even though themselves liable to be dispossessed by the executors on taking out probate. That Muni Singh and Govind Singh were in possession of deceased’s estate is evident from plaintiff’s own suit No. 195 of 1888, and, since first defendant’s decree is not a nullity, it is open to him to prove that Ghulab left a will, and, therefore, that plaintiff is not a person who can claim to set that decree aside.

As regards the execution of the will by Ghulab, we are of opinion that the finding of the learned Judge is right. The fact has been proved

(1) 6 B. 241.
(2) 4 G. 342.
by the writer and one attesting witness, and we see no reason to doubt
the evidence of defendant No. 2, that he heard of the existence of the will
from plaintiff herself, who procured for him the copy, Exhibit II. That
first defendant was willing to help plaintiff in a suit against her step-sons,
provided his own debt was discharged seems to us to prove nothing. All
the executors refused to prove, and the first defendant was [458] naturally
willing to accept payment from any member of the family who would pay
him. All the circumstances of the case tend to indicate that the plaintiff
and her step-sons have since colluded to deprive him of the fruits of his
de cree.

On these grounds we confirm the decree and dismiss the appeal with
costs.

14 M. 458 = 1 M.L.J. 602.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

Rama Rau and Another (Appellants) v. Chellayamma
(Respondent).* [30th April, 1891.]

Succession Certificate Act—Act VII of 1889, Section 4 (b)—Application for execution.

Act VII of 1889, Section 4, Clause (b) does not apply to applications to execute
decrees which were pending at the date of the passing of the Act, but it refers to
applications made after the Act came into force.

Appeal against the order of C. A. Bird, District Judge of Godavari,
passed on miscellaneous petition No. 416 of 1889 in the matter of
execution petition No. 9 of 1888.

The petitioner applied to execute a decree obtained by her husband
in original suit No. 5 of 1875 on the file of the District Court of
Godavari. The petitioner had already been admitted as the representa-
tive of the decree-holder, but it was objected that she could not proceed
without producing a certificate under Act VII of 1889. The District
Judge overruled this objection. The petitioner preferred this appeal
under Civil Procedure Code, Sections 2 and 244.

Bhashyam Ayyangar, for appellants.
S. Subramanya Ayyar and P. Subramanyà Ayyar, for respondents.

JUDGMENT.

We are of opinion that Section 4, Clause (b), Act VII of 1889 does not
apply to applications to execute decrees which were pending at the date
of the passing of the Act, but refers to applications made after the Act
came into force.

Under Section 6 of the General Clauses Act prima facie, the [459]
Act cannot affect pending proceedings. If the Legislature, intended to
give retrospective effect to the section, the language would have clearly
indicated it.

The same view has been taken by the Bombay High Court in
Balubhai Dayabhai v. Nasar Bin Abdul Habib Fazly (1).

We dismiss the appeal with costs.

* Appeal against order No. 29 of 1890.

(1) 15 B. 79.
VIRAYYA v. HANUMANTA

14 M. 459.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

VIRAYYA (Plaintiff), Appellant v. HANUMANTA AND OTHERS
(Defendants Nos. 1 to 9 and 11), Respondents.*
[17th October, 1890, and 4th May, 1891.]

Hindu law—Adoption—Nyogha—Gift—Specific Relief Act—Act I of 1877. Section 18 (a)
—Transfer of Property Act—Act IV of 1882, Section 43.

A member of an undivided Hindu family, consisting of himself, his adoptive son and his uncle, sold certain land belonging to the family to the plaintiff. In a suit by the plaintiff for a declaration of his title to, and for possession of the land, it appeared that the sale was not justified by any circumstances of family necessity, and that the above-mentioned adoptive son was the son of the paternal uncle of the adoptive father. During the pendency of the suit the undivided uncle died, having made a gift of his property to his daughter-in-law:

Held, (1) that the adoption was not invalid by reason of the above-mentioned circumstance;

(2) that the gift by the undivided uncle to his daughter-in-law was invalid as against the plaintiff;

(3) that the plaintiff was entitled to a moiety of the land sold to him.

[R., 17 A. 294 (302) (F.B.); 35 M. 47 (60) = 9 Ind. Cas. 596 = 21 M.L.J. 346 = 9 M.L.T.
389 = (1911) 1 M. W.N. 238; 10 Ind. Cas. 596 = 21 M.L.J. 696 = (701) = 9 M.L.T.
469 = (1911) 1 M. W.N. 422.]

SECOND appeal against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in an appeal suit No. 218 of 1883, confirming the decree of V. Suryamarayana Pan’ulu, District Munsif of Guntur, in original suit No. 302 of 1886.

Suit for the declaration of the plaintiff’s title to, and for possession of, certain land. The plaintiff alleged that he purchased the land in question from defendant No. 1 on 14th February 1885. Defendants Nos. 3—10 were tenants in possession. [(460) to whom defendant No. 2 had granted leases subsequent to the date of the alleged sale to the plaintiff. Defendant No. 2 pleaded that he was the adoptive son of defendant No. 1, with whom and defendant No. 10 (the undivided paternal uncle of defendant No. 1) he was in joint enjoyment of the land and its income, and that the alleged sale was justified by no circumstances of necessity and was invalid and not binding on him. Defendant No. 10 died during the pendency of the suit, having made a gift of his property to his daughter-in-law who was joined as defendant No. 11.

Defendant No. 1 was unmarried at the time when he adopted defendant No. 2, who was then son of his paternal uncle, but the District Munsif held, on the authority of Chandrasekharudu v. Bramhanna (1), that the adoption (the fact of which was established), was not invalid on that account. He also held that the sale set up by the plaintiff was proved, but that it was not binding on defendants Nos. 2 and 10, as there was no evidence of any circumstances of necessity justifying the sale. He accordingly passed a decree declaring the plaintiff’s right to a one-fourth share of the land; in other respects he dismissed the suit reserving leave to the plaintiff to bring another suit for partition.

* Second Appeal No. 4 of 1889.

(1) 4 M.H.C.R. 270.

321
The District Judge, on appeal, confirmed the decree of the District Munsif.

The plaintiff preferred this second appeal.  
Subramanya Ayyar, for appellant.  
Narayana Rau, for respondents.

JUDGMENT (PRELIMINARY).

The judgment of the District Judge is not so full as might be desired, but there is a clear finding by the District Munsif in favour of the adoption and the District Judge accepts the finding. It is then argued that the adoption is not valid, because defendant No. 2 was the father's brother's son of defendant No. 1, and that, under the law of Niyoga, the nephew could not be appointed to beget issue on his paternal aunt. Our attention is drawn in this connection to the cases of Sriramulu v. Ramayya (1) and Minakshi v. Ramanada (2). In these cases the law of appointment was referred to to explain and account for the existing usage and law in regard to adoption. But in the case before us no exception was taken to the adoption in either of the [461] Courts below on the ground that it was contrary to the usage obtaining among the people, nor was any evidence recorded on the point. Having regard to the observation of the Privy Council in Collector of Madura v. Mootoo Ramalinga Sathupathy (3) we are not at liberty to refer to the ancient practice of Niyoga, which is obsolete, or to engraft a rule on the Hindu law as evidenced by the usage of the people. We cannot, therefore, allow the contention to prevail. Another contention is that defendant No. 10 died pending the suit, and that therefore the plaintiff became entitled to a moiety instead quarter only of the property. But we observe no additional issue was recorded after the tenth defendant's death as to whether the instrument of gift set up by defendant No. 11 was valid, and if not, whether with reference to Section 43 of the Transfer of Property Act, a moiety would pass to the plaintiff under the instrument of sale sued on. The District Judge must be called upon to return a finding within six weeks from the date of the receipt of this order, and seven days will be allowed, after the posting of the finding in this Court, for filing a memorandum of objections.

In compliance with the above order, the District Judge returned a finding as follows:

"The High Court call for a finding upon the issue whether an instrument of gift set up by defendant No. 11 was valid, and, if not, whether, with reference to Section 43 of the Transfer of Property Act, a moiety would pass to plaintiff under the instrument of sale sued on.

"In this suit it is not alleged by the plaintiff that the instrument of gift set up by defendant No. 11 is not genuine. The defendant No. 10 filed his answer in this suit in November 1886, and he filed the deed of settlement giving his share to defendant No. 11, which was dated in March 1886. It is therefore not contended that the document is fabricated. The only question is whether it is valid.

"The findings in the suit show that defendant No. 10 was a co-parcener with defendant No. 1 in a united Hindu family. He alienated his share to his daughter, not for value, but in consideration of natural affection. Bearing in mind the Full Bench decision in Baba v. Timma (4)

(1) 3 M. 15.  (2) 11 M. 49.  (3) 12 M.I.A. 397.  (4) 7 M. 857.

322
and its application in *Ponnusami v. Achotti* [462] Thatha (1) to a gift made to daughter's children, I am compelled to find that this alienation is invalid.

"The effect of Section 18 (a) of the Specific Relief Act and Section 43 of the Transfer of Property Act is that this moiety claimed by defendant No. 11 must pass to defendants Nos. 1 and 2, and that the plaintiff is entitled to recover one-half of the property instead of one-fourth which was given him by the decree of the District Munsif."

This second appeal coming on again for final hearing, the Court delivered judgment as follows:—

**JUDGMENT (FINAL).**

It is urged that the respondent had no notice of the day on which the further hearing should take place. But it is not alleged that notice of the day was not affixed to the notice board in the ordinary way. He had notice of the order referring the case. We accept the finding, and must modify the decrees of the Courts below by substituting one-half for one-quarter of the lands mentioned. Proportionate costs in this and in the Courts below.

14 M. 462.

**APPELLATE CIVIL.**

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.*

KUNHIKUTTI AND ANOTHER (Defendants Nos. 9 and 19), Appellants v. ACHOTTI AND OTHERS (Plaintiffs and Defendant No. 1), Respondents.

[28th January and 9th March, 1891.]

Civil Courts Act—Act III of 1873 (Madras), Section 13 (2)—Appeal from a Subordinate Court. Proceeding to be adopted when a District Court erroneously returns an appeal petition for presentation in High Court—Civil Procedure Code, Section 57.

Certain members of a married family sued the others in a Subordinate Court to recover their distributive share under Muhammadan law. The property to be divided was more than Rs. 5,000 in value but the share claimed by the plaintiffs was less. The Subordinate Judge passed a decree, against which an appeal was preferred to the District Court, but the District Judge returned the appeal for presentation in the High Court. The appellants preferred a second appeal [463] to the High Court against the decision of the District Judge, and also presented a petition praying for the revision of his proceedings under Civil Procedure Code, Section 622:

*Held, (1), that the District Court had jurisdiction to entertain the appeal; (2) that neither a second appeal nor a petition under Civil Procedure Code, Section 622, was the appropriate proceeding to be adopted by the appellants but an appeal as from an order made under Civil Procedure Code, Sections 57, 582.

The error of the appellants being one of form merely, the Court amended the second appeal as an appeal from an order of the District Court and directed the District Judge to receive and dispose of the appeal from the Subordinate Court.

[Dis., 21 C. 344 (347); N. F., 17 C.P.L.R. 129 (130); F., 1 L.B.R. 32 (33); R., 5 C.L.J. 39 (39).]

*Petition under Civil Procedure Code, Section 622, praying the High Court to revise the proceedings of the District Judge of North Malabar whereby he erroneously returned a petition of appeal for presentation in*

*Appeal against Appellate Order No. 122 of 1889.*

(1) *9 M. 273.*
1891
March 9.

Appellate
Late
Civil.

14 M. 462.

14 Mad. 464 INDIAN DECISIONS, NEW SERIES

the High Court as being beyond his jurisdiction, and petition of second appeal against the same.

The facts of the case appear sufficiently for the purposes of this report from the judgment of the High Court.

Sankara Menon, for appellants.

Ryru Nambiar, for respondents Nos. 1 and 2.

Respondent No. 3 was not represented.

JUDGMENT.

As members of a Moplah family in North Malabar the plaintiffs claimed, with subsequent mesne profits, a moiety of certain items of property which, as they alleged, belonged to the joint family. The ninth and nineteenth defendants claimed, *inter alia*, item No. 40 under a koyi panom settlement of 1832. The value of the share claimed by plaintiffs was below Rs. 5,000, though the family property to be divided was of more than Rs. 5,000 value. The Subordinate Judge held that a koyi panom settlement of family property was subject to any arrangement which might be made at a future division and declined to exclude it from partible property. From this decision the ninth and nineteenth defendants appealed to the District Court, but the Acting District Judge returned the appeal for presentation to the High Court on the ground that the value of the subject-matter of the suit exceeded Rs. 5,000. From this order, the ninth and nineteenth defendants have preferred this second appeal, and have also presented civil revision petition No. 406 of 1889 under Section 622 of the Code of Civil Procedure. Two questions arise for decision, *viz.* (i) whether the District Court had jurisdiction to entertain the appeal; and (ii) whether, if so, [464] a second appeal, or a civil revision petition will lie to this Court under the Code of Civil Procedure.

As to the first question, we are of opinion that the District Court had jurisdiction to entertain the appeal. This was not a partition suit by the member of a joint Hindu family in which a general partition might be decreed among all the coparceners, but it was a suit by certain members of a Moplah family to recover their distributive share under the Muhammadan law. As observed by this Court in *Mahammad v. Biwi Umma* (1), it is the value of the share claimed and not the value of the property from which that share has to be set out, that is the value of the subject-matter of the suit within the meaning of Clause 2, Section 13, Act III of 1873. On the merits the District Judge must be directed to receive the appeal and deal with it in accordance with law.

As regards the second question, we consider that neither a second appeal nor a civil revision petition is the proper legal proceeding to be instituted against the order of the District Judge. The order returning the petition of appeal for presentation to the proper tribunal is an order made with reference to the provisions of Sections 57 and 582 of the Code of Civil Procedure, and, when such order is passed by a Court in the exercise of its appellate jurisdiction, an appeal will lie to the High Court under Section 588, Clause (c) and Section 589. No second appeal will lie, because there is no appellate decree from which it can be preferred under Section 584. Nor can this Court interfere under Section 622, for an appeal will lie against the order of the District Court under Section 589. This second appeal must be amended as an appeal from an order, and the civil revision petition must be rejected.

---

(1) Appeal No. 67 of 1888 unreported.
The error being merely one of form, we amend the second appeal as an appeal from an order of the District Court, and direct the Judge to receive the appeal presented by ninth and nineteenth defendants and to dispose of it in accordance with law.

Each party will pay his own costs in this Court.

14 M. 465 = 1 M.L.J. 492.

[466] APPEALATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

RANGA REDDI AND ANOTHER (Plaintiffs), Appellants v. CHINNA REDDI AND OTHERS (Defendants). Respondents.*
[8th August, and 15th October, 1890, and 23rd July, 1891.]

Limitation Act—Act XV of 1877, Schedule II, Articles 64, 116—Suit between partners—Registered partnership deed.

The plaintiffs and the defendants entered into a partnership agreement, which was registered, whereby it was, among other things, provided expressly that each partner should bear the loss, if any, incurred in the business in proportion to his share. The plaintiffs, alleging that loss had been incurred and borne by them, sued to recover the defendants' share of the loss:

Held, that since the partnership agreement was registered, the suit was governed by Limitation Act, Schedule II, Article 116.

[R., 16 Ind. Cas. 914 (916)=23 M.L.J. 519 =12 M.D.T. 458 =1912 M.W.N. 1179; D., 22 M. 14; 13 C.W. N. 212 = 4 Ind. Cas. 556 (557).]

APPEAL against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in original suit No. 25 of 1887.

The plaintiffs and defendants entered in 1878 into partnership as abkari contractors under an agreement which was registered. The agreement contained express provision that parties should, according to their shares, pay the loss as incurred in the business. The abkari contract with Government expired on 30th June 1881. The plaint stated that in November 1881 the accounts were cast, and it was found that a loss of Rs. 45,600 was sustained, and the plaintiffs sued to recover the defendants' share of that loss, which had been borne by the plaintiffs. There was no prayer for dissolution of the partnership, or for taking the accounts of the partnership business. The District Judge held that the suit was barred by limitation, more than three years having elapsed since the expiry of the abkari contract.

The plaintiffs preferred this appeal

S. Subramanya Ayyar and P. Subramanya Ayyar, for appellants.
S. Subramanya Ayyar, for respondents.

JUDGMENT.

[466] We are of opinion that the proper article of the schedule to the Limitation Act to apply to this suit was Article 116. The suit is founded on a settlement of accounts made between plaintiffs and their partner, the plaintiffs seeking to recover the defendants' share of loss, which was the result of the partnership business. The contract of partnership contains an express stipulation that the parties should, according to their shares, pay the loss, and thus the origin of the obligation.
now in suit was a registered contract. The account stated had reference to the registered contract and did not constitute in itself an independent contract. It was argued that Article 64, the article relating to suits on accounts stated, should be applied. That would be so, if the partnership contract had not been registered, but that circumstance renders Article 116 applicable, as in the case of the suits against an agent it was held that the general Articles 88 and 89 would not govern the suit, because the agreement with the agent was registered (Harendra Kishore Sing v. The Administrator-General of Bengal(1). It was also held in Vythilinga Pillai v. Thethanamurti Pillai (2) that in a suit for rent founded on a registered agreement the same Article 116 and not Article 64 should be applied. The intention was to extend the period in favour of suit to enforce obligations based on registered instruments.

We must reverse the decree and remand the suit. Costs are to abide and follow the result and to be provided for in the revised decree.

14 M. 467.

[467] APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Weir.

PURUSHOTTAMA (Plaintiff) Appellant v. MUNICIPAL COUNCIL OF BELLARY (Defendants), Respondents*. [31st July and 17th November, 1890.]

District Municipalities Act—Act IV of 1884 (Madras), Sections 102, 103, 110—Towns’ Improvement Act—Act III of 1871 (Madras), Section 51—Distrain notice.

A Municipal Council under the District Municipalities Act has, under Section 113, a power to distrain after due notice, besides that given by Section 103, but the the property distrained must be that of the defaulter, and the doors of a house cannot be removed in execution of a warrant of distress.

The notice which an owner of property must give in order to entitle himself to a remission of the house-tax is an annual notice.

[R., 16 Ind. Cas. 877 (850).]

SECOND appeal against the decree of R. Sewell, District Judge of Bellary, in appeal suit No. 123 of 1889, reversing the decree of C. Purushottamayya Guru, District Munsif of Bellary, in original suit No. 72 of 1888.

Suit by the plaintiff against the Municipal Council, Bellary, alleging that the defendant had issued warrants of distress in respect of Rs. 47-4-0, being arrears of assessment claimed to be due by the plaintiff’s late father on two bungalows in the Cowle bazaar for the year ending 31st March 1884, that the two bungalows in question had been sold to Messrs. Ibrahim Sait & Co., a year before suit, that "meanwhile no demand was made by the Municipality," and that the defendant, in execution of these warrants had, on 23rd September 1887, seized property of the plaintiff in his house at Brucepetta, including the doors of his house.

District Municipalities Act, Section 102, 103, 110 are as follows:—

"Section 102.—(1) When any tax is due, the Chairman shall, prior to enforcing the provisions of Section 103, cause to be presented to, or served upon, the person liable to the payment thereof a bill or

(1) 12 C. 357.

(2) 3 M. 76.

* Second Appeal No. 117 of 1890.
notice stating the sum due: Provided that in [469] the case of a tax under
Section 53 or 77 the notice or bill given under Section 56 or 82, respect-
vatively, shall be deemed to be the bill or notice required to be presented or
served under this section.

(2) Such bill or notice shall contain—
(i) a statement of the period and a description of the occupation,
property or thing for which the tax is charged;
(ii) a notice of the liability incurred in default of payment; and
(iii) a notice of the time within which an appeal against such tax
may be preferred.

Section 103.—If such tax is not paid within fifteen days from the
presentation or service of such Bill or notice, and if the person from
whom the tax is due does not show cause to the satisfaction of the
Chairman why the same should not be paid, the Chairman may
proceed to recover the amount together with all costs in any of the
following ways:

(i) by distress and sale of the moveable property of the defaulter,
or, if the defaulter be the occupier of any building or land
in respect of which such tax is due, by distress and sale of
any property found in or on such building or land;
(ii) if the amount of such tax cannot be recovered by distress
and sale of the moveable property of the defaulter, by
prosecuting the defaulter before a Magistrate. Nothing in
this section shall preclude the Municipal Council from suing
the defaulter for the tax before a Court of competent juris-
diction.

Section 110.—If the sum due on account of any tax from the owner
of any building or land remains unpaid after notice of demand has
been duly served, the Chairman may, provided the arrear has not been
due for more than one year, demand the amount from the occupier for
the time being of such building or land, and, on non-payment thereof,
may recover the same by distress and sale of any property found on the
premises.

Act III of 1871, s. 51, is as follows:

When any sum is due for or on account of any rate or tax leviable
under Sections 41 to 47 of this Act, the Commissioners shall cause to be
presented to the person liable to the payment thereof a bill for
the amount. Such bill shall contain a statement of the period and a
description of the property for which the charge is made.

Jaga Rau Pillai, for appellant.
Mr. Powell, for respondent.

JUDGMENT.

Three questions have been raised in this appeal.
It was first contended that under Section 110 of Act IV of 1884 the
power of distress could only be exercised in respect of an arrear which had
accrued due within one year. We are of opinion, however, that that
section should not be read limiting the powers given by Section 103 but
as giving a further power to distrain property on the premises after notice
given to the occupier. Under Section 103 it is the property of the defaul-
ter only, that is, the person on whom notice has been served under
Section 102, that can be distrained and sold.
The next contention had reference to the notice which an owner of property may give in order to entitle himself to remission of the house-tax. The tax is an annual one and the language of Section 51 of Act III of 1871 appears to us to show that an annual notice was intended.

The case stood over for the decision of a Division Bench (Chief Justice an t Weir, J.) on the question whether the Municipal authorities can legally distrain the doors of a house of a defaulter under the first portion of Clause (1) of Section 103 of the Madras District Municipalities Act IV of 1884. The Division Bench have found this question in the negative (vide Queen-Empress v. Shaik Ibrahim (1)). We concur in the conclusion and in the reasons for the conclusion in that case, and we must accordingly allow this appeal, and reversing the decree of the District Court, we restore the decree of the District Munsiff's Court.

Appellant will receive his costs in this Court and in the Lower Appellate Court.

---

**14 M. 470 = 1 M L.J. 674.**

**[470] APPELLATE CIVIL.**

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

SHANMUGAM (Defendant), Petitioner v. CHINNASAMI AND ANOTHER (Plaintiffs), Respondents.*

[16th April, and 5th May, 1891.]

*Civil Revision Petition No. 173 of 1890.


In a suit on an indemnity bond executed by way of collateral security by the maker of six hundies, it appeared that three of the hundies were paid and when three which were unpaid were presented to the maker, he did not at once insist upon want of notice of dishonour or on non-presentment as a ground of discharge:

Held, that since the defendant did not prove that the drawee had effects of his to meet the hundies on presentment, or that he had sustained damage by reason of the want of notice of dishonour, the plaintiff was entitled to a decree.

PETITION under Section 25 of Act IX of 1887 praying the High Court to revise the decree of V. Srinivasachari, Subordinate Judge of Kumbakonam, in small cause suit No. 811 of 1889.

The facts appear sufficiently for the purposes of this report from the judgment of the High Court.

The indemnity bond sued on was as follows:

"Deed of indemnity executed on 10th of August 1886 to Chi. Chinnasami Naidu Avargal, residing within the Tranquebar fort, of Mayavaram taluq, by Shanmugam Chettiar, son of Kuttiappan Chettiar, residing in Tillaiyadi of the said taluk. That passengers may sail in the steamer called 'Tait' sailing from Tranquebar to Mauritius, through the Agency of Negapatam Mau. Ganapatia Pillai and Co., I this day drew hundies payable at sight for payment of the total sum of Rs. 579-13-0, for this sum of Rupees five hundred and seventy-nine and annas thirteen being passage money for them, (to wit) a hundi on A. Arumuga Chettiar of Mahébourg, Mauritius, for payment of Rs. 96-10-0 being the passage money of two passengers, Govinda Pillai and one Kuppumuttu Pillai."
"... As I have given [471] you, this day, hundies payable at
sight, if money were not paid there; and if they come back here I shall
pay interest at one per cent. per mensem, for the amount of the said
hundi, Rs. 579-13-0, and pay the accrued interest, and principal, on
demand by the owner, paying the sum out of my own property."

The Subordinate Judge passed a decree as prayed and the plaintiff
preferred this petition.

Mr. K. Brown and R. Sutramanya Ayyar, for petitioner.

The decision in Moti Lal v. Moti Lal (1) is an authority for the pro-
position that the law as to notice of dishonour comprised in the Negotiable
Instruments Act, is applicable to hundis in the vernacular, and in the
present case it cannot be said that such notice, if given at all, was given
within a reasonable time. Moreover the same case shows that it lies on
the plaintiff to establish that the want of such notice has not dammified
the maker of the hundi. Again the plaintiff is not entitled to sue, unless
he can prove presentation of the hundis within a reasonable time, see
Mutty Loll v. Chogemull (2) and compare Nilkand Anantapa v. Manshi
Aparaya (3) with regard to the want of notice of dishonour; see also
Pique v. Golab Ram (4) and Byles on Bills, pp. 241, 292, and cases there

cited.

Pattabhirama Ayyar, for respondent.

JUDGMENT.

This is a revision petition filed under Section 25 of Act IX of 1887.
The petitioner is defendant and the counter-petitioners are plaintiffs in
small cause suit No. 811 of 1889 on the file of the Subordinate Judge of
Kumbakonam. The suit was brought on a bond executed by defendant in
plaintiffs' favour in August 1886 for passage money due by certain emi-
grants who then proceeded from Tranquebar to Mauritius by the plaintiffs'
steamer. The bond was given as a collateral security for six hundies,
payable on demand, which the defendant drew on certain persons living at
Mauritius in favour of the plaintiffs' steamer agent. The plaintiffs' case
was that the hundies were presented for payment but not paid, and that,
therefore, the amount of the bond became due by the defendant. The defend-
ant contended that the hundies were not presented for payment; that
he had no notice of their dishonour, and that he was not liable under the
[472] bond. As regards the presentation of the hundies the Subordinate
Judge found that though there was no direct evidence, it was presumable
from the plaintiffs' conduct, and the evidence of his witnesses that the
hundies were presented for payment but dishonoured. As regards notice
dishonour, he held that no notice was given within a reasonable time.
The hundies were drawn in August 1886 and returned to this country un-
paid only in June 1889. Adverting to the delay the Subordinate Judge
observed that when payment was demanded, defendant did not complain
and that moreover, he had no evidence to show that he drew the hundies
upon his debtors and that he sustained any damage by reason of the
delay. In the result, he decreed the plaintiffs' claim.

It is urged for the petitioner that the finding that the hundies were
presented for payment is a mere surmise. But it is in evidence that six
hundies were given, that three were paid, and that the others were not
paid. Both the witnesses for plaintiffs deposed that when payment was
demanded the defendant did not at once repudiate his liability on the

(1) 3 A. 76. (2) 11 C. 344. (3) 10 B. 345. (5) 1 W.R. 75.
ground that he had had no notice of dishonour. The first witness stated that when he demanded payment the defendant took him to one Sundaram Pillai who promised to pay as soon as he heard of the dishonour. The second witness also deposed that payment was demanded on several occasions and that it was put off on some pretext or another. The fact that three out of six hundies given for the passage money were paid at Mauritius suggests to some extent the inference that all the six were presented, and we cannot say that there is no evidence at all as to presentment. Nor can we say that there is no evidence to show that want of notice of dishonour was at once insisted on as a ground of discharge. We observe, further, that the suit is brought on a deed of indemnity whereby the defendant undertook to pay in case the hundies, or any of them, were returned all unpaid to this country. It has been held that mere neglect to present for payment does not discharge one who guarantees payment of a bill or note unless it is shown that if it had been presented it would have been duly paid (see Byles on Bills, 14th edition, 292). It is also found by the Subordinate Judge that the defendant has no evidence to show that he has been damnified in any way by want of notice of dishonour. The action being one based on an indemnity bond it [473] is clearly for the defendant to prove that he has sustained damage, especially as the fact whether the drawer has had any effects of the drawer in his hands, and whether the latter has not been able to withdraw or otherwise utilize them by reason of plaintiff's neglect is one peculiarly within his knowledge.

As regards the objection that the claim is barred by limitation it is to be observed that under the terms of document A the debt became due only when the hundies were returned unpaid. We are also unable to hold that interest was not chargeable under the bond in default of payment from date of its execution.

We dismiss this petition with costs.

14 M. 473.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

MAYAN (Defendant No. 2 in S.A. No. 1104 of 1889 and Defendant in S.A. No. 1105 of 1889), Appellant v. CHATHAPPAN (Plaintiff), Respondent.* [17th and 30th April, 1891.]

Act XXVII of 1860 Section 5—Security bond—Suit by the heir of the deceased.

On the issue to defendant No. 1 of a certificate under Act XXVII of 1860, defendant No. 2 executed to the District Court a security bond. The plaintiff, who had established his right to the monies collected under the certificate, now brought his suit on the security bond to recover the amount so collected:

_Held_ that the plaintiff not having obtained an assignment of the indemnity bond from the District Court was not entitled to sue the surety.

SECOND appeals against the decree of C. Gopalan Nayar, Subordinate Judge of South Malabar, in appeal suits Nos. 54 and 55 of 1889, modifying the decrees of S. Subramanya Ayyar, District Munsif of Cannanore, in original suits Nos. 442 and 443 of 1887.

* Second Appeals Nos. 1104 and 1105 of 1889.
The plaintiff’s karnavan Kunkan Menon died in 1882 and the present first defendant, Paidel Nayar, claiming to be his [474] legal representative applied to the District Court of North Malabar under Act XXVII of 1860 for a certificate of heirship to collect outstanding debts due to his estate to the extent of Rs. 17,000. This application was opposed by the present plaintiff Chathappan Nayar on the ground that Paidel Nayar was only a distant relation of Kunkan Menon and that he himself was his nephew and legal representative. The District Court ordered the certificate to be issued to Paidel Nayar, but, on the plaintiff’s appeal to the High Court, it was ordered that such certificate should only be granted on Paidel Nayar’s furnishing security to the extent of Rs. 17,000 under Section 5 of the Act. The present second defendant, Karuvanta Valappil Mayan, on 5th September 1883, executed a bond as Paidel Nayar’s surety, in the following terms:—

“To

THE DISTRICT COURT OF NORTH MALABAR.

“Security bond executed and presented by Karuvanta Valappil Chere Mayan of Punuat Deshom, Veliampra Amshom, Kottayam Taluk.”

In the matter of the application of Erota Parkum Manikoth Paidel Nayar, as per M. P. No. 251 of 1882 of this Court, and its appeal No. 190 of 1882, praying for the issue to him of a certificate under Act XXVII of 1860, authorising him to collect the outstanding debts due to Manikoth Kunkan Menon alias Kunkan Nayar who died in Metom 1057 [April-May 1882], the Appellate Court has recorded proceedings to the effect that such certificate will be granted to Paidel Nayar on his furnishing security to the extent of Rs. 17,000. In accordance with the said proceedings, I stand surety to the amount of Rs. 17,000 and undertake to make good to any person adjudged by a Court of Justice to be the lawful heir of the deceased, any amount collected by the said petitioner, Erota Manikoth Paidel Nayar, and any loss sustained by his want of diligence in collecting the same. The said Paidel Nayar will pay into Court any amount not exceeding Rs. 17,000 when required to do so by the Court. If he does not so pay, I hereby bind myself to pay that amount in cash myself, and, as security for the same, I hereby hypothecate the following properties, the boundaries and measurements of which are set out herein below and the jemn right over which I [475] acquired by purchase with my own private funds. If the amount be not paid as above, the properties herein below specified are to be sold as it in execution of decrees, without any suit, and making the said properties, myself and my heirs hereby liable for the satisfaction of the claim, I affix my signature to the security bond in the presence of witnesses whose names are written below.

Dated 5th September 1883.

Witnesses.
1. Muttari Kunhi Kutti Nayar.
2. Chowakaren Orkatary Moidin Kutti.

The certificate was then issued to Paidel Nayar, and he collected debts to the extent of Rs. 1,092-3-3 payable to Kunkan Menon’s estate. The plaintiff thereupon brought original suit No. 141 of 1884 on the file of the Tellicberry Munsif to recover that amount, and the Court found that the plaintiff and not Paidel Nayar was Kunkan Menon’s legal representative and passed a decree as prayed. The defendants having failed to pay the amount of the decree the plaintiff filed original suit No. 443 of
1887 on the file of the District Munsif of Cannanore to recover from the second defendant, Mayan, under the terms of his security bond, a sum of Rs. 1,869-9-3 being the amount of principal, interest and costs decreed in original suit No. 141 of 1884 on the file of the Tellicherry Munsif and the costs awarded to him on appeal and second appeal. Plaintiff also filed in the same Court on the same day original suit No. 442 of 1897 for recovery from first defendant Paidel Nayar or from his surety second defendant Mayan, of Rs. 2,499-12-5 on account of monies said to have been collected by the first defendant after the institution of original suit No. 141 of 1884 on the file of the Tellicherry Munsif and also on account of debts said to have been time-barred and lost to the estate by his omission to collect them.

The District Munsif passed a decree against defendant No. 1 for Rs. 1,861-15-6 and decreed further that on his default defendant No. 2 should pay to the plaintiff that amount. The Subordinate Judge reduced the amount of the decree to Rs. 1,629-7-10, but otherwise confirmed the decree of the District Munsif.

[476] Defendant No. 2 preferred this second appeal.

_Sankaran Nayar and Pyru Nambiar, for appellant._

_Bashyam Ayyangar, for respondent._

**JUDGMENT.**

The main question argued in this second appeal is whether the plaintiff is entitled to maintain the suit against the second defendant, the surety. It is contended on the one side that the bond executed under Section 5, Act XXVII of 1860, was executed in favour of the District Court of North Malabar and that plaintiff cannot sue the surety unless the Court assign that bond to him. On the other hand, it is argued that the second defendant undertook a liability to any person whom a competent Court declared to be the rightful heir of Kunkan Menon and that he was therefore under an obligation to pay the plaintiff. The decision must depend upon the construction which we put upon Section 5. That section authorizes the Court to take security from the person to whom a certificate is granted (1) for rendering an account of debts collected, and (2) for the indemnity of persons who may be found to be entitled to monies received by the certificate holder and whose right to recover the same against the certificate holder is not affected by the Act. On referring to the bond, we observe that it purports to be executed to the District Court of North Malabar and that the appellant undertook in default of payment by Paidel Nayar of any amount ordered by the Court up to and not exceeding Rs. 17,000 to pay the said sum in cash. As further security, he mortgaged certain properties specified in the bond. The natural construction to be put upon the section is that the surety enters into a contract with the District Judge for the time being to guarantee the rendering of an account and to indemnify to the extent of the sum mentioned therein. Although the bond was intended for the benefit of persons like the plaintiff there was no privity of contract between him and the executant and in the absence of any special provision in the act we must hold that the plaintiff was not entitled to maintain this suit without first obtaining an assignment of the bond from the District Court. No case has been cited on either side, but the language of Section 5 and the terms of the bond are inconsistent with the contention of the respondent that the obligation was a statutory obligation.
which the plaintiff was entitled to enforce without reference to the District Court.

Under these circumstances, we reverse the decrees of the Lower Courts so far as the second defendant (appellant) is concerned and dismissed the suit as against him with costs throughout.

For the same reasons S.A. No. 1105 is decreed, and the decrees below are reversed and the suit dismissed with costs throughout.

14 M. 477.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

KANNU (Plaintiff), Appellant v. NATESA AND ANOTHER (Defendants), Respondents.* [8th May, 1891.]

Mortgage—Suit for arrears of interest and sale—Suit before principal sum became due.

A suit for arrears of interest accrued due on a mortgage and for the sale of the property comprised therein was brought before the date fixed for the repayment of the principal. The mortgage provided that, on default of payment of interest on the due date, interest should be charged on the arrear, and also that interest at an enhanced rate should be chargeable on the principal:

Held, that the plaintiff was not entitled to sue for the arrears of interest or to bring the mortgage premises to sale before the principal became due.

[From 15 C.P.L.R. 78 (79).]

SECOND appeal against the decree of T. Ramasami Ayyangar, Subordinate Judge of Nogappattam, in appeal suit No. 843 of 1889, confirming the decree of S. Dorasammi Ayyangar, District Munsif of Valangman, in original suit No. 80 of 1889.

Suit upon a hypothecation bond executed to the plaintiff and dated 2nd July 1886 to secure a principal sum of Rs. 2,005-8-0, whereby it was provided that interest at the rate of 8 per cent. per annum should be paid on 2nd July of each year and that in default interest at 9 per cent. should be paid on account of such interest and also the rate of interest on the principal be enhanced to 9 per cent. and that the principal amount should be paid on 2nd July 1890. Arrears of interest having accrued due, the plaintiff now sued to recover that amount and prayed that the property be sold.

[478] The District Munsif dismissed the suit, holding that it was premature, and his decree was affirmed on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal.

Parthasaradhi Ayyangar, for appellant.

Respondents were not represented.

JUDGMENT.

The mortgage document provides that, in default of payment of the interest at 8 per cent. on the dates fixed for payment, interest at 9 per cent. shall be charged on the interest in arrears till payment and also the interest on the principal shall be raised from 8 per cent. to 9 per cent. This clearly shows that the true intention of the parties was to postpone the sale of the mortgaged property till the principal becomes due and to

* Second Appeal No. 937 of 1890.
give the mortgagees on default of payment of interest only a right to the
enhanced rate of interest on principal and on the arrears of interest. We
agree with the Lower Courts that plaintiff cannot bring the mortgaged
property to sale for arrears of interest until the principal is due, and we
think moreover that plaintiff is precluded by the terms of the document
from suing for the interest before the principal is due and must content
himself with the compensation which the mortgage document gives him
for the default in payment of interest.

The second appeal fails and is dismissed.

14 M. 478.
APPELLATE CIVIL.
Before Sir Arthur J. H. Collins, Kt., Chief Justice,
and Mr. Justice Parker.

RAMAN (Plaintiff), Appellant v. MUPPIL NAYAR AND OTHERS
(Defendants), Respondents.* [20th March, 1891.]

Civil Procedure Code, Section 244—Execution of decree—Assignee of decree—Regular
suit.

The assignee of a decree applied for execution; his application was dismissed
and he was never brought on to the record as decree-holder. He now sued for
[479] the cancellation of the order refusing execution and for a declaration of his
right to execution:

Held, that the suit was not precluded by Civil Procedure Code, Section 244.

[8. 16 A. 483 (491); 26 M. 264 (265); 3 O.C. 32 (34).]

SECOND appeal against the decree of L. Moore, District Judge of
South Malabar, in appeal suit No. 543 of 1889, confirming the decree of
P. J. Itteyarah, District Munsif of Kutnag, in original suit No. 557 of
1888.

Defendant No. 3 having obtained a decree against defendants Nos. 1
and 2, in original suit No. 247 of 1885, on the file of the District Munsif
of Kutnag, for the recovery of certain properties assigned the decree to the
plaintiff. The plaintiff applied for leave to execute the decree, but his
application was rejected and he was never brought on to the record as
decree-holder. He now sued to set aside the order by which execution was
refused to him and prayed for a declaration of his right to execute the
decree. The defendants pleaded that the suit was precluded by Civil
Procedure Code, Section 244, and that the decree had been already
satisfied. The District Munsif held that the first of these pleas was un-
sustainable, but decided in favour of the defendants on the second and
dismissed the suit. On appeal the District Judge affirmed the decree of
the District Munsif on the sole ground that the remedy of the plaintiff was
by appeal and not by suit under Civil Procedure Code, Section 244.

The plaintiff preferred this second appeal.

Raman Menon, for appellant.
Govinda Menon, for respondents.

JUDGMENT.

As the plaintiff has never been brought on the record as decree holder
in suit No. 247 of 1885, it is clear that the provisions of Section 244 of the

* Second Appeal No. 845 of 1890.

334
Code of Civil Procedure cannot apply to him, \textit{Halodkar Shaha v. Harogobind Das Koiburto} (1). There was no appeal against the order refusing him leave to execute if he had not been brought on the record as transferee plaintiff, \textit{Sambasiva v. Srinivasa} (2).

The decree of the District Judge must be reversed and the appeal remanded to be heard on the merits. The appellant is entitled to the costs of this appeal, and the costs in the Lower Appellate Court will abide and follow the result.

---

14 M. 480.

[480] APPELLATE CIVIL.


REFERENCE UNDER COURT FEES ACT, S. 5.*

[5th September, 1891.]

Court Fees Act—Act VII of 1870. Section 7—Suit on a mortgage—Institution fee.

In a suit for the redemption of a kanom the institution fee must be computed on the kanom debt as it originally stood.

[R., 29 M. 367 (369)—16 M.I.J. 287; 23 T.L.R. 268; 23 T.L.R. 123.]

CASE referred for the orders of the High Court under Section 5 of Act VII of 1870, by H. W. Foster, Registrar of the High Court, Appellate Side, Madras.

The case was stated as follows:

"A difference has arisen between the officer whose duty it is to see that the stamp duty payable on second appeals under the Court Fees Act is paid, and the pleader by whom the second appeal (S.R. No. 14509 of 1890) has been presented as to the amount of the fee payable on the said appeal, and as the question appears to be one of general importance, this reference is made to the Chief Justice, under the provisions of Section 5 of the Court Fees Act.

"The second appeal under notice arises out of a suit to redeem a kanom of Rs. 150 and to recover from the mortgagee arrears of rent (or porapad), amounting to Rs. 73-3-4, due on the kanom property. If the suit were merely to redeem the kanom the fee payable on the appeal would be Rs. 11-4-0, calculated in conformity with the provisions of Section 7, Sub-Section IX, according to the principal money expressed to be secured by the instrument of mortgage, on Rs. 150. In addition to this fee, however, the appellant has been asked to pay a further fee of Rs. 5-10-0, chargeable on Rs. 73-3-4, the arrears of rent which forms part of his claim. The whole fee thus demanded is Rs. 16-14-0.

"The appellant, however, contends that against the principal amount secured by the mortgage he is entitled to set off the arrears of rent due to him, and that he is liable to pay [481] stamp duty only of Rs. 6 on Rs. 76-12-8, the difference of the two sums.

"The question for decision is therefore as follows:—In a suit to redeem a mortgage and to recover arrears of rent due by the mortgagees to the mortgagor on account of the mortgaged property, should the Court-fee to be levied be calculated according to the sum of the principal amount of

---

(1) 12 C. 105. * Referred Case No. 28 of 1891.
(2) 12 M. 511.
the mortgage and arrears of rent, or according to the difference of those two items?

As authority for his contention, the appellant cites the decision of this Court in C. R. P. No. 387 of 1889. In that case the Court (Muttusami Ayyar and Weir, J.J.), taking the same view as the Subordinate Judge of Palghat and the District Judge of South Malabar, ruled that for the purposes of jurisdiction the valuation of a suit to redeem a mortgage when rent on the property is due to the mortgagor is to be determined by the difference of the two items. The grounds given for the decision are that if arrears of rent are allowed to accumulate the matter becomes one of account between the mortgagor and the mortgagee.

It does not follow that the rule which is applicable in questions of pecuniary jurisdiction governs the question of stamp duty. This is what the appellant urges. But though this Court held in Zamorin of Calicut v. Narayana (1) that the rule under which a suit is valued for the purpose of Court-fees is applicable to determine the Court having jurisdiction over the suit, it does not follow that the converse proposition is true. The jurisdiction of Courts under the Civil Courts Act III of 1873 depends upon the value of the subject-matter in suit, and the ordinary rule of the Court Fees Act is to levy duty according to such value or the value of the relief sought, which is the same thing. But the case of a suit to redeem a mortgage is an exception to this rule.

The value of the relief sought in a suit to redeem a mortgage is either the value of the mortgaged property, or the value less the sum payable for redemption, but the stamp duty is payable on neither of these sums but on the 'principal amount expressed to be secured' which amount may vary inde-

pendently of the value of the relief sought, that is to say, the ordinary rule of valuation is departed from, and for convenience sake a purely arbitrary standard of valuation is adopted in this particular case. Stamp duty is levied not on the value of the relief claimed, but on a quite different, though more easily, ascertainable sum.

If this be admitted, it becomes clear that the appellant's argument is based upon a misconception. He contends that as stamp duty, which is ordinarily chargeable on the value of the relief claimed, is in this case charged on the principal money he has to pay to redeem; the principal money must be regarded as the relief he claims, and because this principal money is liable to reduction on account of other monies due to him, he is entitled to a corresponding abatement of stamp duty. It is plain that the sum he has to pay is not the relief he seeks, though it is on that sum that he pays stamp duty. The relief for which he asks is the recovery of the land, and the payment to him of arrears of rent in addition would be a further relief for which further stamp duty should be paid, notwithstanding that on the main relief asked for stamp duty is not calculated in the ordinary manner.

The position which the appellant takes up would result in this anomaly that the longer he were to allow rent to accumulate the less he would have to pay on a suit to recover his land, and if the rent exactly equalled the mortgage sum, he could file his suit without payment of duty. Indeed in another appeal (S.R. No. 13463 of 1890) similar to the one, under reference, the arrears of rent claimed actually exceeds the mortgage sum, and the appellant still claims to pay on the difference only.

(1) 5 M. 284.
"In the two cases (S.R. Nos. 13463 and 13738 of 1890) when this question of stamp duty was raised by the appellant, Mr. Justice Shephard, sitting in the Admission Court, made an order that the lower rate of duty for which the appellant contends was sufficient, but as the question was not referred by the taxing officer under Section 5 of the Court Fees Act, and the taxing officer was not present in Court when the order was made, I apprehend that this question is still an open one."

On the above reference the Chief Justice delivered the following JUDGMENT.

The question referred to me by the Registrar is whether in a suit for the redemption of a kanom, institution fee ought to be paid on the kanom debt as it originally stood, or on so much of it as was actually due at the date of the suit after setting off against it arrears of rent. The answer must depend on the construction of sub-Section ix, Section 7 of the Court Fees Act. The sub-Section is in these terms—

"ix.—In suits against a mortgagee for the recovery of the property mortgaged, and in suits by a mortgagee to foreclose the mortgage, or where the mortgage is made by conditional sale, to have the sale declared absolute—

"according to the principal money expressed to be secured by the instrument of mortgage."

The language of the sub-Section is clear and unambiguous, and according to it institution fee is payable on the principal money expressed to be secured by the instrument of mortgage. The intention it suggests is to make the principal money so secured the criterion of the value of a suit for redemption. It may be that the legislature did so provide because the amount actually due by the mortgagor to the mortgagee must be a matter of account to be taken in the suit and therefore uncertain at the date of its institution. It is then urged that the original debt may have been considerably reduced by payments made prior to the institution of the suit, and that it is not reasonable to compel the plaintiff to pay institution fee on so much of the debt as has been extinguished by payment.

The Court Fees Act is a fiscal enactment, and when the words are plain, the Courts must give effect to them and are not at liberty to vary the construction with reference to any real or supposed hardship. A similar reference was made to the learned Chief Justice of the High Court at Allahabad in Pirbhoo Narain Singh v. Sita Ram (1) and in that case the plaintiff alleged that the mortgage had been wholly satisfied by payment. The learned Chief Justice held that so far as the Court-fee on the plaint was concerned, it was immaterial whether the mortgage had in fact been satisfied or whether redemption could only be had on payment of Rs. 2, 15,446-15-0. He observed further that, when the relief claimed is a decree for redemption, it is a relief which it is impossible to value, and Section 7, sub-Section ix, must be applied. I am therefore of opinion that the institution fee must be computed on the kanom debt as it originally stood.
QUEEN-EMPRESS v. APPAYY.* [7th and 15th October, 1891.]

On 22nd November 1890 the accused, who was a Deputy Tahsildar, submitted to his official superior a false "nil" return of lands in his enjoyment, and also on 5th December 1890 made a false statement to the same effect in a revenue enquiry before the Principal Assistant Collector. He was convicted of an offence under Penal Code, Section 177.

 Held, that the conviction was wrong. Virasami Mudali v. The Queen (4 M. 144) dissented from.

[F., 1 Weir 105 ; R., 32 C. 363 = 12 Cr. L.J. 411 = 11 Ind. Cas. 595; 1 Weir. 467 (468).]

APPEAL against the sentence of H. G. Joseph, Acting Sessions Judge of Ganjam, in Sessions Case No. 16 of 1891.

The Acting Advocate-General (Hon. Mr. Wedderburn), for accused.

I do not dispute the fact that the accused who was a Deputy Tahsildar stated in reply to an official question he had no lands in Durgahasi which is untrue. He has been convicted under Section 177, which is to be read with Section 43 as to the meaning of word "illegal." My contention is that it is not "an offence" to furnish such a nil return: it is not prohibited by law; so the only question is whether the act comes under the third head in the Section 43, viz., whether it would furnish ground for a civil action.

[COLLINS, C.J.—Could a Collector sue the Tahsildar?]

No. What would be the damage?

[485] Moreover the prosecution has not proved that he was legally bound to furnish a return. They do not file the order infringed. There is no proof that it was the duty of the accused to obey the order or that he knew about it. No other High Court applies the section to cases of departmental orders.

[WILKINSON, J.—But there is the authority of proceedings, dated 21st December 1871 (1)].

In that case the duty was proved; however the case was not argued and merely followed the previous case. Virasami Mudali v. The Queen (2) was a case of wrong entry in a diary kept in pursuance of a departmental order which the accused was bound to obey. But I contend that a ruling that any breach of service amounts to an offence is too wide.

Want of proof of duty was held fatal in the next case. See Weir's Criminal Rulings, p. 66; the Court would not assume village officers as such are bound in the manner there contended for.

The order is not proved here; and Evidence Act, Section 22, bars an admission of contents of documents. The only order filed related to information to be furnished at a date later than that to which the present charge relates. The prosecution has not shown it would be the ground of a civil action if the relation was contractual, but the contract is not proved or its terms; nor is it a tort. Under Section 73 of Contract Act,
no one can get nominal damages by waiving the contract and suing on
the tort.

[COLLINS, C.J.—Is there any evidence that the accused was told it
was his duty to answer these questions?]

The order says it is to be communicated to the Assistant Collector,
&c., but the communication not proved.

Marzetti v. Williams (1) and other cases where nominal damages are
given rest much upon a sort of legal fiction, Broom's Common Law, p. 83,
and they do not accord with the rule in Contract Act, Section 73. Mere
breach of duty by a servant will not enable the master to sue unless damage
proved.

See also Criminal Revision Petitions, Nos. 377, 361 of 1891.

[COLLINS, C.J.—But there the information was true though it con-
tained a suggestive falsi.]

[486] The Government Pleader and Public Prosecutor (Mr. Powell) for
the Crown.

The case is concluded by authority, see especially Virasami Mudali v.
The Queen (2) following the other cases.

[WILKINSON, J.—Do you say we are bound if the Judges did not
consider the meaning of the words "legally bound."]

They considered whether he was bound to obey the order, it must be
taken to be a legal obligation which was contemplated, as to the earlier
cases.

[COLLINS, C.J.—Entertaining great respect for the Judges that
decided them if I see that they were not only not argued, but that the
present point was not present to the Judges' minds I shall not consider
myself bound by their ruling in a criminal case.

WILKINSON, J.—They go to the length of reading the words "departmental order" into Section 177 and make an infringement of it punishable
with two years' imprisonment. Do you rely on the latter part of
Section 43?]

I admit that a civil action will not lie. But if the Deputy Tahsildar
was not legally bound to furnish the information, when can he be legally
bound to give information?

[COLLINS, C.J.—Was the order put on the record?]

The Board's Proceedings prove themselves like the Gazette. The
order is published in Maclean's Standing Orders as order 248.

[COLLINS, C.J.—That seems to have been superseded by the new
order.]

JUDGMENT.

The appellant, a Deputy Tahsildar named Dwarapu Chinnu Appayya
Naidu, was convicted under Section 177 of the Indian Penal Code by the
Acting Sessions Judge of Ganjam.

The Acting Advocate-General appeared for the appellant and the
Government Pleader in support of the conviction.

The facts are admitted. On the 22nd November 1890, the appellant
submitted to his official superior a false "nil" return of lands in his
enjoyment, and also on the 5th December 1890 made a false statement to
the same effect in a revenue inquiry before the Principal Assistant
Collector. It was argued by the counsel for the appellant that no
criminal offence had been [487] committed, that appellant was

(1) 1 B. & Ad., 415.
(2) 4 M. 144.
not legally bound to furnish the information required of him within the definition of "legally bound" in Section 43 of the Indian Penal Code, and further that no order of the Revenue Board directing officers of the status of appellant to furnish such returns has been legally proved to exist. It is also contended that the cases upon this section decided by the High Court and reported in Weir's Criminal Rulings, pages 64, 65 and 66, are wrong.

The Government Pleader admits that no civil suit would lie against the appellant for his act (Section 43), and he is unable to point out any section that makes such an act per se an offence, or any law by which such act is prohibited, but relies on the cases reported in Weir's Criminal Rulings and contends that the Court is bound by those decisions. It is also admitted that the only orders of the Board of Revenue, which were put in, were orders dated 27th January 1890, which directed that certain returns should be made on 15th January 1891.

The main question which we have to decide is whether the appellant has been guilty of a criminal offence or is merely guilty of breach of departmental rules. It is clear that for a long series of years this High Court has held that Section 177 applies to cases not to be distinguished from that of the appellant. In 1862, in High Court Proceedings, 20th November, the Court considered that the terms of Section 177 were unrestricted and that they therefore embraced every case in which a subordinate officer may seek to impose false information upon his superior. This decision is not reported in the Madras Reports, and we think for a very good reason, as if the terms of Section 177 are really unrestricted, any falsehood which a subordinate officer may tell his superior would be a criminal offence. In Proceedings, dated 21st December 1871, the Court, "upon reading a letter from the Sessions Judge of Salem," ruled that "the defendants were public servants and part of the duties they undertook was to make true returns to their official superior. To make false returns was therefore an offence" under Section 177. It is not certain whether these decisions were delivered in Court, and no one appeared to argue the case for the party accused.

The third and most important case is Virasami Mudali v. The Queen (2) before Kindersley and Mutusami Aivar, JJ. This case was apparently argued by an Advocate for the accused, although the points of his argument are not given, and the Court said that, "following the Proceedings of the 20th November 1862 and 21st December 1871, we hold that the accused was legally bound to furnish information to his superior officer on the subject on which he furnished false information and that the offence was punishable under Section 177." The same point was also decided in the same way in High Court Proceedings, No. 2599 of 1877.

With the very greatest respect to the learned Judges who gave these decisions, we are constrained to differ from them. It is a remarkable fact that no reference is made in any one of these cases to the definition given in Section 43 of the words "legally bound," and we are therefore of opinion that the present point has never been decided. Section 43 defines the word "illegal" as follows:—"The word 'illegal' is applicable to everything which is an offence (see Section 40 of the Indian Penal Code), or which is prohibited by law, or which furnishes ground for a civil action, and a person is said to be 'legally bound

(1) 6 M.H.C.R. App. 48.  (2) 4 M. 144.
to do 'whatever it is illegal in him to omit.' Now was it "illegal" as defined by Section 43 for the appellant to furnish a false return? It is no offence, it is not prohibited by law, and it furnishes no ground for a civil action. Take for instance this case. An official is bound by the rules of his superior to be at his office at 10 o'clock a.m. and to enter his name in a book kept for that purpose; he falsely enters his arrival at 10 when he in fact arrived at 11 o'clock; can it be said that he has committed an offence? and yet if we are to accept the High Court Proceedings, November 1862, as correct, the above act would be an offence as it is said the terms of Section 177 are "unrestricted." In the Proceedings, 1871, the Court thought the question to be—does Section 177 apply to a duty arising out of a contract of service, and because the defendants in that case were guilty of a breach of duty, therefore they were, it was held, guilty of an offence; and in Virasami Mudali v. The Queen (1) the Judges ground their decision on the fact that because there was [489] a departmental order which the defendants were bound to obey, a breach of that departmental order was a criminal offence. We are of opinion that the sending in the false "null" return and the appellant's subsequent falsehood that he held no land does not bring the appellant within the provisions of Section 177 of the Indian Penal Code and was not a case contemplated by the Code; he was doubtless guilty of breach of a departmental order, but we consider he was not legally bound to furnish such information within the definition given in Section 43 of the Indian Penal Code.

We are also of opinion that there was no evidence before the Court that the appellant was bound to furnish the information found to be false, the Board of Revenue Proceedings (with the exception of those already alluded to which do not affect this case) not having been put in—see High Court Proceedings, 213 of 1860 (2).

We set aside the conviction and sentence and direct the appellant to be acquitted.

14 M. 489.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar (Officiating Chief Justice) and Mr. Justice Shephard.

PARAMESWARAN (Plaintiff), Appellant v. SHANGARAN (Defendant No. 1), Respondent.* [16th July, 1891.]

Practice—Non joinder—Malabar law—Suit by one of two co-urals.

In a suit by one of two co-urals of a Malabar devasam to recover land, the property of the devasam, the other uralan being joined as defendant, there was no evidence that the latter had repudiated the right of the plaintiff to sue in conjunction with himself, and it appeared that he had not been consulted as to the institution of the suit:

Held, that the suit was bad for non-joinder of the co-uralan as plaintiff.

[N.F., 18 M.L.J. 495 (496)=4 M.L.T. 194 ; F., 23 M. 82 (84); 9 M.L.J. 312 ; R., 29 M. 29 (34); 34 M. 406 (413)=7 Ind. Cas. 422=20 M.L.J. 951 (958)=8 M.L.T. 208 ; 68 P.L.R. 1901.]

* Second Appeal No. 638 of 1890.

(1) 4 M. 144.

(2) 2 Weir's Cri. Rul. 66.
SECOND appeal against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 722 of 1889, reversing the [490] decree of V. Rama Sastri, District Munsif of Palghat, in original suit No. 19 of 1889.

Suit to recover property of a devasom with arrears of rent.

The plaintiff and defendant No. 1 were co-uralers of a Malabar devasom. The other defendants were in possession of the land in question under a demise of 9th September 1878. There was no evidence that the first defendant had repudiated the authority of the plaintiff to sue in conjunction with himself, and it was admitted that the plaintiff had not called upon defendant No. 1 to join him, or consulted him as to the advisability of suing. The District Munsif passed a decree for the surrender of the property in suit to the plaintiff and defendant No. 1.

This decree, however, was reversed by the District Judge who held on the authority of Unni Nambiar v. Nilakandan Bhattathiripad (1) that the suit was bad for non-joinder of defendant No. 1 as plaintiff.

Plaintiff preferred this second appeal.

Santhan Nayar, for appellant.

Santhara Menon, for respondent.

JUDGMENT.

It having been alleged in the plaint that defendant No. 1 refused to join the plaintiff in the suit, and that allegation having been traversed in the written statement, an issue on that point ought to have been joined and the plaintiff should have been required to prove his allegation. The defect was, as clearly appears from the order of remand, intended to be cured by the District Judge by remitting for trial the issue whether the plaintiff is entitled to sue. The District Munsif, however, does not seem to have understood the object with which the issue was directed. But it was admitted before the Judge that there was no discussion between the plaintiff and defendant No. 2 as to whether it was advisable to institute the suit and whether Defendant No. 1 was prepared to join.

As co-uralan he was entitled to be consulted and to be joined as a plaintiff. It is now argued that in the circumstances of the case defendant No. 1 was not entitled to be consulted, as he had all along asserted an exclusive right to sue, relying on the razee in the previous suit. There is no evidence to show that defendant No. 1 had at any time repudiated the plaintiff's [491] authority to sue in conjunction with himself. It must be observed that the suit was merely a suit in ejectment and that there was no prayer for the setting aside of the razee. We cannot say, therefore, the District Judge was wrong in dismissing the suit on the ground that the first defendant was not joined as plaintiff and was not consulted beforehand.

We must dismiss the appeal with costs.

(1) 4 M. 141.
APPELLATE CIVIL

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KUNHI UMAH (Plaintiff) Appellant v. AMED AND ANOTHER
(Defendants Nos. 1 and 2*, Respondents.)
[29th April and 4th May, 1891.]

Transfer of Property Act—Act IV of 1882, Section 52—Lis pendens.

Of the three owners of certain properties, two executed a mortgage of their interest in December 1872. In 1879 a creditor of the three obtained a money-decree against them, and, in execution, attached, inter alia, the properties subject to the mortgage. In July 1880 the mortgagee intervened in execution, and an order having been made directing that the property be sold subject to his mortgage lien, filed a suit upon his mortgage. The property was brought to sale in execution of the money-decree in November 1880, and the defendant became the purchaser. The mortgagee obtained a decree in the following February, and the mortgaged property was sold in execution in March 1884 and was purchased by one who assigned his interest to the plaintiff:

Held, that the defendant's purchase was subject to the doctrine of lis pendens.

SECOND appeal against the decree of E. K. Krishnam, Subordinate Judge of South Malabar at Calicut, in appeal suit No. 325 of 1889, confirming the decree of T. V. Amaan Nayar, District Munsif of Calicut, in original suit No. 99 of 1888.

Suit to recover possession of two-thirds of a certain paramba. The paramba originally belonged as joint property to defendant No. 2, together with his brother and uncle, who mortgaged their two-thirds interest in it and certain other property on the 28th December 1871 under Exhibit B. All the land to which Exhibit B related was attached in execution of a money-decree obtained against the three owners in original suit No. 472 of 1879 on the file of the District Munsif's Court at Calicut. The mortgagee, on the 1st July 1880, put in a claim asserting his mortgage lien and an order was made directing that the property be sold subject to his encumbrance. Subsequently, and in the same month, he filed a suit on the footing of Exhibit B, viz., original suit No. 536 of 1880 on the file of the same Court. The property was brought to sale in execution of the money-decree on the 9th November 1880 and defendant No. 1 became the purchaser. The mortgagee, on the 11th February 1881, obtained a decree in his suit upon the mortgage, and the mortgaged property, viz., the two-thirds share of the judgment-debtors was brought to sale in execution on the 11th March 1884. The purchaser at that sale subsequently assigned his interest to the plaintiff, who brought this suit to recover the property as above. The District Munsif held that the plaintiff was not entitled to recover, his purchase having been subsequent in date to that of defendant No. 1. He accordingly dismissed the suit. The Subordinate Judge on appeal affirmed his decree, holding that, since the mortgagee had filed his suit after the order for sale in execution of the money-decree had been made, he should have joined the holder of the money-decree as a defendant, because the equity of redemption still remained available to the unsecured creditors of the judgment-debtors, and an opportunity ought to have been given to them to redeem his encumbrance.

* Second Appeal No. 1174 of 1890.
The plaintiff preferred this second appeal.

Sankaran Nayar, for appellant.

Sundara Ayyar, for respondents.

JUDGMENT.

Both the Courts below are in error in holding that the first defendant’s purchase is not governed by the doctrine of *lis pendens*. It was held in *Raj Kishen Mookerjee v. Radha Madhub Holdar* (1), that a purchaser under an execution was bound by *lis pendens*, and the same opinion was expressed by this Court in *Manual Frual v. Sanagapalli Latchmidevamma* (2), in which the plaintiff made his purchase at an execution sale held by a District Munsif. The result is that the first defendant must be treated as if he were a party to the plaintiff’s suit and bound by the decree and the execution proceeding therein. But it is urged that prior to the date of the plaintiff’s suit there was an attachment made by the first defendant, that a claim was preferred by the plaintiff, and that the property under attachment was therewith ordered to be sold subject to the mortgage. These proceedings created only a power in the judgment-creditor in original suit No. 472 of 1879 to bring the mortgagor’s equity of redemption to sale, and the judgment-creditor had, as was held by Mr. Justice Wilson in *Soobhul Chunder Paul v. Nitye-Churn Bysack* (3) no right to redeem as a subsequent incumbrancer. It was by the subsequent purchase that such right was created and the purchase was subject to the doctrine of *lis pendens*. The first defendant ought to have paid the amount under the mortgage decree and prevented the sale in execution in the same way in which the mortgagors might have done. It is no doubt true that the purchaser had reference to the order that the property might be sold subject to the prior mortgage, but the order did not create a right to redeem which came into existence only after the purchase. The fact that the mortgagor knew of the order makes no difference, as he only sought to enforce his mortgage which he was legally entitled to do and no notice of the suit was necessary to the first defendant who is sought to be affected by *lis pendens*—*Manual Frual v. Sanagapalli Latchmidevamma* (2). We may observe that in the case of *Manual Frual v. Sanagapalli Latchmidevamma* (2) there was also an attachment and the doctrine of *lis pendens* was nevertheless held applicable.

The decrees of the Courts below are, therefore, set aside and the plaintiff’s claim is decreed with costs throughout. The mesne profits claimed will be ascertained in execution and awarded to the plaintiff.

---

(1) 21 W. R. 349.
(2) 7 M. H. C. R. 104.
(3) 6 C. 663 = 7 C. L. R. 201 = 5 Ind. Jur. 472.
[494] APPELLATE CIVIL.

Before Mr. Justice Mutthusami Ayyar, Officiating (Chief Justice),
and Mr. Justice Shephard.

KUNHI MANNAN (Defendant No. 5), Appellant, v.
CHALI VADUVATH AND OTHERS (Plaintiffs), Respondents.*
[16th July, 1891.]

Malabar law—Court sale—Decree on a mortgage to secure two debts—One debt only
binding on tarwad.

In a suit by members of a Malabar tarwad to set aside a sale in execution of a
decree, passed on a mortgage which had been executed by their karnavan and
senior anandravans in consolidation of two prior mortgages executed, respectively,
to secure two debts, it appeared that one of these debts was binding and the
other not binding on the tarwad:

Held, that the Court should declare the plaintiffs entitled to the property sold
notwithstanding the sale, but subject to the charge created to secure the binding
debt.

Second appeal against the decree of C. Gopalan Nayar, Subordi-
nate Judge of North Malabar, in appeal suit No. 509 of 1889, confirming
the decree of A. Venkataratnam Pai, District Munsif of Tollicherry, in
original suit No. 252 of 1888.

Suit by certain members of a Malabar tarwad against their karnavan
and three other members of the tarwad and a person who had obtained a
decree against the last-named members of the tarwad, in execution of
which he had brought to sale and purchased property belonging to the
tarwad for a declaration that this sale was not binding on the tarwad.

The decree in question was passed upon a mortgage executed by the
Karnavan and two senior anandravans in consolidation of two mortgages,
one of which (filed in this suit as Exhibit I) was executed to secure a debt
which was now found to have been contracted for tarwad purposes, and
the other of which (filed in this suit as Exhibit V), was executed to secure
a debt which was now found to have been contracted under no circum-
stances of justifying necessity.

The District Munsif passed a decree as follows:—

[495] “It is declared that, without prejudice to the mortgage I, the
sale of plaint property in execution of the decree in original suit No. 483
of 1887 passed upon the mortgage bond IV be, and the same hereby is,
set aside;” and this decree was affirmed on appeal by the Subordinate
Judge.

Defendant No. 5 preferred this second appeal.
The Acting Advocate-General (Hon. Mr. Wedderburn), for appellant.
Mr. Gantz, for respondents.

JUDGMENT.

The only question raised is with regard to the money originally
secured by Exhibit I. The decree as framed is made without prejudice to
that mortgage, but the fact is overlooked that this mortgage is merged in
the decree which led to the sale sought to be set aside. The proper decree
should be as follows:— “We declare that the plaintiff is entitled to the
property notwithstanding the sale but subject to a charge in favour of the

* Second Appeal No. 665 of 1890.
fifth defendant on the property sold for so much of the decree amount as relates to the money secured by Exhibit I with interest thereon at the rate of 6 per cent. per annum from 22nd October 1887 up to date of payment."
The suit was substantially a suit for a declaration, and the Lower Appellate Court was probably in error in directing the payment of Rs. 32. But we have no power to interfere.
The appeal has substantially failed and therefore the appellant must pay the respondents' costs.

**APPELLATE CIVIL.**

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

**KUTTYASSAN (Defendant No. 2), Appellant v. MAYAN AND ANOTHER (Plaintiff and Defendant No. 1), Respondents.**

[23rd March and 16th April, 1891.]

*Malabar Law—Will—Gift of a life interest—Limitation.*

The karnavan of Malabar tarwad executed an instrument described as a vaspat whereby he made a gift of a life interest in certain self-acquired property, to come into operation at once. The members of his tarwad acquiesced in this disposition of the property. In a suit by his successor in the office of karnavan to recover the property:

_Boled, that time began to run for the purposes of limitation from the death of the donee._

_Quere, whether the principle laid down in Alami v. Komu (I.L.R., 12 Mad., 125) would apply in the case of a will made by a member of a Malabar tarwad having heirs in the tarwad._

SECOND appeal against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 263 of 1889, reversing the decree of S. Raghunathayya, District Munsif of Tellicherry, in original suit No. 613 of 1886.

Suit by the karnavan of a Malabar tarwad to recover possession of certain land.

The plaintiff's case was that the land in question was property of his deceased karnavan, Chathankandi Kunhi Mayan, who was married to one Ummaya, a member of second defendant's tarwad; that under a will (Exhibit A), dated the 17th Karkidakam 1029 (31st July 1854), Kunhi Mayan devised the property to his wife Ummaya and his daughter Pathumma for life with reversion to his own tarwad; and that, as Ummaya died in 1857 (1881-82) Pathumma having predeceased her, plaintiff was entitled to the possession of the property. The first defendant was alleged to be in possession as Ummaya's tenant. The defendants denied the will and Kunhi Mayan's right to the paraamba, which, they said, was the jomn of second defendant's tarwad, and was now held by the first defendant under a lease (Exhibit III) granted to him by Ummaya's brother and the second defendant's karnavan, Kunhamed Musaliar, in August 1876. They denied the plaintiff's claim to be the karnavan of his tarwad, and also pleaded limitation.

The District Munsif found that plaintiff was the karnavan of his tarwad and therefore competent to maintain the suit, and that the land in

* Second Appeal No. 543 of 1890.
question was the property of plaintiff’s karnavan Kunhi Mayan and did pass to the possession of his wife and daughter on his death under the will in Exhibit A; he was nevertheless of opinion that the will was invalid as against the other members of Kunhi Mayan’s tarwad under the Malabar Law, but ruled, however, that, as they allowed his widow and daughter and the other members of the second defendant’s tarwad to continue in their occupation since Kunhi Mayan’s death in [497] 1034 (1858-89), their present claim for possession was barred by limitation. The District Munsif accordingly passed a decree dismissing the suit. The Subordinate Judge on appeal held that the instrument was valid as a will, and that since the person who took under it survived until 1880, the suit was not barred by limitation, and accordingly passed a decree for the plaintiff.

Defendant No. 2 preferred this second appeal.

Sankara Menon, for appellant.
Ryru Nambi, for respondent.

JUDGMENT.

The District Munsif found that plaintiff was the karnavan of his tarwad and that the plaint property was the self-acquisition of the former karnavan Kunhi Mayan, but that the so-called will (vasyat) was not valid since the property lapsed to the tarwad at Kunhi Mayan’s death in 1859 (Kallati Kunju Menon v. Patil Erracha Menon (1), and hence that the suit was barred.

On appeal the Subordinate Judge concurred with the District Munsif on the first two issues, but held on the authority of Alami v. Komu (2), and S.A. No. 395 of 1887, that the will was valid, inasmuch as Kunhi Mayan had a power of disposition by gift inter vivos, and secondly, that the family had accepted and recognized the life interest of Ummaya and that limitation could only run against defendants from the date of her death (880); hence that the suit was not barred.

In the case of Alami v. Komu (2) the testator had no heirs of any kind, and the question was between his devisees and the Crown in S.A. No. 395 of 1887, the question was between devisees and Attaladakam heirs only; and in both these cases the will was held valid.

But it is not necessary in the present case to decide whether the principle laid down in Alami v. Komu (2) would apply when there were heirs in the tarwad itself, for, on referring to the vasyat (Exhibit A), we find that it purports to be a deed of gift and not a testamentary disposition, though the gift is limited to a life interest only. It purports, however, to come into effect at once, and thus must be regarded as a gift inter vivos, and the Subordinate Judge is fully justified in finding on the evidence that the disposition has been recognized and accepted by the tarwad.

[498] Time will therefore run from the death of Ummaya in 1880, and, as it is found that defendants only got possession through this lady, the suit is not barred.

The second appeal is dismissed with cost.

1) 2 M. H. C. R. 169.
(2) 12 M. 126.
14 Mad. 499

INDIAN DECISIONS, NEW SERIES

14 M. 498—1 M.L.J. 752.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

PARAMASIVA (Defendant', Appellant v. KRISHNA (Plaintiff), Respondent.* [8th May, 1891.]

Practice—Non-joiner—Civil Procedure Code, Act X of 1877, Section 294, amended by
Act XII of 1879—Purchase at a Court-sale on behalf of a judgment-creditor without
permission of the Court.

Under Civil Procedure Code of 1877, as amended by Act XII of 1879, a pur-
chase made at a Court-sale on behalf of a judgment-creditor was not invalid for
want of permission of the Court.

Where a suit is brought by one member of an undivided Hindu family to
recover land, the property of the family, and no objection is taken at the hearing
on the ground of the non-joiner of the plaintiff’s co-parceners, it is not open to
an unsuccessful defendant to raise such objection on appeal.

[Appe., 5 M.L.T. 248 (253); R., 22 B. 621 (623); 2 N.L. R. 45 (46).]

SECOND appeal against the decree of W. F. Grahame, District
Judge of Tinnevelly, in appeal suit No. 256 of 1889, confirming the decree
of S. Krishnaswami Ayyar, District Munsif of Siviviliputur, in original
suit No. 275 of 1888.

Suit to recover possession of certain land. Vedanta Ayyangar,
the undivided brother (deceased) of the plaintiff obtained a decree on
a mortgage against the brother and sister of the defendant in original
suit No. 47 of 1878 on the file of the District Munsif of Siviviliputur. The
mortgaged property was attached and brought to sale in execution
on 8th June 1881. The plaintiff became the purchaser of the land
for his undivided brother, who subsequently died, and the land became
the property of the undivided family. The sale to the plaintiff was
confirmed on 11th August 1881, but he did not obtain a sale cer-
tificate until 24th September 1886. The same property was attached in
[499] execution of a money decree obtained in small cause suit No. 307
of 1877 in the same Court by the defendant against his own brother
above referred to. The property was brought to sale on 13th June 1881;
the sale was confirmed on 15th August 1881. The sale certificate was
issued on 6th October 1883 and the purchaser obtained possession from
the judgment-debtor.

On 29th October 1887 the District Munsif passed an order on civil
miscellaneous petition No. 678 of 1887 directing the delivery of one moiety
only of the property purchased by the plaintiff to him. The plaintiff now
sued to set aside the above order and to obtain possession of the other
moiety from the defendant.

The District Munsif passed a decree as prayed. The defendants
preferred an appeal to the District Judge on the ground, among others,
that the plaintiff had no right to sue alone, he being a member of an un-
divided Hindu family consisting of two or more co-parceners as admitted
by himself. This defence had not been raised in the District Munsif’s
Court, where the plea mainly relied on was as follows, viz., that a few
days after the sale in execution of the decree in original suit No. 47 of 1878
the judgment-debtor had paid the whole of the decree-amount inclusive
of the auction-purchase money to the plaintiffs therein and that the
auction purchase was privately set aside by the parties, the plaintiff therein
promising to certify that fact to the Court and not to seek to obtain a
sale certificate. The allegations upon which this plea rested were held by
the District Munsif not to have been substantiated and this view was con-
curred in by the District Judge who proceeded to deal with the other
questions in the appeal as follows:—

"Defendant's pleader then argued that under Section 294, Civil
"Procedure Code, the purchase by plaintiff's brother for plaintiff, the
decease-holder, is ipso facto void, and I am referred to the decision in
"Mahomed Gazee Chowdry v. Ram Loll Sen (1). Under Act X of 1877,
a decease-holder could not bid without special permission and a purchase
by him was invalid—vide Rukhinee Bullubh v. Brojonath Sircar (2)
and Narayan Deshpande v. Anaji Deshpande (3). But under the provi-
sions of the present Civil Procedure Code, XVI of 1882, such a purchase
is not necessarily invalid, but may be set aside by the Court under
"[500] clause 3 of Section 294 "on the application of the judgment-
debt or any other person interested in the sale." This is also laid down
in Javherbai v. Haribhai (4) and in Chintamanrao Natu v. Vithabai (5)
and in Mathura Das v. Nathuni Lall Mahata (6). Therefore, the conten-
tion is of no avail to defendant. Not only was no application made to
cancel the sale but the Court actually confirmed it.

"It was then objected that the suit was not sustainable because
plaintiff is not the only member of his family who is interested in the
suit and that the others ought to have been added to the array of parties.
As to this I have merely to remark that Section 34, Civil Procedure
Code, requires this objection to be raised at the earliest possible stage,
and that I cannot consider it in appeal, for it was not raised before the
District Munsif—vide the remarks of Broughton, J. (page 602), in
"Rajnarain Bose v. Universal Life Assurance Company (7). This objection
ought to be taken before the first hearing, or it will be held to have
been waived.

"The result then is (1) that defendant has failed to prove the agree-
ment with plaintiff which he set up, (2) that the objection of others
being interested is raised too late, (3) that the purchase by plaintiff for
the decease-holder is not invalid, (4) that plaintiff did not as alleged play
a fraud upon the Court by seeking to evade the provisions of Section 294,
Civil Procedure Code, and (5) that since the property before the death
of Vedanta Ayyangar became the property of the joint family, of which
he was an undivided member and by survivorship has passed to plaintiff
and others, the plaintiff certainly can bring the suit. Therefore, this
appeal fails. The decree of the Lower Court is confirmed and this appeal
is dismissed with costs."

Defendant preferred this second appeal.

Rangacharyar, for appellant.

Parthasaradhi Ayyangar, for respondent.

JUDGMENT.

As to the point that plaintiff's purchase being on behalf of the judg-
ment-creditor was invalid being made without the permission of the Court,
the last clause of Section 294 of the Code of Civil Procedure, Act X of 1877,

(1) 10 C. 767.  
(6) 11 B. 686.  
(2) 5 C. 398.  
(6) 11 C. 781.  
(3) 5 B. 130.  
(7) 7 C. 594.  
(4) 5 B. 575.
in force at the time [501] of the purchase as amended by Act XII of 1879 stood as in the corresponding section of the present Code, and clearly negatives, in our opinion, the view that not obtaining the permission of the Court invalidates the purchase and this opinion is in accordance with the decisions referred to by the District Judge.

The objection that Vedanta Ayyangar's heirs were not made parties to the suit was we think rightly disallowed by the District Judge as taken too late. It is urged that appellant is entitled to compensation for improvements. The District Munsif disallowed the claim, and though it was made a ground of appeal to the District Court, it does not appear to have been urged in that Court, nor do we see any legal foundation for the claim.

The second appeal is dismissed with costs.
I.L.R., 15 MADRAS.

15 M. 1.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Anyar and Mr. Justice Handley.

NARAYANA (Plaintiff), Appellant v. CHANDRA AND OTHERS (Defendants), Respondents.* [7th and 25th August, 1891.]

Panchayet—Regulation XXXII of 1802 (Madras)—Regulation XII of 1816 (Madras)—Cases in which a District Panchayet may be appointed—Finality of award—Notice of nomination of Panchayetdars.

The applicability of the procedure provided in Regulation XII of 1816 is not limited to cases in which a breach of the peace has taken place or is apprehended. When a District Panchayet, appointed under that regulation, has come to a decision, that decision is final and conclusive between the parties and cannot be impeached or set aside, except in the manner prescribed by the regulation. Such decision is not invalid, because only one party consented to the reference of the matter in dispute to a Panchayet, or because the other party, who protested against the proceedings, had not notice of the time when the nomination of the Panchayetdars was to take place.

APPEAL against the decree of E. C. Johnson, Acting District Judge of Ganjam, in original suit No. 13 of 1889.

The facts of the case appear sufficiently for the purposes of this report from the judgment of the High Court.

Anandacharlu and Sunnara Rau, for appellant.

Ramachandra Rau Saheb, for respondent No. 1.

Mr. Powell, for respondent No. 2.

JUDGMENT.

This was a suit by the Zemindar of Pedda Kini to set aside the decision of a District Panchayet under Regulation [2] XII of 1816 awarding certain lands to the Zemindar of Chikati. The 1st defendant is the Zemindar of Chikati, 2nd defendant the Collector of Ganjam, the 3rd defendant the District Munsif of Berhampore who convened the Panchayet: defendants Nos. 4 to 8 are Panchayetdars.

The District Judge held that defendants Nos. 2 to 8 were not necessary parties and struck them off the record, but plaintiff has made them respondents to this appeal.

Plaintiff's Zemindari lies to the north of the 1st defendant's and the estates are coextensive for some distance, and there has been a longstanding dispute as to the boundary between the plaintiff's village of Jakkala and the 1st defendant's village of Kapanavugam involving about 200 acres of land, which each Zemindar claims to be within the boundaries of his own village.

By an order of 5th June 1888 the Collector referred the matter under Regulation XII of 1816 to the District Munsif for disposal by a District Panchayet under the regulation.

*Appeal No. 65 of 1890.

351.
The District Munsif assembled a District Panchayet, which passed a decree in favour of the 1st defendant on the 29th of July 1888.

Plaintiff sues to set aside that decree on seven grounds:

(a) That the Panchayet was not properly constituted.

(b) That no notice was given by the Munsif to plaintiff before constituting the Panchayet.

(c) That plaintiff was not allowed an opportunity of objecting to the Panchayet-dars and they were appointed without consulting him.

(d) No opportunity was allowed to plaintiff of naming two Panchayet-dars as required by Regulation V of 1816.

(e) The various steps prescribed by Section 4 of Regulation V of 1816 were not strictly adhered to.

(f) The award was not read in the presence of the parties as required by Section 6 of Regulation XII of 1816.

(g) The Panchayet-dars went beyond their powers in proceeding to decide the rights of the plaintiff and the 1st defendant to the lands, tanks, &c., in dispute and in ordering them to be made over to the 1st defendant.

The plaint also prays that, as plaintiff has been dispossessed of the lands, &c., he may be replaced in possession with mesne profits. The 1st defendant by his written statement denied [3] plaintiff’s right altogether and the allegations in the plaint as to the irregularity of the procedure.

Three issues were settled, which are called preliminary:

1. Whether, under the circumstances, the Collector had jurisdiction to refer the suit for the decision of a District Panchayet.

2. Should the order of the Panchayet be set aside on the ground that no notice was given to plaintiff before nominating the Panchayet?

3. Should it be set aside on any of the grounds (a), (c), (d), (e), or (f)?

The Judge made a note on the issue paper that, should any of these issues be decided in favour of plaintiff, it would be time enough to settle issues as to the title.

The District Judge found all the issues against the plaintiff and dismissed the suit with costs.

Plaintiff appeals.

There was a previous application for a reference to a District Panchayet in 1884 and the District Court then held that District Panchayets had become obsolete, Regulation VII of 1816, which constituted them, having been repealed. On appeal, the High Court held that the jurisdiction of District Panchayets still existed for the purposes of Regulation XII of 1816, but set aside the award on the ground of irregularity of procedure. The case is reported as Chikati Zemindar v. Peddakimedi Zemindar (1).

In the present appeal, the appellant’s Vakil first argues that this was not a case for a reference to a Panchayet under Regulation XII of 1816, because no breach of the peace had taken place, or was apprehended. It is contended that, as Regulation XII of 1816 was only intended to add a new remedy to those provided by Regulation XXXII of 1802 and as the object of the latter Regulation, as shown by the preamble, was to prevent forcible dispossession and consequent breaches of the peace, it is a condition precedent to Regulation XII of 1816 being put in force that a breach of the peace should either have happened or be apprehended.
This argument appears to us to be founded on a mistaken view of the object and scope of the regulations. Regulation [4] XXXII of 1802 by Section 2 enacts that persons shall not assert their claims to lands or crops by force, but have recourse to the Civil Courts, that is, it proclaims what was already the law. Sections 3, 4 and 5 provide a summary remedy when persons persist in asserting their rights by force, viz., the restoration of possession without reference to title, and if death or other injury is caused, the forfeiture of the guilty party's rights, if any. Section 6 provides for forfeiture of the disputed property to Government and punishment by the Criminal Courts when force is used on both sides and an affray takes place.

Regulation XII of 1816 recites that the remedy by recourse to Civil Courts prescribed by Section 2 of Regulation XXXII of 1802 had been found to be insufficient and provides for the determination by Village or District Panchayats of (1) "claims to lands or crops in districts permanently settled or otherwise, the validity of which may depend on the determination of an uncertain or disputed boundary or land mark;" and (2) "cases of disputes respecting the occupying, cultivating, and irrigating of land which may arise between the proprietors or renters and their ryots in those districts only, where the land revenue is fixed either permanently or for a term of years."

In cases coming within these two classes it was apparently considered that the Village or District Panchayets having local knowledge would be a more satisfactory tribunal than the Zillah Court.

The Village Panchayet is to be the tribunal when both parties agree to the reference and the District Panchayet when one only desires it.

Nothing whatever is said in Regulation XII of 1816 or Section 2 of Regulation XXXII of 1802, to which it refers about a breach of the peace, and there is nothing to limit the application of Regulation XII of 1816 to cases in which a breach of the peace exists or is anticipated.

It is next argued on behalf of the appellant that the procedure under Regulation XII of 1816 is only summary and does not oust the ordinary jurisdiction of the Civil Courts. This argument is not quite accurately stated. No doubt, in one sense, the procedure under Regulation XII of 1816 does not oust the jurisdiction of the Civil Courts. If a suit were filed in the Civil [5] Court first, it would be no answer to it to say that the matter should be referred to a Panchayet under Regulation XII of 1816. The regulation provides an alternative remedy to that of having recourse to the Civil Courts. The question is whether, when the jurisdiction of the Panchayet has once been called into play and a decision passed in due course, the matter can again be litigated in a Civil Court. It is contended that this question must be answered in the affirmative, because the proceeding contemplated by the regulation is a summary proceeding, and can never have been intended for a final adjudication of questions of title. The only reason assigned for treating the proceeding provided for by the regulation as summary is that in the case of the reference to a District Panchayet, it is a proceeding taken in spite of the objection of one party. It is argued that the consent of both parties is essential in order that an award may be final and conclusive, and that it cannot have been the intention of the Legislature to make a decision of a Panchayet on a question of title final and binding on both parties, where only one consented to refer the matter to the Panchayet.

To ascertain the intention of the Legislature, we must look at the words of the enactment when they are clear and free from doubt, and we
can see nothing in the words of the regulation to indicate an intention that
the decision of a Panchayet under it should not be final and conclusive
between the parties, and on the contrary there is much to indicate the
opposite intention. The reason given for the provisions of the regulation,
viz., that the remedy of recourse to the Civil Court provided by Section 2
of Regulation XXXII of 1803 had proved insufficient, seems to indicate
the contrary, as also that the procedure prescribed is similar to that in
regular suit. Plaints and decrees are spoken of. The decree is not to be
set aside for any other cause than gross partiality of the Panchayetdars.
No appeal is provided, and when the award is set aside for partiality
and the second Panchayet agrees with the first, its decision shall be
final.

Clause 8 of Section 5, which provides that if neither party agrees to
the reference of the suit to a District Panchayet, "the suit shall be dismissed
and the parties shall be at liberty to seek redress from the Zillah Court or
any competent jurisdiction," seems to point in the same direction. We
must hold that the decision of a District Panchayet under the regula-
tion is final [6] and conclusive between the parties and cannot be
impeached or set aside except in the manner prescribed by the regulation.

Lastly, it is argued that the decision of the Panchayet is invalid on
the ground of irregularity of procedure. The only irregularity relied on
in appeal is that no notice was given by the District Munsif to plaintiff
before nominating the Panchayet.

The regulation does not require such notice; but plaintiff had,
as a matter of fact, ample notice of the proceedings. He was duly sum-
momed and informed that the matter was referred to the District Munsif
for decision by a District Panchayet within 15 days. He knew, therefore,
the time within which the Panchayet must be assembled and it was his
business to find out when the nomination of the Panchayet was to take
place. The truth is the objection on this ground does not lie in plaintiff's
mouth at all, for he all along protested against the proceedings and declined
to appear or be represented by a Vakil.

We agree with the District Judge that plaintiff has failed to show any
valid reason why the Panchayet's decision should be set aside and we
confirm the decree of the Lower Court and dismiss this appeal with separate
costs of defendants Nos. 1 and 2.

15 M. 6.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar (Officiating Chief Justice),
and Mr. Justice Wilkinson.

SHANKARAN AND OTHERS (Plaintiffs, Nos. 1 to 14), Appellants v.
KESAVAN AND OTHERS (Defendants, Nos. 1 to 11), Respondents.*

[29th January and 11th August, 1891.]

Malabar law—Adoption by the last member of a Nambudri ilom—Limitation Act—Act
XV of 1877, Schedule II, Articles 91, 190—Civil Procedure Code, Section 13—
Res judicata.

In a suit for a declaration that the members of the Nambudri ilom to which
the plaintiffs belonged were the sole heirs and successors of an ilom known as
[7] Kiluvapura, of which the natural line had become extinct, and for possession

* Second Appeal No. 179 of 1890.
of certain land which had formed part of its property, the defendants were the karnavan and manager of the plaintiffs' illom and the members of another illom. It was found on the evidence that the plaintiffs' karnavan had been adopted into the Kiluvapura illom, and that subsequently that illom and the plaintiffs' had been amalgamated under a karré executed by, among others, the wife of the last male member of the Kiluvapura illom, and that she had died less than twelve years before this suit. The defendants, other than the karnavan and manager of the plaintiffs' illom, asserted a right to a moiety of the property of the Kiluvapura illom (with which, however, it was now found on the evidence that they were less closely connected than the plaintiffs), and it appeared that that right had been similarly asserted in suits brought after the date of the karré above referred to, by a member of the defendants' illom against the karnavan and manager of the plaintiffs' illom, and that decrees had been passed therein negating the title now set up by the plaintiffs and that part of the property now claimed was held under one of those decrees. The plaintiffs did not ask that those decrees should be set aside:

Held, (1) that the suit was not barred by limitation;

(2) that it was unnecessary for the plaintiffs to prove mala fides against their karnavan in respect of his conduct in the former suits or to seek that the decrees passed therein be set aside, and that those decrees did not constitute the present claim res judicata, as the karnavan was not then impleaded in his capacity as such;

(3) that the adoption of the plaintiffs' karnavan was valid even assuming that no data-bomam was performed, and the last male member of the Kiluvapura illom had died after merely indicating him as his heir, and the widow adopted him in the Dwayamushayana form;

(4) that the plaintiffs were entitled to a decree as prayed.

SECOND appeal against the decree of H. K. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 1039 of 1888, confirming the decree of V. Raman Memon, District Munsif of Angadiprom, in original suit No. 210 of 1887.

The plaintiffs were the junior members of a Nambudri illom called Alakapura, of which defendant No. 10 was the de jure karnavan, defendant No. 11 being in actual management. The plaintiffs sought (1) a declaration that the members of their illom were the sole heirs and successors of an illom known as Kiluvapura, of which the natural line had become extinct, and (2) possession of certain land which had formed part of its property.

Defendants Nos. 1 to 9 were members of the Valakannath illom and as such claimed to be entitled by inheritance to a moiety of the property of the Kiluvapura illom; they denied the plaintiffs' title and pleaded, inter alia, that the suit was barred by limitation, and also precluded by Civil Procedure Code, Section 13, (8) by reason of the decrees passed in two suits, viz., original suits No. 107 of 1876 and No. 389 of 1878, on the file of the District Munsif of Pattambi.

In original suit No. 107 of 1876 the present defendant No. 1 was the plaintiff, and the present defendants Nos. 10 and 11 were the first and second defendants. The prayer of the plaint was for a declaration of title to and for possession of a moiety of the land now in question. An issue was framed as follows:—"whether plaintiffs and defendants Nos. 1 and 2 have equal claim to Kiluvapura illom." Upon this issue a finding in the affirmative was recorded after contest between the parties; but no decree for possession was passed, because the tenants in actual possession had not been brought on to the record.

Original suit No. 389 of 1878 was thereupon brought by the same plaintiff against the same defendants above referred to and also the tenants in possession. After a similar contest the Court found that the plaintiff
had the right claimed by him and accordingly passed a decree for possession which was subsequently executed.

The plaintiffs relied on the facts that they were not parties to those two suits, and that defendant No. 10 had not been impleaded in his character as karavu; they also charged that the decrees were obtained through the negligence, fraud and collusion of defendants Nos. 10 and 11.

A further question arose upon the following allegations in the plaint, viz., that defendant No. 10 had been adopted into the Kiluvapura illom, and that when he attained his majority he had executed a karar, dated the 21st April 1864, to which defendant No. 11, plaintiff No. 1, and the widow of the last surviving male member of the Kiluvapura illom were some of the parties, whereby it was provided that the properties of the plaintiffs’ illom and the Kiluvapura illom should be amalgamated and the two illoms formed into one.

The District Munsif held that the claim in this suit was res judicata by the reason of the above decrees and further held that defendant No. 10 had not been adopted as alleged, but that the karar of 1864 constituted a binding agreement, whereby the two illoms were amalgamated and the plaintiffs became the heirs to the property of the Kiluvapura illom.

[9] Upon the first of the above findings the District Munsif dismissed the suit.

This decree was upheld, on appeal, by the Subordinate Judge, who similarly held that the claim was res judicata, and also inferred from the evidence that the illoms of the plaintiffs and defendants were related in equal degree to the extinct illom.

The plaintiffs preferred this second appeal.

Sankaran Nayar, for appellants.

Sankara Menon and Sundara Ayyar, for respondents.

JUDGMENT (PRELIMINARY).

The first contention is that the claim is not res judicata by reason of the decree in original suit No. 107 of 1876 or in original suit No. 389 of 1878. The District Munsif distinctly found that the claim was res judicata and the Subordinate Judge came to the same conclusion, though he does not refer to the decision in original suit No. 389 of 1878. Having regard to the decision of this Court in Sri Devi v. Kelu Eradi (1), we are unable to uphold this finding.

The Subordinate Judge has omitted to record any finding on the question of adoption. The plaint distinctly sets forth the adoption, and, if the adoption were true, no question of any reversionary right could arise, and the karar to which the adopted son was a party would prevail.

We must therefore ask the Subordinate Judge to record a distinct finding on the question of the adoption of the tenth defendant on the evidence on record.

As to the relationship the Subordinate Judge refers to certain documents and then observes that, as the illoms of the plaintiffs and contending defendants were found to be related in the same degree to the extinct illoms of Pattoli and Padinharedom, it follows that they were also related in the same degree to the Kiluvapura illom. We are unable to follow this argument. If as is asserted by the plaintiffs that Kiluvapura illom
was an offshoot of Alakapura, the reasoning would certainly not hold good.

We must therefore ask the Subordinate Judge to consider the evidence on record and come to a revised finding on the question of relationship. The amalgamation and management of the joint illoms Alakapura and Kiluvapura by the members of the plaintiff's illom under the karar A was by the consent of the last surviving member of the Kiluvapura illom, who was the widow of Parameswaran Nambudri. She died within twelve years before the suit and possession under her during her life cannot support a claim of title by prescription as against the reversioners.

It is contended by respondents' pleader that the suit is barred by limitation either under Article 91 or under Article 120. With reference to the decision already cited, plaintiffs were entitled to recover possession in spite of the decrees in original suit No. 107 of 1876 and No. 389 of 1878 on proof of title without also showing mala fides on the part of the karnavan.

We do not therefore consider that the omission to ask in the plaint for the setting aside of those decrees can be pressed against plaintiffs.

Findings to be submitted within six weeks from date of receipt of this order, and seven days after posting of the finding in this Court will be allowed for filing objections.

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

"My finding is (1) that the tenth defendant is the adopted son of the deceased Kiluvapura Parameswaran Nambudri and his wife Shridevi Anderjanom, and (2) that he was more nearly connected with the Kiluvapura illom than the first to seventh defendants' Valakunnath illom."

This second appeal coming on for final hearing, the Court delivered judgment as follows:

**JUDGMENT (FINAL).**

The Subordinate Judge finds that the tenth defendant was adopted into the Kiluvapura illom, and that the Kiluvapura illom was an offshoot of Alakapura illom. It is objected that the Subordinate Judge has overlooked Exhibit XVIII in which tenth defendant's grandfather, Narayanan Nambudri, stated that the land sued for in original suit No. 417 of 1840 was the property of the Alakapura Padnhabare-mana, and it is argued that this recital is strong evidence that the contention of the respondents was well founded. The real contention of the respondents was that Kiluvapura was the parent stock and that the other four illoms were its offshoots. It is true that the Subordinate Judge has not expressly referred to Exhibit XVIII, but he bases his finding as to Kiluvapura being an offshoot of Alakapura on evidence, and also shows that for some years past in every transaction between the people of Alakapura and Kiluvapura, identity of interest has been assumed. He also finds that the respondents' contention is not supported by the evidence. We therefore see no reason for thinking that the finding of the Subordinate Judge is open to any objection.

With reference to the adoption it is alleged that the finding of the Subordinate Judge is at variance with the case set up in the plaint. The plaintiffs' case was substantially this, that he had by affiliation become a member of the Kiluvapura illom, and even assuming that no datta-homam
was performed, that Parameswaran Nambudri died after merely indicating the tenth defendant as his heir, and that as found by the Subordinate Judge the widow adopted Kuberan in the Dwayamushyayana form. We see no reason to hold that the adoption was anything but valid. There is a distinct finding of the Subordinate Judge that Kuberan was adopted, and the circumstances may be regarded as mere surplusage. We accept the finding of the Subordinate Judge and setting aside the decrees of the Courts below give plaintiff a decree as prayed for a declaration of their title and for possession of the properties mentioned in Exhibit B. As regards mesne profits the finding of the District Munsif was that the annual yield of the land was 30 paras. No objection was taken, on appeal, to the finding, which we therefore accept and decree mesne profits for three years and future mesne profits. The plaintiffs are entitled to their costs throughout.

15 M. 12.

[12] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

VENKATASAMI (Plaintiff), Appellant v. VENKATREDDI AND OTHERS (Defendants), Respondents.*

[16th March and 17th August, 1891.]

Evidence Act—Act I of 1872, Section 35—Res inter alios acta—Title-deeds—Petition of plaintiff’s predecessor asserting title—Judgment obtained by plaintiff’s predecessor recognizing title.

In a suit to establish the plaintiff’s title to certain land, he put in evidence (1) a conveyance in favour of his father, (2) a sale-certificate issued to his father’s vendor, (3) an order made in certain execution proceedings in which was recited a petition by his father asserting his title, (4) a judgment obtained by his father in which his title was recognized. Neither the defendants nor their predecessors were parties to any of these instruments or proceedings:

Held, that all these documents were relevant.

[R., 24 B. 591 (599).]

SECOND appeal against the decree of M. B. Sundara Rau, Acting Subordinate Judge of Ellore, in appeal suit No. 297 of 1888, reversing the decree of O. Sivaramakristnamma, District Munsif of Ellore, in original suit No. 109 of 1888.

Suit for a declaration of the plaintiff’s title to certain land and for an injunction restraining the defendants from interfering with the plaintiff’s possession.

The plaintiff and the defendants averred that the land formed part of the ancestral property of their respective families. The first issue was framed with reference to these averments.

The plaintiff’s case was that the land in question formed part of the family property, which was divided between his father and his uncle Tataya; that Tataya’s share in it and other property was attached and brought to sale in execution of a decree obtained against him by Tammana Ratnam in original suit No. 239 of 1866 on the file of the District Munisif of Ellore and purchased by the judgment-creditor, who obtained a sale-certificate filed in this suit and marked as Exhibit A; and that the purchaser sold

* Second Appeal No. 1492 of 1889.

358
it to the plaintiff's father under a conveyance, dated 6th October 1875 and filed in this suit and marked as Exhibit B; Tataya's share was subsequently attached in execution of a decree obtained against him by Mohamed Azam Saheb in original suit No. 255 of 1867, and the plaintiff's father intervened by petition in execution, but the attachment was released on payment of the judgment-debt without trial of the petition; an extract from the proceedings of the District Munsif of Ellore, dated 15th June 1876, which was filed in this suit as Exhibit D, contained a recital of the above-mentioned petition, stating the petitioner's title and the order releasing the attachment. In 1877 the plaintiff's father brought original suit No. 171 of 1877 in the same Court against his vendor's son and two persons in occupation, to eject the latter from the premises sold to him under the conveyance of the 6th October 1875 and obtained a decree; the judgment in that suit, filed in this suit as Exhibit C, set out the plaintiff's title and the pleas of the contending defendant, viz., that it had been agreed between the plaintiff and Tataya that the property should be returned to the latter, under whose will the contending defendant claimed title.

The District Munsif passed a decree for the plaintiff. This decree was reversed, on appeal, by the Subordinate Judge, who held that the oral evidence did not establish the plaintiff's title, and ruled that the documentary evidence above referred to, was inadmissible for reasons stated in his judgment as follows:

"The fact of the existence of the sale-certificate (Exhibit A) and judgment (Exhibit C), to which defendants or the person or persons through whom they claim were no parties, do not affect defendants' right. There is nothing to show that the defendants or their predecessors in title were aware of the fact of the sale or of the judgment. There is no evidence on record that the purchaser, under Exhibit A, was put in possession of the premises purchased, whereby to show that, if the defendants were in possession of the ground claimed, they would either have resisted delivery or taken steps to have their right established to it having the sale-certificate and judgment set aside. Likewise Exhibit B (the sale-deed) is res inter alios acta. The same remarks are applicable, with equal force, in regard to Exhibit D. We must not, therefore, be misled by Exhibits A to D which, in their present state, are irrelevant to the present case."

The plaintiff preferred this second appeal.
Parthasaradhi Ayyangar, for appellant.
Bhashyam Ayyangar, for respondents.

JUDGMENT.

The Subordinate Judge was in error in holding that Exhibits A to D were inadmissible in evidence against the defendants. It is true they are not conclusive, since the defendants were not parties to them, but they are relevant evidence as tending to show that the plaintiff's ancestors had dealt with the site as their own for a long term of years.

The Subordinate Judge has thus decided the case upon the oral evidence alone, the defendants not having, on their part, any title-deeds, and he has found a title in the defendants, acquired by adverse possession, as to which no issue was framed.

We must ask the Subordinate Judge to retry the first issue, taking into consideration the documents A to D, and return a revised finding thereon with reference to these observations.
Finding is to be returned within one month from the reopening of the Court after the recess, and seven days, after the posting of the finding in this Court, will be allowed for filing objections.

[In compliance with the above order, the Subordinate Judge submitted his revised finding on the first issue, which was in favour of the plaintiff.

The second appeal having come on for final hearing, their Lordships accepted the above finding and reversed the decree of the Subordinate Judge and restored that of the District Munsif.]

15 M. 15.

[15] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

ABDULKADAR (Defendant), Appellant v. MAHOMED (Plaintiff), Respondent. [*] [11th December, 1890, and 27th and 28th April and 11th September, 1891.]

Specific Relief Act—Act I of 1877, Sections 42, 56—Consequential relief—Civil Procedure Code, Section 53—Amendment of plaint.

The plaintiff obtained a decree in a suit in which he averred that he was entitled to the office of Sheik of Kallai and to certain properties attached thereto, and prayed for a declaration that the defendant had no right either to the office of Sheik or to the properties in question, for an injunction restraining him from interfering with the properties or doing anything in any way inconsistent with the plaintiff’s right to the office, and for further and other relief. It appeared, on the evidence for the defence, that the defendant was in possession of part of the property, but no issue had been framed as to the maintainability of the suit under the last clause of Specific Relief Act, Section 42.

Held, on appeal by the defendant that the Court of first instance should take evidence and try an issue specifically directed to this question.

It having appeared on the evidence recorded on that issue that the defendant was substantially in possession of the office of Sheik and of its emoluments:

Held, that the suit was not maintainable, although an injunction was asked for as relief consequential on the declaration.

The plaintiff was permitted to pay additional stamp duty and amend the plaint by adding a prayer for possession.

[F., 39 M. 452 (455)=5 Ind. Cas. 630=20 M.L.J. 301=7 M.L.T. 311; R., 28 B. 332 (336); 3 A.L.J. 316=A.W.N. (1903), 149; 5 Bom.L.R. 329 (330); 1 C.L.J. 73; 17 C.L.J. 380 (382); 14 M.L.J. 290 (292); 21 M.L.J. 952 (954)=10 M.L.T. 356=(1911) 2 M.W.N. 387 (390); 155 P.R. 1906=117 P.L.R. 1908; D., 15 M. 255 (257); 17 M. 232 (233).]

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No. 37 of 1888.

The plaintiff averred in the plaint that he was the Sheik of Kallai being solely entitled to that office and all the properties attached thereto, that on the death of his father and predecessor in office the defendant had obtained a certificate for the collection of his debts and subsequently "pre-tending that he is the Sheik, has been trying to obtain possession of the properties belonging to the stanom" and added "I have not been able to ascertain the loss caused to the stanom by such pretensions and acts of the defendant."

The prayer of the plaint was "that a decree may be passed declaring that the defendant has no right either to the office of the Sheik of..."
Kallai or to the properties * * * and that a per-[16]ual injunction
be granted restraining him * * * from dealing with the property in any
way * * * and from further doing anything inconsistent with plaintiff's
right to the office, and granting other reliefs which may be prayed for
and legally granted during the pendency of the suit."

The defendant pleaded that he was the Sheik and in possession of the
properties referred to in the plaint and added further pleas as follows:—
"The suit is not sustainable under Specific Relief Act, Section 56, and it is
not within the purview of Section 54 for the plaintiff to apply for the
injunction prayed for" and the relief claimed by the plaintiff is irregular
and one that cannot be granted."

The first issue related to the sufficiency of the stamp duty paid. The
next three issues were framed with reference to the opposing claims of the
plaintiff or defendant to be Sheik and the last was as follows:—"Whether
the suit for an injunction will properly lie under Specific Relief Act,
Section 56."

The Subordinate Judge passed a decree declaring "that the plaintiff
and not the defendant is the rightful Sheik......and as such entitled to
the properties, &c., belonging to the staunch." And issued an injunction
in the terms of the prayer of the plaint.

The defendant preferred this appeal on the ground, among others,
that the suit was not maintainable without a prayer for possession.
Bhashyam Ayyangar and Govinda Menon, for appellant.
Sankara Nayar and Rvru Nambiar, for respondent.

JUDGMENT.

It is argued that the defendant, as alleged in paragraph 4 of the
written statement, has been in possession of the mosque and its endowment
and that the suit for a declaration of title and an injunction without seek-
ing possession is not maintainable under Section 42 of the Specific Relief
Act. No specific issue has been framed as to this; and the fifth issue
appears to have been framed on a special application with reference to
the question whether a suit will lie for an injunction under Section 56 of
the Specific Relief Act. Some evidence as to possession appears to have
been given by the defendant and considered by the Subordinate Judge
under that issue. If, as some of the witnesses assert, the defendant is in
possession of the mosque and some of its emoluments, and if the tenants
have attorned to him or paid rent to him and executed fresh mukhayats and
agreed to hold under him, [17] we should be inclined to hold that plaint-
ifff must sue for possession. As plaintiff had to begin, and, as there
was no specific issue on this point, he had no opportunity of producing
evidence.

We shall therefore ask the Subordinate Judge to take evidence and
try the following issue and to submit a distinct finding within two months,
viz., whether the mosque and mukhayat and properties attached thereto
and the office of Sheikh and its emoluments, or any, and which of them,
were in possession of defendant at the date of the suit, and, if so, what is
the value of such property.

Seven days, after the posting of the finding in this Court, will be al-
lowed for filing objections.

[In compliance with the above order, the Subordinate Judge submitted
his finding as follows:—
"My finding is that the mosque and mukhayat at Kallai and certain
properties attached thereto, as shown in the subjoined list, were in the
possession of the defendant on the date of the suit; that there is no reliable
evidence that he was at the time in possession of the office of Sheik or of
any of its emoluments over and above the sum of Rs. 22 and 150 dangal-
lies of paddy a year, as deposed to by his seventeenth to nineteenth wit-
tesses, and that the value of such property is Rs. 12,910 as shown below.”

This appeal having come on again, the Court delivered judgment as
follows:

**JUDGMENT.**

The finding of the Subordinate Judge, on the issue referred to him
for trial, is that the mosque and mukham at Kallal and certain properties
attached thereto were in the defendant’s possession at the date of the suit
and that they are of the value of Rs. 12,910. After referring to the
evidence we are satisfied that it warrants the conclusion at which he has
arrived. We are further of opinion that there is sufficient proof that the
defendant is also substantially in possession of the office of Sheik and of
its emoluments. The evidence adduced for the plaintiff only shows that
he has received Nircha in two cases, and we do not consider it sufficient
to justify a finding that neither party was in possession of the office.
Upon these facts we think that a suit for a declaration of the plaintiff’s
right to the office cannot be maintained under Section 42 of the Specific
Relief Act without praying for possession of the mosque and its endow-
ments. Though the plaintiff prays for a perpetual injunction restraining the
[18] defendant from interfering with the exercise by the plaintiff of his
right to the office of Sheik, and, though an injunction is a form of
consequential relief, yet it is clearly not sufficient, when the defendant is
in possession, to meet the requirements of Section 42. As observed by
this Court in Chokalinga Pesama Naicker v. Achiyar (1), no suit will lie
under that section unless there is no attempt either to evade the stamp
law or to eject parties in possession under colour of a mere declaration of
title. The reasonable construction of Section 42 is that the further relief
which the plaintiff is bound to claim is such relief as he would be in a
position to claim from the defendant in an ordinary suit by virtue of the
title which he seeks to establish and of which he prays for a declaration.

Another contention urged upon us is that the plaintiff may be allow-
ed on appeal to pay additional stamp duty and to amend the plaint so as
to include a prayer for recovery of possession, and our attention is drawn
to Limba Bin Krishna v. Roma Bin Pimphu (2), Chomu v. Umma (3). It
was held in those cases that, where the objection that the suit for a mere
declaration of title was not maintainable was not taken in the Court of
First Instance, the plaint might be allowed to be amended on appeal.
Though in the present suit the defendant denied, in his written state-
ment, that the plaintiff was in possession either of the mosque or of its endow-
ments and contended that the relief claimed was irregular and ought not
to be granted in the suit, yet he did not ask for a distinct issue at the
first hearing as to whether the suit was maintainable under Section 42 of
the Specific Relief Act.

The Subordinate Judge, however, in dealing with the fifth issue,
incidentally discussed the evidence as to possession and came to the con-
clusion that neither party was in possession; but he now finds that
defendant was in possession of properties to the extent of Rs. 12,000 and

---

* On the finding of the Subordinate Judge—Ed.

(1) 1 M. 40.
(2) 13 B. 548.
(3) 14 M. 46.

362
BYATHAMMA v. AVULLA 18 Mad.

1891 SEP. 11.

APPELLATE CIVIL.

18 M. 15.

odd. But for the original finding of the Subordinate Judge on the question of possession, the plaintiff would have had an opportunity of amending the plaint in the Court below. Under the circumstances, we think we may allow the plaint to be amended. We allow the respondent-plaintiff three months' time to amend the plaint and to pay the additional stamp duty on the plaint so amended.

This appeal having come on again, after the plaint had been amended and stamp duty paid, in accordance with the foregoing order, the Court delivered judgment as follows:—

JUDGMENT.*

The respondent has now amended the plaint and paid the necessary stamp duty. We must therefore set aside the decree and remand the suit to the Subordinate Court in order that a revised decree may be passed in accordance with the amended plaint after such further inquiry as may be necessary.

The costs hitherto incurred will be provided for in the revised judgment.

18 M. 19.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Handley.

BYATHAMMA (Defendant No. 71), Appellant v. AVULLA AND ANOTHER (Plaintiff and Defendant No. 35), Respondents.*

[10th, 11th, 12th, 13th and 18th August, 1891.]


The plaintiff sued as the karanav of a Mapilla tarwad to recover lands in the possession of the defendants who were a donee from and the descendants of a previous karanav and their tenants. It appeared that the alleged previous karanav had died less than twelve years before the suit was filed, but more than twelve years before the joinder, as a supplementary defendant, of one to whom he had conveyed certain property by way of gift five years before his death. An issue was raised as to whether the rights of the parties were governed by Makkattayom or Marumakkattayom law, and an order of a District Munsif reciting a petition to which the alleged previous karanav was a party, was put in evidence to show that he had in a particular instance acted in the capacity of karanav of a Marumakkattayom tarwad. The rough draft of a plaint which had been filed by the alleged previous karanav was put in evidence to show that he admitted having alienated property in a manner which would be adverse to the claim of his tarwad:

Held, (1) that on the allegations in the plaint the plaintiff was entitled to maintain the suit alone, and that the suit was not bad for multifariousness;

(2) that the order and draft plaint were admissible in evidence for the above-mentioned purposes;

(3) on the evidence, that the plaintiff had succeeded to the office the previous karanav as alleged, and that the previous karanav had followed the Marumakkattayom rule, although it was shown that other members of the family had dealt with property, described as self-acquired, under the precepts of Muhammadan law;

* * After the plaint was amended ED.

* Appeal No. 126 of 1889.
(4) that the suit was barred by limitation as against the donee above referred to, her possession having been adverse to the tarwad since the date of the gift.

Observations as to documents marked as exhibits without proof.

Appeal against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No. 31 of 1886.

The plaintiff sued as karnavan of a tarwad of Mapillas following the Marumakkatayam law to recover properties described in the plaint as "belonging to my and my karnavan's (the deceased Rayaroth Kunhi Soopi Haji) tarwad and acquired by Kunhi Soopi Haji with the profits of the tarwad." The defendants were persons in possession of the properties sought to be recovered and some of them in their written statements raised the plea (inter alia) of multifariousness. Soopi Haji was found to have died on 24th August 1874; the plaint in this suit bore date 13th August 1886; defendants Nos. 69, 70 and 71 were subsequently joined as supplemental defendants. Defendant No. 71, the donee from Soopi Haji above referred to, was not joined until after 15th December 1886. The further facts of the case appear sufficiently for the purposes of this report from the judgment.

Exhibit K, the admissibility in evidence of which is discussed by the High Court, was as follows:

Extract taken from the diaries of the District Munsif’s Court of Katathnad in the Tellicherry district, dated 3rd August 1864 and 30th September 1864.

M. P. No. 593 of 1864.

The petition presented by Chettaiyil Raman Nair, vakil for Vazhlepittikayil alias Rayaroth Kunhi Soopi Haji and (2) Anandarvan Rayaroth Cheriyaa Soopi Haji on the 18th Karkadagom 1039 (1st August 1864) states the following as the reasons for not selling Kayalavallappa para No. 6, the para No. 10 wherein a tiger’s pen was built, Kattila alias Parambah para No. 11, Thanniullathil para No. 12, Prachala para No. 13, Puthanpurayil para No 14, and Koraanthoty Kandi para No. 15 which were attached in satisfaction of the decree in suit No. 927 of 1830.

Of these No. 6 is the first petitioner’s self-acquisition and the remaining paracons were purchased by the petitioners’ karnavan [21] the deceased Jakkian Soopi in jeom a very long time ago. With the exception of para No. 6, the assessment of all the paracons was in the name of the said karnavan who was paying the Government revenue and leasing them to tenants and was causing them to be held. After the death of karnavan, the first petitioner leased the paracons Nos. 11 to 15 and was causing them to be held and obtained Marupats under which the second petitioner received the purapad and was paying the Government revenue according to the old assessment from 1014 to 37 and, afterwards, according to the assessment in his own name and is enjoying them.

Order.

The claim set up in this must be proved within 8 days. 3rd August 1864.
Second order.

The petitioners have not produced any documents whatever to show that the properties claimed are their jenns. Neither Kunhali, who admits that the first plaintiff sold the jenn right to paramba No. 6, nor his tenant has preferred any claim in this Court. The abovementioned paramba is released from attachment on the evidence adduced by the claimant in No. 571. The plaintiff has by means of witnesses and documents proved that the plaintiffs' jenns have demised other properties to tenants and are causing them to be held. From the evidence adduced by the claimant in No. 589, it appears that paramba No. 23 was obtained from the first petitioner and is (so) held. The attachment is therefore withdrawn; but the disputes, namely, that between these petitioners and claimant in No. 571 with regard to paramba No. 6 and that, owing to the claimants in Nos. 566 and 678 saying that paramba No. 10 appertains to paramba No. 9 and the petitioners denying the same, should be decided by a regular suit. 30th September 1864.

The Subordinate Judge passed a decree now appealed against as prayed in the plaint, except with regard to certain items of the property claimed, of which some of the defendants were found to have been in possession adverse to Soopi Haji.

Defendant No. 71 preferred this appeal.

Sankara Menon, for appellant.
Sankara Nayar, for respondents.

JUDGMENT.

The plaintiff alleging himself to be the present karnavae of the Rayaroth tarwad, sued to recover properties which [22] be alleged had been acquired by a former karnavae, one Kunhi Soopi Haji, who died in 1874, and which are now in the possession of the descendants of the said Soopi Haji or tenants under them. The Subordinate Judge decreed in plaintiff's favour for certain of the properties sued for, and the appeals Nos. 125, 126, 127, 128, 140 of 1889, and appeal No. 12 of 1890 are preferred by some of the defendants, while plaintiff appeals in appeal No. 141 of 1889 as to some of the plaint items disallowed.

Preliminary objections were taken as to (1) misjoinder of causes of action, (2) the right to a karnavae to sue alone, and (3) limitation. Upon the first point we entertain no doubt that plaintiff can implead the several defendants in one suit to recover the tarwad property—Vasudeva Shankhaga v. Kuleadi Narnapai (1), Mahomed v. Krishnan (2)—upon the second the right of a karnavae to sue for the tarwad property is well established—Subramanyam v. Gopala (3)—while the question of limitation will, it appears to us, depend upon the date in each instance on which the possession of the several defendants became adverse to the tarwad. It was further alleged that the whole suit was barred, inasmuch as it was not instituted within 12 years of the date of Kunhi Soopi Haji's death. Upon this point, we are satisfied that Exhibit A is not a copy, but is the duplicate register of deaths kept in the amsihom in the ordinary course of official business, and it fixes the date of Soopi Haji's death as having occurred on 24th August 1874. We accept that date accordingly.

We pass, therefore, to the second and principal issue in the suit, viz., whether Kunhi Soopi Haji followed Marumakkatavom or Muhammadan law. The Subordinate Judge found that the Marumakkatavom

(1) 11 M. 106.  (2) 11 M. 106.  (3) 10 M. 229.
system governed the descent of the tarwad property, but that the self-acquisitions of members of the family were governed by the Muhammadan law.

Kunhi Soopi Haji was the sister's son of Jokkian Soopi, who died about 1822, and who is alleged to have been the original karnavan of the Rayaroth tarwad, so far at least as it is necessary to go back for the purposes of this litigation. We find, however, that the revenue registry of the 28 nunjah lands and 77 parambas which stood in his name were continued in his name till Fasli 1270 (1860), i.e., for about 38 years after his death. Exhibit 115 [23] shows that the registry was then transferred, 14 out of the 28 nunjah lands and 55 out of the 77 parambas being transferred to the name of Rayaroth Cheriya Soopi Haji, who is represented by plaintiff to have been the fourth karnavan in succession from Jokkian Soopi, the first karnavan. The other lands and parambas were transferred to the names of eight other persons, and the Subordinate Judge states that it was conceded these were distant relations; but there is nothing in the evidence before us to show what the precise relationship was, and their names do not appear in the pedigree, as made out from the evidence of plaintiffs' witnesses.

Some confusion has been introduced into the case from the fact that the Subordinate Judge did not understand that the Rayaroth Cheriya Soopi, to whose name these lands were transferred in 1860, was not the Kunhi Soopi Haji whom he takes to have succeeded Jokkian Soopi as karravan No. 2. Kunhi Soopi Haji was alive in 1860, and according to plaintiff was de jure karnavan; but he is said to have then been an old man, and we are asked to believe that the patta was issued in the name of Cheriya Soopi Haji as he actually collected the rents and paid the assessments on the property (see Exhibit K). This document is objected to as not furnishing legal evidence of the contents of the joint petition by Kunhi Soopi Haji and Cheriya Soopi which it recites, and we were referred to the decision in Subramaniam v. Parameswaran (1) (at page 122) in which the learned Judges stated that they followed the Full Bench decision in Gujju Lall v. Fatteh Lall (2). It is not clear what was the precise nature of the documents rejected in the Madras case, but we think the decision in Parbatty Dossi v. Purno Chunder Singh (3) is applicable to the present case, and is not inconsistent with the Full Bench ruling above referred to. We may point out that in Gujju Lall v. Fatteh Lall (2), the sole object for which it was sought to prove the former judgment was to show that in another suit against another defendant the plaintiff had attained an adjudication in his favour on the same right claimed, and it was held that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act. In the case before us, it is not the adjudication which it is sought to prove,—for the point was never adjudicated [24] upon—but the judgment is tendered in evidence as proof that in a particular instance the plaintiff's predecessor acted in the capacity of karnavan of a Marumakkatayom tarwad wholly irrespective of the particular decision arrived at in the suit. This, we think, is a relevant fact, and the entry is therefore admissible under Section 35 of the Evidence Act—See also Ramasami v. Apparuv (4).

Exhibit AK is the revenue register of the 14 items of nunjah and 51 parambas which were entered in Cheriya Soopi Haji's name in Fasli 1290, and in coming to the conclusion that the Marumakkatayom rule governed

---

(1) 11 M. 116.  (2) 6 C. 171.  (3) 9 C. 586.  (4) 12 M. 9.
the descent, the Subordinate Judge has been greatly influenced by the fact that several items of property which he enumerates are shown by Exhibit 115 to have stood first in the name of Jokkian Soopi, that they were transferred to that of Cheriya Soopi in 1860 and were in the interval dealt with by Kunhi Soopi Haji under various documents. For the defendants it is not denied that Kunhi Soopi Haji came into possession of various properties which originally belonged to Jokkian Soopi, but it is contended that he took them as sister's son under Muhammadan law, and hence that from that fact alone no inference favourable to Marumakkatayom can be drawn.

We may here observe that there is no evidence to show that Kunhi Soopi Haji's mother, Byathamma, survived her brother, Jokkian Soopi. If she did, and if the family followed the Muhammadan law, she would be a legal sharer, and we might expect to find traces of her having dealt with portions of the property and of her share being divided among her several children at her death. There are no such indications. If, on the other hand, (still assuming that Muhammadan law ruled the descent) Byathamma did not survive Jokkian Soopi, Kunhi Soopi Haji as the sister's son, would have come under the head of distant kindred and have been altogether excluded by the brother's sons, the descendants of Jokkian Mamm and Jokkian Kutti Ali.

It is admitted, however, that Kunhi Soopi Haji did in fact succeed—whether under Marumakkatayom or under Muhammadan law—to a great deal of property which originally stood in the name of Jokkian Soopi. He was alive in 1860, and it is inexplicable if these properties were really governed by Muhammadan law, that he, and the descendants of his brothers and sisters would have permitted the revenue registry to be transferred to the name of Cheriandi Soopi; Kunhi Soopi Haji was an old man, and his death could not be far distant; and his own nephews, who would be his natural heirs under Muhammadan law, would hardly have allowed the transfer to the name of a distant cousin, who was no heir at all. If, on the other hand, we accept the theory of Marumakkatayom and the explanation given by Exhibit K, the situation becomes intelligible.

It is objected by the defendant's pleader that many of the documents referred to in paragraphs 50 to 61 of the judgment of the Subordinate Judge were not proved, and that it is not shown they came from proper custody. With regard to his objection, we observe from the B diary in the suit that these documents were put in by the plaintiff's pleader, and may fairly be taken as having come from the plaintiff's custody, though the formality of examining plaintiff when they were put in was not observed. No objection appears to have been taken at the time; indeed the defendant's pleader was allowed to take precisely the same course with some of his documents. Many of these documents are judgments and public records as to whose genuineness there is no doubt,—while others (marupats and sale-deeds) purported to be more than 30 years' old and came from proper custody if the plaintiff is the karnavan of a Marumakkatayom tarwad. If he is not, his possession of them is unexplained, and no objection to their genuineness appears to have been taken at the proper time. We do not think it necessary to remand the appeal for further evidence on these points.

It is true that the items of property which the Subordinate Judge traces from Jokkian Soopi in this part of his judgment are not part of the property in suit,—but the evidence is relevant as showing that properties which originally stood in the name of Jokkian Soopi were afterwards dealt with by Kunhi Soopi Haji,—who would be the next karnavan.
if Marumakkatayom governed the descent,—but who is not proved to be the next heir under Muhammadan law, and that these properties were allowed without objection to be registered in the name of Cheriandi Soopi, who would be an heir under Marumakkatayom but not under Muhammadan law, there being no evidence whatever that he had acquired any title either by gift or purchase to Jokkian Soopi’s property.

[26] The litigation referred to in paragraphs 55, 56 and 60 of the judgment also support the plaintiff’s case. It was argued that no connection was proved between the properties sued for as shown by Exhibit A with that demised in Exhibits D and E,—but Exhibit A B shows that this property was sued for in 1829 by Kunhi Soopi Haji. It was demised in 1863 by the same person (Exhibit D) and again in 1875 by Cheriandi Soopi (Exhibit B) to the plaintiff’s eighth witness who admits holding under the tarwad. If the property was not tarwad property it is not explained why Kunhi Soopi Haji’s descendants allowed this witness to attorn to Cheriandi Soopi instead of to themselves.

Exhibit A D shows that Kunhali who is represented to have been karnavan from 1874 to 1878 sued as karnavan in 1877 to recover property given on a demise by his former karnavan Kunhi Soopi Haji and got a decree. In that case the plaintiff was brought in as supplemental plaintiff. It is objected that Cheriandi Soopi was the next senior uanandavan and not the plaintiff, but Exhibit B executed on 2nd October 1877 shows that the plaintiff was given a power-of-attorney by Kunhali to manage the affairs of the Rayaroth tarwad during his absence in Arabia. The genuine of this document is not disputed, and it is important as tending to show that Kunhali made separate arrangement for the management of his self-acquired property and of his tarwad property.

A suggestion was made by the defendant’s pleader that several of the documents had been executed since the death of Kunhi Soopi Haji in 1874 with a view to create evidence. This however, cannot be said with regard to several marupats executed in the early part of the century, and it is clear that the alleged successors of Kunhi Soopi Haji have not shown themselves in any hurry to assert their rights. Kunhali went to Arabia, and his successor is alleged by plaintiff to have been negligent of the interests of the tarwad. The plaintiff himself—as far as the evidence goes—did not become responsible for the management till 1885 and the suit was brought in 1886.

It is next urged that the Subordinate Judge omitted to consider several documents which would have tended to show that the descent of property in this family was governed by Muhammadan law, and in particular we were referred to Exhibits 120, 118, 123, 145 and 154.

[27] In Exhibit 120 the plaintiff is said to be the son of the brother of Kunhali (Karnavan No. 3). He sued to recover property demised by his late brother, and the defence was that the land was held under his mother (fourth defendant). The District Munsif found that the document creating demise from the fourth defendant was a concoction, and observed that under Muhammadan law the plaintiff would have a right to succession in preference to the wife. The observation was a mere obiter dictum, and the question of Marumakkatayom or Muhammadan law did not arise in the suit. Exhibit 118 is a certified copy of a decree, but there is nothing before us by which we connect the parties with the parties to this suit. Exhibit 122 shows that in 1897 some relations of Kunhi Soopi Haji had obtained from him some share in some property; but there is nothing to show what was the nature of that property, or on what ground the share was given.
Exhibit 140 is a patta which shows that a bit of land was transferred from Kunhi Soopi Haji’s name in 1874 to that of Cheriy Soopi “with permission of son Ahmed Kutti Haji.” This does not necessarily show anything more than that no objection was made by Kunhi Soopi Haji’s son to the transfer and is consistent with the suggestion that the property may have been tarwad property. Exhibit 181 shows that Kunhi Soopi Haji purchased some property in 1844, but there is nothing to show how his vendors acquired a title, though it may have descended to them from their father.

We are unable, therefore, to hold that these documents in any material way assist the contention of the defendants.

Passing to the oral testimony, we find that the plaintiff’s second witness is the grandson of Jokkian Kuti Ali, brother of Jokkian Soopi. His testimony that the family is governed by Marumakkatayam law is therefore clearly against his interest, as he would have been a nearer heir than Kunhi Soopi Haji in succession to Jokkian Soopi under Muhammadan law. The third and fourth witnesses have also opportunities of knowing the facts, and the evidence of the first witness called by the defendants was to the same effect.

Upon the whole, therefore, we are of opinion that the Subordinate Judge was right in his conclusion that Rayaroth Kunhi Soopi Haji was a follower of the Marumakkatayam rule, notwithstanding that it is shown that other members of this family have dealt [28] with property which is described to be self-acquired under the precepts of Muhammadan law. We may point out that the very execution of such documents as Exhibits F and G may tend to show the executants felt it necessary to make a special provision for their descendants to prevent the operation of the Marumakkatayam rule upon such property.

The next point is whether the plaintiff is the present karnavan of the tarwad. His seniority is disputed on account of the evidence of Kuruvaugat Ahmed Kutti, first defence witness,—who allege himself to be the plaintiff’s senior and the eldest in the Rayaroth tarwad. We do not think much reliance can be placed upon the evidence of this witness. He was not called by the plaintiff, and the defendants complained that he had to be brought on a warrant and was hostile to them. It is difficult to reconcile his different statements. He at first declared that he belonged to the Kuruvaugat tarwad, in which the plaintiff had no right, and then that he was the eldest in Rayaroth tarwad in which the plaintiff is undoubtedly a member. Had he really belonged to Rayaroth and been the eldest in it, we think he would have claimed the karnavanship on the death of Cheriy Soopi, but he declares that he has no right to the property therein. We cannot give credit to the statement of this witness that he is the senior member of the Rayaroth tarwad.

It remains to consider whether the plaintiff is entitled to recover the property (item No. 55) from the appellant (71st defendant). The claim is resisted on the ground of limitation.

The 71st defendant was not a party to the suit till after the 15th December 1886, or more than 12 years after the death of Kunhi Soopi Haji. We think, however, we are bound to examine the original character of the possession, in order to see whether the 12 years’ rule applies—Byari v. Puttanna (1). The contention is that the property was given to the 71st defendant by Kunhi Soopi Haji in 1869 and has since been held by her

---

(1) 14 M. 38.
1891
AUG. 18.

APPEL-
LATE
CIVIL.

15 M. 19.

adversely to the tarwad. In proof of this contention we were referred to Exhibits 81, 189, 190 and 191.

It was objected that Exhibit 81 is inadmissible in evidence. We are satisfied that it is the rough draft of the plaint put in in original suit No. 270 of 1869 on the Badagara District Munsif’s [29] file and is not a copy but an original rough draft. It has been kept for record in the Vakil’s office, bears the number of the suit, and the decision in the suit has been endorsed upon it. The plaint actually put in was a copy of this draft. We hold therefore that it is admissible and shows that in August 1896 Kunbi Soopi Ha’ji admitted having alienated the property in a manner which would be adverse to the claim of his tarwad.

The razi decree in that suit was in favour of the present appellant (Exhibit 190, dated 6th November 1869) and on 2nd September 1869 the tenant attorned to her (Exhibit 189). The evidence of the 70th defendant’s second witness proves that the 71st defendant held possession since 1869.

We are of opinion, therefore, that the plaintiff’s claim to item No. 59 is barred. The appeal of the 71st defendant must be allowed and the plaintiff’s claim as against the property in her possession (item No. 59) be dismissed with costs throughout.

15 M. 29—1 M.L.J. 598.

APPEAL CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

CHENNAPPA (Appellant) v. RAGHUNATHA (Respondent).* [31st March, and 5th May, 1891.]

Civil Procedure Code, Section 111—Set-off—Chara-ter in which claim is made—Court Fees Act—Act VII 1870, Sections 6, 28—Levy of stamp duty.

In a suit in which the plaintiff sued, as son of a deceased vakil, to recover the amount of a promissory note and bond executed by the defendant to his deceased father, the defendant alleged in his written statement that the plaintiff’s father had collected funds belonging to him, as his vakil, exceeding the amount due on the promissory note and bond and asked for a decree for the difference:

* Held, (1) that the written statement must be regarded as a plaint in regard to the set-off and should have been stamped accordingly;
(2) that if the plaintiff claimed as the heir and representative of his father the set-off was rightly pleaded;
(3) that when a memorandum of appeal is insufficiently stamped the deficient stamp duty should be levied by the Appellate Court.

[Diss., 8 C.W.N. 174 (177); 2 L.B.R. 186 (190); R., 19 C. 780 (781); 32 C. 654 (661)=1 C.L.J. 361; 22 M. 491 (501)=9 M.L.J. 37; 24 M. 331 (333); 25 M. 380 (381); 16 C.P.L.R. 118 (120); 5 M.L.J. 233; 8 M.L.T. 63=123 P.R. 1907=53 P.W.R. 1907; 4 O.C. 108 (113); 189 P.L.R. 1901; 86 P.R. 1908=190 P.L.R. 1908=80 P.W.R. 1908.]

[30] CASE referred for the decision of the High Court under Section 617 of the Code of Civil Procedure by W. J. Tate, District Judge of South Canara, in the matter of appeal suit No. 14 of 1890 on the file of his Court.

The plaint in the suit in which this reference was made, set out (1) that the defendant borrowed Rs. 50 from the plaintiff’s father and gave him a promissory note for that amount; (2) that the defendant borrowed Rs. 150 from the plaintiff’s father, pledged certain jewels with him and

* Referred Case No. 36 of 1890.
executed a karar undertaking to repay the same in two months, with interest at 12½ per cent.; (3) that plaintiff's father was dead, and plaintiff, who was his heir, had "been enjoying all his estate" and prayed for a decree for the sums due on the note and the karar respectively.

The defendant pleaded that the suit was barred by limitation so far as the claim founded on the promissory note was concerned, and as to the rest of the claim his allegation was as follows:

"I executed the plaint karar revoking confidence (in him) because he had agreed to deduct the amount due to him by me from the amount realized by him on my account, and only because he had just then no time to square accounts;" and the written statement proceeded to state that "a sum exceeding the amount of the karar" executed on the pledge of the jewels, that is, Rs. 182-8-3, recovered in execution taken out through the plaintiff's father (who was a pleader) is remaining with him and is due to me," and he prayed for a decree for the difference between the last mentioned sums.

The case as stated by the District Judge, after summarising the pleadings, proceeded as follows:

"The District Munsif disallowed the set-off on the ground that the parties did not fill the same character within the meaning of Section 111, Civil Procedure Code.

"It is now contended for the appellant that the requirements of the section are complete, for the amount to be set off is ascertained and legally recoverable, and the parties fill in the matter of set-off the same character as they fill in the suit, inasmuch as the plaintiff sued on the promissory note and bond simply as his father's representative, and it is as such representative that the monies due to defendant would have by him to be disbursed; further, that there is no legal distinction between money received by plaintiff's father in his capacity of pleader, and money received by him in a private capacity. It is also argued that what has to be looked to is the position of the present parties, and that qua both sets of transactions the plaintiff stands to the defendant in an identical position.

"On the other hand, it is urged that although paragraph 6 of the plaint sets up plaintiff's heirship to his father in respect of all his property, it does not state that the plaintiff amounts are the father's own (self-acquired) property; that the set-off is asked for from plaintiff himself (last paragraph of the written statement), and that he is entitled, now that it has been pleaded, to dispute his liability to pay it in this suit, on the ground that it has not been stated, or proved, in what capacity he is to be saddled with the liability, i.e., whether as his father's heir in respect of self-acquired property, or by virtue of his right of survivorship, in which case there would be no separate estate.

"The case is not one of equitable set-off, and so governed by the then Chief Justice's judgment, in Clark v. Ruthnavaloo Chetti (1).

"It falls, as seems to me, within the stricter limits of Section 111, inasmuch as the transactions were different. And, on the analogy of Illustration (b) to Section 111, I am, not without great doubts, of opinion that, because the plaintiff virtually (the plaint being taken as a whole) chose to bring himself forward as his father's representative in respect of the money due on the promissory note and the bond, and because such assumption of character was not objected to by the defendant, it is

(1) 2 M.H.C.R. 296.
"not necessarily open to defendant to say that any other sums due to him by plaintiff’s father are payable by plaintiff in such character, i.e., really to say that on the face of his plaint in this suit plaintiff must be taken to represent his father in respect of all property and for all purposes.

"I also consider that if plaintiff is to be taken as representing his father in respect of the set-off he represents him only in his fiduciary capacity, he being, on a species of implied contract, trustee of the defendant’s money. If this view be correct, the set-off amount would not be recoverable as such from plaintiff’s father were he suing on the promissory note and bond. Much less is it recoverable as set-off from the plaintiff.

[32] "Then, on the authority of two rulings, one of the Allahabad, and one, following it, of the Bombay High Court, Amir Zama v. Nathu Mal (1) and Bai Shri Majirajbai v. Narotam Hargovan (2), it is said for respondent that court-fee should have been paid on the amount of the set-off. On the other side, it is urged that there is no provision in the Court Fees Act authorizing the charge, and that, by Section 111, Civil Procedure Code, the set-off has to be pleaded in a written statement which is not, per se, chargeable at all; moreover, that Government has already received full court-fee on the plain amount, of which the set-off only, on the pleadings, forms a fraction, so that, at any rate, where the amount of set-off is less than the amount in suit, the dues of the State have been already satisfied by the court-fee paid on the plaint.

"I incline, on the whole, to the latter view; but as two High Courts have held the contrary, think it right to ask for a ruling which shall govern the procedure in Madras.

"The appellant further urges that no interest was due on the promissory note A until the date of demand. I think this contention correct. A contains no mention of interest, and interest could, only be made payable, therefore, as damages. The contract to pay was only broken at the date of the demand, so that defendant would only, from that date, be liable in damages.

"But the appeal-memorandum is only stamped with the court-fee payable on the amount of the set-off. And the respondent relying on the Allahabad Full Bench ruling in Balkaran Rai v. Gobind Nath Tewari (3) contends that court-fee cannot now be admitted on this other sum objected to. If the learned Judges of the Allahabad Court have interpreted the law correctly, and I am bound, in the absence of a contrary ruling of the High Court of this Presidency, to think that they have done so, it seems to follow that qua the second relief sought, the appeal-memorandum in this suit is so much waste paper, it being a document, incapable of being received or filed in any Court under Section 6 of the Court Fees Act, and of no validity under Section 28, and incapable under the same section of being validated. I have felt myself compelled to follow in another case the strong authority of the Full Bench, and would do so [33] "here, but that I have (speaking respectfully) great doubts whether that ruling is correct, i.e., whether the word document should be held to include, plaint or memorandum of appeal, seeing that Section 54 (5), Civil Procedure Code, permits a plaint to be returned for the affixing of the proper stamp (it is true that the chapter including this section refers to the institution of suits), and whether the ‘mistake or inadvertence’ mentioned in Section 28 of the Court Fees Act refers only to mistake or

(1) 8 A. 396. (2) 13 B. 672. (3) 12 A. 199.
"inadvertence on the part of the Court or its officers, or may be held to include inadvertence on the part of the party or his vakil.

"And the last question, which follows the above, for the answer to it seems deducible from the same view of the law, is whether, if the statement pleading set-off should have been stamped, and the proper stamp is tendered now, that stamp can be received, and the statement thus become validated."

Pattabhirama Ayyar, for appellant (defendant).

Narayana Rau, for respondent (plaintiff).

JUDGMENT.

We are of opinion that the parties to the present suit fill the same character as regards both the subject-matter of the claim and of the set-off. The debt which the plaintiff sues for he seeks to recover as the heir and representative of his father, and the debt which the defendant pleads as a set-off is one which, according to him, the plaintiff is bound to pay as the heir and representative of his father. It may be that if the debts due on the promissory note and the pledge-bond are proved to be ancestral which survived to the plaintiff on his father’s death, and if it appears further that he inherited no separate property from his father, and that the debt pleaded as a set-off is not one which, as a son, he is bound to pay under Hindu law, the set-off will have to be disallowed. But a distinction ought to be made between the character in which a liability is sought to be enforced and the conditions of the liability in that character. Section 111 premises two things as necessary to allowing a set-off, viz., (1) that the matter of set-off must be an ascertained sum legally recoverable by the defendant from the plaintiff, and (2) that the character in which the debt is claimed by, and from, the plaintiff must be the same. In the case before us, the character is the same, viz., the plaintiff is the heir and representative of his father. But if it turns out on enquiry that the plaintiff is not liable to pay the [34] debt claimed by the defendant on the ground that he inherited no separate property from his father, the set-off will fail because the sum is not recoverable legally from the plaintiff by the defendant, and not because the character which the plaintiff fills as regards the debt sued for and the subject-matter of set-off is not the same.

Unless the defendant admits that the debt he seeks to recover is not legally recoverable from the plaintiff, the plea of set-off must be allowed to be set up and proved, and ultimately allowed or disallowed according as the cross-debt is or is not shown to be recoverable from the plaintiff.

As regards the second question, we are of opinion that a written statement containing a claim of set-off must be regarded as a plaint in regard to such set-off. Having regard to the language of the concluding paragraph of Section 111 and of Section 216, we think that the Legislature intended that it should be treated as a plaint for the cross-claim. The same view was taken of the effect of those sections by the High Courts at Allahabad and Bombay (Amir Zama v. Nathu Mal (1) and Bai Shri Majirajbai v. Narotam Hargovan (2)).

As to the third question, we consider that when the memorandum of an appeal is not sufficiently stamped, it is competent to the Court to levy the deficient stamp duty. This view is in accordance with the principle laid down by the Privy Council in Skinner v. Ords (3), and the wording of

1891
May 5.

APPEL-
LATE
CIVIL.

15 M. 29 =
1 M.L.J. 593.

(1) 6 A. 896.
(2) 16 B. 672.
(3) 1 A. 290.
Section 4 of the Limitation Act and Section 54 of the Code of Civil Procedure appear also to support it. We do not concur in the opinion expressed in Balkaran Rai v. Gobind Nath Tiwari (1).

Our answer to the fourth question is also in the affirmative.

Costs to follow the result.

---

15 M. 35 = 1 M. L. J. 745.

[35] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Shephard.

COLLECTOR OF NORTH AROCOT AND ANOTHER (Defendants), Appellants v. NAGI REDDI (Plaintiff No. 2), Respondent.*

[30th April and 1st May, 1891.]

Revenue Recovery Act—Act II of 1861 (Madras), Section 52—Karnam in a permanently settled zemindari.

The karnam in a permanently settled zemindari is a village servant employed in revenue duties within the meaning of the Revenue Recovery Act, Section 52.

[R., 27 M. 332 (337) = 13 M. L. J. 429.]

SECOND appeal against the decree of H. H. O'Farrell, Acting District Judge of North Arocot, in appeal suit No. 97 of 1889, reversing the decree of C. Ranga Rau, Acting District Munsif of Vellore, in original suit No. 11 of 1888.

The plaintiff's property had been attached and sold under Act II of 1864 to enforce payment of a sum said to be payable by him on account of mera due to the karnam of a village in the permanently settled Kangudi Zemindari.

The plaintiff now sued to have the order made by the Collector (defendant No. 1) under Act II of 1864 set aside and for damages.

The District Munsif dismissed the suit, but his decree was reversed on appeal by the District Judge, who awarded to the plaintiff Rs. 7,14,3 damages against the Collector and the manager of the zemindari, who was defendant No. 2.

The defendants preferred this second appeal.

Mr. Powell, for appellant No. 1.
Subramanya Ayyar, for appellant No. 2.
Bhashyam Ayyangar, for respondent.

JUDGMENT.

The question is whether the karnam in a permanently settled zemindari is a village servant employed in revenue duties within the meaning of Section 52 of Act II of 1864. It has been held by the District Judge that the section does not apply to such karnams, but only to karnams in unsettled [36] districts. It is clear that, independently of Regulation XXIX of 1802, the karnam was, as he is now admittedly everywhere except in lands settled under Regulation XXV of 1802, a revenue servant. By the preamble of Regulation XXIX of 1802, passed after the passing of Regulation XXV, it is declared that the office of karnam is still of great importance, and

* Second Appeal No. 505 of 1890.
(1) 19 A. 129.

374
that it is expedient to provide for the continuance of it, and the Regulation
goes on to indicate the duties which are to be performed by the karnam.
Some of those duties are duties which may aptly be called revenue duties.
The Regulation VI of 1831 further tends to show that these karnams were
regarded as revenue servants, for the Regulation relates to hereditary
village and other offices in the Revenue and Police departments, and by
the last section it is expressly provided that the Regulation shall not
apply to karnams holding office under Regulation XXIX of 1802. We
cannot agree with the District Judge in the view he has taken of the
question, and must reverse the decree and remand the appeal to be dealt
with according to law. Costs are to be provided for in the revised decree.

15 M. 36—2 Weir 218.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and
Mr. Justice Wilkinson.

QUEEN-EMPRESS v. RANGA RAU. [*] [14th and 15th October, 1891.]

Criminal Procedure Code—Act X of 1872, Section 466—Act X of 1882. Section 197—
Government orders as to tribunal for trial of officials.

In 1890 the Collector of Ganjam reported to the Board of Revenue a charge of
bribery, &c., against a Sub Magistrate and received directions to send the case
for trial to some Magistrate other than himself, or the Principal Assistant Magis-
trate. He accordingly sent it to the Senior Assistant Magistrate of Berhampore;
the accused was convicted, but he appealed to the Sessions Judge, who reversed
the conviction on the merits. The Government did not appeal against the acquit-
tal of the accused, but the District Magistrate referred the case to the High Court the
question whether the Magistrate had jurisdiction:

[37] Held, on the reference, that it was not a case for the interference of the
High Court, because (1) it was not shown that the Magistrate had acted without
jurisdiction; (2) Government had not appealed against the acquittal by the Ses-
sions Judge who had tried and determined the question of jurisdiction.

CASE referred for the orders of the High Court under Section 438 of
the Code of Criminal Procedure by E. C. Johnson, District Magistrate of
Ganjam.

The case was stated as follows:——

"A charge of bribery, extortion and criminal intimidation having
been made against the Sub-Magistrate and Deputy Tahsildar of
Narasannapat, I reported the same, in the capacity of Collector, to the
Board of Revenue on 18th September 1890, and was directed in Board’s
Proceedings, No. 6967, Miscellaneous, dated 31st October 1890, to
send the case for trial to some Magistrate other than myself or the
Principal Assistant Magistrate who had held departmental inquiry in the
case. I accordingly sent it for trial to the Senior Assistant Magistrate,
Berhampore.

"The case was taken up as calendar case No. 36 of 1890 on his
file; charges under Sections 161, 166 and 384, Indian Penal Code, were
framed; the accused was found not guilty under Sections 166 and
384, Indian Penal Code, but guilty under Section 161, Indian Penal
Code, and was sentenced to two years’ simple imprisonment and a fine
of Rs. 1,000."

[*] Criminal Revision Case No. 262 of 1891.
Against this conviction appeal was made to the Sessions Judge who quashed the conviction.

I then asked the Government to direct the Public Prosecutor to present an appeal to the High Court against the double acquittal; but Government, in declining to do so, has directed me to refer to the High Court the question of the jurisdiction of the Senior Assistant Magistrate.

Government Order No. 572, dated April 9, 1875, specified, under the last paragraph of Section 466 of the Code of Criminal Procedure of 1872 (corresponding with Section 197 of the Code now in force), the Court of Sessions as the Court before which any Deputy Tahsildar and Magistrate should be tried. This order is declared by Government to be still in force.

Under these circumstances the trial by the Acting Senior Assistant Magistrate was without jurisdiction; and I have the honour to request that his order in the case may be set aside and the commitment of the accused for trial by the Court of Sessions ordered.

The Government Pleader and Public Prosecutor (Mr. Powell), for the Crown.

Ramachandra Rau Saheb and Pattabhirama Ayyar, for the accused.

JUDGMENT.

This is a case referred to us by the District Magistrate of Ganjam under the instructions of Government.

A charge of bribery, extortion and criminal intimidation was made against the Sub-Magistrate and Deputy Tahsildar of Narasannapet, and on the 18th September 1890 the District Magistrate of Ganjam reported the same to the Board of Revenue, and was directed by the Board to send the case for trial to some Magistrate (other than himself or the Principal Assistant Magistrate). The case was, therefore, sent for trial to the Senior Assistant Magistrate, Berhampore. The prisoner was convicted under Section 161, Indian Penal Code. The Sessions Judge on appeal reversed the conviction on the merits. It was argued before him by the vakil for the prisoner that the conviction was void on the ground that the Senior Assistant Magistrate had no jurisdiction. This defence, however, the Sessions Judge overruled on the ground that from the list of notifications and rules which have the force of law in this Presidency it does not appear that the Government has passed an order under Section 197, Criminal Procedure Code. The Government did not appeal against the acquittal.

Mr. Powell, the Public Prosecutor, now argues that all the proceedings must be set aside, as the Senior Assistant Magistrate had no jurisdiction to try the case, and consequently all the proceedings are void, and he refers us to an order of Government, dated 9th April 1875, which specified, under Section 466 of the Code of Criminal Procedure then in force the Court of Session as the Court before which a Tahsildar and Magistrate or a Deputy Tahsildar and Magistrate shall be tried exclusively. The Government has, however, furnished the High Court with a list of the notifications and rules having the force of law in this presidency revised up to July 1887, and we find no mention of the order of Government, dated 9th April 1875, in this list, and we must presume, therefore, that the order has been repealed or is considered to have ceased to have effect, the Code having been repealed. Mr. Pattabhirama Ayyar argues that such a Government order under Section 197 of the present code would be ultra vires, because, as it now stands, the
law limits the power of Government to determining, in each particular case as it arises, the person by whom and the manner in which the prosecution of such public servant is to be conducted, and empowers Government to specify the Court before which the trial of a public servant is to be held; whereas in the order of 1875 the Government directed that a class, viz., Tahsildars and Magistrates or Deputy Tahsildars and Magistrates, should be tried only by a Court of Session. This may be so and may explain why the Government order was repealed, if repealed it be.

We must decline to interfere on two grounds: (1) it has not been shown that the trial by the Senior Assistant Magistrate was without jurisdiction; (2) the question of jurisdiction was considered by the Sessions Judge and decided adversely to Government and Government has not appealed.


APPELLATE CRIMINAL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

QUEEN-EMPRESS v. MUNISAMI AND OTHERS.* [6th August, 1891.]


A District Magistrate who refers a case to a Sub-Magistrate for further inquiry has no authority to fetter him in the exercise of his judicial discretion as to the question whether the case should or should not be committed to the Court of Sessions.

[R., 39 M. 133 = 7 Cr. L. J. 267 = 18 M. L. J. 57 (61) = 3 M. L. T. 230.]

CASE referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure by E. J. Sewell, Sessions Judge of North Arcot.

The question referred was whether or not a committal was illegal which was made by a Second-class Magistrate (who had previously discharged the accused and now expressed no opinion that a prima facie case had been made out for the prosecution) in pursuance of an order of the District Magistrate, directing him to hold further inquiry and adding "as it might be doing a violence to the scruples of the Lower Court to come to a different finding from that already recorded, the Lower Court will do well if a reconsideration of the evidence leads to the conclusion that it is possible for two views to be held as to the conduct of the accused, if it commits the accused to the Court of Sessions."

The Acting Advocate-General (Hon. Mr. Wedderburn), for the accused.
The Government Pleader and Public Prosecutor (Mr. Powell contra.

JUDGMENT.

Under Section 437, Criminal Procedure Code, the District Magistrate had power to make further inquiry himself or to direct the Sub-Magistrate to make further inquiry, but if he chose the latter course he had no legal authority to fetter the Sub-Magistrate in the exercise of his judicial discretion.

A commitment to the Sessions (assuming that the case was one which ought to be tried by the Sessions Court) would not be justifiable...
unless the committing Magistrate considered a *prima facie* case had been made out which in his judgment ought to be tried at the sessions. The order of the District Magistrate that the case was to be committed if the Sub-Magistrate thought it was possible for two views to be held (the District Magistrate distinctly stating he held another view) was therefore *ultra vires*, and practically took away from the Subordinate Magistrate the exercise of his judicial discretion. In making the commitment the Sub-Magistrate does not profess to have exercised any judicial discretion, but commits the case as it is possible two views may be held, though he does not say he himself entertains any doubt as to the correctness of the decision he himself had arrived at.

The commitment must be quashed and the order of the District Magistrate of 10th June must be restricted to a simple direction to hold a further inquiry.

---

15 M. 41 – 1 Weir 365.

**[41] APPELATE CRIMINAL.**

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.*

**Srinivasa v. Annasami and Others.** [10th October, 1891.]

Penal Code—*Act XLV of 1860, Section 372—Illegal disposal of a minor.*

A dancing woman of a temple applied to the manager of the temple for the appointment of a minor girl, whom she falsely described as her daughter, to her "kothu" *mura*; the manager ordered that the girl be placed on the pay sheet alongside other dancing girls, and she was employed at the temple, though the ceremony of tying the bottu (after which the girl could not be married) did not take place:

*Held,* that the above facts constituted *prima facie* evidence that an offence under Penal Code, Section 372, had been committed by the dancing woman, the manager above named, and the parents of the girl.


**Petition under Criminal Procedure Code, Sections 435 and 439,** praying the High Court to revise the proceedings of T. Weir, Sessions Judge of Madura, in criminal revision petition No. 42 of 1890, in which he declined to interfere with the proceedings of W. B. Ayling, Acting Head Assistant Magistrate of Madura, dismissing a complaint.

The complaint was made against the manager of a temple, the parents of a minor girl, and a dancing woman, charging them with having committed an offence under Penal Code, Section 372.

The Acting Head Assistant Magistrate had, previously to the above order, forwarded the case under Criminal Procedure Code, Section 202, for preliminary inquiry to the Sub-Magistrate of Tirupattur, who recorded the evidence referred to in the following judgment of the High Court.

The Acting Head Assistant Magistrate in dismissing the complaint said: "From a perusal of the papers it is clear that no offence has been committed at all. The tying of bottu to show dedication or the enrolment of this girl among the dancing girls of the temple is the important ingredient of the offence, [**42**] to prove which there is no evidence. It does not appear that she had been dedicated with the

* Criminal Revision Case No. 243 of 1891.
formal ceremonies pertaining to the occasion. Further, the girl is only nine or ten years old and not matured. She is at liberty to marry, and the mere fact of her having been appointed to some menial services in the temple (and even that has been cancelled before the date of this complaint) would not of itself constitute an offence under the Penal Code.

The Sessions Judge said in paragraph 2 of his order: "The evidence does not show that there was any tying of the bottu, but shows that the girl was only employed to do certain menial offices in the temple, viz., "figuring on the floor before the idol."

The complainant preferred this petition.

The Acting Advocate-General (Hon. Mr. Wedderburn), for petitioner, argued that the evidence showed that the girl had been dedicated to the temple service and referred to ex-parte Padmavati (1) and Weir's Criminal Rulings, 3rd edition, p. 215.

S. Subramanya Ayyar (Bhashyam Ayyangar with him) argued that mere registration as holder of the "kothu" miras was not enough, and that the tying of the bottu was a necessary preliminary to a girl entering on the occupation of a dasi.

JUDGMENT.

The only question which is before us is whether the Sessions Judge was right in holding that there had been no such disposal of the minor as would bring the accused under Section 372, Indian Penal Code. The Acting Head Assistant Magistrate was of opinion that no offence had been committed, because there was no evidence of the tying of the bottu, which in his opinion forms the important ingredient of the offence. The Sessions Judge would appear, from paragraph 2 of his order, to have been of the same opinion. In our judgment there may be such disposal of a minor as is contemplated by Section 372 even though bottu is not tied. The facts of this case have not been set forth either by the Acting Head Assistant Magistrate or by the Sessions Judge. If they had been attentively considered, we hardly think the Lower Courts would have come to the conclusion that there was no ground for proceeding against the accused. The facts to be gathered from the report of the Second-class Magistrate of Tirupattur, are as follows:

[43] In November 1889, fourth accused, a dancing girl of Thirukoshityur Devastanam, falsely styling herself the mother of a girl, Pichaimuthu, petitioned the first accused, the devastanam manager, to "appoint her daughter" to her (fourth accused's) kothu miras. The first accused, without, so far as appears from the record, making any inquiry, endorsed on the petition that the applicant's request might be complied with if there was no objection. The Tahsildar of the temple replied that the applicant had no objection, and that he had accordingly ordered that "Pichaimuthu should be entered in the pay abstract like other dancing girls." It is not denied that the first accused received this communication, nor that Pichaimuthu was entertained and employed about the temple. From November 1889 to May 1890 Pichaimuthu's name was accordingly entered in the pay abstracts along with the names of the other dancing girls and she performed work in the temple. We consider that these facts constituted prima facie such a disposal of the minor with the knowledge that it was likely that she would be employed or used for immoral

(1) 5 M.H.O.R. 415.
1891
Oct. 10.

APPEL
LATE
CRIMINAL.

15 M 41=
1 Weir 365.

[44] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

GAJAPATI (Plaintiff's Representative), Appellant v. BHAGAVAN DROSS
(Defendant), Respondent.* [17th and 18th August, 1891.]

Mutt—Relation between the founder's representative and the Mahant—Agreement by
the Mahant on his appointment—Power of dismissal.

In the absence of a deed of endowment the obligations of the head of a mutt
to the representative of the founder can only be deduced from the usage of the
institution.

In a suit by the representative of the founder to remove the defendant from
the headship of a mutt, it appeared that the usage was for the head of the institution
for the time being to nominate his successor, and for the representative
of the founder to sanction the nomination and invest the nominee with a sada,
on his installation, and that the defendant had asked the plaintiff to appoint
him and had undertaken on his appointment to furnish to him accounts of the
income and expenditure of the mutt;

"Held," that the plaintiff was not entitled to remove the defendant from office on
the ground of his refusal to furnish accounts.

[R., 1 Bom. L.R. 749 (748); 11 C.L.J. 2 (12) = 3 Ind. Cas. 408.]

APPEAL against the decree of E. C. Johnson, Acting District Judge of
Ganjam, in original suit No. 8 of 1889.

Suit by the Zemindar of Parlakmedi to remove from his office the
Mahant of the Devi Mutt at Parlakmedi. The plaintiff alleged that he
had dismissed the defendant on 25th November 1885 for not furnishing
him with the accounts of the mutt, &c., and that he had been justified in
doing so under his authority as representative of the founder of the mutt
and also under a document executed by the defendant on his appointment
as Mahant.

The District Judge dismissed the suit.
The plaintiff preferred this appeal.
Anandacharlu, for appellant.
Pattabhirama Ayyar, for respondent.

JUDGMENT.

It is an essential part of the plaintiff's case, as disclosed in his plaint,
that he is the hereditary trustee and manager of the mutt, the subject
of the suit. This he has altogether failed to prove and, on the contrary,
the evidence—oral and documentary [46]—shows that the mutt and
some of the property now attached to it were dedicated to the worship of
Madana Mohanaswami by the plaintiff's ancestor, and that the management
was handed over to a Brahman ascetic who, and his successors, have

* Appeal No. 51 of 1890.
continued to manage the mutt and receive and administer its revenues down to the present time.

The mutt is a religious institution under the management of Byragi Brahman ascetics, and the plaintiff and his family not being ascetics could not take an active part in the management of its affairs. The legal relation, therefore, between plaintiff and defendant is not that of a trustee and his servant, but that of the representative of the founder and the manager of the institution.

The obligations attaching to that relation can, in the absence of any deed of endowment, only be deduced from the usages of the institution. As the plaintiff is not the hereditary trustee and manager, the question is whether the usage of the institution justifies his claim to remove the defendant from the headship of the mutt and the custody of its properties, which is the foundation of his suit. It is argued before us that this claim rests upon the fact that the plaintiff and his ancestors have always appointed the ascetics who have been successive heads of the mutt, and that the right of appointment involves a right of dismissal. And as against the defendant it is said the case for a right of dismissal is strengthened by the fact, that, on his appointment, he executed Exhibit N in favour of the Zemindar, by which he requested that he might be appointed, and undertook to render accounts of the income and expenditure.

But we agree with the District Judge that the power of appointment, which the plaintiff and his predecessors are shown to have exercised in respect to the headship of this mutt, is a limited one and does not involve the power of dismissal. The appointments have always been made from among the chelas or disciples of the last head of the mutt, and have really amounted to nothing more than that the Zemindar, as a powerful supporter and large benefactor of the mutt, has sanctioned the choice of a successor from among his chelas made by the head for the time being, and has invested the successor with a sadi on his installation.

With the exception of the series of documents marked as Exhibits J to J3, which are accounted for by the fact that the Collector called for accounts and particulars of the property and [46] income of the mutt, which the Zemindar obtained from the then head, there is no evidence that the heads of the mutt ever furnished accounts to the Zemindar, or except in the case of the demand made upon defendant before suit, were ever asked to furnish accounts.

And we think the defendant's undertaking in Exhibit N to furnish accounts cannot operate to alter his status so as to render himself liable to dismissal for not furnishing accounts. If he was not by the terms on which he held his office liable to render accounts, he could not, by any voluntary promise on his part, impose on himself an obligation which had no legal existence. The obligation to render accounts does not appear to form part of the usage of the institution, nor does it appear that the provision in Exhibit N for rendering accounts was ever acted upon until the demand before suit. No instance of a Zemindar having ever dismissed the head of this mutt, or having appointed a chela other than the one nominated by the head of the mutt, is proved. It is urged that it was open to the Zemindar to appoint any chela at his discretion. In this case it is not necessary to determine the precise nature of the Zemindar's right of appointment. It is sufficient to observe that he did appoint the defendant and that his right of appointment is a qualified right and does not necessarily involve the power of dismissal. It was for the plaintiff to
prove his right to dismiss the defendant and we agree with the District Judge that he has failed to do so.

In this view of the case, the reasons alleged for the dismissal are immaterial, but we may as well express our opinion upon the evidence on this part of the case.

Three grounds of dismissal were originally alleged (1) misappropriation of mufti funds, (2) immorality, and (3) refusal to render accounts. The first is given up in appeal. As to the second the evidence is so vague and improbable that we cannot say the District Judge was in error in declining to accept it. As to (3), as mentioned above, in our opinion, according to the usages of the institution, the defendant was under no legal obligation to render accounts to plaintiff, and his refusal or failure to do so is no justification for his dismissal.

The suit was rightly dismissed by the District Judge, and we confirm his decree and dismiss the appeal with costs.

15 M. 47.

[47] APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

APPARAU (Plaintiff's Representative), Appellant v. NARASANNA
(Defendant), Respondent.* [13th and 23rd July, 1891.]


A zamindar holding lands irrigated by the Kistna anicut, from whom no extra peishush is on that account levied by Government, is not entitled to impose on his tenants a "wet" rate of rent without the permission of the Collector.

The fact that the tenants have paid rent at such a rate for six years is not sufficient to establish an implied covenant to continue to do so.

It is allowable for a landlord to insert in his pattas a term to the effect that the tenant shall not fell trees without his consent.

[R., 17 M. 50 (59); 17 M. 73 (75); 26 M. 252 (257) = 12 M. L.L. J. 449; 29 M. 24 (25) = 16 M. L.J. 8; 30 M. 155 (156) = 17 M. L. J. 64 = 2 M. L.T. 25; 4 Ind. Cas. 1136 (1137) = 5 M. L.T. 264; 2 M. L.J. 292 (293); 24 M. L.J. 342 (341) = (1913) M. W. N. 216; D., 17 M. 1 (7) ]

SECOND appeal against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in appeal suit No. 9 of 1887, modifying the decree of P. Ramachandra Rau, Acting Head Assistant Collector, in summary suit No. 39 of 1886.

Suit by a zamindar to enforce the acceptance of a patta and the execution of a corresponding muchalka by the defendant under the Madras Rent Recovery Act.

The facts of the case are stated sufficiently for the purposes of this report in the judgment of the High Court. The proposed conditions of the patta therein alluded to as mentioned in paragraphs 15—17 of the judgment of the District Judge were stated by him as follows, viz.:

"The first of these conditions recites that the raiyats are not to "neglect or refuse to take a patta in succeeding fasils. If a raiyat culti- 
"vates so neglecting or refusing to take a patta he is to pay half his stay 
"in excess as a penalty.

* Second Appeal No. 562 of 1890.
"The second condition stipulates that raiyats converting dry land into wet or garden land must pay wet or garden rates. If it is without the zemindar's permission, the rates on neighbouring lands must be paid. If it is with the zemindar's permission [46] rates will be fixed. The third condition is that if cattle graze or heaps are placed on any land in the zemindari, the trespasser is to pay double the siste for the first offence, quadruple siste for the second offence, and sextuple siste for the third offence, and so on."

The provision in the patta as to trees to which the memorandum of objections related was as follows:—

"As the matura (tax) on the fruit trees, palmyra trees and Indian date trees standing on the said lands and the tumma (babul) trees thereon are not included in the said siste, you should obtain my permission and fell tumma (babul) trees only if required for cultivation."

The Head Assistant Collector made certain modifications in the patta and it was further modified by the District Judge.

The landlord preferred this second appeal and the tenant filed a memorandum of objections.

Bhashyam Ayyangar and P. Subramanya Ayyar, for appellant.
Mr. Ramasami Raju and Pattabhirama Ayyar, for respondent.

JUDGMENT.

PARKER, J.—The facts found are that a general village rent was paid up to fasli 1280, in which year a system of individual holdings with rates per acre was introduced. For four years there were quarrels and disturbances about the rates of rent which the zemindar wished to levy, but for Faslis 1285—1291 the rates paid have been Rs. 2-9-0 for dry and Rs. 8-8-0 for wet. The tenants object to the wet rate, and claim that they are only liable to pay the dry rate (Rs. 2-9-0; per acre) plus Rs. 4 Government tax upon dry land converted into wet by the water of the Kistna canal, thus distinguishing this wet land from the old mamul wet for which nanjab rates have to be paid to the zemindar.

After careful consideration I find myself unable to distinguish this case from Narasimha v. Ramasami (1).

The six years (Fasli 1285—1291) during which these rates have been paid are no sufficient to establish an implied contract. No extra peishcush is levied from the zemindar, nor is it found that he has contributed to the cost of the improvements. In either case he has not obtained the sanction of the Collector to the [49] enhancement of rent and that the charge of such consolidated assessment is an enhanced rate there is no doubt. The argument that the zemindar is only charging the mamul wet rates is of no force, since it is clear that no extra rate is demanded from him and Section 4, Madras Act VII of 1865, exempts him from extra payment for lands to which he is entitled to irrigation free of separate charge.

I agree with the District Judge that the three conditions referred to in paragraphs 15—17 of his judgment must be omitted. No argument was addressed to us with respect to the first and third, while the retention of the second would be inconsistent with the principle of this decision.

The memorandum of objections was not pressed except with regard to the trees.—Prima facie a tenant has no right to cut down trees without

(1) 14 M. 44.
his landlord's permission and I can see no reason to omit this clause in the patta.

I would dismiss the second appeal and memorandum of objections with costs.

WILKINSON, J.—I am of the same opinion. It was held in Ramesan v. Bhanappa (1), that the water tax of Rs. 4, which Government levies upon all lands irrigated from the Kistna channels, is not rent, and that if the landlord desires to add the tax to the rent and claim it as rent, he must obtain the sanction of the Collector. I can see no reason why the zemindar should be allowed to charge the mamul wet rate of Rs. 8-8-0 upon dry lands converted into wet by the use of the Kistna water, seeing that his doing so would be to enhance the rent from Rs. 6-9-0 to Rs. 8-8-0 without the consent of the Collector.

15 M. 50.

[50] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

MAHOMED AND OTHERS (Plaintiffs, Nos. 2 to 11), Appellants v. SITARAMAYYAR AND OTHERS (Defendants), Respondents.*

[23rd August and 22nd September, 1891.]

Transfer of Property Act—Act IV of 1882, Section 55 (2) —Vendor and purchaser—Covenant for title, wainer of—Power of attorney, construction of.

When a vendee, who sues to cancel a sale on the grounds of fraud, misrepresentation or concealment by his vendor, fails to establish these grounds of relief, he is not entitled to set up in second appeal a case founded on the implied covenant for title under Transfer of Property Act, Section 55 (2).

SECOND appeal against the decree of H. T. Ross, Acting District Judge of Madura, in appeal suit No. 538 of 1889, affirming the decree of S. Gopalachariar, Subordinate Judge of Madura (East), in original suit No. 56 of 1888.

On 21st March 1888, defendants Nos. 1—4, who are coparceners, executed to plaintiff No. 1—

(1) A sale-deed (H) for Rs. 4,575, of one-fourth of village of Kottiyarkottai, five other pangus in Kottiyarkottai, five pangus in Tirupalagudi, and the east half of a house-site in Ramnad.

(2) A mortgage-deed (J) for Rs. 440, of one and odd pangus in Kottiyarkottai, one and odd pangus in Tirupalagudi, and the west half of the house-site aforesaid.

On the same day, defendant No. 5 had executed to defendants Nos. 1—4 a sale-deed (G) of all the above properties which he (fifth defendant) had acquired as execution-purchaser in a suit (original suit No. 160 of 1888) instituted against them by him as agent for the holders of a mortgage from them in which he, as such agent, obtained a decree for sale.

The present suit was instituted by plaintiff No. 1 (since deceased) to obtain a cancellation of the sale and mortgage [51] (H and J) and a refund of Rs. 3,661 alleged to have been paid by him towards the consideration therefor, on the grounds:

* Second Appeal No. 941 of 1890.

(1) 7 M. 189.
(a) That the properties sold and mortgaged to him by defendants Nos. 1—4 were charity properties, originally held by them as mere trustees, which they and their vendor, the fifth defendant, fraudulently represented to be their ancestral Dharmasanam properties, originally held by them as proprietors under a personal grant.

(b) That the fifth defendant had no power to sell the properties to defendants Nos. 1—4 having purchased them in the execution sale, not on his own account, as was fraudulently represented to plaintiff No. 1, but merely as an agent of the original mortgagees who had not authorised the subsequent sale.

(c) That no effect was given to the transactions by transfer of possession to first plaintiff.

Defendant No. 5, the executant of exhibit G, had received jointly with his accountant, one Narayana Pillai, a power of attorney filed as Exhibit B from the original mortgagees of the land in question which was translated as follows:

"You both, on our behalf, shall be our representatives and agents, and authorised to exercise the power in respect of the one-fourth village and collect the arrears, relating to the former incomes, &c., of the village, to institute suit for the previous incomes to obtain the incomes, &c., all profits after tendering patts to the raiyats from the present fasli and making endeavours for conducting cultivation, and to deliver to us with accounts; to appear and conduct civil, criminal and revenue functions regarding the said one-fourth village and get them legally disposed of, to raise loan, &c., as our agents for expenses as required, to receive money, &c., and increase the funds to receive and pay us the mortgage money after the expiry of the term of mortgage or subsequent thereto or when you get it, to continue to pay Circar parupp; and to sue for the loss of mortgage amount when there is difficulty in recovering the incomes of the village. We shall admit all acts as well as all reasonable acts done by you in the said matter, as if they were done by us personally."

The further facts of this case appear sufficiently for the purposes of this report from the judgment of the High Court.

[32] The Subordinate Judge held that possession of the land which was, in fact, burdened with a charitable trust had been delivered to plaintiff No. 1, and that no fraud had been practised on him and accordingly dismissed the suit, and his decree was affirmed on appeal by the District Judge.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and Sundara Ayyar, for appellants.
Ramachandra Rau Sahib, for respondent No. 1.
Subramanya Ayyar, for respondent No. 5.

JUDGMENT.

The argument addressed to us by the learned vakil for the appellants may be summarized as follows. Accepting the findings of the Lower Courts that there was no fraud, misrepresentation or concealment on the part of defendants as to the title of the properties they professed to sell and mortgage, the plaintiffs are entitled to succeed because Section 55, Clause 3 of the Transfer of Property Act imports into the contract of sale an absolute covenant for title on the part of the defendants and the facts as they appear in the judgments of the Lower Courts show that
the defendants could not make a proper title to the properties sold and
mortgaged.

It is to be observed that this was not the case set up for appellants
(plaintiffs) in the Lower Courts. The plaintiffs sued to set aside the sale
and mortgage in question on the ground of fraudulent misrepresentation
and concealment of facts relating to the title by the defendants. Both
Courts found that there was no misrepresentation or concealment, and
now the plaintiffs seek to fall back upon another ground of relief, viz.,
their rights under the covenant for title given them by the Transfer of
Property Act. We think that they should not be allowed to do this in
second appeal. No issue was raised upon this point and defendants had
no opportunity of meeting it or of adducing evidence as they might have
done, to show that there was a contract to the contrary which would
prevent the incident of a covenant for title attaching to the transaction.
Plaintiffs chose to go to trial upon the ground of fraudulent concealment
and misrepresentation and having failed on that ground cannot at this
stage be allowed to start a new case which would involve new issues and
a fresh inquiry.

We think this appeal ought to be dismissed on this ground alone,
but we are also of opinion that upon the facts found the [53] plaintiffs'
case would fail even if it were based upon the covenant for title conferred
by the Transfer of Property Act.

The defects of title alleged as ground for the rescission of the sale are
two: first, that as to one-fourth of the village of Kottiyanakottai it was
not the absolute property of the defendants 1 to 4 but was charity pro-
erty dedicated to the support of a chutrium; second, that defendant No. 5
purchased the properties which he professed to sell to defendants Nos. 1
to 4 as agent for other persons, and, therefore, could not sell without
the consent of those persons. The second objection to the title may be
disposed of at once by saying that there is nothing to show that the fifth
defendant's principals ever objected to his selling. On the contrary, one of
them was the defendant's second witness and stated that he did not object.
The other is dead, and the Lower Courts disbelieve the right of the per-
son who claims as his representative to object to the transaction. Moreover,
we agree with the District Judge that it is not shown that the act of the
defendant No. 5 in selling to defendants Nos. 1 to 4 was beyond the scope
of the authority given him by the power of attorney. Exhibit B, to recover
the debts due to his principals. As against defendant No. 5 it is to be
noticed that the plaintiffs can have no cause of action except on the ground
of fraud, for their contract for sale was with defendants Nos. 1 to 4 who
purchased from defendant No. 5.

As to the first objection to the title the conduct of the first plaintiff
at the time of, and since the contract for, sale, in our opinion, amounted
to a waiver of the defect in the title even if it existed, which is more than
doubtful. The District Judge finds that 'the probability and the evi-
dence is overwhelming that everything about this one-fourth village and
all the papers connected with it were explained by the first and fifth
defendants to the first plaintiff in the negotiations which ended in the sale
and mortgage now sought to be cancelled.' It is not shown to us that
there is no evidence to support this finding, and, on the contrary, we see
in some of the documents and evidence brought to our notice much to
lead us to think that it is well founded.

With this knowledge, then, of the alleged defect in the title plaintiff
No. 1 paid the consideration and entered into possession of the property

386
and we think he must be taken to have waived the defect in the title, a
defect which, it may be observed, even if it exists, does not go to the root
of the title but merely saddles [55] one part of the property sold with a
burden in favour of a charity. That there is any real danger of any
disturbance to the plaintiff's enjoyment of the property by reason of the
supposed claims of this charity we do not believe. The proceedings taken
by the Local Fund Board on behalf of the charity appear to have been
abandoned and there is nothing to show that the claim of the charity, if
it ever existed, has been recognized or enforced for a considerable period
of time.

On the whole, we agree with the Lower Courts that no case has
been made out for setting aside the sale and mortgage in question and we
must dismiss this second appeal with costs. A separate set for first and
fifth respondents respectively.

15 M. 55.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice,
and Mr. Justice Shephard.

CHINNAN (Plaintiff), Appellant v. RAMACHANDRA AND OTHERS
(Defendants), Respondents.*
[11th March and 31st August, 1891.]

Transfer of Property Act - Act IV of 1882, sections 85, 91 - Parties - Redemption - Suit by
puisne mortgagor - Jointer of mortgage on second appeal - Plaintiff, a name-lender.

On second appeal against a decree dismissing a suit which had been brought
by a puisne mortgagor to redeem a prior incumbrance, it was ordered that the
mortgagor be brought on to the record.

On its appearing that it had not been intended that the plaintiff should take
any interest under the mortgage sued on;

Held, that the second appeal should be dismissed.


SECOND appeal against the decree of T. Ramasami Ayyangar,
Subordinate Judge of Négapatam, in appeal suit No. 167 of 1887, confir-
mimg the decree of T. Venkatarama Chettiar, District Munsif of Pattukotta, in
original suit No. 123 of 1886.

The plaintiff sued as mortgagor under an instrument of usufructuary
mortgage of 14 3/32 pungus of land, dated 8th April 1881 and executed in
his favour by one Subramania Gurukkal, (which was filed in this suit as
Exhibit A,) to redeem a prior [55] mortgage executed in favour of the
father of defendant No. 1 and to recover the land comprised therein which
was in the possession of the other defendants. The mortgagor was not
joined as a party to the suit. Among the defences raised on the pleadings,
it was alleged that the mortgage set up by the plaintiff, even if it was a
genuine document, was fraudulent and void as against the defendants.
The third issue was framed as follows:—

"Whether the said Subramania Gurukkal usufructually mortgaged
"after the death of the said Srinathra Gurukkal without issue, and on the
"8th April 1881 for Rs. 5,000, 14 3/32 pungus (including those already
"mortgaged to the first defendant's father) to the plaintiff?"

* Second Appeal No. 1383 of 1889.
The District Munsif passed a decree dismissing the suit. The Subordinate Judge, on appeal, affirmed the decree of the District Munsif recording as to the third issue a finding "that the plaintiff's mortgage is not a bona fide one and he has therefore no right to claim redemption."

The plaintiff preferred this second appeal.

Ramasami Raju and Subramanya Ayyar, for appellant.

Bhashyam Ayyangar and Pattabhirama Ayyar, for respondents.

JUDGMENT (PRELIMINARY).

The third issue has apparently been tried under a complete misapprehension of the law.

Assuming that the person, who executed the mortgage in the plaintiff's favour, was the owner of the property, the only question is whether in fact he did mortgage it to the plaintiff. That is the only real question. It is found by the Subordinate Judge that the sums stated in the mortgage document to have been advanced on the security of it have not really been advanced, and on that finding apparently the Subordinate Judge arrives at the conclusion that the plaintiff's mortgage is "not a bona fide one" and that he has no right to claim redemption. The expression "bona fide mortgage" is a very loose and indefinite one, and it is not clear what the Subordinate Judge means. Prima facie when the execution of a mortgage or other conveyance is proved—and here apparently it was proved and not denied by the mortgagee—further evidence is not required to show that the purchaser has taken the interest which the document purports to convey. It is not necessary for him to prove as against a third person that the consideration passed, and proof that the consideration mentioned did not exist is of no avail to show that the interest which the instrument purported to convey was not conveyed to the purchaser. Such proof is only important, when taken with other circumstances, it tends to show that the instrument was a mere sham not intended to convey any interest to the ostensible purchaser at all.

In the present case, if the plaintiff's mortgage is content that the plaintiff should redeem, the defendant has no reason to object; but for that reason the mortgagee ought, as Section 91 of the Transfer of Property Act requires, to be brought on the record.

We must ask the Subordinate Judge, after first adding the mortgagee or his representative as a defendant, to return a revised finding on the third issue, and, if he finds in favour of the plaintiff on that issue, to return findings on the other question raised in the appeal.

Findings to be returned within a month after the re-opening of the Subordinate Court, and seven days, after the posting of the finding in this Court, will be allowed for filing objections.

[The Subordinate Judge, in compliance with the above order, returned a revised finding which was to the effect that the mortgage-deed sued on was executed for the benefit of one Vellian Chetty and not for that of the plaintiff who had paid nothing for it. He observed that the plaintiff's case was not that he had obtained the mortgage benami for Vellian Chetty (who was his cousin), but that he had taken it for his own benefit.]

The second appeal having come on for final hearing, the Court delivered judgment as follows:—
JUDGMENT (Final).

It is now found that, as far as the plaintiff is concerned, it was not intended that he should take any interest under Exhibit A. We must accept the finding observing, however, that the observations of the Subordinate Judge are very confused.

The appeal is dismissed with costs.

18 M. 57 = 1 M. L.J. 75 7 N.

[57] APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

PATCHA and others (Defendants 1—9), Appellants v. MOHIDIN (Plaintiff), Respondent.* [17th and 24th July, 1891.]

Limitation Act—Act XV of 1877, Schedule II, Article 127—Joint family property—Suit by Muhammadan heir for his share in an undistributed estate.

The words "joint family property" in Limitation Act, 1877. Schedule II, Article 127, are intended to refer to joint family property in the Hindu sense of the term. A Muhammadan sued, as heir in 1888, to recover his share in the property of his grandfather, which had been enjoyed jointly by his descendants from his death, which occurred in 1840, up to a recent date. It did not appear that the family was governed by any special custom:

Held, that the suit was not governed by Limitation Act, 1877, Schedule II, Article 127, and was barred by limitation.

[F., 22 C. 954 (359); 15 M. 60; R., 23 B. 137 (140); 23 M. 583 (588); 34 M. 511 (513)
6 Ind. Cas. 50 = 30 M. L.J. 288 = 8 M. L.T. 4; 5 Som. L.R. 305 (383); 13 Ind.
Cas. 731 = 5 (1912) M. W.N. 45; 5 N. L.R. 41; 1 M. L.J. 754 (757); Disappe., 16 M.
61 (63) (F.B.).] kaufen

APPEAL against the decree of H.R. Farmer, Acting District Judge of Cuddapah, in original suit No. 14 of 1888.

It was alleged in the plaint that the plaintiff's maternal grandfather, Kader Sabeb died twenty years before this suit, leaving him surviving a widow, two sons, Madar Saheb and Kassim Saheb, and a daughter, Lal Bee, who was the plaintiff's mother; that after his death his property had been jointly enjoyed by his heirs and legal representatives; and that his widow, and Madar Saheb and Lal Bee had since died—Madar Saheb leaving several children. The defendants were the heirs of Madar Saheb, Kassim Saheb and their transferees.

The prayer of the plaint was for the partition and delivery of possession of the plaintiff's share under the Muhammadan law of inheritance in the properties left by Kadar Saheb and Madar Saheb.

The District Judge stated his findings as to the history and condition of the family as follows:

"I find that the family by which the suit property was acquired was a trading family of Mussalmans and a family, upon which, like that of the plaintiff's father, the Muhammadan law sat very lightly. This is shown by the fact that, when the representa- [58] tatives of the two brothers, Madar and Kassim, divided their property, Madar's sons were allowed to take the share which their grandmother, Morad Bee, had inherited from their father, whereas Kassim, as son of Morad Bee, was entitled to two-thirds of that property. Again the plaintiff himself

* Appeals Nos. 18 and 105 of 1890.
was at first allowed a share in his paternal grandfather's property, though
his father had predeceased his grandfather; afterwards, when the plaint-
iff's uncle consulted those who knew the law and found that plaintiff
had no legal claim, he took from him the property which he had been
allowed to hold on the mistaken impression that he inherited it from his
grandfather through his father who predeceased his grandfather. I
further find that his trading family, who seemed to have acted as they
thought fair and reasonable, rather than in accordance with the compli-
cated rules of Muhammadan law with regard to the distribution of
family property, were content to recognize one man as head of the
family, and that he was allowed to manage the business, while the other
members of the family allowed him to act as banker, took a subordinate
part, and were content with such provision as he chose to make for
their maintenance. Kader, the grandfather of plaintiff and of 8th, 10th
and 11th defendants, may be regarded as the founder of the family for the
purpose of this suit. He was succeeded by his sons, Madar and Kassim.
After Madar's death about 1859, his brother Kassim became the leading
member of the family, and, since Kassim's death, in 1882, his place has
been taken by his son Patcha Mahan, the first defendant. I find that Kader
died about 1840, that his son Madar died about 1859, that this widow,
"Morad Bee, died about 1872, his daughter Lal Bee in 1879 or 1880, and
his son Kassim in 1882."

Upon these facts, after reference made to Regulation II of 1802
(Mahrut), Section 18 and Act XIV of 1859, Section 18, Act IX of 1871,
Schedule II, Articles 122, 145, the District Judge held that the suit was
not barred by limitation, but came within the provisions of Act XV of 1877,
Schedule II, Article 127, and he passed a decree as prayed.

Defendants 1—9 preferred this appeal.

Parthasaradhi Ayyanagar and Sivagnana Mudaliar, for appellant.
Mahadeva Ayyar, for respondent.

JUDGMENT.

The plaintiff's rights are derived through his mother Lall Bee who
died in 1879. The rights of this lady were [59] derived from her father
who died about 1840 and from her mother who died in 1872, but she
never obtained any distribution of her share. The Judge has held that
the property was joint family property from which Lall Bee was never
excluded during her life, and from which plaintiff was not excluded till
1882, and that the suit is governed by Article 127, Limitation Act.

The Judge finds that the family was a trading family of Mussalmans,
upon whom the Muhammadan Law sat very lightly. It was not alleged,
however, that there was any special family custom by which the rules of
Hindu Law, as to joint family property, would apply. On the contrary,
the Judge points out that when in plaintiff's own family he had at first by
mistake (under the rules of Muhammadan Law) been allowed a share in
his paternal grandfather's property, it had afterwards been taken from
him when this mistake was pointed out by friends who knew the Muham-
dadan Law. This case differs therefore from Khatria v. Ismail (1), in
which it was held that the class called "Navayat" (the descendants of
Arab immigrants and Hindu Konkanis) had adopted Hindu customs.

Nor are the rights which plaintiff seeks to enforce consistent with
joint family rights under Hindu Law. Under Hindu Law the plaintiff's

(1) 12 M. 380.

390
mother could have had no joint rights in her father's estate, nor would her mother have been entitled to anything but maintenance.

The decision in Aruna v. Masunsha (1) was quoted as an authority for the propositions that joint family property includes property left by a deceased Muhammadan and divisible among his heirs until it is divided, and that article 127 of the Limitation Act applies to a suit for a division of such property. With all respect we cannot agree with the learned Judges in either of these propositions. It seems to us impossible that property, which was in no respect joint family property in the Hindu sense up to the date of the deceased's death, should become joint property in the Hindu sense because of his death, and we cannot but think the words "joint family property" in article 127 were intended to refer to joint family property in the Hindu sense of the term. We are strengthened in this opinion by the view taken by the Full Bench of the Allahabad High Court in Ammon Raham v. Zia Ahmad (2). [60] The Legislature had no doubt some reason in repealing the word "Hindu" and substituting the word "person," but it may have been done as pointed out by Mahmood, J., with the intention of meeting cases in which by special custom Muhammadan families were governed by the Hindu Law of succession, or it may have been intended to meet cases where a non-Hindu had become the purchaser of a Hindu's undivided share in joint family property.

Taking this view we are of opinion that the property left by Kader Sahib who died in 1810 never became joint family property, but at his death became separate property in which each individual owner became entitled to his or her separate share.

The suit is therefore barred. We would reverse the decree of the District Judge and dismiss the suit with costs throughout.

The stamp fee due to Government must be recovered from the plaintiff.

1891
JULY 24.
APPEL-
LATE
CIVIL.

15 M. 60= 1 M.L.J. 754.

APPELATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

KASMI AND OTHERS (Defendants Nos. 1 to 3 and 5), Appellants v. 
AYISHAMMA AND OTHERS (Plaintiffs and Defendants Nos. 7 to 9), 
Respondents.* [4th, 7th, and 24th August, 1891.]

Limitation Act—Act XV of 1877, Schedule II, Articles 123, 127, 144—Suit by a Mapilla 
widow for her share in her husband's property.

The widow of a Mapilla, who had died intestate more than fourteen years before suit, sued to recover a one-sixteenth share of the property left by him and his brother:

Held, that although the parties were Mapillas the suit was governed by Article 123 of the Limitation Act and was accordingly barred.

[Dis., 34 M. 511 (513) = 3 Ind. C. 50 = 10 M.L.J. 288 = 8 M.L.T. 4; R., 16 M. 61 
(69) (F.B.); 4 M.L.J. 43 (45); 5 N.L.R. 41.]

SECOND appeal against the decree of L. Moore, District Judge of 
South Madras, in appeal suit No. 53 of 1889, affirming the decree of 
O. Chandy Menon, District Munsif of Shernad, in original suit No. 291 of 
1888.

(1) 14 B. 70. (2) 13 A. 262.

* Second Appeal No. 794 of 1890.
Hydroskutti, a Mapilla, who died in 1875, was the husband of the plaintiff; his brother Mamodkutti, who predeceased him, was the father of the defendants. The plaintiff brought this suit in 1888 against the appellants and others, for the partition and delivery of possession of one-sixteenth share of the property left by these two persons, to which the plaintiff claimed to be entitled as the widow of Hydroskutti.

The District Munsif passed a decree for the plaintiff as prayed, which was affirmed, on appeal, by the District Judge. The defendants preferred this second appeal.

Narayana Rau, for appellants.
Sankara Menon and Govinda Menon, for respondent.

JUDGMENT.

The question for decision in this second appeal is whether the plaintiff's suit is barred by limitation. The District Judge held that the case was governed by article 127 of the Limitation Act and that the suit was therefore within time. On behalf of the appellants, it is argued that article 123 applies, whereas respondent's pleader maintains that article 144, if any, is the proper article to apply.

The suit was instituted by a Muhammadan (Mapilla) lady who sought to obtain a declaration of her right to, and possession of, a certain share in property which, she alleged, had belonged to her husband, Hydroskutti, who died fourteen years before the suit was filed. Admittedly, Hydroskutti died intestate. This then being a suit for a distributive share of the property of an intestate, article 123 is the only one that applies, and the suit not having been brought within twelve years from the time when the share became deliverable it is clearly barred.

But it is argued, on behalf of the respondents, that co-partenary among Mapillas has been judicially recognized, and that the undivided family property having been held by the members jointly, time did not begin to run against the plaintiff until she was excluded. We are not aware in what case co-partenary has been judicially recognized as the custom of Mapilla families in Malabar. In Ammunity v. Kunji Keyi (1), although it was remarked that Mapillas in Malabar ordinarily follow closely the Hindu custom of holding family property undivided, that was not the point on which the decision of the case rested. We have referred to the records of the case and find that there was no issue as to the customs of the Mapillas in Malabar. Moreover, the case now set up was not the case put forward in the plaint. There it was asserted that the greater portion of the immovable property in Schedule A the moveable properties in Schedule B, and part of the buildings in Schedule C had been acquired by Kasmi, the father of Hydroskutti; that after his death (in 1859) the property had been improved by Hydros and his brother Mamod (father of appellants), who died in 1875, and that since their death plaintiff had been in possession of certain items, the remaining being in the possession of first or seventh defendant. Participation in the possession or enjoyment of the property held by the defendants was never pleaded, but plaintiff offered apparently to put the property, of which she has sole possession, into hotchpot provided she got a one-sixteenth share in the whole of the property left by Hydros and Mamod.

We have already held in Patcha v. Mohidin (2) that article 127 does not apply to Muhammedans, and article 144 can have no application to

(1) 8 M. 459.
(2) 15 M. 57.
this case, because, as held by the Privy Council, that article only applies where there is no other article which specially provides for the case, and it applies only to immovable property. In the present case, Article 123 clearly applies, and plaintiff's suit, not having been instituted within twelve years from the date of Hydros' death, is barred. The decrees of the Lower Courts, so far as they affect the first, second, third, and fifth defendants (appellants) must be set aside and plaintiff's suit as against them dismissed with costs.

15 M. 63 = 2 Weir 794.

[63] APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

QUEEN-EMpress v. Samiappa and Others,*

[31st March and 9th September, 1891.]

Evidence Act—Act I of 1872. Sections 80, 132—Self-incriminating statements of witness—Proof and admissibility of depositions containing such statements in proceedings against the witness.

A revenue official was charged with the offence of attempting to receive a bribe from certain raiyats who gave evidence for the prosecution, and he was convicted. He subsequently charged the raiyats with having conspired to bribe him, and in their trial their depositions in the previous case were tendered in evidence for the prosecution:

Held, that the depositions should have been admitted in evidence.

CASE referred for the orders of the High Court under Section 438 of the Criminal Procedure Code by E. S. Laffan, District Magistrate of Bellary.

The facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court.

Mr. Paulie, for the accused.

The Government Pleader and Public Prosecutor (Mr. Powell), for the Crown.

JUDGMENT.

In calendar case No. 2 of 1889 on the file of the District Magistrate of Bellary, one Murtinajayalu, a classifier in the Revenue Settlement Department, was convicted of an attempt to receive a bribe from a body of raiyats at the rate of four annas an acre of their holdings and was sentenced to two years' rigorous imprisonment. In April last he complained to the District Magistrate against ten raiyats upon whose evidence he was convicted, and charged them with having conspired to bribe him. The District Magistrate transferred the complaint for disposal to the Deputy Magistrate, who, after examining the complainant, issued process. In his examination Murtinajayalu denied that he attempted to take a bribe, whilst he stated that the accused admitted having conspired to bribe him in the evidence which [64] they gave in calendar case No. 2 of 1889. Seeing that the complaint was in its nature vindictive, the District Magistrate asked the High Court to interfere in revision. In Queen-Empress v. Sunnoppa (1), a divisional bench of this Court considered that there was nothing illegal on the part of the Divisional Magistrate in entertaining the complaint and

* Criminal Revision Case No. 602 of 1890.

(1) Criminal Revision Case No. 267 of 1890, unreported.
issuing process, and that it was premature for them as the case was sub judice to express any opinion on the other questions discussed by the District Magistrate in his letter of reference. The Deputy Magistrate then tried the accused, discharged the fifth, seventh, eighth and ninth, convicted the first, second, third, fourth, sixth and tenth accused under Sections 116 and 161, Indian Penal Code, and sentenced the third and fourth to two months' simple imprisonment and the others to a fine of Rs. 25 each. On appeal the Sessions Judge acquitted the third and fourth accused. Both the District Magistrate and the Judge agree in thinking that the strength of the case for the prosecution depends mainly on the question whether the self-incriminating depositions given by the accused are receivable in evidence. The District Magistrate considers that they are not admissible under the proviso of Section 132 of the Evidence Act, though the accused had not claimed an indemnity before incriminating themselves. He questions the correctness of the decision of the majority of this Court in The Queen v. Gopal Doss (1) and drawing attention to the cases of Manjaya v. Sesha Shetti (2) and Bhikumber Singh v. Becharam Sircar (3) refers the convictions of the accused to this Court for revision so far as they have not been set aside by the Sessions Judge. As regards the acquittal of the third and fourth accused, the District Magistrate thinks that the Sessions Judge has overlooked Section 80 of the Evidence Act, and that the acquittal, if supported, can only be supported for the reason mentioned by him, viz., that the self-incriminating depositions of the accused in calendar case No. 2 of 1883 are not legal evidence. All that was decided in Manjaya v. Sesha Shetti (2) was that a witness was not liable to be convicted of defamation on a statement made by him as a witness, and that if the statement was false the remedy was by indictment for perjury. Again, in the case of Bhikumber Singh [65] v. Becharam Sircar (3), it was only decided that no suit would lie for damages on account of slander uttered by a witness whilst under examination in a judicial proceeding. There is no real conflict between these decisions and the decision in The Queen v. Gopal Doss (1), and we feel, therefore, bound to follow it. As observed by the District Magistrate, the Sessions Judge was clearly in error in holding that the depositions given by the third and fourth accused were not legal evidence against them, and that it was not one of the presumptions arising under Section 80 of the Evidence Act that the witnesses did actually say what was recorded. Section 80 provides, inter alia, that the Court shall presume that the evidence was duly taken, and it could not be considered to be duly taken if it did not contain what the witness actually stated. Having regard to the decision in The Queen v. Gopal Doss (1) and to the mistake made by the Sessions Judge in declining to act upon Section 80 of the Evidence Act, we think that the acquittal of the third and fourth accused was wrong. As the sentence of imprisonment has been suffered in part, we will merely restore the conviction and treat the sentence that has been undergone as sufficient.

(1) 3 M. 271.  
(2) 11 M. 477.  
(3) 15 C. 264.

394
SARAVANA v. CHINNAMMAL

APPELLATE CIVIL

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

SARAVANA (Defendant), Appellant v. CHINNAMMAL (Plaintiff), Respondent. [26th August, 1891.]

Transfer of Property Act—Act IV of 1881, Section 68 (c)—Personal suit for mortgage amount.

In a suit against a mortgagor for the principal and interest due on a mortgage, it appeared that the payment of interest had fallen into arrears, and that the mortgage deed provided that in such event the mortgagees should be entitled to possession of the mortgage premises; the mortgagee falsely alleged that all the interest due had been tendered:

Held, that the mortgagee was entitled to sue as above.

[R., P.L.R. (1900) p. 180]

[66] SECOND Appeal against the decree of R. S. Benson, District Judge of South Arcot, in appeal suit No. 291 of 1888, reversing the decree of S. A. Krishna Rau, District Munsif of Chidambaram, in original suit No. 526 of 1888.

Suit for the principal and interest due on a mortgage dated 18th June 1887: the sum secured was Rs. 300, and the material portion of the mortgage deed was as follows:

"The interest accruing at the rate of half per cent. per mensem shall be paid in cash within the 30th Vykasi of every year. In default of so paying, the said hypothecated land shall be enjoyed. I myself shall pay the assessment of the said land."

The further facts of the case appear sufficiently for the purposes of this report from the following judgment.

Krishnamachariar, for appellant.

Mahadeva Ayyar, for respondent.

JUDGMENT.

By the terms of the mortgage document, on failure of payment of interest at the stipulated time, plaintiff was entitled to possession of the mortgaged property. Defendant alleged tender of the interest at the due date, but it is found that this allegation is false. On the findings, therefore, plaintiff was, some months before suit, entitled to possession, and defendant did not put her in possession, but, on the contrary, denied her right to possession on a false plea of tender of the interest. We think, therefore, that, under clause (c) of Section 68 of the Transfer of Property Act, plaintiff was entitled to sue for the mortgage amount, and the decree of the Lower Court can be supported on this ground. The appeal is dismissed with costs.

* Second Appeal No. 1015 of 1890.
APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

KRISHNA (Defendant), Appellant v. LAKSHMINARANAPPA (Plaintiff), Respondent.* [28th August, 1891.]

Rent Recovery Act — Act VIII of 1865 (Madras), Sections 3, 12 — Mulgeni holding — Right of tenant to relinquish his lease.

It is not competent to a mulgeni tenant in South Canara to relinquish his lease and free himself from his obligation for rent without the consent of the landlord:

Quaere, whether a mulgar is within the class of landholders defined in Rent Recovery Act, Section 3.

[R., 27 M. 465 (469) — 14 M.L.J. 81.]

SECOND Appeal against the decree of S. Subbayyar, Subordinate Judge of South Canara, in appeal suit No. 299 of 1889, affirming the decree of K. Krishna Rau, District Munsif of Puttur, in original suit No. 103 of 1889.

The plaintiff, who was a mulgar in South Canara, sued to recover Rs. 18.8.0, being arrears of rent, with interest, due under a mulgeni lease granted to the defendant on 16th November 1877. The defendant pleaded that he had intimated to the plaintiff in the beginning of the year for which rent was claimed, that he had relinquished possession of the land and his rights under the mulgeni lease, and that accordingly the plaintiff was not entitled to recover. He further alleged that he had been compelled to quit the land, as the plaintiff had failed to get certain works on the land carried out as promised by him. This allegation was held by both the Courts not to have been substantiated, but no issue was framed with reference to it.

The District Munsif passed a decree for the plaintiff, providing that he should recover the decree-amount "from the defendant or by sale of the property mentioned in the plaint." This decree was affirmed on appeal by the Subordinate Judge. Both decrees were passed on the ground that it is not open to a mulgeni tenant to surrender his rights under the lease and thereby free himself of liability for rent without the consent of the landlord.

[66] The defendant preferred this second appeal on the following grounds:

"The Lower Courts were wrong in deciding that defendant could not "relinquish his lands in favour of his landlord."
"Defendant having relinquished his lands to plaintiff as per I and II "is not liable to pay plaintiff the rent sued for."
"The Lower Courts should have framed an issue as to whether there "was an agreement between plaintiff and defendant that plaintiff should "do certain acts in reference to the land and "whether the non performance "of such acts justified defendant in relinquishing the lands and the "absence of such an issue prejudiced defendant's case."

Ramasami Mudaliar, for appellant.
Mr. Subramanyam, for respondent.

* Second Appeal No. 1039 of 1890.
JUDGMENT.

We are of opinion that Section 12 of the Rent Recovery Act does not apply to this case. In the first place it is not shown that the plaintiff comes within the class of landholders defined by Section 3, and next it is impossible to suppose that in an Act for consolidating and improving the law for the recovery of rent, it could possibly be intended to repeal the ordinary law relating to contracts and enact that one contracting party could put an end to the contract whenever he chose and the other never. (See the remarks of Holloway, J., page 173, in the case of Chockalinga Pillai v. Vythealinga Pundara Sunnady.)

The appeal is dismissed with costs.

15 M. 69.

[69] APPELLATE CIVIL.


NARAYANAN (Plaintiff No. 1), Appellant v. NARAYANAN AND OTHERS (Defendants Nos. 2 to 14 and Plaintiff Nos. 2 to 18), Respondents.*

[8th October, 1891.]

Civil Courts Act (Madras)—Act III of 1873, Section 12—Jurisdiction—Valuation of relief—Suit for partition.

In an appeal against a decree of a Subordinate Judge dismissing a suit brought by the members of one Nambudri illoom against the members of another for partition and delivery of a moiety of the property of an extinct illoom, it appeared that the value of the share claimed was less than Rs. 5,000.

Held, that the appeal lay to the District Court: Krishnasami v. Kanakasabai (14 M. 183) followed.

[R, 22 B. 315 (316).]

APPEAL against the decree of E. K. Krishnan, Subordinate Judge of Calicut, in original suit No. 16 of 1889.

Suit for the partition and delivery to the plaintiffs of the property formerly belonging to a Nambudri illoom known as Varanasi, which was now extinct.

The Varanasi illoom and those of which the plaintiff and defendants were respectively members were branches of the same illoom. The plaintiffs sued as co-heirs and successors with the defendants of the extinct illoom.

The value of the share claimed was Rs. 2,743.1-4.

The Subordinate Judge passed a decree dismissing the suit.

The plaintiffs preferred this appeal.

Bhashyam Ayyangar and Sankaran Nayar, for appellant.

Sankara Menon, for respondents Nos. 1 to 6.

Sundara Ayyar, for respondent No. 1.

JUDGMENT.

We think that we should follow the principle laid down in Krishnasami v. Kanakasabai (2) and other cases instead of that laid down in Vydinatha v. Subramanya (3) on the ground that when the Varanasi illoom

(1) 6 M.H.C.R. 164.
(2) 14 M. 183.
(3) 8 M. 235.
became extinct there were, [70] according to plaintiffs’ own case, only two illoms entitled to share in the property of the extinct illom. The value of the suit is, therefore, the value of the share claimed, and the appeal lies to the District Court. We return the appeal to be presented in the proper Court. Appellant must pay respondents’ costs in this Court.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Handley.

RAMAYYAR (Plaintiff), Appellant v. SHANMUGAM AND OTHERS (Defendants), Respondents.*
[3rd and 13th November, 1891.]

Alteration in document sued on. Materiality of—Forged attestation.

In a suit on a hypothecation bond, dated before the Transfer of Property Act came into operation, and executed in favour of the plaintiff by the father (deceased) of defendant No. 1, it appeared that, after the bond had come into the hands of the plaintiff, the name of defendant No. 1 had been added as that of an attesting witness and that this was a forgery:

Held, that the plaintiff was not precluded from recovering by reason of this alteration in the bond sued on.

[R., 40 P.L.R. 1901.]

Second Appeal against the decree of W. F. Graham, District Judge of Tinnevelly, in appeal suit No. 326 of 1889, reversing the decree of V. Kuppusami Ayyar, District Munsif of Ambasamudram, in original suit No. 1022 of 1888.

Suit to recover the principal and interest due on a hypothecation bond, dated 18th January 1881, executed by the father (deceased) of defendant No. 1, who was the father of defendants Nos. 2 and 3. The instrument sued on purported to contain the signature of defendant No. 1 as an attesting witness, but it was found that this signature was a forgery and had been added after the instrument came into the hands of the plaintiff.

The District Munsif passed a decree for the plaintiff. This decree was reversed on appeal by the District Judge, who held that the instrument had been materially altered, and the plaintiff was thereby precluded from recovering on it on the authority of [71] Ramasamy Kon v. Chinna Bhavani Ayyar (1), Christucheru v. Karibasayya (2), Mohesh Chunder Chatterjee v. Kamini Kumari Dalia (3), Vakappa v. Muhammed Khashim (4), Govindasami v. Kuppusami (5), Sitala Krishna v. Daji Devaji (6), and Paramma v. Ramachandra (7).

The plaintiff preferred this second appeal.

Bhashyam Ayyanger, for appellant.
Parthasaradhi Ayyanger, for respondent No. 1.

JUDGMENT.

SHEPHARD, J.—This is a suit brought upon an instrument of hypothecation executed in the plaintiff’s favour by one Ponnappa Pillai, now

* Second Appeal No. 1284 of 1890.

(1) 3 M. H.C.R. 247. (2) 9 M. 399. (3) 12 O. 313. (4) 5 M. 166.
(5) 12 M. 239. (6) 7 B. 418. (7) 7 M. 303.
The defendants are the sons and grandsons of Ponnappa. It has been found by the District Judge that, after the bond came into the plaintiff's hands, an attestation was added purporting to be signed, but not in fact signed by Ponnappa's son Shanmugam. In the opinion of the Judge this addition, for which the plaintiff was responsible, constituted a material alteration of the instrument, and he accordingly dismissed the suit. There can be no doubt that the object in making this addition was to facilitate the proof of the execution of the instrument as well against the executant as against his son, the defendant. It was the more important to obtain the son's attestation rather than that of a stranger, because when the instrument came to be enforced, it would be material to show that he had admitted the debt and that his interest in the property was therefore affected by the hypothecation. In this respect and also because in the Calcutta case cited in argument—Mohesh Chunder Chatterjee v. Kamini Kumari Dabia (1)—the added signature was genuine, that case is distinguishable from the present. I am, however, of opinion that the principle laid down in that case applies, and that there is here no material alteration of the instrument within the meaning of the penal rule on which the defendants rely.

It is clear that the adding of an attestation, whether the signature is genuine or not, does not purport to affect the terms of the contract between the parties to the instrument: nothing new is embodied in it. No fresh party is added as was the case in Gardner v. Walsh (2). The executant of the instrument could not be affected by the addition prejudicially or otherwise. It cannot be said that the identity or effect of the instrument is altered, for it remains as it was, when executed by Ponnappa Pillai, an instrument hypothecating his property. It is not as if the attestation were necessary in order to make the instrument legally operative. That would be a totally different case and is expressly excepted from the proposition laid down in Mohesh Chunder Chatterjee v. Kamini Kumari Dabia (1), and see Davidson v. Cooper (3). In the present case the object which the attestation fulfilled might have been almost equally well secured by a memorandum written on a separate piece of paper. It was not indispensable for the plaintiff's purpose that anything should be written on the very paper on which the instrument is written.

I can find no authority for holding that in such a case there can be deemed to have been a material alteration of the instrument, and I would therefore reverse the decree of the District Judge and remand the appeal.

HANDLEY, J.—In my opinion, even on the finding of the District Judge that the name of defendant No. 1 as an attesting witness to the hypothecation bond sued on was forged after execution and registration and after the document came into plaintiff's hand, the case does not come within the rule laid down in Master v. Miller (4) and the other English cases, and declared by the Full Bench decision in Christchurch v. Kari- 
basoyya (5) to be applicable to this country, so as to disentitle plaintiff to sue on the bond. In the order in Vazeeralli v. Surianarayana (6), to which I was a party, this Court, following Mohesh Chunder Chatterjee v. Kamini Kumari Dabia (1) in preference to Sitaram Krishna v. Daji Devaji (7), held that the addition of the name of an attesting witness subsequently to the delivery of the document was not a material alteration which invalidated the document. I adhere to the principle of that

---

(4) 1 Sm. L.C. (Ed. 6), 857. (5) 9 M. 399.
(6) Appeal No. 89 of 1890, unreported. (See 1 M. L.J. 369.) (7) 7 B. 418.
1891

Nov. 13.

APPEL-
LATE
CIVIL.
—
15 M. 70=
2 M. L. J. 39.

decision; and it seems to me to make no difference in principle that the
addition of the name of the attesting witness is a forgery and made with
the fraudulent intention of precluding the person, whose name is forged,
from denying the genuineness of the document. The attestation clause
[73] is no part of the document as executed by the executant, but merely
one means of proof of the document, and, as such, is not a material part
of the document as executed within the principle of the rule under
consideration. Attestation was not in this case necessary to the validity
of the document as it was executed before the Transfer of Property Act
came into force. I express no opinion as to what would be the effect of
the addition of an attesting witness’s name in cases where attestation was
necessary to the validity of the document.

I would reverse the decree of the Lower Appellate Court and remand
the appeal for disposal upon the other questions raised.

—

15 M. 73.

APPELLATE CIVIL.

Before Mr. Justice Multusami Ayyar and Mr. Justice Parker.

GRAY (Plaintiff), Petitioner in C.R.P. No. 303 and Respondent in No. 408
v. FIDDIAN (Defendant), Respondent in No. 303 and Petitioner
in No. 408.* [5th and 6th October, 1891.]

Master and servant—Liability of master for servant’s act—Offer of money by defendant
to avoid litigation.

The servant of the defendant, who was staying in the plaintiff’s hotel, broke
a filter, the property of the plaintiff. In a suit by the plaintiff for damages it
appeared that the servant, when he broke the filter, was not acting within the
scope of his employment, nor on the defendant’s business, or for his benefit.
The defendant offered to the plaintiff as compensation Rs. 30 (which was refused)
but without acknowledging any liability:

Held, (1) that the defendant was not liable for the act of his servant;
(2) that the plaintiff was not entitled to a decree for Rs. 30.

PETITIONS under Provincial Small Cause Courts Act IX of 1887,
Section 25, praying the High Court to revise the decree of W. E. T. Clarke,
Subordinate Judge of Nilgiris, Ootacamund, in original suit No. 366 of
1889, small cause side.

The facts of this case appear sufficiently for the purposes of this
report from the following judgment of the High Court.

[74] The Subordinate Judge passed a decree for Rs. 30 without
costs.

Plaintiff preferred civil revision petition No. 303 of 1890 and the
defendant preferred civil revision petition No. 408 of 1890.

Mr. W. Grant, for plaintiff.
Mr. Gover, for defendant.

JUDGMENT.

In Civil Revision Petition No. 303 of 1890:—In this case the plaint-
iff, an hotel proprietor, sued to recover from defendant the value of a
filter broken by defendant’s servant while defendant was resident in the
hotel. The Subordinate Judge found that defendant’s servant was

* Civil Revision Petitions Nos. 303 and 408 of 1890.
not acting under any express or implied authority from his master when he broke the filter, and hence that defendant was not liable for the act of his servant. Inasmuch, however, as defendant had offered Rs. 30 to plaintiff as compensation for the loss of the filter and to avoid litigation, the Subordinate Judge decreed that amount against defendant without costs. Both plaintiff and defendant have applied to the Court to revise this decree.

The learned Counsel for the plaintiff has correctly stated the rule of law that a master is liable for the acts of his servant, provided they were within the scope of the employment, and also if they are intentionally done in the interest and for the benefit of the master. In the case before us there is no evidence that the servant, when he broke the filter, was doing anything for the benefit of his master or upon his master's business, and the question therefore is whether he was acting within the scope of his employment. The Subordinate Judge, after hearing the evidence, has decided that he was not so acting, and the contention before us is that the Judge was in error upon this point. We think that in revision we are bound to accept the finding of the Judge upon this question. The question of scope of authority was a question of fact, as to which the evidence was conflicting. In England such a question would have been left to the Jury, and the Judge would have been bound by the finding, the evidence being conflicting—Stevens v. Woodward (1). In revision, therefore, we must accept the finding, unless it is open to some legal objection. We cannot hold, as a matter of law, that for any act done by defendant's servant, the master should be held responsible, though the act was wholly outside the scope of the servant's employment, and in no way an incident of it. We must, therefore, dismiss the plaintiff's petition with costs.

In Civil Revision Petition No. 408 of 1890:—Upon the question raised by the defendant, we are clearly of opinion that the Subordinate Judge could not decree to plaintiff a sum of money which defendant had merely offered as a matter of grace and without acknowledgment of liability (but merely to avoid litigation) and which offer the plaintiff had refused to accept. We must allow the petition, and reverse the decree of the Subordinate Judge and dismiss the suit with costs throughout.

15 M. 75 = 1 Weir 372.

APPELLATE CRIMINAL.

Before Mr. Justice Parker and Mr. Justice Shephard.


Penal Code, Section 372—Disposal of a minor—Dedication of a girl in a temple.

The accused dedicated his minor daughter as a Basivi by a form of marriage with an idol. It appeared that a Basivi is incapable of contracting a lawful marriage, and ordinarily practises promiscuous intercourse with men, and that her sons succeed to her father's property:

Heald, the accused had committed an offence under Penal Code, Section 372.

[R., 24 B. 287 (292); 1 Bom.L.R. 678.]

* Criminal Revision Case No. 475 of 1891.

(1) 6 Q.B.D. 318.
CASE reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure by H. T. Knox, Sessions Judge of Bellary.

In this case the Magistrate convicted the accused, a Madiga, of an offence under Penal Code, Section 372. The minor in respect of whom the offence was held to have been committed was the daughter of the accused, and the "disposal" charged consisted of the dedication of the girl as a Basivi by the performance of a marriage ceremony between her and an idol.

In his letter of reference the Sessions Judge expressed an opinion that the conviction was wrong. The Sessions Judge pointed out that the record was silent as to the effect of the [76] Basivi marriage ceremony save that it prevented a subsequent marriage, in regard to which he referred by way of comparison to the formal marriage of girls in Malabar under the Marumakkattayam law. He referred to evidence that it was not a matter of course for Basavis to prostitute themselves for money and added:

"The evidence is very clear that Basavis are made in accordance with a custom of the Madiga caste. Madigas are leaither-workers, but in the western taluks of this district, where the custom seems to prevail, they appear to be in a position much better than that of the chucklers in the southern districts. It is also in evidence that one of the effects of making a girl a Basivi is that her male issue becomes a son of her father and perpetuates his family, whereas, if she were married, he would perpetuate her husband’s family. In the particular case the girl was made a Basivi that she might be heir to her aunt who was a Basivi, but childless. Siddalingana Gowd says that they and their issue inherit the parents’ property. There is evidence that Basavis are made on a very large scale, that they live in their parents’ houses. There is no evidence that they are regarded otherwise than as respectable members of the caste. It seems as if the Basivi is the Madiga and Bedaru equivalent of the 'appointed daughter' of Hindu law (Mitakshara, Chapter I, Section XI, 3).

"Upon the whole the evidence seems to establish that among the Madigas there is a widespread custom of performing in temple at Uchhangidurgam a marriage ceremony, the result of which is that the girl is married without possibility of widowhood or divorce; that she is at liberty to have intercourse with men at her pleasure; that her children are heirs to her father and keep up his family, and that Basavis' nieces being made Basavis become their heirs. The Basavis seem in some cases to become prostitutes, but the language used by the witnesses generally points only to free intercourse with men, and not necessarily to receipt of payment for use of their bodies. In fact they seem to acquire the right of intercourse with men without more discredit than accrues to the men of their caste for intercourse with women who are not their wives."

The Government Pleader and Public Prosecutor (Mr. Powell), in support of the conviction.

[77] Accused was not represented.

JUDGMENT.

PARKER, J.—The evidence shows that a girl, who is dedicated as a Basivi, becomes incapable of contracting a marriage, which would be recognized as valid by the laws and customs of her caste; that she is at
liberty and is expected to have promiscuous intercourse with men generally, and that she and any children born to her inherit in her father’s family only.

The dedication thus made effects a change in the circumstances of the minor which was recognized as a “disposal” within the terms of Section 372, Indian Penal Code, in the Proceedings of this Court, dated 11th April 1881, No. 746, paragraph 13 (1), and the parents of the minor cannot but be aware that the minor will in consequence live a life which is recognized as immoral.

I do not think that any analogy can be drawn as suggested by the Sessions Judge between the dedication of a girl as a Basivi and the formal marriage of a girl in Malabar under the Marumakkatayam law. In Malabar there is no legal marriage, and neither a woman nor her offspring can ever pass into the family of a husband, while among Madigas such is not the case, and a girl, by becoming a Basivi, becomes incapable, ipso facto, of contracting a legal marriage. Nor do I think that the Basivi is the Madiga equivalent of the “appointed daughter” under Hindu law, since the latter arrangement neither debars from ordinary marriage nor contemplates the possibility of promiscuous intercourse.

I would decline to interfere with the conviction.

SHEPHARD, J.—Having read the evidence in the case, I agree that an offence is proved and would decline to interfere.

---

[78] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

---

PATCHA SAHEB (Plaintiff), Appellant v. SUB-COLLECTOR OF NORTH ARCOT (Defendant), Respondent.* [24th August, 1891.]

Limitation Act—Act XV of 1877. Section 4—Unstamped memorandum of appeal—Stamp affixed after expiry of time of limitation.

Where a petition of appeal was presented unstamped within the period of limitation and the stamp was ultimately affixed after the appeal had been barred by limitation:

Held, following Skinner v. Orde (6 I.A. 126) that the appeal was in time.

[F., 21 B. 576 (578); Appr., 22 B. 849 (855); R., 22 M. 494 (502); 9 M.L.J. 37 24 M. 351 (353); 25 M. 380 (381); 16 C.P.L.R. 89 (91); 5 M.L.J. 333 (336); 8 M.L.T. 63 (63); 123 P.R. 1907 = 62 P.W.R. 1907; 78 P.R. 1906 = 150 P.L.R. 1906; 159 P.L.R. 1901.]

SECOND appeal against the decree of H. H. O’Farrell, Acting District Judge of North Arcot, in appeal suit No. 115 of 1889, affirming the decree of C. Ranga Rau, District Munsif of Vellore, in original suit No. 98 of 1888.

The suit was brought for a declaration that the revenue sale of the plaint lands was legal and to cancel the proceedings of the defendant annulling the sale. The District Munsif dismissed the suit. On appeal before the District Judge a preliminary point was raised that the appeal

---

* Second Appeal No. 806 of 1890.

was presented beyond the period of limitation. On this point the judgment of the Lower Court proceeds as follows:

"I have now to decide the second objection. The appeal memorandum was presented unstamped within the period of limitation to the Sheriff of the Court on the 11th June, the Court then being in recess. A note was made on the appeal memorandum that the stamp could not be procured and would be filed on the next Court day. This was not done, but the stamp was ultimately affixed on 25th June. On that date the appeal was barred by limitation admittedly."

The Judge finding the appeal barred by Section 4 of Act XV of 1877, dismissed the appeal with costs.

The plaintiff preferred this second appeal.

Sankaran Nayar, for appellant.

[79] The Government Pleader (Mr. Powell), for respondent.

JUDGMENT.

The petition of appeal was presented on 11th June in the recess, and the stamp was received and affixed on the 25th. The Court opened on 27th June.

Following the principle laid down in Skinner v. Orde (1), we must hold that the petition must be regarded as an appeal from the date on which it was presented and not from the date on which the stamp was received. The decree of the District Court must be reversed and the appeal remanded. The appellant is entitled to the costs of this appeal, and the costs in the Lower Appellate Court will abide and follow the result.

15 M. 79,

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

SADAGOPA RAMANJIAH AND OTHERS (Defendant's Representatives), Appellants v. MACKENZIE AND OTHERS (Plaintiffs), Respondents.*

[17th, 18th, 20th September and 2nd November, 1891.]

Contract Act, Section 27—Restraint of trade.

One having a license for the manufacture of salt entered into a contract with a firm of merchants, whereby it was provided that he should not manufacture salt in excess of the quantity which the firm, at the commencement of each manufacturing season, should require him to manufacture; and that all salt manufactured by him should be sold to the firm for a fixed price. The agreement was to be in force for a period of five years. In a suit by the merchants for an injunction restraining the licensee, from selling his salt to others and for damages:

Held, that whether or not the first of these clauses was invalid under Section 27 of the Contract Act, it was separable from the second clause which was not bad as being in restraint of trade.

Appeal against the decree of Mr. Justice Handley, sitting on the Original Side of the High Court in civil suit No. 142 of 1888.

Suit by the members of the firm of Messrs. Arbuthnot and Company for an injunction restraining the defendant from selling salt manufactured by him under a license to others.

* Appeal No. 30 of 1889.
(1) 6 I.A. 126.
The defendant was the holder of a license for the manufacture of salt and had entered into an agreement with the plaintiffs for the sale to them of all the salt manufactured by him. The material parts of the agreement which was contained in two documents are as follows:

Clause 6.—The licensee shall not manufacture any salt in excess of the quantity which the said firm of Arbuthnot and Company shall, from time to time, at the commencement of each manufacturing season, require the licensee to manufacture.

Clause 12.—All salt manufactured and stored by the licensee under the said license, and, in accordance with these presents, shall be sold by the licensee to the said firm of Arbuthnot and Company at, and for the price or sum of, Rs. 11-8-0 for each and every garce of 120 maunds of the said salt measured and taken delivery of by them at Madras, and the licensee shall and will accept such sum of Rs. 11-8-0 for every such garce of salt in full payment and satisfaction for the same.

Mr. Justice Handley passed a decree for the plaintiffs, against which defendant preferred this appeal on the ground (among others) that the agreement was void as being in restraint of trade.*

Rama Rau, Krishnasami Chetti, and Srimulu Sasiri, for appellants.

Mr. W. Grant and Mr. K. Brown, for respondents.

The Court delivered judgment on the above ground of appeal as follows:

**JUDGMENT.**

Several points were raised by Mr. Rama Rau in this appeal, but the only one purporting to be a complete answer to the plaintiffs' claim and requiring any special notice is that the contract for breach of which damages have been decreed was invalid as being made in restraint of trade. The contract is expressed in two documents, dated the 13th May 1885, one of which was signed by the plaintiffs, and the other by the defendant. Shortly stated, the effect of it was on the one hand to oblige the defendant who had obtained a license under the Salt Commissioner to manufacture salts for a period of five years, and on the other hand to oblige the plaintiffs to take delivery of such salt at a [81] certain price. Another material provision in the contract was that the defendant should not manufacture any salt in excess of the quantity which the plaintiffs might, at the commencement of any season, require to be manufactured. It was argued on behalf of the appellant that, as the contract had by implication prohibited him from selling the salt to third persons, and also empowered the plaintiffs to limit the amount of salt which he should manufacture, Section 27 of the Contract Act became applicable and there was no legal agreement. The section provides as follows:—"Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void."

The agreement, it is to be observed, is only void in so far as it restrains any one from exercising his trade. In the present case the breach complained of was that the defendant sold to third persons the salt manufactured by him, which he ought to have delivered to the plaintiffs. It is an ordinary case of a breach of contract to manufacture and sell goods, and it cannot possibly be said that by such a contract the manufacturer is restrained from exercising his trade. On the contrary he is encouraged

* See Mackenzie v. Striramiah, 19 M. 472, in which the same Judge, dealing with a precisely similar agreement, came to the same conclusion as that arrived at by their Lordships in the present appeal.
to exercise it because he is assured of a certain market for the products of his labour.

It is true that there is a clause enabling the plaintiffs to limit the amount of salt which should be manufactured; and if the plaintiffs had acted under that clause, and, notwithstanding the limit prescribed by them, the defendant had manufactured a larger quantity of salt, a question might have arisen as to the competency of the plaintiffs to restrain such manufacture in excess of the amount required by themselves. It may well be that to the extent to which the contract purported to empower the plaintiffs to restrict the defendant’s manufacture of salt, the contract might be considered void. But this is not the question we have to consider. The plaintiffs are not seeking directly or indirectly to restrain the defendant from exercising his trade as manufacturer of salt. Section 27 of the Act has therefore no application and the contract for breach of which damages have been given is clearly legal. Carlisle's Nephews & Company v. Ricknauth Bucktearmul (1), Donnell v. Bennett (2).

Barclay, Morgan & Orr, attorneys for respondents.

15 M. 79.

[82] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shepard.

FAZAL SHAU KHAN (Defendant), Appellant, v. GAFAR KHAN (Plaintiff), Respondent. [21st and 22nd September, 1891.]

Civil Procedure Code, Section 14—Foreign judgment, suit on—Procedure—Waiver of objection to jurisdiction.

In a suit upon the judgment of a Court at Bastar, it appeared that in the suit in which the judgment was pronounced, the defendant took no objection as to the jurisdiction of the Court, and that he carried on business by his agent in the Bastar territory, and that a decree was passed for the plaintiff after evidence adduced on both sides in the ordinary way:

Held, (1) that the defendant was not entitled to have the case re-heard;

(2) that the defendant was not entitled to take objection to the jurisdiction of the Bastar Court.

[Appl., 24 B. 86 (39); R., 21 A. 17 (13); 20 B. 86 (96); 28 M. 437 (441) = 15 M.L.J. 236; 24 M.L.J. 619 (624); D., 18 M. 327 (330).] 

APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in original suit No. 9 of 1888.

Suit upon a judgment of the Court of the Chief of Bastar in the Central Provinces. The plaintiff sued the defendant for the price of timber sold, and obtained a decree for Rs. 2,935-2-0 which had been satisfied in part. He now sued as above to recover the balance of the decree amount, viz., Rs. 2,545-10-6.

The District Judge passed a decree as prayed.

The defendant preferred this appeal.

Pattabhirama Ayyar, for appellant.

Venkataramayya Chetti, for respondent.

* Appeal No. 146 of 1889.

(1) 8 C. 809. (2) L.R. 22 Ch. D. 385.
JUDGMENT.

The first point taken is that there was no judgment of a foreign Court on which an action would lie. This point is clearly not maintainable. From the record it is apparent that there is a Court in the Bastar territory, and that by that Court the plaintiff's claim was heard and determined after consideration of evidence adduced on both sides in the usual way.

It is then argued that the Bastar Court had no jurisdiction, because the defendant did not reside or possess property, and the cause of action did not arise within the Bastar territory.

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—see Schibsby v. Westenholz (1) followed in Kandoth Mammi v. Abdu Kalando (2). On this point, therefore, the appellant's contention fails. Finally, it is argued that notwithstanding the judgment, the District Judge ought to have taken the evidence afresh and re-heard the case de novo, and that upon the facts the judgment of the Bastar Court was wrong. We are clearly of opinion that it was not intended by the Legislature when amending Section 14 of the Code that parties to an action on a foreign judgment should have the right to have the case re-heard.

All that the section says is that the Judge is not to be precluded from inquiry into the merits. In the present case he has so inquired having had before him ample materials in the judgment of the Bastar Court and the evidence then taken, and he then found that the judgment was well founded.

We see no reason to differ from him. The appeal is dismissed with costs.

15 M. 83 = 2 Weir 326.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Hundleby.

QUEEN-EMpress V. ERUGADU.* [10th June and 13th July, 1891.]

Criminal Procedure Code, Section 260—Summary procedure—Bias of Magistrate.

A Deputy Magistrate, being also the Chairman of a Municipality, without issuing process, or making a record of the proceedings, or dismounting from a pony on which he was riding, convicted and fined an inhabitant of the town, who admitted that he had raised the level of a road within the limits of the Municipality which was considered by the Magistrate to amount to the offence of causing an obstruction in a public way:

[64] Held, the Magistrate's procedure was illegal, and the conviction should be set aside.

[R., 23 C. 44 (47).]

Case reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure by R. Sewell, District Magistrate of Bellary.

* Criminal Revision Cases Nos. 174 to 178 of 1891.

(1) L. R. 8 Q. B. 165.

(2) 8 M. H. C. R. 14.
The case was stated as follows:—

"The Deputy Magistrate is Chairman of the Adoni Municipality, and as such is interested in keeping the town clean and preventing nuisances and encroachments. He does not say whether Venkanna made his complaint to him as a Magistrate or as Chairman of the Municipality. No record of complaint was made, nor was any entry of the complaint or information made in the magisterial diary.

"The Magistrate's own explanation of the institution of the case is as follows:—'It was instituted under Clause (c) of Section 191, upon information received from one Venkanna and subsequent personal inspection.' No processes were issued and no notice of any kind given to the accused.

"On 12th February the Magistrate visited the spot, sitting on his pony, and there and then began and concluded his (very) 'summary trial.' There is no record of any inquiry having been made beyond the fact that the Magistrate saw the 'platform.' He does not describe it, but writes: 'The platform is over about half the road and is a real obstruction to the public, meant evidently to appropriate the whole space for the purpose of extending his house.' The plea of the accused is 'admitted,' but accused says he has no objection to the public walking over the platform.

"Now (rightly or wrongly) I have no means of judging; the accused before me pleads that the whole of the case is prejudiced by the use of the word 'platform.' His plea is that the road being an alley common to only five houses, of which he owns three (or four), and it being worn into deep holes, he has mended and raised the road so as to bring it up to the level of the main street,—that there is no platform, but merely that the gravelled road in front of his own house has been raised. The plea may or may not be absolutely false, but the point is that he plainly pleaded not guilty. He did not admit any obstruction according to the record, but pleaded that there was no obstruction to the public, since the public were welcome to [88] use the place. He may have 'admitted' doing something to the road, but he did not plead guilty to causing danger, obstruction, or injury to any one in a public way, which is the sole essence of the offence under Section 283, Indian Penal Code. Section 283 does not contemplate the punishment of a man for raising anything in the street unless that something causes danger, obstruction or injury to the public, and this was expressly denied by the accused and not 'admitted.'

"Having seen the place and questioned the man, the Magistrate promptly, without getting off his pony, fined him Rs. 20 and went away. This proceedings was entered as a 'summary trial,' and next day process was issued and the fine paid.

"In the other cases sent up, I gather that the procedure was equally peculiar.

"In answer to my questions, the Deputy Magistrate ... has made the following explanations:—

"(i) No oral or written complaint was preferred under Section 200, "Code of Criminal Procedure.

"(ii) No processes were issued against the accused.

"(iii) The Magistrate, sitting on a pony surrounded by a number of people, among whom was the Municipal Conservancy Inspector, and probably one or more municipal peons, visited the lane in question and called out the house-owner. Till then the latter had no knowledge of
any criminal proceedings being taken against him, and there is nothing
whatever to show that he was ever told that Mr. Kothanda Ramayya
had come there in any other capacity, but that of Chairman of the
Municipal Council, in which capacity, probably, he had been often seen
by the accused. Going his rounds of inspection. To the eyes of the
accused, therefore, he had before him the Chairman of the Municipality.
There was no police constable or magisterial clerk present to show him
that the Chairman had suddenly divested himself of his municipal
powers, and that he was an accused person pleading in a Court of
Justice. All appearances must have conveyed a totally contrary opinion.

(iv) The Magistrate . . . thinks that sitting on a horse in
the road is quite a fitting place for him to try a case, for in a letter
received by me only two days ago, he describes it as affording the best
position for the public Inquiry.

[86] (v) The entire procedure in case No. 2 appears to have been
that the Chairman-Magistrate used his eyes and thought there was an
encroachment, he called on the house-owner (from his horse) to show
cause why he should not be convicted for 'obstruction and encroachment
on the road,' and on Viranna's pleading that, though it was certainly he
who had raised the thing complained of, yet it was no obstruction, because
the public could not be injured—he was at once told that he was fined
Rs. 20.

(vi) In none of those cases was any notice given to the accused
that they were entitled to require that the case against them might be
transferred to another Magistrate (last clause of Section 191, Code of
Criminal Procedure, Act III of 1854, Section 2.) I assume this from
the Magistrate's reply to my query, 'What opportunity was allowed to
the accused to have the cases transferred to another Magistrate if they
thought fit under the last clause of the section?' He replies: 'The
accused did not express their unwillingness to be tried by me, but plainly
admitted the offence (?) and submitted to my trial. There was nothing in
the circumstances of the trial to prevent . . . their desiring a
transfer.' It is plain from this answer that none of the accused was
informed that he could, if he pleased, be tried by a Court other than that
of the interested Chairman-Magistrate who sat on his horse before him.

*   *   *   *   *

A zealous Chairman of a Municipality is the very last person who
should himself try cases which come to his knowledge as Chairman,
and it is a mere fiction for Mr. Kothanda Ramayya to pretend that he
was not Chairman but Magistrate when perambulating the town on
horseback hunting up nuisances and encroachments. It is a well-known
rule that a man cannot be both prosecutor and judge. Parallel cases
are quoted in Kharak Chand Pal v. Tarack Chander Gupta (1) or I
should say barely parallel, for the present are much more flagrant
instances than either of those quoted. Perhaps the best case to
refer to is Queen v. Meyer (2), where it was ruled that a Judge ought
not to sit on a bench where he has such interest as to give him a
real bias.

[87] The Magistrate's explanation is given in the last paragraph
of his letter, No. 138, dated 25th March 1891. He says: 'I beg to
submit that, after careful observation for months together of the require-
ments of the town and the numerous encroachments by individuals in

(1) 10 C. 1030.  (2) 1 Q.B.D. 173.
"public places, and to the reckless manner in which these were being
used, notwithstanding numerous punishments by Bench Magistrates,
generally after considerable delay and in remote Court-houses not much
attended by the people, for whom the punishments were meant as
warnings, it seemed to me essential that to be really effective as
warnings, a few select cases should be taken up and disposed of by me
summarily and in an exemplary manner on the spot.""

The Government Pleader and Public Prosecutor (Mr. Powell), for the
crown.

JUDGMENT.

The procedure of the Deputy Magistrate in all these cases seems to
have been irregular in several respects. In the first place the proceed-
ing were not commenced by any summons to the accused or other formal
notice that a criminal investigation was about to take place.

Chapter XXII of the Code of Criminal Procedure does not appear to
intend that proceedings in summary trials shall commence ordinarily
otherwise than in other criminal trials either by summons or warrant,
indeed Section 262 implies the contrary. Section 263 requires a record
of the proceedings to be made by the presiding officer, and we think that
it is intended that the record shall be made at the time of the trial. Pre-
sumably the Deputy Magistrate, while seated on his pony, could not have
kept the record required by Section 263, and he states that no clerk ac-
 companied him. The record must, therefore, have been prepared after
the close of the trial from memory or possibly from some rough note.
This is not the procedure contemplated by the Code even in summary
trials.

The admissions of the accused persons are directed by Section 243 to
be recorded, and this also should be done at once, and the words used in
the admissions should be stated as nearly as possible. Here again the
procedure of the Deputy Magistrate appears to have been defective, for he
does not appear to have made any record of the admissions at the time, and
the record he did ultimately make, does not profess to state the words of
the admissions [88] and does not show what was admitted. From the
record it is impossible to say whether the accused admitted only the acts or
omissions with which they were charged, or admitted them with all the
accompanying circumstances necessary to constitute their acts or omissions
offences. This may have led to a most serious miscarriage of justice. In
our opinion these errors and irregularities of procedure are sufficiently
serious to invalidate the proceedings of the Deputy Magistrate, and are not
such as we can overlook even to secure the very desirable end of the
improvement of the sanitary condition of Adoni.

And there is another fatal objection to these proceedings, viz., that the
Deputy Magistrate, as Chairman of the Municipal Council, was the very
person interested in abating the nuisances, in respect of which these
proceedings were taken, and was therefore a Judge in his own cause.

It is true Section 555 of the Criminal Procedure Code provides that
the mere fact of being a Municipal Commissioner shall not of itself be a
disqualification for trying any case, but the Chairman of a municipality
being an executive officer, who would be the proper person to institute
prosecutions for offences against the health or comfort of the town, is a
very different person from a mere Municipal Commissioner, and is clearly
disqualified to try such cases.
VAIKUNTA PRABHU and another (Defendants), Petitioners v.
MOIDIN SAHEB and others (Plaintiffs), Respondents.*

[69] APPELLATE CIVIL.

Before Mr. Justice Parker.

VAIKUNTA PRABHU AND ANOTHER (Defendants), Petitioners v.
MOIDIN SAHEB AND OTHERS (Plaintiffs), Respondents.*

18th and 23rd September, 1891.]


In proceedings in execution of the decree passed in a Small Cause Suit by a District Munsif who had been invested with insolvency jurisdiction, the judgment-debtors filed a petition under Section 344 of the Civil Procedure Code praying that they might be declared insolvents. Their petition was dismissed by the District Munsif:

_Held, an appeal lay to the District Court against the order dismissing the petition._

[F., 4 Ind. Cas. 617 = 19 M.L.J. 65 = 4 M.L.T. 455; R., 23 A. 56 (59); 20 A.W.N. 194; 2 N.L.R. 54 (57).]

PETITION under Section 622 of the Civil Procedure Code praying the High Court to revise the order of W. J. Tate, Acting District Judge of South Canara, made on civil miscellaneous appeal No. 7 of 1889.

The facts of this case appear sufficiently for the purposes of this report from the judgment of the High Court.

The defendants preferred this petition.
Pattabhirama Ayyar, for petitioners.
Narayana Rau, for respondents.

JUDGMENT.

In the execution of small cause suit No. 417 of 1885 on the Mangalore District Munsif’s file, the defendants applied to be declared insolvents. This application was filed as insolvency suit No. 7 of 1886, and was dismissed by the District Munsif. Their appeal to the District Court has been dismissed on the ground that no appeal lies; hence this revision petition under Section 622, Civil Procedure Code.

The ground on which the District Judge has dismissed the appeal is that it is one from an insolvency order passed by the District Munsif in the exercise of his small cause jurisdiction, [90] and that under Section 24 of Act IX of 1887, an appeal is only given from one of the orders specified in Section 588, Civil Procedure Code (Clause 29), Chapter XLIII of the Civil Procedure Code (in which Sections 588 and 589 occur), is not included in the chapter of the Procedure Code extended to Provincial Courts of Small Causes by Schedule II, Civil Procedure Code.

On appeal it is argued that the order passed by the District Munsif was not passed in the exercise of his small cause jurisdiction, but in the

* Civil Revision Petition No. 234 of 1890.
exercise of a special jurisdiction conferred upon him by the Local Government under Section 360, Civil Procedure Code, by which he has been invested with the powers conferred on District Courts in insolvency matters (vide G. O. of 14th December 1886, No. 480, Fort St. George Gazette, 14th December 1886, page 1093). It is pointed out that the special jurisdiction and powers given by Sections 354 to 359 are far more extensive than the powers ordinarily vested in a Small Cause Judge, and hence it is argued that from the exercise of this special jurisdiction as an Insolvent Court an appeal will lie under Section 588, Clause 17, Civil Procedure Code, and that under Section 589 as amended by Section 3 of Act X of 1888, the appeal will lie to the District Court.

I am of opinion that this view is sound and must prevail. It appears also in consonance with the view taken by this Court in Sitharam v. Vythilinga (1).

I set aside the order of the District Judge and remand the appeal for investigation. The petitioner is entitled to his costs in this Court, and the costs in the District Court will abide and follow the result.

15 M. 91 = 1 Weir 747.

[91] APPELLATE CRIMINAL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

QUEEN-EMpress v. SEvUdAPPAYAR AND OTHERS.∗

[24th and 28th July, 1891.]

District Municipalities Act (Madras)—Act IV of 1884, Section 222—Nuisance—Sewage water.

An occupier of a building who allows sewage water to run into a street within the limits of a Municipality, governed by the District Municipalities Act, Madras, commits an offence under Section 222 of that Act, although the Municipality may have supplied no side drains in the street in question.

[F., 30 M. 221—17 M.L.J. 372 (373).]

CASE reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure by J. Thomson, Acting District Magistrate of Tanjore.

The case was stated as follows:

"I have the honor to state that the accused concerned were charged under Section 222 of the District Municipalities Act IV of 1884 with having allowed sewage water to run into the street, but were acquitted on the ground that no side drains have been provided by the Negapatam Municipality and the accused could not escape allowing the water to run into the street for want of any other place of discharge. The President of the Bench, on being directed to explain fully, urges the same ground and argues that Section 222 of the Act does not regard the running of sewage water into the street as an offence, while it is the bounden duty of the Municipality to take steps to prevent any nuisance resulting from such water soaking into the ground. The view of the President is wrong and the orders of acquittal illegal."

Counsel were not instructed.

∗ Criminal Revision Cases Nos. 79 to 93 of 1891.

(1) 12 M. 472.
QUEEN-EMpress v. SEVUDAPPAYyar 15 Mad. 93

JUDGMENT.

PARKER, J.—The complaint against the accused was that "let out sewage water to run into the street."

By Section 222 of the District Municipalities Act every owner or occu-
pier, who allows the water of any sink, drain or privy, or [92] the drainage from any stable or place, or any other offensive liquid matter belonging to him or being on his land or in his building or in any building or land occupied by him, to run down on or to be put upon, any street or into any drain in or alongside of any street, except in such a manner as shall prevent any avoidable nuisance from any such liquid or offensive matter soaking into the walls or ground at the side of the said drain, shall be liable to a fine of Rs. 10."

The first witness deposed that the accused had let "stagnant water" run into the street (presumably the word stagnant is a clerical error or misdescription for "sewage") and that such water could not be kept inside the house. The Bench of Magistrates did not record any finding upon the facts, but dismissed the prosecution on the ground that the Municipality had not provided drains, and that it was not possible for poor people to provide places for their stagnant water.

It appears to me that the ground of decision is based on an error in law. The Legislature has not made the providing of drains by the Municipality a condition precedent to the obligation imposed upon the owner or occupier. The words "except in such a manner as shall prevent any avoidable nuisance from any such liquid or offensive matter soaking into the walls or ground at the side of the said drain" seem to be limited to the case in which the owner or occupier permits such water to be "put into any drain in or alongside of any street," and that the section also makes punishable any owner or occupier who allows such water to run down on, or to be put upon any street.

The section is awkwardly worded, but it seems to contemplate two classes of cases, in one of which the street is not provided with drains, and in the other in which such provision has been made. In the latter case it was intended to secure that the offensive water should actually pass into the drain, and not be allowed to soak into the walls or ground at the side of the drain.

As the Bench has dismissed the prosecution upon an erroneous ground, and without recording any finding as to whether or not the accused have allowed sewage water to run into the street, I would set aside the acquittals and direct that the case be retried.

WILKINSON, J.—There was no finding by the Bench as to whether the stagnant water which the accused are charged with having allowed to flow into the street was "the water of a sink, [93] drain or privy, or the drainage from any stable or place, or any other offensive liquid matter." The acquittal on the ground that the Municipality has not provided drains was erroneous. The Municipality are not bound to make drains, whereas every owner or occupier is bound to keep his offensive liquid matter from running into the street. If drains are provided, the owner or occupier may apparently discharge offensive liquid matter into them, provided that in so doing he avoids causing a nuisance by allowing such liquid matter to soak into the walls or ground.

The acquittal must be set aside and the cases retried.
15 M. 93 = 1 Weir 131.

APPELLATE CRIMINAL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

QUEEN EMPRESS v. THIMMACHI.* [16th October, 1891.]

Penal Code, Section 186—Obstructing a public servant—Public vaccinator.

To spread a false report and thereby prevent persons from bringing their children for vaccination to the public vaccinator is not an offence under Penal Code, Section 186.

[R., 7 P.R. 1905 (Cr.) = 96 P.L.R. 1905; Rat. Unrep. Cr. Cas. 850 (851); U.B.R. (1897-1901), 266 (267)]

Case reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure by S. H. Wynne, Acting District Magistrate of Madura.

The act charged as obstruction was the following:—

"While a vaccinator was at work, the accused spread a report that the children vaccinated would go mad, and the mothers who were in attendance with their children ran away, so that the latter could not be vaccinated. Vaccination is not compulsory in the locality."

Counsel were not instructed.

JUDGMENT.

WILKINSON, J.—I do not think the conviction can be maintained. Spreading a false report and thereby preventing people from bringing their children for vaccination does not appear to me to amount to voluntary obstruction of the vaccinator in the performance of his public duties. The conviction and sentence should be quashed.

SHEPHARD, J.—To prevent by physical means persons willing to be vaccinated from being vaccinated might be obstruction of the vaccinator within the meaning of the section. But merely to dissuade a person from submitting to vaccination is another matter. This is not obstruction, for it is only with regard to willing patients that the vaccinator has any duty. The conviction should be set aside, and the fine, if paid, refunded.

Ordered accordingly.

15 M. 94 = 2 Weir 692.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

MADAVARAYACHAR v. SUBBA RAU AND OTHERS.]*

[23rd September, 1891.†

Criminal Procedure Code, Section 528—Village Munsif.

A Village Munsif not being a Magistrate under Criminal Procedure Code, a Joint Magistrate under Criminal Procedure Code, Section 528, to withdraw a case from a Village Munsif and transfer it for disposal to a Second-class Magistrate.

[R., 26 M. 394 (396) = 2 Weir 693; 1 Weir 788 (B.)]

* Criminal Revision Case No. 475 of 1891.
† Criminal Revision Case No. 189 of 1891.
V.]

VENKATACHARLU v. KANDAPPA

15 Mad. 96

CASE reported for orders of the High Court under Section 438 of the Code of Criminal Procedure by G. Stokes, District Magistrate of Salem. Aravamudu Ayyangar, for accused.

JUDGMENT.

Village Magistrates are not Magistrates under the Code of Criminal Procedure, and, therefore, we do not think that the Joint Magistrate had power under Section 528 to withdraw the case and transfer it for disposal to the Second-class Magistrate.

The order must be set aside.

15 M. 98.

[96] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Hardley.

VENKATACHARLU (Plaintiff), Appellant v. KANDAPPA (Defendant), Respondent.* [8th September, 1891.]

Landlord and tenant—Suit for ejectment—Burden of proof.

In an ejectment suit by a landlord against his tenant the plaintiff cannot succeed unless he shows that under the terms of the tenancy and in the circumstances that exist he has a right to eject the defendant, although the latter may allege and fail to establish a right of permanent occupancy.


SECOND appeal against the decree of H. H. O'Farrell, Acting District Judge of North Arcot, in appeal suit No. 135 of 1889, reversing the decree of C. Rama Rau, District Munsif of Tirupati, in original suit No. 387 of 1888.

Plaintiff, as Inamdar of the village of Athur, sued to eject defendant from certain lands occupied by him in that village, and for damages for cultivating them for the years 1884-85, 1885-86, 1886-87, without plaintiff's consent.

It appeared that defendant had been in possession of the disputed land for the last 40 or 50 years, and that in the year 1874-75 he obtained a lease (Exhibit A) for a term of ten years from the plaintiff expiring 1883-84, and paid plaintiff rent for these years. On the expiry of this lease, defendant continued in possession of the lands in question, but refused to execute a moucharaka in consequence of a dispute with the plaintiff as to its terms. In consequence of this refusal and non-payment of rent since 1883-84, the present suit was filed. The defendant claimed to have a permanent right of occupancy. An issue was framed as to this claim, but the finding of the District Munsif which was accepted by the District Judge was adverse to the defendant.

The Munsif held that plaintiff had not proved his right to eject, but passed a decree for damages on the ground that defendant had not paid rent for the three years 1884-87.

[96] The District Judge reversed this decree and dismissed the suit throughout on the ground that plaintiff had not established his right to

* Second Appeal No. 1080 of 1890.
eject, there being no stipulation to that effect in Exhibit A or any evidence on the point.

The plaintiff appealed on the grounds that, (1) the District Court was wrong in law in holding that the burden of proof of the fact that the tenants had no right of occupancy was on plaintiff; (2) there was no evidence in this case sufficient in law to hold that the tenants had permanent rights of occupancy.

The other grounds of appeal are not material for the purposes of this report.

Mr. Subramaniam, for appellant.
Parthasaradi Ayyangar, for respondent.

JUDGMENT.

In our opinion the District Judge was right in holding that plaintiff had not proved his right to eject defendant. On the findings of both Courts, it must be taken that the only facts proved are that plaintiff is the Inamdar of the village, that defendant and his father have been in occupation of the lands for 40 or 50 years as tenants. Plaintiff's case, as set up in his plaint, was that of an occupancy commencing with the execution by defendant of a muchalka for 10 years in 1874-75. This is clearly not supported by the evidence. It was for plaintiff to show that, under the terms of the tenancy and in the circumstances that exist, he has a right to eject defendant, and this he has not shown. The cases of Appa Rau v. Subbanna (1), and Venkan v. Kasavelu (2) there referred to, are distinct authorities for the position that, when the plaintiff does not prove what the terms of the tenancy are, he cannot eject, although defendant may fail to prove his right of occupancy. Achayya v. Hanumantragupu (3) does not, in our opinion, conflict with this decision. We agree with the District Judge that the muchalka (Exhibit A) does not of itself show that plaintiff has any right to eject defendant.

The appeal fails, and is dismissed with costs.

15 M. 97.

[97] APPPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KOTHANDAPANI (Plaintiff), Appellant v. SOMASUNDARAM AND ANOTHER (Defendants), Respondents.* [5th October, 1891]

Indian Companies Act—Act IV of 1882, Section 177—Voluntary liquidation—Liability to be sued.

Where a Company has gone into a voluntary liquidation it can still be sued for debts due by it incurred prior to liquidation, although the fact that there are liquidators may be material if execution of the decree is sought.

PETITION under Section 622 of the Civil Procedure Code, praying the High Court to revise the decree of P. D. Shaw, Chief Judge, Small Cause Court, Madras, in small cause suit No. 24941 of 1889.

The plaintiff sued the "Sagothara Sagaya Sasvatha Nidhi (Limited) by its liquidators P. K. Somasundara Mudali and B. Rajahgopaul Naidu" to recover with interest Rs. 400, being the balance

* Civil Revision Petition No. 349 of 1890.

(1) 13 M. 60. (2) S. A. No. 1078 of 1897 unreported. (3) 14 M. 269.

416
of Rs. 600 deposited with the company in February 1882. The defendants contended that the suit was not maintainable, as the plaint disclosed that the fund was in liquidation; that interest had not been paid up to 30th November 1886, and that the suit was barred. The Chief Judge referred to judgments previously delivered by the Full Bench of the Small Cause Court on the construction of the Indian Companies Act, 1882, Section 117, and held that the suit was not maintainable.

Plaintiff presented this petition under Section 622 of the Civil Procedure Code.

Parthasaradhi Ayyangar and Ambrose, for petitioner.
Rajaratne Mudaliar, for respondent.

JUDGMENT.

The learned Judges of the Small Cause Court have given no reasons for their decision.

The right to sue to recover a debt is in the nature of a common law right, and unless it is taken away either expressly or by necessary implication, it must be treated as subsisting. We are [98] not referred to any section in the Indian Companies Act under which we can support the decision of the learned Judges. Section 177, which enumerates the consequences of the voluntary winding up of a company, only recognizes the liability of the liquidators to pay the debts of the company and limits the right of creditors to a payment pari passu. It does not absolve the debtors from liability to be sued. The fact that there are liquidators may be material if execution is sought of the decree. We set aside the order and direct that the suit be restored to the file and disposed of in accordance with law. The costs will be costs in the cause.

15 M. 98.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

MUTTUKARUPPAN (Plaintiff), Appellant v. SELLAN AND ANOTHER (Defendant Nos. 2 and 3), Respondents. 18th September, 1891.

Civil Procedure Code, Section 586—Provincial Small Cause Courts Act—Act IX of 1887 Section 23—Suit transferred to regular side.

A suit of a nature cognizable by a Small Cause Court does not cease to be so within the meaning of Civil Procedure Code, Section 586, because the Court in which it was instituted as a Small Cause suit returned the plaint to be filed on the regular side under Provincial Small Cause Courts Act, Section 23, on the ground that the suit involved questions of title.

[F., 21 C. 557 (1861); E., 21 B. 298 (1899); 33 M. 547 (F.B.); 4 Ind.Cas. 512 (613) = U.B.R. 1909, II Civ. Pro. Code, p. 21.]

SECOND appeal against the decree of S. Gopalachariar, Subordinate Judge of Madura (East), in appeal suit No. 631 of 1889, reversing the decree of T. Venkataramayya, District Munsif of Sivaganga, in original suit No. 462 of 1888.

* Second Appeal No. 980 of 1890.
Suit for Rs. 55, value of fish taken by defendants from a tank in the village of Thanavally Vayal, of which plaintiff claimed to be the owner. The defendants admitted plaintiff’s right as melvaramdar, but contended that they owned the kulivaram right in the village and enjoyed the right over the fish in the tank.

The District Munsif of Sivaganga passed a decree for the plaintiff, but the Subordinate Judge of Madura (East) reversed his decree and dismissed the suit with costs.

The plaintiff preferred this second appeal. It was objected for the respondents that no second appeal lay.

Sadanopachariar and Subramanya Ayyar, for appellant.
Bhashyam Ayyangar for respondents.

JUDGMENT.

The suit was of a nature cognizable by a Court of Small Causes, and did not cease to be so by reason of the Court having exercised its discretion under Section 23 of the Provincial Small Cause Courts Act to direct the plaint to be presented to the Court on its regular side. This point has been previously decided by this Court. No second appeal lies under Section 586 of the Civil Procedure Code, and this appeal must be dismissed with costs.

15 M. 99 = 1 M.L.J. 591.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

GOPI REDDI AND ANOTHER (Plaintiffs), Appellants, v.
MAHANANDI REDDI AND ANOTHER (Defendants), Respondents.

Civil Procedure Code, Section 525—Suit on award maintainable—Secondary evidence.

Where an award cannot be filed and a decree obtained upon it under Civil Procedure Code, Section 525, a party is not precluded from suing upon it. Secondary evidence of the contents of the award is admissible on proof of its being lost.

[F., 20 M. 490 (492); R., 19 P.R. 1907 = 46 P.L.R. 1907 = 134 P.W.R. 1907; U.B.R. (1906; 1st Qtr. Specific Relief 30.)]

APPEAL against the order of M. R. Weld, District Judge of Kurnool, under Section 53 of the Code of Civil Procedure returning the plaint in original suit No. 3 of 1890 to be amended.

Suit to enforce an award under the following circumstances: Plaintiffs and defendants, who were members of an undivided family, owing to family disputes, agreed to effect a partition of the family property, and, for this purpose referred the matter to arbitration. The arbitrators, by an award dated 1st March 1887, awarded to plaintiffs about Rs. 11,498, but as the award was subsequently not forthcoming, the plaintiffs were unable to file it under Section 525 of the Code of Civil Procedure.

Thereupon plaintiffs brought the present suit and further alleged that the award was not forthcoming owing to collusion between the defendants and the principal arbitrators. The District Judge by an order dated 28th

* Appeal against Order No. 119 of 1890.
July 1890, under Section 53 of the Code of Civil Procedure, returned the
plaint for amendment with the following remarks:—‘I am of opinion
“that the only way in which an award can be enforced is under Section 525
“et seq. and failing that, that it cannot be enforced, and that the plaintiffs
“must bring a regular suit to obtain what he says was given by the award.”

The plaintiffs preferred this appeal.

Ramachandra Rau Saheb and Krishnasami Rau, for appellants.
Respondents were not represented.

JUDGMENT.

The District Judge is clearly in error in supposing that no suit will
lie upon an award. Section 525, Code of Civil Procedure, only provides,
that a party may apply to the Court to have an award filed: this is no bar
to his right to sue upon the award, and, if the award cannot be produced,
secondary evidence of its contents will be admissible on proof of its loss.

We must therefore set aside the order and direct the Judge to
entertain the plaint. The costs will be provided for in the revised
judgment.


[101] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, and Morris, Sir R. Couch and Mr. Shand.

[In appeal from the High Court at Madras.]

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (Defendant) v.
NELLAKUTTI SIVA SUBRAMANIA TEVERV (Plaintiff).

[4th, 5th, and 21st November 1891.]

Proof of a Zamindar's title to tract of hill and forest—Construction of istemmar samad
of 1803 as to lands granted—Specification of villages—Effect of proved acts of posses-
sion by Zamindar.

Where the proprietary right in a tract of land had been constantly asserted, all
questions between the disputants as to the amount of the use of the tract by the
claimant, and as to the sufficiency of such use to establish his possession over
the whole extent, were held to be questions of fact.

A Zamindar claimed from the Government the proprietary possession of a
tract of hill and forest, in virtue of an istemmar samad of the year 1803, conferring
upon the grantee, his heirs and successors a permanent property in the
zamindari as then possessed. To the samad, which was aptly worded to include the
subject of this claim, the acts of the Zamindar had been ascribed. But it did
not contain any description of the lands which it was intended to carry, a
marginal note only specifying three villages then comprising the zamindari:

Held, that the grant was not confined to the villages so named, and to an area
in their immediate vicinity, but that the whole tract of hill and forest was
claimable on its being shown, by direct evidence, or reasonable inference, that it
was in the possession of the Zamindar when he obtained a permanent title from the
Government.

As to part of the tract, the Zamindar's acts of possession, such as grazing cattle,
cutting timber, and collecting forest produce, had been exclusive of the exercise
of such rights by any other persons; but as to another part of the tract, his acts
of that character had been concurrent with a similar user of hill and forest by
raiyyats of neighbouring villages, not part of the zamindari, and belonging to the
Government.
Held, as to both parts, that the acts of possession, which had been found by both the Courts below to have been done by the Zamindar, did not fall short of proving his proprietary possession, and that the user by the villagers, not having taken place in the assertion of conflicting proprietary right, and whether or not they were sufficient to establish rights of easement, were neither in amount nor quality sufficient to displace the Zamindar's proprietary title. The decision of the first Court that the exercise of the abovementioned rights by the Zamindar was evidence only of the right on his part to use the land of another for the purposes indicated, had been rightly reversed by the High Court.

[102] APPEAL from a decree (30th April 1885) of the High Court (1) reversing a decree (8th January 1883) of the District Judge of Tinnevelly. On the 29th July 1880 the plaintiff, as the sanad-holding Zamindar of Singampatti in the Tinnevelly District, sued the Government to obtain the proprietary possession of a tract of hill and forest described as consisting of three parts. The first or eastern part was an area of 10 square miles; the second or central part was an area of less than 1 square mile; and the third or western part comprised nearly 33 square miles. They formed the Singampatti Hills, and had been, as was alleged, from time immemorial in the possession of the plaintiff's ancestors. He also alleged that his possession having been continuous, he had acquired a title by prescription against the Government. During his minority, and while his estate was in the hands of the Collector of the Tinnevelly district, as agent of the Court of Wards, the Assistant Superintendent of Revenue Survey, Mr. Baber, acting under Act XXVIII of 1860 (2), decided, on the 6th April 1880, that the tract now in dispute was the property of the Government. That under Section 25 of the above Act this order should be cancelled, was now claimed as well as a decree for possession on the title. The Government denied his title asserting that the tract was outside, though in the neighbourhood, of the zamindari, and belonged to the State, as land undisposed of by it.

The District Judge having transferred the suit to his file from that of the Subordinate Judge was of opinion that the Zamindar of Singampatti had, over the whole of the western part of the tract, exercised, to the exclusion of all other persons, the right of grazing cattle, of cutting wood, and collecting forest produce, those acts being all the profitable use that could be made of the tracts. As to the eastern part of the tract, the Judge found that the Zamindar had exercised similar rights but not exclusively; inasmuch as that the raiyats of neighbouring riyatwari villages had all along done the like acts by way of user of the eastern part. He was also of opinion that the Government had always had the power of regulating, in the general interests of the people of the [103] district, the management of all the tract of hill and forest. He made no order as to the middle tract, which was small, of little value, and not affected, in his view, by the evidence.

The Judge's finding was that only rights of easement, and not the proprietary right over the tract in dispute, had been proved to have been exercised by the Zamindar. But he considered that the Assistant Superintendent of Revenue Survey had been wrong in deciding that the Zamindar had no rights whatever in respect of that land. He referred to

(1) Siva Subramanya v. Secretary of State for India, 9 M. 285.
(2) An Act of the Government of India for the establishment and maintenance of boundary marks and for facilitating the settlement of boundary disputes in the Presidency of Fort St. George.

The High Court (Turner, C.J., and Muttusami Ayyar, J.) agreed with the District Judge in accepting as proved the facts done by the Zamindar upon the land in dispute; but disagreed with him as to the effect of those acts. According to them the acts so done were acts of ownership, as the person exercising the right to do them asserted general ownership. If he had asserted a particular right so to act upon the property of another, easement only might have been established. The judgment is reported in I.L.R. 9 Mad., 3 but to explain the Court's view the following extract is here added:

"It may be that specific portions of the hills were not regularly cultivated, but such cultivation is not necessary when other acts of ownership are done upon them. As already observed, there is evidence of acts of enjoyment done in the open assertion of title as owner, and the ayakut accounts, and the special circumstances of the case warrant the presumption that such acts were done for more than sixty years, if not from time immemorial. As to the interference by officers of Government with the enjoyment by the Zamindar of his rights in full, there is no evidence to show that such interference was accompanied with a denial of the Zamindar's right as owner. The enjoyment of any right of ownership over the soil, whether it be the cutting of timber or of turf, or the gathering of produce, is prima facie proof of ownership of the soil; and, when the District Judge found that there had been such an enjoyment of the forests as proved a [104] title to the profits, he was logically bound to find a title established to the soil, seeing that the enjoyment had been throughout accompanied with an insertion of such ownership. We see no reason to doubt that all the hills to which the suit refers were included in, and formed part of, the zamindari as it existed in 1803, and as it had been enjoyed by the appellant's family prior to the permanent settlement."

The Court concluded by saying—

"We are of opinion that the acts of enjoyment proved in this case are acts of ownership, done adversely to the respondent; and that as the adverse possession has extended to more than sixty years, the appellant has acquired a title by prescription."

The decree was that the plaintiff should recover possession of the three tracts, with mean profits from the date of suit till date of possession and costs. All rights of vicinage held by any raiyats were reserved.

The Secretary of State for India in Council having appealed, Mr. W. F. Robinson, Q. C., and Mr. J. D. Mayne appeared for the appellant.

Mr. J. Rigby, Q. C., and Mr. R. V. Doune, for the respondent.

Among the arguments for the appellant were the following:—A definite connection has not been shown, as regards proprietorship, between the different parts of the tract of hill and forest, to which the plaintiff has attempted to make out a title by evidence only of acts done in distant and isolated places. Some of the hills are not only far distant, but are inaccessible, on account of thick jungle, from where the acts of ownership..."
are said to have taken place. Again, there is no evidence to show that the zamindari of Singampatti, before 1803, comprehended the tract, or that the Zamindar before then had possession of it. In the sanad of 1803, no boundaries are stated, and it is difficult to suppose that the term "villages" included many square miles of hill and forest. All the zamindari villages, as shown in Mr. Baber's map of 1880, are to the north, and near Government villages. The High Court has inferred from the ayakut accounts of villages lying to the north, and to the east, that the tract of hill and forest must have been included in the zamindari, not having been shown to belong to the Government villages. But no such inference can be drawn. The hill and forest tracts would not, prima facie belong to either a raiyatwari or a zamindari village, unless expressly [105] granted. The documents, maps, and suits between the Zamindar and the villagers referred to. The Zamindar had only a permitted user, under the control of the real proprietor.

Documents show that even within the limits, within which the Government did recognize rights as possessor by the Zamindar, they yet claimed authority to restrain him in the exercise of those rights, in a manner inconsistent with his being the proprietor of the soil. From 1837 onwards, it appears that the revenue officials have been in the habit of restricting the inhabitants of villages adjacent to the hills in the exercise of their rights of cutting wood, when these rights were likely to diminish the rainfall by stripping the hills of their trees. Orders to this effect issued to the inhabitants of other villages in 1837, 1839, 1842 and 1844 are upon the record. Similar orders were issued as regards the Singampatti Zamin Hills in 1861, 1862 and 1866. When a case was granted of part of the hills in 1866, by the guardian of the then minor Zamindar, the lessee agreed to abide by the Government regulations and acts for the preservation of the hill and forest. As it is admitted by High Court that the Government questioned the Zamindar's title in 1865, it is unnecessary to refer in detail to similar proceedings in 1878, 1879 and 1880. It is submitted that the view taken by the High Court, that these were acts done by the Government agents in the interests of the minor Zamindar, and on his behalf, is wholly untenable.

The oral evidence is non-existent as regards the central tract; it is vague and insufficient as regards the eastern tract; and, as regards the western tract, it does not make out an actual proprietorship of the soil in the Zamindar. Taking the evidence of the witnesses who are credited by the District Judge, it only shows that the rights, which existed in the undisputed district, had been carried on by way of encroachment into the adjoining tract. It must be remembered that the whole hill country is destitute of visible boundaries or marks of delimitation.

As regards the alleged title by prescription, it is necessary to prove a sixty years' adverse possession. Since 1865 the Zamindar's title has been disputed. The period of prescription must therefore begin to run from some date not more recent than 1805, and the High Court seems to be of opinion, chiefly on the evidence of the ayakut accounts, that the possession of these hills by the Zamindars has been from time immemorial. There [106] is, however, no sufficient evidence to that effect, especially as the sanad appears to negative any such possession in 1803.

Counsel for the respondent were not called upon.

Afterwards (on 21st November) their Lordships' judgment was delivered by Lord Watson.
JUDGMENT.

This appeal is taken by the Secretary of State for India in a suit instituted before the District Court of Tinevelly by the respondent, the Zamindar of Singampatti, for cancellation of a decision of the Government Survey Officer, dated the 10th April 1880, and for a declaration of his title to certain tracts of mountain land, covered with forest and jungle, as being parts of his zamindari.

The villages and cultivated lands of the zamindari are situated on the plains, and are contiguous to lands and villages belonging to the Government of India. These lands lie at the northern base of a mountain range whose crest or watershed runs nearly due east and west, rising to an elevation varying from 3,850 to 4,900 feet above sea level. The watershed is a well defined natural line and forms the northern boundary of the territory of Travancore.

The respondent was a minor when he succeeded to the zamindari, and did not attain majority until the year 1880. Until 1867 his estate was managed by his mother; and from that date until 1880 it was under the management of the Court of Wards.

For a considerable period, antecedent to the year 1865, it appears to have been well known to the Government that the Zamindars of Singampatti claimed, as their property, the extensive hill tract lying between their cultivated lands and the Travancore boundary. In that year the Government began, for the first time, to suggest doubts as to the validity of their right; and, in 1870, a demand was made for production of the evidence of their title. A report was thereafter made by Lieutenant Campbell Walker, which was submitted to the Government Pleader; but no further steps were taken in the matter until October 1879, when an order was issued directing a Survey Officer, empowered under the Boundary Act, to take up the settlement of the case.

That order was carried out by Mr. Baber, who, after making inquiries, and personally surveying the tract in dispute, issued his report and decision on the 6th April 1880, with a relative plan prepared by him, which shows the whole area then claimed, and also that portion of it which he held to be part of the zamindari. The latter, roughly estimated, comprehends about one-half of the area claimed, and forms the north-western portion of that area. The lands, which Mr. Baber held to be Government property, consisted of a tract varying in breadth lying outside the eastern and southern boundaries of the lands assigned by him to the Zamindar.

In this suit, which was brought by the respondent in July 1880, after he became of full age, the Government concede, as they have all along done, his right to the land to which he was found to be entitled by the decision of their Survey Officer. The subjects now in controversy are described in the plaint as consisting of three parcels. The first, which has been termed in these proceedings the eastern tract, does not include the whole area to the east which was claimed before and disallowed by Mr. Baber, but only that portion of it about 12 square miles in extent, which lies to the north of the river Varattar. The second, termed the central tract, about 1 square mile in extent, is bounded on the north by the land now admitted to be the respondent's, on the east by the Kusavankuli river which is also, in that locality, the eastern boundary of the admitted land, on the south by Travancore, and on the west by the third tract claimed. That third or western tract, which extends to 35 square miles,
is bounded on the north by the lands awarded to the Zamindar in April 1880, on the east by those lands and by the central tract now claimed on the south by the Travancore boundary, and on the west by the river Tambraparni, which is also the western boundary of the lands to which he has already been found to have right.

The title of the respondent is a sanad, dated the 22nd of April 1803 granted by Lord Clive to his ancestor, Nallakutti Toven, then Zamindar of Singamnatti. The sanad contains the usual recitals, one of these setting forth that the object of the grant was to confer upon the Zamindar, his heirs and successors, "a permanent property in their land in all time to come." It contains no specification or description of the lands which it was intended to carry, but is a grant in general terms of the zamindari as then held and possessed by the grantee. There is a marginal note specifying the names of three villages then composing the zamindari; and it was suggested, in the argument for the appellant, that the effect of the note is to limit the grant to these three villages and a limited area in their immediate vicinity, [103] and to exclude the claim of the respondent for any land beyond these limits which is not shown to have been subsequently acquired from the Government by prescription. Their Lordships do not think that a marginal specification of the villages existing at its date can control the plain terms of the grant, or can be taken as definitive of the extent of land, cultivable or not, which was then held and possessed by the Zamindar of the villages enumerated. In their opinion, the respondent must prevail in this suit, if he has been able to show, either by direct evidence or as matter of reasonable inference, that the lands now in dispute were held and possessed by the Zamindar at the time when he obtained a permanent title from the Government.

The issue settled in the District Court for the trial of the cause upon its merits was simply "Whether the right to, and possession of, the property in dispute belonged to plaintiff or to Government?" Documentary and oral evidence was adduced by both parties, into the details of which their Lordships find it unnecessary to enter, because of the unanimity of the conclusions in fact which both Courts below have derived from it. It is sufficient to say that there is evidence of both kinds tending to prove that the Zamindars had, for a period beyond living memory or at least for fifty years past, uniformly asserted their right to all the tracts now claimed, by including them in leases of their hill land. Not only so, but in the year 1843 the Government Collector, who was at that time in possession of the zamindari for arrears of revenue, granted a lease of the hill lands and their products, in which these tracts were expressly included; and a Collector who was in possession in the years 1857-58 also dealt with them as forming part of the zamindari. On the other hand, there is no evidence tending to prove that before the challenge which ultimately led to the present litigation, there was any similar assertion of right, either on the part of the Government or of any other person.

Whether there has been a persistent claim of right to a tract of land is, their Lordships need hardly say, a question of fact. Such assertion being proved, all questions as to the amount of use and enjoyment of the tract by the claimants, and as to the sufficiency of such use and enjoyment to constitute possession of the whole extent claimed, are also, in the opinion of their Lordships, pure questions of fact.

[169] The District Judge held it to be established by the evidence that, throughout the third or western tract, the Zamindars of Singamnatti had all
along exercised the exclusive right of grazing cattle, cutting timber, and collecting mountain produce. With regard to the first or eastern tract, he found that the Zamindars had exercised rights of precisely the same kind over the whole tract, but not to the exclusion of a certain amount of user by inhabitants of Government villages. Upon these findings, the learned Judge came to the conclusion in law that the possession of the western tract by the respondent and his predecessors ought not to be ascribed to a title of property, but that it was sufficient to give him right to exclusive easements of pasturage, cutting timber, and collecting mountain produce over its whole area. As to the western tract, he held that the respondent was entitled to easements over it of the same character, but not exclusive. The only observation upon the second or central tract which occurs in his judgment is to the effect that "it appears to be of comparatively little value, and no evidence regarding it was produced on either side."

The result was that the learned Judge set aside the decision of the Survey Officer, which found that the respondent had no interest in the disputed lands; and pronounced no further order beyond finding neither party entitled to costs.

On appeal, the High Court adopted the findings of the District Judge with respect to the Zamindars' exclusive possession of the western tract, but rejected his legal inference that the right thereby constituted was in the nature of easement, and held that it amounted to a full right of ownership. In that view of the law their Lordships entirely concur. Having regard to the character of the subjects in controversy, the exclusive possession which the Zamindars are, by concurrent judgments, found to have enjoyed, appears to them to have in no particular fallen short of proprietary possession. There is no ground for presuming that a proprietor, whose title was clear, and who was desirous of turning his estate to the best account, would have occupied or used the subjects in any other way than they did. When that circumstance is taken in connection with the fact that the Zamindars had a title which will aptly include these subjects, and that their acts of possession have invariably been ascribed to that title, the inference drawn by the High Court appears to be inevitable.

[110] The learned Judges of the High Court also expressed their concurrence in the findings of the District Judge with respect to the Zamindars' possession of the eastern tract, but came to the conclusion that their possession alone was that of proprietors, and that the proved acts of user by raiyats from neighbouring villages were not of that character. On examining the judgments of the two Courts, their Lordships were satisfied that the possession of the Zamindars, as found by both, would, in the absence of conflicting possession sufficient to cut down or qualify their right, entitle the respondent to a declaration of his proprietorship. But it did not seem to be equally clear that the two Courts were altogether agreed as to the extent and character of the stranger raiyats' possession; and they accordingly permitted the appellant's Counsel to bring before them all the evidence bearing on that point. Their Lordships are unable to affirm that there was any difference of opinion in the two Courts upon that point; but, whether that be so or not, they are satisfied, upon the evidence, that the decision of the High Court is right. Beyond what may be implied in the acts themselves, there is nothing to show that such done by these stranger raiyats was in the assertion of right; and, assuming the statements of the appellant's witnesses to be absolutely true, the acts of user to which they speak are neither in amount nor quality sufficient
to displace the proprietary title of the Zemindar. Whether the evidence
would per se be sufficient to raise rights of easement, and, if so, in whose
favour, are issues which do not arise in the present case.

The High Court, differing from the District Judge, held that the
respondent has proved his title to the second or central tract claimed; and
in that finding also their Lordships concur. It is not easy to understand
why the tract was made the subject of a separate claim. It adjoins the
hill lands which have been found to belong to the zemindari; it lies within
their natural limits, namely, the Kusavankuli river on the east, and the
watershed on the south. There is nothing to suggest that it was ever
claimed or possessed by any other person, whilst it was persistently claimed
and treated by the Zemindars as part of their estate. In these circum-
stances, their Lordships are of opinion that their proprietary possession
of the hill lands adjoining is sufficient to establish their title to the central
tract.

The High Court, upon these findings, allowed the appeal, reversed
so much of the decree of the Court below as dismissed the respondent’s
claim, and decreed the claim as made, with costs in all Courts. Being of
opinion, for the reasons already indicated, that the decision of the High
Court is right, and ought to be affirmed, their Lordships will humbly
advise Her Majesty to that effect. The appellant must pay to the
respondent his costs of this appeal.

Appeal dismissed.

Solicitor for the appellant:—The Solicitor, India Office.
Solicitors for the respondent:—Messrs. Lawford, Waterhouse &
Lawford.

19 M. 111.

ORIGINAL CIVIL.

Before Mr. Justice Subramanya Ayyar.

VITHILINGA PADAYACHI (Plaintiff), v. VITHILINGA MUDALI
AND ANOTHER (Defendants).* [16th December, 1891.]

Civil Procedure Code, Sections 13, 98, 103—"Res judicata"—"Court of competent
jurisdiction"—Landlord and tenant—Quiet enjoyment, covenant for—Parties—
Suit for damages against lessor, including costs—Joinder of one or two co-lessees as
defendant—Suit dismissed against such lessee.

In 1883 A, the trustee of a certain charity, executed in favour of X and Y an
agricultural lease for nine years and delivered over possession of the lands com-
prised in it, being part of the trust property. The lease contained a provision
that it should be cancelled on default being made in payment of the rent and
kist, and it contained no express covenant for quiet enjoyment. In 1887 de-
fault was made in payment of the rent and kist. A thereupon cancelled the
lease and sued X and Y in a Subordinate Court and obtained a decree for the
arrear, the total amount of his claim being Rs. 2,807. In that suit X alleged
that Y was merely a name-lender for A who desired to benefit himself at the
expense of the charity, and also that certain raiyats setting up a false claim had
evicted X from the lands demised at the instigation of A, who had subsequently
sought unsuccessfully to obtain further advantages for himself. The Subordi-
nate Judge framed an issue on each of these allegations and recorded findings
in the negative. In the same year X filed a suit for damages for breach of con-
tract against A and Y in the High Court, repeating in his plaint the above alle-
gations. When that suit came on for hearing, it was dismissed for default. Y

* Civil Suit No. 148 of 1890.
being the only party who appeared. X now sued A again on the same cause of action, making the same allegations. Y was subsequently brought on to the record as being a necessary party to the suit, being joined as [112] second defendant, but he applied to be and was struck off the record on the ground that the dismissal of the former suit in the High Court was final as against him:

Held, (1) that the suit was not bad for the non-joinder of the co-lessee as a plaintiff, nor for the reason that the plaintiff could not prosecute the suit against him;

(2) that the matters put in issue in the Subordinate Court were not res judicata by reason of the decision of that Court;

(3) that the plaint disclosed a good cause of action against the lessee;

(4) that even if the plaintiff had substantiated his allegations against his lessor, he would not have been entitled to recover the cost of civil and criminal proceedings against the riyats who had evicted him.

[Sess., 25 C. 571 (578); 23 C. 78 (81) = 5 C. W.N. 483; R., 17 M. 164 (178); 17 M. 273 (274); 18 M. 193 (194); 20 M. 195 (F.B.) = 1 M. L.T. 128; 7 C.L.J. 251 (260); 2 O.C. 261; 54 P.R. 1904; 57 P.R. 1909 = 66 P.W.R. 1909.]

SUIT for damages by one of two lessees against the lessor of a village in the Tanjore district. The lands comprised in the lease formed part of the endowment of certain charities of which the lessor was trustee under the will of Ammoyee Ammal. The other lessee was a relative of the lessor, and it was alleged by the plaintiff that he held his ostensible share in the lease really for the benefit of the lessor. The plaintiff's case was that the lessor had sought to obtain from him a larger share, and on his refusal had instigated the riyats of the village to oust him, that they had in fact ousted him, and that the lessor had wrongfully cancelled the lease for non-payment of rent in 1887, whereby he suffered damages, in the assessment of which he included the cost of certain civil and criminal proceedings instituted by him against them. The lease contained no covenant for quiet enjoyment. It provided for the cancellation of the lease on default in payment of rent and taxes, and it was under this provision that the lease had been cancelled in 1887.

In original suit No. 59 of 1887 on the file of the Subordinate Court at Kumbakonam the lessor sued both lessees for the arrears of rent, the amount of kist paid by him, &c., the total amount of the claim being Rs. 2,807-11-1. Upon the allegations of the present plaintiff that Court framed the following among other issues:

1. Whether defendant No. 2 has joined in the execution of the lease agreement on behalf of the plaintiff in his individual capacity, and, if so, whether the lease is invalid on that account.

2. Whether the plaintiff instigated the tenants of the village to claim a kudikan right in themselves.

3. Whether any and what portions of the lands included in the lease agreement were lying waste in fasti 1296, and whether [113] defendant No. 1 can on that account object to pay plaintiff the lease amount.

The Subordinate Judge recorded findings on the above issues in favour of the lessor, and his findings were upheld on appeal by the District Judge. It was now pleaded that the matters referred to in these issues were res judicata.

In civil suit No. 187 of 1887 on the file of the High Court the present plaintiff sued the lessor, and his co-lessee upon the same cause of action as that now set up. That suit was dismissed for default against the lessor, who did not appear under Civil Procedure Code, Section 98, and against defendant No. 2, who did appear under Civil Procedure Code, Section 103.
The present suit was in the first instance, filed against the lessor alone in his individual capacity. The plaint was subsequently amended and the lessor was described as "Mirasidar and executor under the will of one Ammoyee Aminal;" and by order of the High Court Singaravelu Mudali, the second lessee, was joined as being a necessary party. The latter applied to be struck off the record on the ground that the dismissal of the former suit as against him was final, and this was done by the order of Rost. J.

The further facts of the case appear sufficiently for the purposes of this report from the following judgment.

Viswanadha Ayyer, for plaintiff.

Mr. K. Brown and Mr. R. F. Grant, for defendants.

JUDGMENT.

The inam village of Puttore in the Tanjore district forms the endowment of certain charities founded by one Lakshmana Mudali, deceased, of Madras. The first defendant is the present executor of the said Lakshmana Mudali's estate and the trustee of the said charities.

A lease of the village of Puttore was granted on the 17th April 1883 by the first defendant under an instrument purporting to be for the benefit of the plaintiff and of the second defendant. The parties exchanged registered instruments regarding the lease. It was for a term of nine years from fasli 1293 and the rent reserved was 2,200 calves of paddy per annum, deliverable in two instalments within the year. The lessees had further to pay certain taxes amounting to Rs. 200 annually. The instruments between the parties provided that the lease might be forfeited for non-payment of the rent or the taxes. The plaintiff at once entered into possession under the lease. So far the facts are undisputed.

I shall now briefly state the other material allegations of the parties as ascertained from the pleadings or at the trial. Those of the plaintiff areas follows:—The second defendant possessed in reality no interest under the lease; his name was introduced into the transaction merely to secure a benefit to the first defendant, whose daughter by a concubine is married to the second defendant. A fourth share of the profits that the plaintiff might make from the village during the term of the lease was to go to the first defendant, the plaintiff taking the remaining three-quarters. This was the original understanding; but shortly after the lease was granted, the first defendant wanted half the profits instead of a fourth; the plaintiff refused to comply with that demand, and the first defendant, who was bound by law and by the contract to secure quiet possession and enjoyment to the plaintiff, instigated certain inhabitants of the village who had been cultivating the lands before falsely to set up occupancy rights, to disturb his possession and obstruct his enjoyment. In faslis 1295 and 1296 the obstruction became so complete that the plaintiff and his tenants were unable to cultivate any of the lands, which consequently lay waste. The first defendant having thus succeeded in ousting the plaintiff, sent a notice on the 17th May 1887 professing to cancel the lease under the forfeiture clause and openly resumed possession. The damages sustained by the plaintiff are estimated at Rs. 20,500, which he seeks to recover from the first defendant.

The material allegations of the first defendant, so far as they are necessary, are these:—The plaintiff's statements summarised in the last paragraph are untrue. The lease was a bona fide transaction, and the first defendant had no manner of connection with the profits. The second
defendant was in reality one of the lessees, and the plaintiff cannot sue without joining him. The disturbances and obstructions alleged by the plaintiff were caused by the ill-feeling, which arose between the plaintiff and the inhabitants of the village in consequence of the plaintiff's attempting to raise the rents, his refusing to give lands to cultivate to such of them as declined to accept his terms, his bringing in tenants from other villages, and his having offended them by other imprudent acts. The plaintiff failed to pay the rent and the tax due for fasli 1296; the lease was thereupon lawfully cancelled by notice to the plaintiff and possession of the village [115] taken by the first defendant. Subsequently the first defendant brought original suit No. 59 of 1887 against the plaintiff and the second defendant in the Kumbakonum Subordinate Court for the recovery of the above rent and tax, &c., and obtained a decree for the same, and the matters raised by plaintiff in the present suit are, therefore, res judicata.

The second defendant put in a written statement urging that there was no cause of action against him, and that as civil suit No. 187 of 1889 on the file of this Court instituted by the plaintiff in respect of this very matter against the first defendant and second defendant was dismissed for default of appearance on the part of the plaintiff; this suit is not maintainable against him.

On the 20th November 1890, Best, J., passed an order dismissing the suit as against the second defendant.

The following issues were recorded:—

First.—Is the suit maintainable in the absence of Singaravelu Mudali?

Second.—Is the suit not maintainable in whole or in part by reason of the decree in original suit No. 59 of 1887 on the file of the Subordinate Court of Kumbakonum?

Third.—Was the first defendant justified in cancelling the lease?

Fourth.—To what damages, if any, is plaintiff entitled?

Fifth.—Is the defendant personally liable for such damages, if any?

Mr. Brown, in opening the first defendant's case, commented on the inconsistent manner in which the plaintiff's case was presented. From paragraphs 4 and 8 and the prayer of the plaint it clearly appears that the plaintiff intended to rely on a covenant for quiet enjoyment, and that he treated the suit as one for breach of contract. Later on, however, the plaintiff informed the Court that he sued the first defendant not as executor, but in his personal capacity. Mr. Brown argues that this is in effect an admission that the suit is not one for breach of contract. Though the first defendant traversed the allegation about the covenant for quiet enjoyment, no express issue was raised by the plaintiff on the point. But on the other hand, if the plaintiff was understood to have abandoned the case on the footing of a breach of contract, that ought to have been made clearer upon the record and the plaint amended accordingly; for if the plaintiff is [116] to be taken as suing the first defendant solely on the ground of a wrongful eviction by him, it may be open to doubt whether the reliefs which the plaintiff seeks are the appropriate ones. The trial has, however, proceeded on the assumption that the issues recorded cover the real questions arising in the case, and I shall deal with them as they stand.

First issue.—On the face of the lease the plaintiff and the second defendant are co-lessees. Prima facie, therefore, both must be parties to this litigation. The plaintiff, alleging that the second defendant had in
reality no interest in the matter, sued the first defendant alone without making the second defendant a party. But the latter was made a party by the order of the Court. His contention that the dismissal of civil suit No. 187 of 1887 was fatal to the maintenance of this suit prevailed, and the suit was dismissed so far as the second defendant was concerned by the order of the 20th November 1890. Now it is argued for the first defendant that in consequence of that order this case must proceed as if the second defendant had never been made a party, and that the plaintiff’s claim must fail on the ground of non-joinder of a necessary plaintiff. I do not agree with this argument. Assuming, as the first defendant contends, that the second defendant had an interest in the lease, plaintiff is in no view entitled to recover anything from the second defendant except it be costs. As one entitled with the plaintiff to sue, but refusing to join, the second defendant could only have been made a defendant so that all persons interested might be before the Court. This was expressly done, and I cannot see how the subsequent order relied on can alter the fact.

It is next contended for the first defendant that, even if my view as stated above be correct the suit cannot be maintained without the second defendant being arrayed as co-plaintiff. According to the Indian practice it is sufficient that persons having the interest that the second defendant is alleged by the first defendant to possess are made defendants. Kanna Pisharody v. Narayanan Somayajipad (1). It is unnecessary, therefore, to consider the English authorities cited by Mr. Brown in support of his argument (2).

[117] Upon the view I take of this legal objection, I must decide the first issue against the first defendant, even if I should come upon the evidence in the case to the conclusion that the second defendant is a co-lessee; I therefore refrain from discussing the evidence upon this feature of the transaction, which reveals its questionable character. That it is a questionable transaction is clear whether the evidence for the plaintiff or the evidence for the defendant be accepted. The plaintiff’s case is that at the time of the lease, which, I consider, was granted on favourable terms, the lessee agreed to give the lessor, a trustee, one-fourth of the profits during the whole term as an inducement to his granting the lease. On the other hand the second defendant as the first defendant’s witness admits that the plaintiff offered him a share in the profits to make the first defendant give the lease, and that the latter did, in consequence, grant the lease with full knowledge that the profits were to go to the second defendant, his own son-in-law then living with him as a member of his family, and with the knowledge that second defendant was to take no trouble whatever in connection with the management of the property demised.

Second issue.—The main question in the present suit is whether the first defendant was justified in cancelling the lease. He says he was entitled to act upon the forfeiture clause as the plaintiff and the second defendant had neglected to pay the rent and the tax due for fasli 1296. The plaintiff’s case on the other hand is that he had been unlawfully evicted and kept out of possession during that fasli by the first defendant, that the latter was consequently not entitled to treat the rent, &c., for that period as in arrears, and the first defendant’s action in cancelling the lease is, therefore, invalid. This contention on the part of the plaintiff

---

(1) 9 M. 234.
(2) Dicey on Parties, pp. 104-110, and cases there cited.
is based on the rule that eviction of the lessee by the lessor from the whole or any part of the premises demised creates a suspension of the entire rent during the continuance of the eviction, until the tenant re-enters and resumes possession,—Morrison v. Chadwick (1). The material question, therefore, to be determined is whether the plaintiff had been evicted by the first defendant as alleged by him. This was, in my opinion, decided against the plaintiff in original suit No. 59 of 1887, wherein the first defendant sued and obtained[118] a decree for the very same rent, &c., against the plaintiff and the second defendant. The third issue and the finding thereon (Exhibits VII and VIII) in that suit were, no doubt, expressed in somewhat different words, but it is clear that the point in issue was really as stated by me. It is contended for the first defendant that that adjudication bars this suit.—Ananta Balacharya v. Damodhar Makund (2). This raises a question on which the authorities are not quite agreed. In Bholabhai v. Adesang (3), West and Nanabhai Haridas, JJ., held that the decision of a District Court in appeal in a suit for less than Rs. 500 was not binding on the same or any other Court in a subsequent suit for more than Rs. 500 in which the identical question was raised between the parties, because they are entitled to prefer a second appeal to the High Court in the subsequent suit, whilst no such appeal lay in the first suit. This case was recently followed by Sir Charles Sargent, C.J., and Telang, J., in Govind Bin Lakshman Shet v. Dhandharav Bin Ganbarav Tambye (4). In Singarachariar v. Krishnasami, (5) Wilkinson, J., came to a different conclusion, whilst Kernan, J., adopted the view which is to be explained on the principle referred to by West, J., in the latter part of the second paragraph on page 80. Bholabhai v. Adesang (3) was not brought to the notice of Wilkinson, J., and the latter decision of the Chief Justice and Telang, J., was subsequent.

The Bombay rulings seem to me necessarily to involve the proposition, which, for the purpose of the point I am now considering, may be shortly stated thus. In appealable cases, a decision to be *res judicata* must have been given in a previous suit which the parties, according to the ordinary procedure, were entitled to take, as to fact and law, ultimately to the same (or corresponding) appellate tribunal to which the subsequent litigation, wherein the decision is relied on as conclusive, could be carried. If the rule thus deduced is correct, the first defendant's contention as to *res judicata* is unsustainable, as the suit in the Subordinate Court was for less than Rs. 5,000 and only an appeal upon questions of law lay to the High Court; whereas the present claim is for a sum over Rs. 5,000 and admits of an appeal on the facts also. Mr. Brown argues that, as the Subordinate Court could entertain a suit for [119]more than Rs. 5,000, it was competent, within the meaning of Section 13, Civil Procedure Code, to entertain the present suit and that the letter of the law requires nothing more. But Section 13 of the Civil Procedure Code is not exhaustive. Moreover the decisions on the section relating to *res judicata* in the successive Civil Procedure Codes show that the legislature did not find it quite easy to make the language of that section precise and comprehensive at the same time. It is sufficient to refer to one decision on each in support of this statement. In Krishna Behari Roy v. Brojeswar Chowdhryee (6), the Privy Council held that the words "cause of action" in Section 2 of Act VIII of 1859 cannot be taken in its literal and most restricted sense. The same tribunal ruled

---

(1) 7 O.B. 266.  
(2) 13 B. 25.  
(3) 9 B 75.  
(4) 15 B. 104.  
(5) S.A. No. 1200 of 1887, unreported.  
(6) 2 LA. 263.
in Misir Raghobardial v. Rajah Sheo Baksh Singh (1) that the words "Court of competent jurisdiction" in Section 13 of Act X of 1877 meant a Court which had jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive. In Bababhut v. Narharbhut (2), the Bombay High Court construed the same term "Court of competent jurisdiction" in explanation VI, Section 13 of the present code as including a foreign competent Court. Dr. Whitley Stokes, who had much to do with the preparation of the codes of 1877 and 1882, refers to the matter dealt with by Section 13 as "a subject of which the importance in a country "inhabited by a litigious population is only equalled by the difficulty of "dealing with it clearly, concisely and accurately in a legislative "enactment".—Volume II, Anglo-Indian Codes, page 393.

These considerations being kept in view, the interpretation suggested on behalf of the first defendant cannot, I think, be insisted on when it leads to results so manifestly opposed to reason as pointed out by West, J. In one place he puts the matter thus: "Moreover for the purpose of "establishing a prior decision as res judicata, we must look to the whole "series of possible proceedings up to the highest available ordinary tribunal, "otherwise as we have seen, the anomaly must arise of the highest Court "being bound by a prior decision in the lowest Court in a case too paltry "for an appeal." The passage from Savigny, cited in support of this view, is quoted by West, J., in Anusuyabai [120] v Sakharam Pandurang (3), and is as follows:—"Everything that should have the authority of res judicata "is, and ought to be subject to appeal." This being so, it follows that that element of res judicata on which the whole of the present discussion turns, viz., concurrence of jurisdiction, must exist not only as to the Original Court, but also as to the appellate tribunals and their powers in the respective suits. That the necessity for this complete concurrence of jurisdiction in appeal also was distinctly present to the Privy Council when it laid down the law in terms very similar to those of Section 13 of the Civil Procedure Code is clear from the observation of their Lordships. "It is true that there is an appeal from the Munsif's decision, but that "upon the facts would lie to the District Court, and not to the High Court." Misir Raghobardial v. Rajah Sheo Baksh Singh (1), Mr. Brown cites Krishna Behari Roy v. Brojeswar Chowdrie (4), but the point now raised was not taken there, whereas, in the later case of Misir Raghobardial v. Rajah Sheo Baksh Singh (1) just referred to that aspect of the matter with which the present question is closely connected was fully considered. The great impropriety of binding the higher Court in a case of considerable magnitude by the decision of a lower Court presided over by a Judge of presumably inferior qualifications was strongly pointed out, and the argument based on one of the maxims on which the doctrine of res judicata rests was met by the remark that "although it may be desirable to put an "end to litigation, the inefficiency of many of the Indian Courts makes it "advisable not to be too stringent in preventing a litigant from proving "the truth of his case."

It has been said that the conclusion of the Bombay High Court would itself in some cases lead to anomalous results. This is not, however, quite clear to me. But supposing it to be otherwise, I should still hold that the balance of advantages is in favour of that conclusion, and I accordingly venture to adopt it.

(1) 9 I.A. 197. (2) 19 B. 224. (3) 7 B. 468 (466). (4) 2 I.A. 289.
Third issue.—As I have already noticed a covenant for quiet enjoyment is relied on in the plaint. It is not now contended that there was any express contract, but apart from the Transfer of Property Act, which it is conceded does not apply, there is no [121] doubt that the law implies a covenant of the description in question. By such covenant for quiet enjoyment, however, "the lessee is to enjoy his lease against the lawful entry, eviction or interruption of any man, but not against the tortious entries, evictions or interruptions and the reason for the law is solid and clear, because against the tortious acts the lessee has his proper remedy against the wrong-doers" (Woodfall’s Landlord and Tenant) 14th edition, page 695, see also Douzelle v. Girdharee Singh (1). The case for the plaintiff is that the persons that actually ousted him had no occupancy rights, but set up a false claim, their entry therefore was, according to him, unlawful and the first defendant cannot, as lessor, be made liable on the covenant in law. If, however, the first defendant had instigated his former tenants to set up an unfounded claim and thereby ousted the plaintiff, he would be liable as a wrong-doer. It is thus clear that in one view the plaintiff cannot here derive any advantage from the implied covenant and that in the other view no question of covenant arises.

Mr. Brown next argued that the acts on the part of the people in the village, relied on by the plaintiff, did not in law amount to an eviction. It cannot be denied and, I believe, it is not denied, that in the fasli in question the plaintiff and his tenants were, in consequence of the objection of the former tenants, utterly unable to cultivate any of the wet lands, which were the most valuable part of the property demised, and a great portion of the dry lands. The Magistrate, by an order (Exhibit H) under the Criminal Procedure Code, upheld the possession of those that set up occupancy rights. Upon this state of the facts, I would have no hesitation in holding that there was an eviction sufficient to create, according to Morrison v. Chadwick (2) already referred to, a suspension of the rent, &c., for the non-payment of which the first defendant proceeded to determine the lease, should I find that the first defendant instigated the people that turned out the plaintiff to do so.

The question I have now to consider is that of the first defendant’s responsibility for the acts of the people of the village. The evidence, on behalf of the plaintiff on the point, is almost purely [122] oral and I distrust it, as it is inconsistent with the conduct of the parties and against the probabilities of the case.

[After a discussion of the evidence, His Lordship recorded a finding on the third issue in favour of the defendant observing, "I come to the conclusion that the plaintiff brought the troubles on himself by demanding more rent and by his unacconciatory conduct towards the raiyats of the village and that the first defendant was in no way responsible for them." The judgment proceeded as follows:—]

As to the damages neither party has produced any accounts. The evidence as to the profits that the plaintiff is likely to have made if he had had undisturbed possession is oral and there is in reality no conflict between the evidence for the plaintiff and that for the defendant; both sets of witnesses give only rough estimates. I have already said that, in my opinion, the lease was granted on favourable terms. I think the annual profits may be fairly taken at Rs. 1,000 a year. As to the Rs. 2,500

---

(1) 23 W.R. 121.  
(2) 7 C.B. 266.
appropriated by the first defendant towards the rent of fasli 1295 at the express request of the plaintiff, I do not understand how the plaintiff is entitled to a refund thereof.

The remaining item is Rs. 4,000 claimed as costs incurred by the plaintiff in connection with criminal complaints and civil suits. I hold that the plaintiff is not entitled to claim this by way of damages. *Khaja Mahomed Isakhan v. Baboo Kishc Lal* (1). Apart from this, I think the plaintiff has failed to establish that he spent this large amount as alleged by him. Exhibit K is quite unreliable. The plaintiff swore, in the examination in chief, that he was personally aware that the account was kept in the course of business from 1883 to 1885, but when his attention was drawn in cross-examination to the water mark, dated 1885 in the sheets of paper of which the book consists, he admitted that he first knew of this book only a short time before this plaint was filed. There is no other satisfactory evidence about this matter. For this ½ share, I would give the plaintiff Rs. 5,000 on account of the profits, if he were entitled to damages, but, in consequence of the conclusion at which I have arrived as to the cancellation of the lease, I must hold he is not entitled to recover any amount.

[123] I find, on the first issue, that the suit is sustainable; on the second issue that the suit is not unmaintainable either in whole or in part by the decree in O.S. No. 59 of 1887 of the Subordinate Court at Kumbakonum, on the third issue, that the first defendant was justified in cancelling the lease and on the fourth issue Rs. 5,000 is the amount, I would award to the plaintiff if he were entitled to recover any damages, but that he is not entitled to any. I record no finding on the fifth issue.

The result is that the plaintiff's suit is dismissed with costs.

Branson & Branson, attorneys for defendants.

---

15 M. 123 = 2 M.L.J. 81.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

MADAVAN (Plaintiff No. 2), Appellant v. ATHI NANGIYAR AND OTHERS (Defendants), Respondents. [26th October, 1891.]

Malabar law—Anubhavom tenure—Forfeiture by alienation—Landlord and tenant—Denial of landlord's title in pleadings—Limitation.

Lands in Malabar were demised on anubhavom tenure. Some of them were alienated by the tenant, but the landlord subsequently accepted rent. More than twelve years after the alienation, the landlord sued to eject the tenant on the ground that the tenure was thereby forfeited. The tenant for the first time in his written statement denied the landlord's title:

Held,

(1) that the cause of action alleged in the plaint was barred by limitation;
(2) that the plaintiff could not recover in this suit on the ground of the denial of his title in the written statement.

[F., 2 C.L.J. 389 = 9 C.W.N. 923 (934); R., 11 C.W.N. 661 (662).]

SECOND appeal against the decree of E. K. Krishnan, Subordinate Judge of South Malabar at Calicut, in appeal suit No. 473 of 1889, confirming the decree of P. J. Iittiyerah, District Munsif of Kutnad, in original suit No. 632 of 1888.

* Second Appeal No. 1122 of 1890.

(1) 6 B.L.R. App. 44.
Suit for recovery of three parcels of land demised on anubhavom tenure by plaintiff's predecessor in title to the karnavan of defendant No. 1 on 22nd April 1850 on the ground that defendant No. 1 alienated her right over the property contrary to the terms of her holding and thereby forfeited the tenancy.

[128] Defendant No. 1 denied the demise and plaintiff's title and contended that the land was jeém of her barwad, that she had sold item No. 1 to defendant No. 2 and items Nos. 2 and 3 were held by defendant No. 3 under her barwad.

Defendants Nos. 2 and 3 supported the statement of defendant No. 1 and pleaded limitation.

The District Munsif held that the plaintiff had established the demise sued on, that such a demise was a perpetual grant for past or future services, that one of its incidents was that the grantee had no power of alienation, and that the services in question were of a feudal nature, the necessity of which no longer exists, and following Forbes v. Meer Mahomed Tequeee (1) held that the grant was not resumable, and accordingly dismissed the suit. His decree was affirmed on appeal by the Subordinate Judge who concurred in the above rulings.

The plaintiff No. 2 preferred this second appeal.

Govinda Menon, for appellant.

Raman Menon for respondents.

JUDGMENT.

Assuming that the rights under the demise were forfeited by the alienations made by first defendant, these alienations were admittedly made more than twelve years before suit, and the suit, so far as it is based upon forfeiture, is barred by Limitation. We also observe that rent was accepted for serval years after the alleged alienation. On these grounds, we think the decision of the Lower Courts can be supported. It is argued for appellant that he has a right to recover, because first defendant denied his title in the written statement. It is not shown that there was any denial of title before suit, and therefore plaintiff had no cause of action at the time of filing the suit.

The cases referred to by appellant's Vakil, including Chidanabaram v. Saminatha (2), all relate to the question whether a disclaimor of the landlord's title would preclude the necessity of proving a valid notice to quit.

We do not think the disclaimer in the written statement in this case can relate back to the date of institution of the suit, and thereby give plaintiff a cause of action which he did not otherwise possess. There is no question of notice to quit in this case.

The appeal fails and is dismissed with costs.

(1) 19 M.I.A. 498.

(2) Second Appeal No. 512 of 1890 unreported.
15 Mad. 125

INdian DECISIONS, NEW SERIES

[Vol.

1891

SEP. 4.

[125] APPELLATE CIVIL.

Before Mr. Justice Muttasami Ayyar and Mr. Justice Wilkinson.

VAGURAN AND OTHERS (Defendants Nos. 3 to 11), Appellants v.
RANGAYANGAR (Plaintiff), Respondent. [*] [4th September, 1891.]

Landlord and tenant—Forfeiture for non-payment of rent—Transfer of reversion—
Transfer of Property Act—Act IV of 1892, Section 6, Clause (b).

A condition in a lease providing that the landlord may re-enter on non-payment
of rent is penal and will be relieved against, apart from the provisions of
the Transfer of Property Act.

Semble: The transfer of the reversion based on clause for forfeiture is not
invalid by reason of Transfer of Property Act, Section 6, Clause (b).

[F. 6 Ind. Cas. 927 (928)=6 N.L.R. 83; R., 36 B. 139=13 Bom.L.R. 1042 (1046).]

SECOND appeal against the decree of C. Venkobachariar, Subor-
dinate Judge of Madura (West), in appeal suit No. 2 of 1890, modifying
the decree of T. B. Vasudeva Sastri, District Munisif of Tirumangalam,
in original suit No. 91 of 1886.

Suit for ejectment and damages.

The lands in question belong to a religious endowment attached to a
temple, of which defendant No. 1 is trustee. Defendant No. 1 leased
these lands by Exhibit C, dated 4th May 1881, to defendant Nos. 2 and 3
for a term of six years on an annual rent of 71 kalam of paddy payable on
or about 11th April of each year. Defendants committed default in pay-
ment of rent due for fasli 1292 and 1293, but these defaults were
condoned or waived by acceptance of rent subsequently. Defendants
Nos. 2 and 3 again failed to pay rent in fasli 1294, whereupon defendant
No. 1 proceeded to enforce the condition of forfeiture reserved to him by
the lease and gave notice to defendants on 13th June 1885, cancelling
the lease and intimating that if the rent due was not paid he would
recover it by suit. The rent not having been paid as demanded, defendant
No. 1 sued and obtained a decree for the amount. On 20th June
1885, defendant No. 1 leased the lands to the plaintiff, and gave notice of
the fact to defendants Nos. 2 and 3, calling upon them not to interfere with
[126] the plaintiff's entry on and enjoyment of the lands. Defendants
Nos. 2 to 15, who were all members of one family, failed to give up
possession of the land, the plaintiff accordingly sued as above.

Defendants Nos. 2 to 15 pleaded, inter alia, that the condition for re-
entry was penal and not enforceable, and that the right of re-entry could
not be validly transferred under Clause (b), Section 6, Transfer of Property
Act.

The Lower Courts overruled both of these pleas and passed decrees
for the plaintiff.

Defendants 3—11 preferred this second appeal.

Parthasaradhi Ayyangar, for appellants.

Ramachandra Ayyar, for respondent.

JUDGMENT.

It is argued that upon the true construction of Exhibit C, the last
clause which relates to forfeiture does not apply to the failure to pay rent.

* Second Appeal No. 1055 of 1890.

436
but to failure to comply with the other terms of the lease. We have no
doubt that the last clause does refer, inter alia, to the covenant for
payment of rent on the due date. The words "further" and "as per
terms of the above-mentioned lease" leave no room for doubt on this
point.

We agree, however, with the appellant’s pleader that the clause is a
penal one which should be relieved against. There is a series of cases in this
and in the Bombay High Court in which the right of relief against forfeiture
in cases like the present has been recognised and acted on. The Transfer
of Property Act does not apply to agricultural leases and the landlord had,
prior to the institution of this suit, obtained a decree for the payment of
rent for fasli 1294.

As to the right of re-entry we are of opinion that the decisions of
the Courts below are right. What was transferred was not the right of
re-entry by itself, but the reversion as based on the clause for forfeiture.
Though the lease has expired since the suit was instituted, in dealing
with this second appeal, we must be guided by the status of the parties
at the date of the institution of the suit. The result will be that we set
aside the decree of the Courts below and dismiss the plaintiff’s suit with
costs of defendants Nos. 3 to 11 throughout.

15 M. 127 = 1 Weir 72.

[127] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collin, Kt., Chief Justice, and
Mr. Justice Handley.

SUBRAMANYA v. SOMASUNDARA:* [23rd October, 1891.]

Penal Code, Section 166—Public servant—Regulation XXIX of 1802 (Madras), Section
12—Duties of zamindari karnam.

Per cur., A zamindari karnam is a public servant and is bound by law to
produce accounts to the proprietor or farmer of a zamindari.

CASE reported for the orders of the High Court under Section 438 of
the Code of Criminal Procedure by S. H. Wynne, Acting District Magis-
trate of Madura.

The case was stated as follows:—
"The offence of which the accused was convicted is that he being a
public servant disobeyed a direction of law with intent to cause injury
(Section 166, Indian Penal Code), and he was imprisoned for three weeks
and made to pay a fine of Rs. 25.
"He is, what both Magistratescall the de facto karnam of a zamindari village, i.e., they both admit that he is not legally occupying that
post, but he is deemed to be liable to the penalties under Section 21,
"explanation II, Indian Penal Code.
"Both Magistrateshold the accused to be a public servant on the
authority of the High Court, the Lower Court quoting High Court Proceed-
"ings No. 1381, dated 25th July 1881. The Head Assistant Magis-
"trate says it has ‘often been ruled,’ but it does not quote any rulings. The
"Regulation of 1802 sets out in the preamble the object with which the
"office is maintained, and it seems to me that the karnam is not appointed
to do anything in the interest of the landholder, but to secure the revenue

* Criminal Revision Case No. 452 of 1891.
of Government, to protect the rights and property of the people, and to secure authentic information and accounts for the officers of Government and the Courts of Judicature. Here he has been convicted of conducting himself as a public servant in disobedience to legal directions so as to injure the landholder. In the case quoted, High Court Proceedings No. 1381, dated 25th July 1881, the prosecutor was a receiver under a Court of Judicature: although a zamindari karnam is a public servant for the purposes set out in the preamble, it does not follow that he is so in all his functions. His 'conduct' in this case is the not keeping or not preparing in time certain accounts. The first set of accounts are the demand, collections, and balance accounts for fasli 1299 and 1300. The accounts which a zamindari karnam has to keep are described in Section 11 of Regulation XXIX of 1802. A demand, collection and balance account is not one of them. The Court of first instance explains that under Clause 8 an account of land cultivated and of money rents must be prepared and under Clause 10, a register of quit-rent and ready money payments must be prepared, and he says 'the balance must be worked out from both accounts.' But this is a criminal charge, and in respect of it the law must be construed strictly. Moreover, the account in Clause 8 is one which clearly comes within the wording of the preamble as an account necessary in the interest of Government and the Courts, and the account in Clause 10 comes within the wording of the preamble as an account to secure individual persons from injustice, but a demand, collection, and balance account is one whose object is the convenience of the landholder only, and therefore it seems to me that in the preparation of it a karnam is not conducting himself as a public servant. Both the demand account (Clause 8) and the tandal or collection account (Clause 10) for fasli 1299 were produced at the inquiry, one witness stated that the latter had not been furnished,' but he does not say that it was not prepared, and the Magistrate does not find that it was not prepared, nor even that it was not produced when asked for, but says 'the collections have been totalled twice and the second account is obviously a second addition' whatever that may mean. The Appellate Court also records no finding on the point.

The second account was the demand, collection, and balance account for Fasli 1300, i.e., the current Fasli, and the accused urged that it was too soon for the preparation of the account. As already stated, I do not think the karnam is required as a public servant to prepare this account. An account showing the gross demand (Clause 8) was produced. As to collections (Clause 10) it must be remembered that they are made at the very end of the Fasli. There is no distinct finding by either Court as to whether there was any negligence in respect of the keeping of the account (Clause 10) such as was a breach of the Regulation.

The third account is the harvest account of Fasli 1300. The account which a karnam is bound to keep is described in Clause 6. It is admitted that the account was kept, but there is the oral evidence of the complainant and others that, in practice, it should be prepared previous to division, whereas it was in point of fact prepared at or after division. There is nothing in the Regulation prescribing the time at which it is to be prepared, and 'practice' cannot vary the law on a criminal charge.

The Lower Court found that the karnam had broken the law in preparing the account at division, because there was so much 'rule of
three' to be gone through in the preparation of the account that it ought
to be prepared beforehand.

There is one other point requiring notice on the facts. If the
finding of the Magistrate in the Lower Court is that the tandal account in
(Clause 10) for Easli 1293 was asked for but not produced (which may be
his meaning, though he does not say so), then this may be an infringe-
ment of Section 12 of the Regulation which directs the karnam to
produce certain accounts on the requisition of the proprietor supposing
'revenue' to mean collections. But the prosecutor and the person, if
any, who 'required' the production of the accounts is one Raman
Chetti. The zamindar has leased the whole zamindari to certain
lessees, who in turn have sub-let this village to one Alagappa Chetti. The
latter is therefore the proprietor and he has given no power of attorney
or other authority to Raman Chetti. The Appellate Court says the
'accused was estopped' from denying Raman Chetti's right to demand
production of accounts, because he had for a considerable time recognised
Raman Chetti's management. But under Section 115, Evidence Act,
estoppel acts in a suit or proceeding between the parties themselves.
'This is a proceeding between the accused and the Crown.'

Mr. E. Norton and Parthasarathi Ayyangar, for complainant.
Accused was not represented.

JUDGMENT.

[130] This case has been so much complicated by the Lower Courts
having wandered into the consideration of many irrelevant matters that it
is very difficult to understand what has been decided. From what we
can make out of the confused judgments the karnam has been convicted
for not producing certain accounts as he is required by Section 12 of
Regulation XXIX of 1802 to do to the proprietor or farmer.

We think the Lower Courts have rightly held that the accused is a
public servant and that he was bound by law to produce the accounts in
question to the proprietor or farmer.

But in our opinion the prosecution has failed to prove that the person
complaining of the non-production of the accounts was the proprietor
or farmer within the meaning of the Regulation. The complainant
Subramanya Ayyar is said to be the paishkar of one Ramasami Ayyar,
the agent of one Raman Chetti, the undivided brother of Alagappa Chetti,
the lessee, who is said to be absent in Singapore. It is impossible in a
criminal case, where everything must be strictly proved against the
accused, to hold that the agent of the undivided brother of a lessee is the
proprietor or farmer within the meaning of the Regulation. It is said that
Alagappa Chetti subsequently recognized Raman Chetti's appointment of
Ramasami Ayyar as his agent, but the only proof of this is a letter which
is certainly not sufficient to constitute such an agency as is required to give
Ramasami Ayyar all the powers of Alagappa Chetti under the Regulation.

Upon this ground we hold that the conviction is illegal.

We also agree with the District Magistrate that even if accused had
been rightly convicted the sentence was under the circumstances far too
severe, although we consider that a karnam who does persistently and
wilfully refuse to produce accounts to the landowner should be severely
punished.

The convictions of sentence are set aside, and the fine, if paid, must
be refunded.
QUEEN-EMPRESS v. VENKATASAMI. [19th November, 1891.]

Penal Code, Section 228—Insulting Magistrate—Criminal Procedure Code, Section 1, 195, 480-482—Village Munsif.

The accused intentionally insulted a Village Munsif in the discharge of his magisterial duties; the Village Munsif did not prefer a complaint or sanction a prosecution, but a Second-class Magistrate charged the accused under Penal Code, Section 228, on a police report and convicted him:

_Held._ (1) that Criminal Procedure Code, Sections 480-482 do not apply to Village Munsifs;

(2) that the Second-class Magistrate was competent to try the complaint, and the conviction was right.

_PETITION_ under Criminal Procedure Code, Sections 435, and 439, praying the High Court to revise the proceedings of the Sub-Divisional Magistrate of Madanapalli confirming a conviction by the Second-class Magistrate of Peler Division.

The accused was charged under Penal Code, Section 228, with having intentionally offered an insult to a Village Munsif while sitting in a stage of a judicial proceeding and was convicted by a Second-class Magistrate. The Village Munsif did not prefer the complaint nor sanction the prosecution.

The accused preferred this petition on the following grounds:

"The proceedings in this case are wholly void, since the lower Courts had no jurisdiction whatever to try an offence under Section 228, Indian Penal Code.

"The conviction by the Courts below is wrong in law, because no sanction was given nor complaint made as required by Section 195 of the Criminal Procedure Code.

"The Lower Appellate Court is wrong in saying that no sanction is necessary since the Criminal Procedure Code does not apply to Village Munsifs.

[132] "The offence under Section 228 being a non-cognizable offence, the Second-class Magistrate had no jurisdiction to try the case on a police report, and the First-class Magistrate is wrong in construing the evidence of the Village Munsif as a complaint."

Mr. Subramanyam, for accused.

The Government Pleader and Public Prosecutor (Mr. Powell), in support of the conviction.

JUDGMENT.

We do not think the provisions of Sections 480-482, Criminal Procedure Code, apply to Village Magistrates (Section 1, Criminal Procedure Code).

It is true that no complaint was made by the Village Munsif, but that defect is covered by Section 537, Criminal Procedure Code. The

* Criminal Revision Case No. 366 of 1891.
Second-class Magistrate is of a grade competent to try the complaint, and
the sentence was reduced to simple imprisonment on the appeal. The
imprisonment has been undergone.

There is nothing now to call for our interference. The petition is
dismissed.

15 M. 132 = 2 Weir 36,

APPELLATE CRIMINAL.

Before Mr. Justice Muttsasami Ayyar and Mr. Justice Hanley.

QUEEN-EMpress v. VIRANNA AND OTHERS. [14th September, 1891.]

Criminal Procedure Code, Section 40—Transfer of a Sub-Registrar invested with powers
of a Special Magistrate—Act XXIV of 1859 (Madras), Section 48.

A Sub-Registrar having been invested with Magisterial powers with reference
to offences under Act XXIV of 1859 was transferred from the place where he was
occupying at the time he was so invested to another place, and there took on to
his file and tried certain cases. The District Magistrate having reported the
cases for the orders of the High Court, the Court declined to quash his proceed-
ings.

CASE reported for the orders of the High Court under Criminal
Procedure Code, Section 438, by A. W. B. Higgins, Acting District
Magistrate of Kistna.

The case was stated as follows:—

"The Sub-Registrar of Ponnur, M. Safdar Ali Sabeb, was invested
with third-class powers for trial of offences under [183] Section 48
of Act XXIV of 1859 by him as a Special Magistrate within the said
town (vide Notification No. 388, published in the Fort St. George
Gazette, dated 16th August 1887). This officer was recently transferred
from Ponnur to Gannavaram, another Sub-Registrar's station in the
district, he requested the Head Assistant Magistrate to inform him if he
could continue exercising at the latter station the powers already granted
to him. The matter was referred to me by the Head Assistant Magistrate
for orders. As I considered that the Sub-Registrar's previous powers
were limited to the town of Ponnur, I requested the Government
for his investiture with powers in respect of Gannavaram. The Sub-
Registrar not having qualified himself by passing the requisite tests,
the Government in its order No. 613 of 29th May 1891 declined to
grant him the powers applied for; but before the Government order
reached him, he began taking up cases on his file and completed the trial
of the six cases so taken up. In explanation for this, he states that on
further consideration, he thought he could exercise the powers at the
new station under Section 40, Criminal Procedure Code, as the same
were not withdrawn after his transfer. I consider that as he had
only received powers in respect of Ponnur, he could exercise no powers
at Gannavaram, and that, under Section 530, Criminal Procedure Code,
ol. (p), his proceedings are void."

Counsel were not instructed.

JUDGMENT.

It appears to us that under Section 40, the Sub-Registrar was com-
petent to exercise on his transfer to Gannavaram the powers conferred
upon him as Sub-Registrar of Ponnur unless the local Government directed

* Criminal Revision Cases Nos. 353 to 358 of 1891.
him not to exercise them. In the Government order of 29th May last, the
Government declined to invest him with those powers as Sub-Registrar of
Gannavaram. The order was passed apparently under the impression that
the powers had to be conferred again whilst no such fresh grant of powers
was necessary under Section 40. Again the Government order was not
communicated to the Sub-Registrar until after he had decided the cases
under reference. We do not think that under these circumstances there
is any necessity to interfere.

15 M. 134 (F.B.).

[134] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice
Muttusami Ayyar and Mr. Justice Shephard.

REFERENCE UNDER STAMP ACT, SECTION 46.*
[13th October, 1891.]

Stamp Act—Act 1 of 1879, Section 46, Schedule I, Articles 5 (c), 44—Mortgage—
"Agreement not otherwise provided for."

A licence issued to an arrangement expressly required as one of its conditions
that the licensee should deposit a sum equal to three months' rental as a security
for the performance of the contract. The licensee executed a muchalka
stating that he agreed to all the terms and conditions mentioned in the licence:
Hold that the muchalka ought to be stamped with an eight-anna stamp.

Case referred for the opinion of the High Court by the Board of
Revenue under Section 46 of the Indian Stamp Act, 1879.

The case was referred as follows:—
"The question is, what is the stamp duty on a muchalka executed
by an abkari licensee? The muchalka simply states that the executant
agrees to all the terms and conditions mentioned in the licence. One of
the conditions of the licence is that, as a security for the due performance
of the conditions of the contract, the licensee shall deposit with the
Collector in cash, Government notes or stock notes, a sum equal to
three months' rental. Should the document be stamped as a mortgage
under Article 44, Schedule I, or as an agreement under Article 5 (c), or, if
not under either of these, under what other Article of Schedule I?

According to the Indian Stamp Act, a mortgage deed includes
every instrument, whereby one person transfers in favour of another a
right over specified property for the performance of an engagement.
Thus neither the license nor the muchalka taken separately or together
fulfills the conditions of a mortgage as defined in the Stamp Act, i.e.,
neither thereby actually creates an interest in the deposit in favour of
Government.

The Board is, therefore, of opinion that an abkari muchalka of the
kind under reference comes under Article 5 (c), Schedule I, and that the
proper stamp duty is eight annas. But as the [135] matter is not free
from doubt, it is referred to the Honorable the Judges of the High Court
for the favour of an authoritative ruling."

The Government Pleader (Mr. Powell), for the Crown.

JUDGMENT.

We think, the Board are right and that the document ought to be
stamped with an eight-anna stamp.

* Referred Case No. 23 of 1891.
APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

KRISHNA VIJAYA PUCHAYA NAICKER (Plaintiff) v.
MARUDANAYAGAM PILLAI (Defendants). [1st December, 1891.]

Civil Procedure Code, Section 39—Pleader retained by a Collector as Agent of Court of
Wards—Validity of vakalatnama after the Collector’s death.

The Collector of a district, who was Agent for the Court of Wards, filed a suit
on behalf of a ward of the Court of Wards and executed a vakalatnama to a
Pleader whom he retained to conduct it. The Collector died before the suit was
determined:

Held, that it was not necessary for a new vakalatnama to be executed to enable
the pleader to proceed with the conduct of the suit.

CASE referred for the decision of the High Court under Civil Procedure
Code, Section 617, by M. A. Tiralalachariar, Acting District Munsif of
Kutilal.

The case was stated as follows:

"In small cause No. 224 of 1891 on the file of this Court, the plaint-
iff is the minor Zemindar of Marungapuri, represented by the Court of
Wards.

"Before the suit could be disposed of Mr. G. W. Fawcett, the late
Collector of the district of Trichinopoly and Agent to the Court of Wards,
who gave the vakalatnama to a Vakil of this Court, died.

"As the suit came on for hearing and disposal after his demise, it
was objected on the defendant’s side that a fresh vakalat should be pro-
duced from the present Collector since the [136] vakalats, already given
by Mr. Fawcett, ceased to be in force under Section 39, Act XIV of 1882.

"This Court thought that the objection was valid and ordered, on
30th July 1891, that a fresh vakalat from the present Collector should
be produced.

"This order is now sought to be reviewed, and the communication of
the present Acting Collector of the district and Agent to the Court of
Wards, upon the opinion of the Government Pleader of the district, is
presented to this Court to be considered along with the petition for
review of my order. The Government Vakil states that the client in
the present case, under Section 39, Act XIV of 1882, is the ward
and not the Agent to the Court of Wards. The cases of transfers
of Collectors to other districts, not rendering ineffectual the vakalats
executed by them, before such transfers, are adduced by him as
arguments justifying the Court in proceeding upon vakalats given by
such officers, even after their actual deaths.

"But so long as the man is alive, his responsibilities under the
vakalat do not cease to exist, whenever he may be sent, after the vakalat
is given. In the case of actual death, the vakalat appears to me to be of
no force. I have yet to know if transfers can be compared to actual
deaths, for such purposes.

"The word ‘client’ used in the Section 39, Act XIV of 1882, is
explained in the Webster’s Pocket Dictionary referred to by me, in the
words, an ‘employer’ of an attorney.

* Referred Case No. 29 of 1891.
"This employer may be a different person from the party although he may represent the party during his lifetime under any law or written authority from the party. Although the analogy of ordinary cases of private persons suing as next friends of minors, may not apply to this case, the death of the client rendering the vakalat given by him ineffectual according to the express words of Section 39 of Act XIV of 1882. I am inclined to think that the vakalat given by the Collector (deceased) cannot be now acted upon by me."

Counsel were not instructed.

JUDGMENT.

The pleader is really retained by the Court of Wards. We do not think any fresh vakalat is necessary.

15 M. 137 = 2 Weir 468.

[137] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

QUEEN-EMPRESS v. ARIPPA AND OTHERS.*
[30th September and 19th October, 1891.]

Criminal Procedure Code, Section 419—Petition of appeal, presentation of.

A petition of appeal sent by post is not presented to the Court within the meaning of Criminal Procedure Code, Section 419.

[F., 19 M. 354 (355) = 2 Weir 469; Applt., 8 C.P.L.R. 93.]

Case reported for the orders of the High Court, under Section 438 of the Code of Criminal Procedure, by O. Wolfe-Murray, Acting District Magistrate of Cuddapah.

The case was stated as follows:

"The Head Assistant Magistrate admitted a criminal appeal presented by post. He requests me to refer the question to the High Court for a definite ruling on the matter in view of the apparently contrary rulings of the High Court on the point which now exists.

"His procedure in admitting the appeal is in contravention of the ruling in Lurisetti Pitchaiya in re,(1) and in conformity with the ruling in Criminal Revision Case No. 607 of 1890; the latter, however, does not specifically overrule the ruling referred to above."

The Government Pleader and Public Prosecutor (Mr. Powell), for the Crown.

JUDGMENT.

COLLINS, C. J.—I was at first inclined to think that a petition, under Section 419, Code of Criminal Procedure, sent through the post, should be received as fulfilling the requirements of the section, but on further consideration, I am of opinion that the decision of Kernan and Mutthusami Ayyar, JJ., reported in Weir's Criminal Rulings, page 1006, is correct. The words used in the section are "Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader."

* Criminal Revision Case No. 326 of 1891.
The word presented evidently means that such petition shall be
delivered to the proper officer of the Court either by the appellant or his
pleader. Any other interpretation of the section would give rise to number-
less difficulties. I hold, therefore, that a petition sent by post is not
presented to the Court within the meaning of Section 419, Code of
Criminal Procedure.

Shephard, J.—I have had considerable doubts on this question, but
am not prepared to differ.

15 M. 138 (F.B.) = 2 M.L.J. 64.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami
Ayyar, Mr. Justice Parker, and Mr. Justice Shephard.

ATCHAYYA AND ANOTHER (Accused Nos. 1 and 2), Petitioners v.
GANGAYYA (Complainant), Counter-petitioner.*
[22nd January and 13th October, 1891 and 8th January, 1892.]

Criminal Procedure Code, Section 196—Registration Act—Act IH of 1877, Sections 72-
75—“Court”—Sanction prosecution for perjury.

A Registrar, acting under Registration Act, Sections 72-75, is a Court for the
purposes of Criminal Procedure Code, Section 193.

M.L.J. 60 = (1912) M.W.N. 473; 3 S.I.R. 66 (71); D., 2 M.I.J. 286 (288); 4
M.L.J. 169 (1925).]

PETITION, under Sections 435 and 439 of the Code of Criminal Pro-
procedure, praying the High Court to revise the order of F. H. Hamnett,
Sessions Judge of Godavari, dated 21st November 1890, passed on
criminal revision petition No. 9 of 1890.

Parthasaradhi Ayyangar and Srirangachar, for petitioners.
Mr. Wedderburn, for respondent.

This criminal revision petition having come on for hearing before
Muttusami Ayyar and Wilkinson, JJ., their Lordships made the
following order of reference to the Full Bench.

ORDER OF REFERENCE TO FULL BENCH.—The counter-petitioner
denied the execution of an instrument of mortgage which was presented for
registration to the Sub-Registrar of Rajahmundry by the second petitioner
as the agent and on behalf of the first in July last. Therupon the Sub-Regis-
trar refused to register the document. The first petitioner then applied to the
Registrar of Godavardistrict under Section 73 of Act II of 1877 to establish
his right to have the document registered. That officer held an
inquiry as provided in Section 74 and refused to register the document on
the ground that he was not satisfied that it had been executed. On the
10th October 1890, the petitioner brought a suit to enforce the registration
of the document under Section 77, and, on the same day, the counter-
petitioner complained to the Joint Magistrate that petitioners and five
others had forged the document and thereby committed an offence punish-
able under Section 467, Indian Penal Code. On the 12th October 1890,
the Joint Magistrate transferred the complaint to the Second-class
Magistrate of Rajahmundry for disposal. On the 19th November the

* Criminal Revision Case No. 590 of 1890.
Subordinate Magistrate held on the authority of the decision in *Queen-Empress v. Sobhanadri* (1) that the complaint could not be entertained without the Registrar's previous sanction, and upon that ground he returned it to the counter-plaintiff for want of sanction. On the 21st November last, the Sessions Judge of Godavari directed the District Magistrate under Section 437 of the Code of Criminal Procedure to re-open the case and to order the Taluk Magistrate to deal with it under Chapter XVIII of the Code on its merits. He observed that the sanction of the Registrar was not necessary, and that it was not competent to the Second-class Magistrate to dismiss the case without inquiry into its merits after it had once been taken cognizance of by the Joint Magistrate. In support of his opinion that no sanction of the Registrar was necessary, he relied on the decision in *Queen-Empress v. Tulja* (2). The main question for decision is whether the sanction of the Registrar is necessary within the meaning of Section 195, Criminal Procedure Code, Clause (c). The answer must depend upon the meaning of the words 'any proceeding in any Court in respect of a document given in evidence in such proceeding.' It must be in the affirmative if the proper construction is that the expression refers to a judicial proceeding or inquiry held before any officer in the course of which the document is given in evidence. If, on the other hand, the person holding the inquiry must be a Judge presiding over a Court ordinarily exercising judicial functions as in civil suits, the answer must be in the negative.

On this question there is conflict of authority. In the case of *Venkatsachala* (3), it was held that a Sub-Registrar acting under [140] Section 41 of Act III of 1877 is a Court, the ground of decision being that the general expression Court is used in Section 195 in preference to the more restricted description 'Court of Justice' that the Sub-Registrar who is legally authorised to take evidence under Part VIII of the Registration Act for certain purposes is a Court, when acting under Section 41 of the Registration Act, within the meaning of the Indian Evidence Act, and that the document under consideration in that case was given in evidence in a proceeding in which the Sub-Registrar had to determine whether the document should or should not be registered.

So early as 1881, a Divisional Bench of this Court held that a Registrar acting under Sections 73, 74 and 75 of the Registration Act was a Court within the meaning of Section 195, Criminal Procedure Code. Mr. Justice Jones observed 'a Registrar is empowered in a legal proceeding to give a definite judgment on the points mentioned in Section 74 of the Registration Act. He is, therefore, a Judge, and his Court is a Court of Justice under the definitions of the Penal Code.' (Weir's *Criminal Rulings, 3rd edition, p. 844.

It was also held in *Queen-Empress v. Subba* (4) that a Sub-Registrar acting under Section 34 of the Registration Act, 1877, is not a Court. It was observed that for certain purposes the Registration Act declared that the term 'judicial proceedings' shall include proceedings before Registering Officers, viz., in order to bring those proceedings within the purview of Section 228, Indian Penal Code, and for other similar purposes, it declared that Registrars are and that Sub-Registrars are not to be deemed Courts, that the Registration Act did not constitute Registering Officers Courts generally, and that Section 84 would be unnecessary if the Legislature regarded such officers as Courts.

---

(1) 12 M. 201. (2) 12 B. 36. (3) 10 M. 154. (4) 11 M. 3.
In *Queen-Empress v. Sobhanadri* (1), the question whether a Sub-Registrar refusing to register a document, of which execution was denied was a Court, was again raised with reference to the decision of the Bombay High Court in *Queen-Empress v. Tulja* (2). It was pointed out in that case that a Sub-Registrar refusing to register a document on the ground that its execution was denied was not a Court: that there was no conflict in the course of decision in this Presidency, and that, though the Bombay case was [141] in conflict with the Madras decision in *re Venkatachala* (3), the question whether a Registrar acting under Sections 73, 74 and 75 of the Registration Act, 1877, was a Court did not arise in the case then brought to notice. It will be noted that the expression 'any proceeding in any Court in which the document is given in evidence' was construed in the foregoing decisions to include a proceeding in which the Legislature authorized a person to hold a judicial inquiry, to record evidence and to form a judgment as to the right of the party to have the document registered, and that such authorization was accepted as rendering him a Court for the limited purpose of that inquiry within the meaning of Section 195, Criminal Procedure Code.

The decision of the Bombay High Court rests on two principal grounds, viz., that the position of a Registrar as a Court is anomalous, that both in the Registration Act, Section 81, and in Section 483 of the Code of Criminal Procedure, the Legislature has declared for what purposes he shall be deemed a Court, and that the decision that he may also be deemed a Court for other purposes is at variance with the principle, that an exceptional provision which is an 'excrescence' on the general rule ought not to be extended so as to derogate from it.

That such is the general principle was never doubted by this Court, the point as to which there is a difference of opinion being whether the word 'Court' in Section 195 signifies any officer authorized to receive a document in evidence and to form an opinion as to whether there is a right to claim its registration, and thereby to make it the source of a jural relation, and whether the exceptions enumerated in Section 84 are exhaustive.

A Registering Officer is expressly declared by Section 84 of Act III of 1877 to be public servant as defined in the Indian Penal Code. There can, therefore, be no doubt that it is his ordinary status. The section then specifies two exceptions: the first has reference to the purposes of Section 228 of the Indian Penal Code, and for those purposes, the Registrar's proceedings under the Registration Act are declared to be judicial proceedings; the second exception has reference to what are known as cases of contempt. For the purposes of those cases, Section 84 declared that the Registrar shall be deemed, and that the Sub-Registrar shall [142] not be deemed a Court, but Section 483 of the present Code of Criminal Procedure vests a power in the local Government to direct that any Registrar or Sub-Registrar shall be deemed to be a Civil Court. There is nothing in Section 84 of the Registration Act or in Section 483 of the Code of Criminal Procedure to show that a Registering Officer may not be deemed to be a Court under Section 74 of the Registration Act for the purposes of Section 195 of the Code of Criminal Procedure; that it was not expressly included among the purposes specified in Section 84 is the only circumstance in favour of the view taken in *Queen-Empress v. Tulja* (2)— is that circumstance of itself conclusive?

(1) 12 M. 301.  
(2) 12 B. 36.  
(3) 10 M. 154.
On the other hand, the words, as if he were a Civil Court, are used in Section 74, and they are susceptible of the construction that they signify that he shall be deemed a Civil Court for the purpose of the inquiry contemplated by Sections 73 to 75.

Again, the subject-matter of the inquiry is a civil right—a right to have the document registered and to invest it with a capacity to generate a jurial relation under the provisions of the Registration Act. The procedure prescribed for the investigation of the right is also judicial. The application for registration is required to be verified as a plaint, the Registrar is authorised to summon and enforce the attendance of witnesses, and to compel them to give evidence, and he is empowered to order by whom costs are to be paid. Such costs are declared to be recoverable as if they had been awarded in a suit under the Code of Civil Procedure. In the event of registration being refused after inquiry, a suit is permitted to be brought in a Civil Court to obtain a decree directing that the document be registered. The intention is to constitute the right to have the document registered into a civil right, to protect it by creating a right of suit, to authorize a judicial inquiry in the first instance by the Registrar, and to allow a regular suit in the nature of an appeal from his judgment when he refuses registration.

Again, the intention of the Legislature in prescribing a previous sanction by Section 195 is as stated in re Gyan Chunder Roy v. Protap Chunder Dass (1) to ensure that the person resorting to criminal prosecution acts bona fide and not from a vindictive feeling, and not to prevent his adversary from taking [143] any further legal proceeding which he is entitled to take. The decision that a Registrar acting under Section 74 is a Court for the purposes of Section 195 is in furtherance of that intention. Again, the words used in Section 469 of the former Code of Criminal Procedure were 'any Civil or Criminal Court.' Whilst the words used in Section 195 are proceeding in 'any Court' in which the document is given in evidence and the difference in the language used in the present Code appears to be significant. In Queen-Empress v. Tulja (2), the inquiry contemplated by Sections 73, 75 appears to have been regarded as administrative and a reference is made to the case of The Queen v. Price (3).

The inquiry distinguished by Mr. Justice Blackburn from a judicial inquiry was as to whether certain facts existed and whether in consequence the event in which a statute cast an obligation on a body of persons to do a certain thing had occurred. In the same case he compares the language of 15 and 16 Vict., c. 57, with that of 26 and 27 Vict., c. 29, and observes that under the former enactment, the Commissioners had a discretion to decide whether a witness was entitled to a certificate of indemnity, whereas under the latter enactment, they had no such discretion but were bound to give a certificate if the witness answered certain questions and those answers criminated him. The distinction pointed out appears to be between an inquiry as to certain matters of fact in a case in which the Commissioners had no discretion to exercise and no judgment to form, but were enjoined to do a certain thing in a certain event as a matter of duty, and an inquiry in a case in which the Legislature authorized them to form a judgment and to grant or withhold a certificate on that judgment. In the latter case, the inquiry was regarded as judicial, and this appears to us to support the view taken by this Court.

(1) 7 C. 208. (2) 12 B. 36. (3) L.R. 6 Q.B. 418.
The question, however, is not free from difficulty. On the one hand, Section 84 of the Registration Act and Section 469 of the Code of Criminal Procedure lend support to the opinion expressed by the Bombay High Court which appears to have been concurred in by a Divisional Bench of this Court in Queen-Empress v. Subba (1). On the other hand, the language and the presumable intention of Section 195 of the Code of Criminal Procedure, the definition of Court contained in the Evidence Act, [145] and the character of the inquiry prescribed by Sections 72 to 75 of the Registration Act and several considered decisions in this Presidency seem to support the view that the Registrar acting under those sections is a Court for the purposes of Section 195, Code of Criminal Procedure. Under these circumstances, we consider it desirable to refer to the Full Bench for the purposes of Section 195 of the Code of Criminal Procedure."

Upon this reference the case came on for hearing before a Full Bench composed of COLLINS, C.J., MUTTUSAMI AYYAR, PARKER and SHEPHARD, JJ.

Srirangachariar, for petitioners.

The Acting Advocate-General (Hon. Mr. Wedderburn), for respondent.

JUDGMENTS OF THE FULL BENCH.

COLLINS, C.J.—The question referred to the Full Bench is whether a Registrar acting under Sections 72 to 75 of the Registration Act is or is not a Court for the purposes of Section 195, Code of Criminal Procedure.

The facts of the case are fully set out in the order of reference made by MUTTUSAMI AYYAR and WILKINSON, JJ.

The question is undoubtedly one of some difficulty, as there is no definition of a "Court" either in the Registration Act or in either of the Codes.

By Section 3 of the Evidence Act, a "Court" includes all persons except arbitrators legally authorized to take evidence. A "Court of Justice" is defined by the Indian Penal Code, Section 20, and is more restricted in its application.

Are we then at liberty to apply the definition of "Court" given in the Evidence Act to the Registrar acting under Sections 72 to 75 of the Registration Act? It is argued that the definition of "Court" given in the Evidence Act is framed only for the purposes of the Act itself and cannot be applied to cases under the Registration Act (see Queen-Empress v. Tulja (2). If this argument prevailed, the difficulty in holding the Registrar's inquiry to be a "Court" would be much increased. The duties of the Registrar on the point in question are defined by Sections 72 to 75 of the Registration Act and are as follows:—

[145] "An application shall be made to him in writing, and the statements in the application shall be verified in the manner required by law for the verification of plaints. He shall then inquire—(1) whether the document has been executed; (2) whether the requirements of the law have been complied with so as to entitle the document to registration. If he finds the document has been executed and that certain requirements have been complied with he shall order the document to be registered.

(1) 12 B. 36.

(2) 11 M. 3.
“The Registrar has power to summon and enforce the attendance of witnesses, he can compel them to give evidence ‘as if he were a Civil Court,’ and he has also a discretion as to the costs.’

It is therefore clear to my mind that the Registrar exercises more than mere administrative functions—in the examination of witnesses he is bound to observe the rules of evidence, and he is to consider the weight and credibility of the evidence and form his own conclusions. The learned Judges in Queen-Empress v. Tulja (1) appeared to consider the Registrar’s functions purely administrative and the fact appears to have mainly influenced their judgment.

It appears also that in the former Code of Criminal Procedure the words used in Section 469 were “any Civil or Criminal or Revenue Court,” whilst in Section 195 of the present Act the words used are “any Court.” I assume that it was the intention of the Legislature to give the word “Court” a more extended meaning than it had in the former Act. I am of opinion, therefore, that I am entitled to hold that the definition of “Court” used in the Evidence Act applies to the Registrar holding an inquiry and taking evidence under the Registration Act, and I therefore answer the question in the affirmative.

MUTTUSAMI AYYAR, J.—For the reasons recorded in the order of reference to the Full Bench I am of opinion that the question must be answered in the affirmative.

PARKER, J.—The question referred to the Full Bench is whether a Registrar acting under Sections 72 to 75 of the Registration Act is or is not a Court for the purposes of Section 195 of the Criminal Procedure Code. The reference has been made in consequence of the decision in Queen-Empress v. Tulja (1) in which in the decision of this Court in Venkitachala in re (2) was dissented [146] from. The question, therefore, for decision is in what sense the word “Court” is used in Section 195, Criminal Procedure Code. The Code does not contain any definition of the term, and it is used in more than one meaning in some places as signifying a personal judicial authority and in others a place. In Section 352 the same word is used in the two significations, but when used as signifying a person it does not appear to be synonymous with “Court of Justice” as defined in Section 20 of the Indian Penal Code. The term “Court of Justice” (Section 20, Indian Penal Code) necessarily denotes a Judge as defined in Section 19. Now, illustration (d) to Section 19 declares that a Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial is not a Judge. The explanation to Section 193, Indian Penal Code, makes it clear, however, that a preliminary inquiry under Chapter 18 of the Procedure Code is a stage of a judicial proceeding. There is, again, no doubt that a Committing Magistrate is a Court within the meaning of the term as used in the Evidence Act and a Criminal Court within the definition of Section 6 of the Code of Criminal Procedure. He is also referred to as a Court in Sections 312 to 344 of the Criminal Procedure Code. The contention, therefore, that the term “Court” in the Criminal Procedure Code, Section 195, is necessarily identical with Court of Justice as limited in the Indian Penal Code definition cannot be supported.

In order to ascertain the sense in which the word is used by the Legislature in Section 195 it will be useful to compare the present Criminal Procedure Code with its predecessor, Act X of 1872. Both the Codes have

(1) 12 B 36.
(2) 10 M. 154.
contained provisions for requiring previous sanction to certain prosecutions and also prescribing the procedure to be followed when a prosecution is instituted by a Court suo motu. The Sections dealing with these matters in the old Code X of 1872 are sections 467 to 471. Sections 467 to 470 are reproduced in Section 195 of the present Code and Section 471 (as to prosecutions instituted by the Court itself) in Section 476 of the present Code. It will be noticed that Section 468 of the old Code declared that a complainant of an offence against Public Justice, when such offence is committed before or against any Civil or Criminal Court, should not be entertained except with the sanction of the Court, whereas the corresponding provision in the present Code, (Section 195 b) requires the same sanction when such offence is committed "in or in relation to any proceeding in any Court." [147] The words used in the latter Code are therefore wider in their signification. There is a similar alteration in regard to complaints of offences relating to documents—compare Section 469, Act X of 1872 with Section 195, Clause (c) of the present Code. But in re-enacting the procedure to be followed when the Court itself acts we do not find the powers given to "any Court" but to "any Civil, Criminal or Revenue Court." Had the enumeration of the three classes of Courts, Civil, Criminal or Revenue, been absolutely exhaustive of all possible Courts, it is only reasonable to suppose the Legislature would have used the term "any Court" as it did in Section 195. The difference in language leads to the supposition that there may be Courts as created and defined by the Legislature on which it was not intended to confer the powers given in Section 476, Criminal Procedure Code.

This supposition appears reasonable when it is remembered in what terms the Legislature defined the word "Court" for the purposes of the Indian Evidence Act (Section 3) in which enactment the term simply means all persons except arbitrators legally authorised to take evidence. In this sense a Commissioner holding an inquiry under Act XXXVII of 1880, a Settlement officer under Act XXVII of 1860, a Forest officer under Section 59, Madras Act V of 1832 and a Registrar under Sections 72 to 75 of the Registration Act are all Courts, though it may be, they are not invested with powers to take action under Section 476, Criminal Procedure Code, as Civil, Criminal or Revenue Courts. The Proceedings before these officers are judicial in their character and false evidence given before them is punishable under Section 193, Indian Penal Code, Explanations 2 and 3—is given in a stage of a judicial proceeding, though not given before a Court of Justice.

The view that the term Court in Section 195, Criminal Procedure Code, was intended to include all persons except arbitrators legally authorised to take evidence is strengthened when the principle of that section is considered. The restriction was obviously intended "to prevent prosecutions for acts done or evidence given at the suit of disappointed or hostile parties, and it was intended to protect parties against reckless or groundless Criminal Proceedings. Sanction is required in order to ensure that the prosecution should not in such cases be instituted unless there was ground sufficient in the opinion of the officer to justify such proceeding"—vide remarks of Karnan and Muttu-[148] sami Ayyar, JJ., in Vasteva Putteruia v. Lakshmi Narayana Kachinthaiya (1). The word 'Court' in Section 195 is used strictly with reference to offences of fabrication of evidence and of documents used in evidence, and, therefore,

(1) Weir's Cri. Bulings (Ed. 3, 849.)
it seems not unreasonable to hold that the term is used—like the term "evidence"—in the same sense as in the Indian Evidence Act. The Registrar is a public servant—Section 84, Act III of 1877; and it would seem anomalous if the Legislature had made his sanction a condition precedent in case of disobedience of summons (Section 174, Indian Penal Code), or refusal to give evidence or to take oath (Section 178), but yet had required no such sanction for the far graver offences mentioned in Clauses b and c of Section 195—alleged to have been committed in relation to a proceeding before him, which proceeding is a stage of a judicial proceeding.

It was moreover urged before the Full Bench that the words "as if he were a Civil Court" in Section 75 of the Registration Act signify that a Registrar should be deemed a Civil Court for the purposes of the inquiry contemplated by Sections 73—75. The argument was that the proceedings before the Registrar are judicial and the inquiry judicial, and the right sought to be enforced was a legal right, registration being necessary to give legal validity to the document.

It appears to me there is some difficulty in adopting this view. The words "as if he were a Civil Court" would seem to imply that the Registrar was not one, and the words have reference only to the procedure to enforce the attendance of witnesses and compel them to be examined. If the Registrar can give a definitive judgment upon a civil right, he would be a Judge within the definition of Section 19 of the Indian Penal Code, and, therefore, a "Court of Justice" under Section 20. The registration of a document is merely a consequence of the Registrar finding that the document is genuine. But his finding upon that point is not a definitive decision which, in the absence of an appeal, can make the matter res judicata between the parties.

In the view I have taken, however, it is not necessary to decide this point. I still adhere to the view taken in Venkatachalai in re (1) to which I was a party. Holding that the term 'Court' in Section 195 has the same meaning as that assigned to it in Section 3 of the Indian Evidence Act, I would answer the question referred to the Full Bench in the affirmative.

SHEPHARD, J.—It is argued as well with reference to the provisions of the Registration Act as with reference to certain sections of the Criminal Procedure Code that the Registrar, acting under Section 72 of the Act, is not a Court within the meaning of Section 195 of the Code.

Considering, first, the provision of the Act, I observe that the methods and procedure which a Registrar entertaining an application under Section 72 is enjoined to follow are precisely those which a Judge trying a civil suit has to pursue. The application has to be written and verified like a plaint—the Registrar has power to summon and enforce the attendance of witnesses and to compel them to give evidence 'as if he were a Civil Court'—he also has power to adjudicate on the subject of costs. Moreover, as is pointed out in the order of reference, the subject-matter of inquiry is a civil right. The claim, which the holder of a registrable instrument has to have that instrument registered, may be compared with that of a person entitled to be registered as a parliamentary voter. In both cases, in order to constitute a certain legal relation, the law requires registration, and registration must, in the case of dispute,
necessarily be preceded by an inquiry. When it is found that the lines
upon which that inquiry must proceed are those which are followed in the
adjudication of an ordinary civil suit, it seems to me that as the public
officer who conducts the inquiry discharges all the functions of a Court,
he must also be deemed to be a Court, unless a clear intention to the
contrary is indicated by the Legislature.

It is said that the language of Section 84 of the Act and also of Section
483 of the Code indicates such intention. These sections have reference
to proceedings for contempt for which provision is now made by Sections
480 and 482 of the Code. It is argued that, if the Registrar, acting under
Section 72 was a Court, there was no occasion for the provision in Section
84 that he should be deemed to be a Court within the meaning of the
law relating to proceedings for contempt—and again, that there was no
occasion to confer on the Local Government power to constitute a Regis-
trar a Court for the same purpose, as has been done by Section 483 of
the Code. I confess that I was at first inclined to accede to this
argument, but, on consideration, seeing that, in [150] other respects, the
Registrar is in all essentials, a Court, I am not disposed to give weight
to the circumstance that the Legislature doubted whether the Registrar
was a Court, or thought it expedient to leave it to the Government to
say whether he should be ranked as a Court, with reference to a
particular purpose. I do not think that circumstance can be considered
conclusive to show that the Legislature, in passing the Registration
Act did not intend the Registrar to be a Court for other purposes than
those referred to in Section 84.

For this reason, I think, that the decision of this Court mentioned in
the order of reference ought to be followed, and that the question referred
to us should be answered in the affirmative.

This petition having come on for final disposal, the Court delivered
the following judgment.

**JUDGMENT.**

The only parties to these proceedings are the first and second
defendants. So far as they are concerned the order of the Sessions Judge
must be set aside inasmuch as the sanction of the Registrar is required by
Section 195, Criminal Procedure Code, for their prosecution. The order
of December 3rd, 1890, staying proceedings is discharged.

---

**15 M. 150.**

**APPELLATE CIVIL.**

Before Mr. Justice Muttusamv Ayyar and Mr. Justice Parker.

**KYD AND ANOTHER (Plaintiffs) v. MAHOMED (Defendant).**

[16th April, 1891.]

*Stamp Act—Act I of 1879, Schedule II, Article 2—Exemption—Agreement for the sale
of goods.*

An agreement for the sale of goods does not require a stamp under the Indian
Stamp Act, although it contains provisions as to the warehousing and insurance
of the goods previous to delivery.

[[F., 39 C. 669 = 16 Ind. Cas. 153 (155) ; R., 5 Ind. Cas. 986 = 5 L. B. R. 157 (159).]]

* When the petition came for final disposal.—ED.

† Referred Case No. 5 of 1891.
CASE stated under Section 69 of the Presidency Small Cause Court Act, 1862, and Section 617 of the Code of Civil Procedure by P. Srinivasarau, Second Judge of the Small Cause Court, Madras, in his letter, dated 13th February 1891, No. 129, in the matter of small cause suit No. 20431 of 1890 on his tile.

[151] The question referred was the following:

"Are the agreements A and B filed by the plaintiffs in this suit such as are exempted from stamp duty under Article 2, Schedule II of the General Stamp Act I of 1875?"

The agreements A and B were as follows:

A. Madras, 7th February, 1889.

"I have this day purchased from Mr. F. M. Bowden the following article at the prices as specified below payable in cash within thirty days from the date of the steamer's arrival: less one and three-quarter per cent. discount, 5 cases of 100 pieces each John Orr Ewing's assorted jacoconets, quality and pattern as per indent No. 403 at Rs. 3-11-0 per piece, 38/39; 20 yards Turkey red and yellow jacoconets.

"In default of payment within the time above specified I do hereby authorize Mr. F. M. Bowden, to sell at public auction or by private bargain to the best advantage the goods above referred to or such portion of them as may be left with them unpaid for and uncollected at the time on my account and credit the proceeds thereof less 3 1/2 per cent. (being commission on resale) to my account, and I do hereby further engage and promise to pay to Mr. F. M. Bowden, on demand, any loss that may be incurred by such resale or balance that may still remain due by me on account of the purchase forfeiting all advantages and the amount of the deposit, if any. It shall, however, be in the option of Mr. F. M. Bowden, in the event of the goods not being cleared on or before the prompt of thirty days above referred to, to allow the goods or any portion of them to remain uncollected for such further period as he may think fit and for this accommodation I undertake to pay to Mr. F. M. Bowden a consolidated charge of 12 per cent. per annum to cover godown rent, fire insurance, and interest. It is further provided that all claims on account of late delivery, inferiority of goods, or otherwise are to be preferred within the prompt of thirty days above referred to, failing which it shall be competent to Mr. F. M. Bowden to decline to entertain them. Service of notices to be considered or complete if it can be shown that same have been duly despatched. In the event of the goods above referred to not being forthcoming owing to frost, strikes at manufacturer's works, destruction by fire, loss at sea, &c., this agreement is to be considered null and void, but on the other hand should only a portion be so lost or destroyed this agreement will become null and void only as regards the portion lost or destroyed, but remain in force as regards the portion available. Should any dispute arise in regard to the time of delivery, alleged inferiority of the goods or otherwise I hereby agree to refer the matter to and abide by the decision of two European arbitrators skilled in Import business, one of whom shall be appointed by me and one by Mr. F. M. Bowden, and should the said arbitrators differ in opinion it shall be competent to them to refer the question to an averseman, whose decision shall be final.

"In the event of any import or other duties being imposed I agree to pay the same in addition to the sale price.

The above has been explained to me, and I understand it.

(Signed) ERRAHAM SALAY MAHOMED."
B. 

Madras, 16th May 1889.

[162] "I have this day purchased from Mr. F. M. Bowden the following articles at the price as specified below payable in cash within thirty days from less one and three-quarter per cent. discount, 6 (six) bales each 300 pieces 29/30 inches 4/5½ yards filled dhooties at Rs. 0-11-10½ pies. per piece."

"(Signed) EBRAHAM SALAY MAHOMED."

Mr. W. Grant, for plaintiffs.
Mr. K. Brown, for defendant.

JUDGMENT.

We are of opinion that the agreements A and B fall within the exemption. It is urged that the stipulations relating to the payment of godown rent and fire insurance as also those relating to reference to arbitration are extraneous to the contract of sale, but we are of opinion that they are only collateral and subsidiary incidents relating to the sale of the goods, which is the transaction evidenced by the documents.

The test which should be applied is to see whether the document evidences only a transaction of sale or a sale and some other independent transaction, and if the former the number of subsidiary stipulations it may contain cannot alter the nature of the transaction. The material words of the exemption are "an agreement for or relating to the sale of goods or merchandise exclusively," and the intention was to exempt bona fide sales and purchases of merchandise from stamp duty. If the contention were to prevail fair effect could not be given to that intention.

We answer the question referred to us in the affirmative. The plaintiffs are entitled to the costs of this reference.

D. Grant, Attorney for plaintiffs.
Branson & Branson, Attorneys for defendants.

15 M. 150.

[153] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

MUNICIPAL COUNCIL OF TELlicherry (Defendant), Petitioner v. BANK OF MADRAS (Plaintiff), Respondent.* [30th October, 1891.]

District Municipalities Act—Act IV of 1884 (Madras), Sections 55, 56, 60, 262, Clause (2)
—Protest tax.

The Bank of Madras carried on business at (among other places) Negapatam and Telnicherry, in both of which places the Madras District Municipalities Act was in force. The Bank paid protest tax under that Act to the Municipality of Negapatam two years before it was due. The Municipality of Telnicherry subsequently, and with knowledge of the above facts, assessed the Bank to the same tax for the same period and levied the amount which was paid under protest.

Held, that the Bank was entitled to recover the amount so paid, from the Municipality of Tellicherry.

Stipulation: The aggregate income derived by the Bank from the exercise of its business in the separate municipalities would regulate the class under which it would be liable to taxation.

* Civil Revision Petition No. 389 of 1900.
PETITION under Section 25 of Act IX of 1887, praying the High Court to revise the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in small cause suit No. 336 of 1890.

Suit by plaintiff to recover Rs. 50 with interest, profession tax wrongfully collected by the defendant from the plaintiff for the second half-year ending 31st March 1890, on the ground that the tax for the half-year in question had been already paid to the Negapatam Municipality, and the fact of such payment had been brought to the notice of the defendants. The tax was paid to the Negapatam Municipality before the due date.

The Subordinate Judge of North Malabar on the authority of Tuticorin Municipality v. South Indian Railway (1) passed a decree for the plaintiff.

The defendant preferred this petition.

Mr. Powell and Mr. Subramanyam, for petitioner.

Mr. K. Brown, for respondent.

JUDGMENT.

[134] The first objection taken is that the profession tax was paid in Negapatam three days before it fell due and therefore was not paid in discharge of a legal obligation; hence that plaintiff is liable to the tax at Tellicherry, the payment at Negapatam having been voluntary. The liability to pay is created by Section 53, Madras Act IV of 1884, and Section 55 operates to exempt a person who has exercised his profession for less than 60 days in the half-year. Section 55 therefore indicates a ground on which a person may, if he wishes, claim exemption from liability and also gives him the privilege of paying the tax in two instalments. It is not the petitioner’s case that the Madras Bank ceased to carry on business at Negapatam before the expiry of 60 days, nor do we think that payment, three days before the expiration of that time, can be treated as made otherwise than in discharge of the liability for the second half-year.

The next contention is that each Branch Bank ought to be treated as a distinct person—but there is only one corporation, and the Bank carries on its business through agents in different municipalities. Having regard to the definition in Clause xxix, Section 3, of the Act, we cannot hold that the Madras Bank is not a single person within the meaning of the Act.

Section 60 precludes the supposition that the same person carrying on business by agents in different municipalities is liable to pay the profession tax in each municipality for the same half-year.

Section 59 is not applicable, as the person, i.e., the Bank, does not carry on more than one class of business, and even if it did it would not be liable to pay more than one tax, though the class under which it was to be taxed might be determined by the aggregate income.

We dismiss the petition with costs.

Barclay, Morgan & Orr, Attorneys for respondent.
FISCHER v. TURNER, COLLECTOR OF MADURA

15 M. 158.

[155] APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

FISCHER (Plaintiff) v. TURNER, COLLECTOR OF MADURA AND AGENT TO THE SECRETARY OF STATE FOR INDIA IN COUNCIL (Defendant).* [1st December, 1891.]

Provincial Small Cause Courts Act—Act IX of 1887, Section 15, Schedule II, Article 41.

The plaintiff sued to recover from the defendant Rs. 227, being his share of the cost of repairing a channel, which was the property of the plaintiff and defendant.

Held, the suit was cognizable by a Court of Small Causes.

CASE referred for the decision of the High Court under Code of Civil Procedure, Section 646 B., by T. Weir, District Judge of Madura.

The case was stated as follows:—

"I have the honor to submit to the High Court the record in Small Cause suit No. 593 of 1890 on the file of the Subordinate Court, Madura (West), in which the Subordinate Judge has, I consider, failed to exercise a jurisdiction vested in him by law.

"The suit is to recover from defendant Rs. 227-9-6, being his share of the cost of repairing in fathoms 1297, 1298 and 1299, a channel which is the joint property of plaintiff and defendant.

"The Subordinate Judge has held that the suit falls under Article 41 of the second schedule of the Provincial Small Cause Courts Act.

"The present suit is of the very same nature as original suit No. 59 of 1888 on the file of the Madura Munsif’s Court and between the same parties. One of the issues in that suit was— Has the Court jurisdiction in this case on its original side? The Munsif thought the suit was cognizable on the Small Cause side and returned the plaint for presentation on that side; but he took it back on the original side under Section 23 of the Act as questions of title were raised. The suit was then registered in original suit No. 158 of 1889. In their judgment, dated 19th January 1891, in The Secretary of State for India in Council v. Fischer (1) which arose from the said suit, their Lordships have remarked as follows:— The suit is of a nature cognizable in a Court of Small Causes, although the District Munsif acting under Section 23 of Act IX of 1887 very rightly directed that the plaint should be presented to a Court having jurisdiction to determine a question of title which arose in the suit. I am of opinion that, in the face of the above ruling, the Subordinate Judge’s order holding that the present suit is not cognizable on the Small Cause side is erroneous and should be set aside, and the plaint ordered to be received on the small cause side of the Subordinate Court.

"It should be stated that this reference is made at the instance of the plaintiff and is rendered necessary by the circumstance that the District Munsif of Madura rejected the plaint when presented on the regular side, being of opinion that the suit was cognizable as a Small Cause suit."

Counsel were not instructed.

JUDGMENT.

The suit is cognizable by a Small Cause Court.

* Referred Case No. 26 of 1891.

(1) Second Appeal No. 593 of 1890 unreported.
QUEEN-EMPERESS v. KRISHNANAYAN. [*] [8th October, 1891.]

Forest Act—Act V of 1862 (Madras), Section 21 (d)—Grazing cattle in a forest reserve.

The owner of cattle found grazing in a forest reserve cannot be convicted under Madras Forest Act, Section 21 (d), in the absence of evidence that he either pastured the cattle or permitted them to trespass in the reserve.

CASE reported for the orders of the High Court under Criminal Procedure Code, Section 438, by W. J. Tate, Acting District Magistrate of Coimbatore.

Counsel were not instructed.

JUDGMENT.

To sustain a conviction under Section 21 (d) of the Forest Act there must be some evidence either that defendant [*157] pastured the cattle or permitted them to trespass in the reserved forest. In the present case all that the prosecution proved was that defendant's cattle were found in a reserve. Such cattle may be impounded, but the owner cannot be held liable unless some overt act of his be proved. We set aside the conviction and sentence and direct that fine be repaid.

SUBBAKKA (Defendant), Appellant v. MARUPPAKKALA AND ANOTHER (Plaintiffs), Respondents. [†] [29th October, 1891.]

Limitation Act—Act XV of 1877, Schedule II, Articles 49, 116—Suit to recover title-deeds left with a mortgagee after redemption—Demand and refusal.

After the redemption of a mortgage, the title-deeds of the mortgagees were left with the mortgagee, who refused to return them on demand made by the mortgagee. The mortgagee now sued to recover possession of them:

Held, that Limitation Act, Schedule II, Article 49, was applicable to the case, and that time began to run from the date of the mortgagee's refusal.

[N.F., 33 M 56 = 5 Ind. Cas. 1 = 20 M. I. J. 41 (48) = 7 M L T. 282; F., 9 M. L. J. 51 (56); R., 35 M. 686 = 698 = 12 Ind. Cas. 207 = (191) = M. W. N. 190; 12 Bom. L. R. 513 = 7 Ind. Cas. 447 (448).]

CASE referred for the orders of the High Court under Civil Procedure Code, Section 617, by W. J. Tate, District Judge of South Canara. The case was stated as follows:—

"The suit was brought for possession of certain title-deeds. Two "mortgages, one for Rs. 3,300 and one for Rs. 1,200, were executed by "relations to the defendant's mother. Defendant sued one Ganapa (the

[15 Mad. 157]

Indian Decisions, New Series

15 M. 156 = 1 Weir 763.

APPELLATE CRIMINAL.


15 M. 156 =
1 Weir 763.

1891
Oct. 8.

APPELLATE
CRIMINAL.

15 M. 157 = 2 M.L.J. 56.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

Subbakka (Defendant), Appellant v. Marupakkala and Another (Plaintiffs), Respondents. [†] [29th October, 1891.]

Limitation Act—Act XV of 1877, Schedule II, Articles 49, 116—Suit to recover title-deeds left with a mortgagee after redemption—Demand and refusal.

After the redemption of a mortgage, the title-deeds of the mortgagees were left with the mortgagee, who refused to return them on demand made by the mortgagee. The mortgagee now sued to recover possession of them:

Held, that Limitation Act, Schedule II, Article 49, was applicable to the case, and that time began to run from the date of the mortgagee's refusal.

[N.F., 33 M 56 = 5 Ind. Cas. 1 = 20 M. I. J. 41 (48) = 7 M L T. 282; F., 9 M. L. J. 51 (56); R., 35 M. 686 = 698 = 12 Ind. Cas. 207 = (191) = M. W. N. 190; 12 Bom. L. R. 513 = 7 Ind. Cas. 447 (448).]

Case referred for the orders of the High Court under Civil Procedure Code, Section 617, by W. J. Tate, District Judge of South Canara. The case was stated as follows:—

"The suit was brought for possession of certain title-deeds. Two "mortgages, one for Rs. 3,300 and one for Rs. 1,200, were executed by "relations to the defendant's mother. Defendant sued one Ganapa (the

* Criminal Revision Case No. 398 of 1891.
† Referred Case No. 20 of 1891.
"Surviving descendant of the mortgagors, and a minor), thereon in
original suit No. 14 of 1883 on the file of the Subordinate Court. With
Ganapa (first defendant) was joined his mother Gauramma (defendant
No. 2) and another. Defendant obtained a decree for the whole mort-
gage money, and a direction that the mortgaged (hypothecated) property
be sold after two months. In order to raise the money and so save
[168] the property, Gauramma and Ganapa's other guardian, Laksh-
mamma, executed two usufructuary mortgages to plaintiffs for Rs. 5,300
and Rs. 4,500 respectively, on the same two separate properties. The
plaintiffs accordingly redeemed the properties by paying the mortgage
money into Court; and the same was received by defendant.

Defendant did not, however, deliver to plaintiffs the title-deeds, i.e.,
the original deeds of mortgage and the connected documents, and more
than three years after she received the mortgage amount, the plaintiffs
bring this suit to enforce delivery of the same.

The defendant contended, first, that the suit was barred under
"Article 49 of the second schedule of the Limitation Act. And the first
question I have the honor to refer to the High Court is, whether that
article applies to a suit like the present, which is one for the recovery of
title-deeds; in other words, whether the title-deeds of immovable pro-
erty fall under the head of specific movable property? Under the
former Limitation Act (IX of 1871) there was a special article (No. 33)
relating to such property, and Mitra, in his 'Law of Limitation
and Prescription,' second edition, thinks that a suit for title-deeds
is governed by the article in question (No. 49 of the present Act) in
the absence of a repetition in Schedule II of an article corre-
sponding to Article 33 of Act IX of 1871; so in the note to Whitley
Stokes' 'Anglo Indian Codes' under Article 49. But the two reported
cases—Jagivan Javeherdas v. Gulam Jilani Chaudhri (1) and Rameshar
Chaubey v. Mata Bikhk (2)—referred to by the latter author do not
seem to be in point, as they refer only to suits for money.

My own opinion on the point is that the article applies, inasmuch as
"title-deeds do not, at any rate in India, fall under the definition of
"immovable property in the General Clauses Act, Section 2, and are
"therefore by the same statute 'movable property.'

The next question is, whether the period of limitation under this
article, supposing it to apply, runs from the date when defendant received
the mortgage money (1st April 1886—vide Exhibits A, B and C), or, as
the Munisif thought, from the [169] 'date of receipt by defendant of
plaintiff's letter of notice (Exhibit D shows that this was in July 1888)?
In the former case the suit is barred, in the latter not barred.

The point seems doubtful, but on the analogy of Article 33 of the
former Limitation Act, and relying on the definition of the mortgagor's
rights in Section 60 (vide right 'a') of the Transfer of Property Act, I am
inclined to think that the period of limitation runs from the former date,
i.e., from 1st April 1886, when the mortgage money was received by
defendant, her detention of the title-deeds being thereafter wrongful.

The third question, which was raised only in appeal is whether,
inasmuch as the mortgage deeds (both the original ones to defendant's
mother and also those to the plaintiffs) reveal a privity of contract

(1) 8 B. 17. (2) 5 A. 341.
between the parties that the title-deeds should be surrendered on receipt of the money—a contract which is in writing registered—the true article to apply is not Article 116 on the principle of giving the longest available time, when either of two limitation periods apply to the person whose right is sought to be barred?

I have great doubts in this point, but am, on the whole, of opinion that Article 116 does not apply, inasmuch as it governs only a suit for 'compensation' for breach of contract, and not a suit for moveable property; but it is not at all certain that the present suit cannot be held to fall under the definition 'suit for compensation' owing to the request in the plaint for Rs. 200 damages in case the title-deeds are not produced and delivered to the plaintiffs.

Appellant (defendant) further contends that the suit is bad for misjoinder, inasmuch as separate suits should have been brought with reference to each of the two plaint mortgages. My own opinion is that the suits may, legally and not improperly, be joined with reference to Sections 42 and 45, Code of Civil Procedure; but, as I am raising the other points in the case and have some doubt in the matter, I would ask the High Court to decide whether the present suit is bad owing to the joinder in it of the title-deeds relating to two separate mortgages, such mortgages being separately redeemable under Section 61 of the Transfer of Property Act.

Lastly, defendant says she is willing to waive other objections and to surrender the title-deeds to plaintiffs provided she [160] be secured by them against any possible suits brought by Ganapa on attaining his majority. She further says that Ganapa's present guardians have not authorized her to deliver to plaintiffs the title-deeds. Is she bound to do so without such security? The request for security seems certainly equitable, but rests on no provision of law. The equity of redemption having been transferred to the plaintiffs, they must, qua the defendant, be, I think, regarded as owners. If so, she is bound to deliver the deeds to them unconditionally. She is also, in my opinion, estopped by her acceptance of the plaintiff's tender. She might, perhaps, have refused to accept this in the absence of authorization from the guardians, but, having done so, her lien on the title-deeds would cease.

There are, however, doubts in the matter, and I therefore refer also to the High Court the question whether defendant is bound to surrender the plaint title-deeds without furnishing security?"

Sankaran Nayar, for appellant.
Narayana Rau, for respondents.

JUDGMENT.

We are of opinion that Article 49 applies. The original possession of the title-deeds by defendant was lawful and the time runs from the date of the detainer's possession becoming unlawful. The mere retention of the deeds in defendant's possession after payment of the decree amount was not unlawful, though plaintiffs had a legal right to demand delivery, but his retention of them after a lawful demand for delivery was made was an illegal detention.

The time will, therefore, run from the date of demand (July 1885) and the suit is not barred.
The Judge does not state he entertains any doubt on the question of misjoinder, and we see no reason to consider it under the provisions of Section 617, Civil Procedure Code. In answer to the last question, the point for decision is whether plaintiffs are entitled to the deeds. If they are, and if the defendant is not entitled to detain them, there can be no question of security.

15 M. 161.

[161] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

RAMACHANDRA (Plaintiff), Appellant v. JAGANMOHANA AND OTHERS (Defendants Nos. 3 to 6 Respondents).*

[29th April and 9th September, 1891.]


In a suit by a Zemindar against the grantee of an inam, to recover arrears of kattubadi, it appeared that no payment had been made in respect of kattubadi for a period of twelve years before suit. The suit was dismissed in the Court of first appeal on the findings (1) that no exchange of patta and muchalka had been proved, (2) that the plaintiff had not proved his right to the kattubadi, and (3) that his right to it, if any, was barred by limitation.

On second appeal by the plaintiff:

Held, that the second and third of the above findings should be accepted and the second appeal dismissed Alubi v. Kunhi Bi (I.L.R., 10 Mad., 115) distinguished.

Per cur: We do not think it necessary to consider whether if there had been a grant subject to kattubadi, patta and muchalka ought to have been exchanged.

[R., 24 M.L.J. 188=13 M.L.T. 130.]

SECOND appeal against the decree of H. R. Farmer, District Judge of Vizagapatam in Appeal Suit No. 33 of 1890 reversing the decree of B. Rajalinga Sastri Garu, District Munsif of Parvatipore, in original suit No. 389 of 1889.

The plaintiff, zemindar of Salur, sued to recover from defendants twelve years' arrears of kattubadi accrued due on service inam lands at Rs. 30 per annum, alleging that the last payment was made in 1883 for the amount due for 1871-72.

Defendants pleaded, inter alia, that the lands were inam lands free of kattubadi, that no services were ever rendered, that a permanent patta was given to the ancestor of defendants by the ancestor of plaintiff, that plaintiff's claim was barred by limitation, and that plaintiff's claim to kattubadi for more than three years prior to suit was barred by limitation.

The District Munsif passed a decree for the plaintiff for five years' arrears. The District Judge on appeal reversed this decree and dismissed the suit.

[162] The plaintiff preferred this second appeal.
Subramanya Ayyar, for appellant.
Mr. Gantz and Mr. K. Brown, for respondents.

* Second Appeal No. 1254 of 1890.
1891 SEP. 9
APPEL. CIVIL. 15 M. 161.

JOUDGMENT.

The appellant is the zamindar of Salur and respondents are the descendants of the grantee of an inam. The questions for decision were whether the original grant was rent free or subject to the payment of kattubadi of Rs. 30 a year and whether the present suit for arrears of kattubadi for a period of twelve years was barred by limitation. The District Munsif determined both questions in appellant’s favour, but decreed his claim to arrears of kattubadi for five years only, commencing with Fasli 1293 on the ground that kattubadi had been paid for Fasli 1292, and that, in the circumstances of the case, he was entitled to presume that there had been no arrears due for the prior period. From this decree defendants No. 3—6 appealed, and on appeal the District Judge found that payment of kattubadi for 1292 was not proved, and that the entry in Exhibit G as to a part payment in 1871-72 was not reliable and, in the view which he took of the facts, he held that the appellant was not entitled to claim any kattubadi, that even if he was, he could only claim arrears for three years before suit and that his rights to kattubadi, if any, had become extinct, under Section 28 of the Limitation Act by reason of respondents’ refusal to pay it for more than twelve years prior to suit. He observed also that the kattubadi claimed by the appellant was a mere rent and that no suit would lie for its recovery, no patta and muchalk having been exchanged as required by Act VIII of 1865. In the result, the Judge dismissed appellant’s suit with costs; hence this second appeal.

Upon the facts found by the Judge, we think his decision is right though we do not agree in all the reasons assigned by him in its support. He discusses at some length the question whether kattubadi payable to a zamindar is a mere rent or a rent charge, but we entertain no doubt that when a grant is made subject to an annual payment of kattubadi, it represents the portion of the revenue reserved by the grantor and excluded from the interest alienated as inam. As regards the question, whether the appellant was entitled to claim payment of kattubadi, the Judge observes that none was paid prior to 1816, and infers from that fact that the original grant was rent free. He rests this opinion on Exhibit H and we cannot say that it is not well founded. Though the [163] District Munsif found that kattubadi was paid in 1871-72 and in 1883, yet the Judge after discussing the evidence, set aside the finding and held that the evidence in its support was not trustworthy. This is a question of fact which it was for him to determine and in second appeal we are bound to accept his conclusion as to the weight due to the evidence. Again, the suit was brought on the 1st November 1883, and upon the evidence as appreciated by the Judge, no rent had been paid not only for twelve years prior to the date of the suit but also from 1869. There only remains then the fact that when the appellant’s estate was under the Court of Wards a kattubadi had been levied prior to 1869. The District Munsif considered that such payment, though made more than twelve years ago, was sufficient proof of the appellant’s title, but the Judge declined to attach weight to it as it was levied under the erroneous impression that an alienation claiming from a zamindar could not make good a title by adverse possession for twelve years, and on that ground it was not levied in 1869 when the Court of Wards again happened to take charge of the estate. We cannot say that if kattubadi had been irregularly levied for a time and then abandoned more than twelve years before suit, it is wrong.
In law to refuse to accept such irregular collection as proof of a legal right, especially when that right, if any, has become barred by non-payment for more than twelve years before suit. The District Munisif relied upon the decision Aliubi v. Kunhi Bi (1), but the case now before us is not all fours with it. There the nature of the tenure and the liability to pay kattubadi were admitted, the only matter in dispute being whether the tenant was really the party to whom it ought to be paid, and as his title was considered to be established, the Court held that there was no statutory bar. In the present case the nature of the tenure and the plaintiff's right to kattubadi were denied. In the view which we take of the case we do not think it is necessary to consider whether if there had been a grant subject to kattubadi, patta and muchalka ought to have been exchanged. We accept the findings that the appellant has not proved his right to the kattubadi and that the right, if any, is barred by limitation and dismiss the second appeal with costs.

1891
SEP. 9.
APPPEL-
LATE
CIVIL.
15 M. 164.

15 M. 164 (F.B.).

[164] APPELLATE CIVIL.—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar and Mr. Justice Shepherd.

REFERENCE FROM THE BOARD OF REVENUE UNDER SECTION 46 OF THE INDIAN STAMP ACT, 1879.* [13th October, 1891.]

Stamp Act—Act I of 1879, Section 3, Clause 11. Section 29 (e)—Instrument of partition.

Three out of seven brothers, constituting an undivided Hindu family, executed documents whereby each acknowledged the receipt of certain property made over to him; "a division of family property having been effected," and acknowledged himself liable for one-seventh of the debts of the family. One of the documents contained a clause to the effect that the executant had no further claim on property of the family:

"Held, that the documents should be stamped as instruments of partition each member paying according to the share taken by him under the partition.

Case stated for the opinion of the High Court by the Board of Revenue under Stamp Act, Section 46.

The case was stated as follows:

"The documents evidence that three out of seven brothers have "received Rs. 200 each in pursuance of partition of family property "and that they remain liable, each for one-seventh of the family debts; "in one case also the executant adds that his claims have been fully "satisfied.

"The first question is what are these documents; presumably, the "whole of the family property was divided, but it is not actually said so, "and all the seven documents are not produced. They are on the face "of them receipts, and are stamped as such; their combined effect would "be much the same as that of a formal deed of partition, and if all of "them could be produced, and the release clause had been continued "through all of them, the ruling in Reference under Stamp Act, Section 46 (2) "would apply; but only three of them are produced, and two of these do "not contain the release clause.

* Referred Case No. 19 of 1891.

(1) 10 M. 115.
(2) 12 M. 198.

468
"The second question is what is the amount of duty payable on them? If they are a partition deed, do they pay on the amount, the receipt of which is evidenced in the three documents produced, viz. Rs. 600, or on the whole amount of the family property divisible, presumably Rs. 1,400; and does each document pay separately or all three together?

"If not a deed of partition, of what effect are the clauses accepting liability for a one-seventh share of the family debts, and the clause stating "that the recipient's claims have been satisfied?"

The papers placed before the High Court referred also to Reference under Stamp Act, Section 49 (1).

The following is a translation of one of the documents in question:

Dated Palmanair, 4th June 1890.

I, Venkataramanayya by name, the son of Jallapeta Subbayya, whose means of livelihood is some lands assigned to the Brahman caste, grant this receipt written in my own handwriting to my brothers (1) Appayya alias Apparaw, (2) Raghavayya, (3) Krishnayya, (4) Gopakrishnayya, (5) Adayya and (6) Rangayya, all residing in Palmanair village, Palmanair taluk, North Arcot district.

A division of our family property having been effected by lottery, the following is the description of the above which I got and which all of you made over to me for my free enjoyment. . . . . I agree to take for my share (1) dry, wet, circar and inam lands above detailed; (2) 7, 8 sarams of a house on the eastern side of the houses which now form our residence and which are situated between the following boundaries, viz., west of Kuppayya's house, south of P. Surayya's and M. Sayar Kuppurar's houses and north and east of two small lanes; (3) plain ground extending north and south in front of my sarams and having a breadth of one and-a-half yards; and (4) one-seventh of the debts due by our family up to this date. I received the property above detailed which is worth about Rs. 200.

(Signed) JALLAPETA VENKATARAMANAYYA.

Presented by the undersigned, in the office of the Sub-Registrar of Palmanair at 4-40 p.m., on 4th June, 1890.

(Signed) JALLAPETA VENKATARAMANAYYA.

It is agreed that the receipt was written by the undersigned.

(Signed) JALLAPETA VENKATARAMANAYYA.

The Government-Pleader, (Mr. Powell) for the Board of Revenue.

JUDGMENT.

[166] We are of opinion that these documents are partition deeds and must be stamped accordingly having regard to the provisions of Section 29 (c) of Act I of 1879. Each member must pay according to the share which he has taken under the partition.
15 M. 166.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

RAMUNNI AND OTHERS (Defendants Nos. 1, 2 and 13), Appellants v. KERALA VARMA VALIA RAJA AND OTHERS (Plaintiffs Nos. 1—17 and Defendant No. 16), Respondents.*

[23rd and 24th September and 19th October, 1891.]

Landlord and tenant—Surrender—Limitation—Adverse possession—Malabar law—Karnavan, powers of—Perpetual lease.

The karnavan of a Malabar kovilagom executed a kuikanom lease of certain land, the jemm of the kovilagom, in 1846, and in 1861 his successor demised the same land to the same tenants in perpetuity. The present karnavan sued in 1889 to recover possession of the land:

Held, (1) that the perpetual lease, as being of an improvident character, was ultra vires and void;
(2) that the original lease was not surrendered;
(3) that the suit was not barred by limitation, the possession of the defendants never having been adverse to the plaintiff’s kovilagom.


APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No. 26 of 1889.

Plaintiff No. 1 was the Valia Raja of the Cherikal kovilagom, of which plaintiff’s Nos. 2—17 and defendant No. 16 were the junior members. They sued to recover possession of a paramba, being the jemm of their kovilagom, alleged to have been comprised in a kuikanom lease executed by a predecessor of plaintiff No. 1 to the karnavan of the remaining defendants in August 1846. The contending defendants denied the demise set up in the plaint and alleged that they were in possession under a perpetual lease executed in May 1861 by another predecessor of plaintiff No. 1, and also pleaded limitation.

[167] The Subordinate Judge held that both the above leases were proved, but he was of opinion with reference to Tod v. Kurnamad Haji (1) that the execution of that of 1861 was beyond the authority of the then karnavan of the plaintiff’s kovilagom. With regard to the further plea of the defendants he referred to Aliba v. Namu (2) and Kannasami v. Muttukumarappan (3), and pointed out that the lease of 1846 specified no term for its duration and proceeded to record his rulings as follows:—

"The perpetual grant was unauthorized, ineffectual and legally inoperative, an against the kovilagom, and I certainly agree in the soundness of the contention that the latter has the right to treat it as altogether non-existent and to fall back on the original lease of 1846, which was made on its behalf by Ravi Varma Valia Rajah and has never been since determined by any act of the kovilagom (Haji v. Atharaman (4) and Madehava v. Narayana (5),) and there can, of course, be no surrender, either express or implied, without the consent of both the landlord and tenant, and the landlord, in this case the kovilagom, is not shown to have assented to any surrender at all (Balaji Sutaram

Appeal No. 45 of 1890.

(1) 3 M. 169 (176).
(2) 9 M. 218 (222).
(3) 10 M. 509 (516).
(4) 7 M. 512.
(6) 9 M. 244.
1891
Oct. 19.

APPEL-
LATE
CIVIL.

15 M. 165.

INDIAN DECISIONS, NEW SERIES

"Naik Salgavkar v. Bhikoji Sayare Prabhu Kanolekar (1) and Judoonath Ghose v. Schoene Kilburn & Co., (2). I therefore find that the paramba "is now held by the 1st to 13th defendants’ family under the plaintiffs’ "kolvilagom not under the perpetual right evidenced by Exhibit I, but "under the improving lease in Exhibit A and that the suit is not barred "by Article 139 or any other provision of the Limitation Act."

Defendants Nos. 1, 2 and 13 preferred this appeal.
The Acting Advocate-General (Hon. Mr. Wedderburn and Sankara Menon, for appellants).

Sankaran Nayar and Ryru Numbiar, for respondents.

JUDGMENT.

It is quite clear that the perpetual lease given by the plaintiff’s predecessor in title in 1861 was a disposition of an improvident character which could not bind his successors.

It is argued that by reason of the acceptance of this lease there was a surrender of the prior lease of 1846 and that therefore the suit was barred by limitation. In our judgment, however, any [168] surrender by operation of law that might have ensued on the taking of the perpetual lease was nullified by the plaintiff’s repudiation of the perpetual lease. The surrender must fall to the ground with the transaction on which it is supported (Doe d Egremont v. Courtenay (3)). It is contended by the Acting Advocate-General that this principle is not applicable, because the plaintiff’s right to challenge the lease of 1861 was extinguished by the law of limitation more than 12 years having elapsed since the date when the defendants’ possession under it began. The case is compared with Madhava v. Narayana (4). In that case it was held that possession acquired under a kanom granted by the manager of a Nambudri family, and extending over more than 12 years, gave the holder a prescriptive title against the successor in management, who otherwise would have been entitled to repudiate the kanom and recover immediate possession.

It is clear that in such a case where the only legal title to which the defendants’ possession could be referred was repudiated by the plaintiff, the possession must have been adverse to the family. But in the present case it is otherwise, because apart from the perpetual lease which the plaintiff treats as non-existent the defendants had a right to possession under the prior lease which had never been determined.

The plaintiff was never in a position to recover immediate possession from the defendant as from a trespasser. It was not competent to him at one and the same time to repudiate the perpetual lease and to take advantage of it by claiming that it operated to effect a surrender of the prior lease.

Under these circumstances, it is clear that the possession of the defendant cannot be deemed adverse and that the suit is not barred by limitation.

The appeal is therefore dismissed with costs.

(1) 8 B. 164. (2) 9 C. 671. (3) 11 Q.B. 702. (4) 9 M. 244.

466
ANDERSON v. PERIASAMI

15 M. 169.

[169] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

ANDERSON (Petitioner) v. PERIASAMI (Respondent).*

[21st September, 1891.]

Civil Procedure Code, Section 598—Application for certificate for appeal to Privy Council—Limitation Act—Act XV of 1877, Section 12, Schedule II, Article 177.

In computing the period of limitation for an application for a certificate admitting an appeal to Her Majesty in Council, the time occupied in obtaining copies of the decree and judgment sought to be appealed against cannot be excluded.

[F., 28 A. 391 (833) = 3 A.L.J. 165 = A.W.N. (1906) 55; Appr., 18 M. 484 (485).]

PETITION under Section 598 of Act XIV of 1882 praying for the grant of a certificate to enable the petitioner to appeal to Her Majesty in Council against the decree of this Court in appeal No. 5 of 1889.

Biligiri Ayyangar, for petitioner.
Bhashyam Ayyangar, for respondent.

JUDGMENT.

This application for the admission of an appeal to Her Majesty in Council is put in 92 days out of time, and the time taken by the petitioner in obtaining copies of the decree and judgment cannot be excluded.

An application of this nature under Article 177 of the Limitation Act does not fall within the provisions of Section 12, Act XV of 1877.

We agree with the view taken by Stuart, C. J., in Jawahir Tal v. Narain Das (1), and the same view was taken by this Court in civil miscellaneous appeal No. 254 of 1886.

We may also observe that Section 599 of the Code of Civil Procedure has been repealed by Act VII of 1888. We cannot see that the argument based upon the alleged harshness of the law has any foundation. The period of six months, which is allowed by law, seems ample, and in this case the petitioner was actually in possession of copies of the decree and judgment on August 26th, so that he had ample time before November 6th to [170] prepare a memorandum of grounds of appeal and make an application to this Court under Section 600. We are, therefore, constrained to dismiss this application with costs.

* Civil Miscellaneous Petition No. 540 of 1891.
(1) 1 A. 644.
A mortgagor obtained a decree for redemption of his mortgage "within six months from the date of this decree." The mortgagee appealed, but the Appellate Court confirmed the decree. The mortgagor sought to redeem within six months from the date of the appellate decree:

Held, the Court to which the application of the mortgagor was made should, before passing orders on the application, have given the plaintiff time to apply to the District Court to amend the decree under Transfer of Property Act, Section 92.

APPEAL under Letters Patent, Section 15, against the judgment of SHEPHARD, J., on appeal against order No. 20 of 1889, which was preferred against the order of L. Moore, District Judge of South Malabar, in civil miscellaneous appeal No. 124 of 1889, reversing the order of K. Ramanadha Ayyar, Acting District Munsif of Nedumangad, in civil miscellaneous petitions Nos. 337 and 341 of 1889.

On 9th December 1887 a decree was passed for the redemption of a mortgage within six months from that date. An appeal was preferred against that decree, but it was confirmed on 29th September 1888. The mortgagor deposited in Court the amount due on the mortgage within six months from the date of the decree of the Appellate Court. The mortgagee objected that the equity of redemption had been lost by the efflux of time.

The District Munsif held that the mortgagor was still entitled to redeem. On appeal the District Judge reversed this decision.

JUDGMENT.

The plaintiff obtained a decree on 19th December 1887 entitling him to redeem certain property on payment of the redemption amount to second defendant within six months from the date of that decree. The second defendant appealed, and the District Court, on 29th September 1888, ordered that the decree of the Lower Court be confirmed and this appeal dismissed. The plaintiff then applied for execution, but was resisted by second defendant under Section 92 of the Transfer of Property Act on the ground that as plaintiff had not paid the redemption amount within six
months of the original decree, the right to redeem was barred. The District Munisif held, upon the authority of Noor Ali Chowdhuri v. Koni Meah (1) and Daulat and Jagjivan v. Bhukandas Manekchand (3), that the appeal decree of the District Court incorporated the decree of the first Court and thus became the only decree capable of execution, hence that the petition for execution was not barred. On appeal the District Judge, following Govindan v. Chapputti (3), held that the mere fact that an appeal was preferred would not extend the time allowed for payment, and reversed the order of the District Munisif.

The appeal was first heard by a single Judge (Mr. Justice Shephard), who held that he was bound by the decision in Govindan v. Chapputti (3). Hence this appeal under the Letters Patent.

We have no doubt that when an appeal has been heard, the decree of the Appellate Court becomes the final decree in the suit, and the only one capable of execution. This doctrine has [172] been recognized in various decided cases—Arunachellathudayan v. Veludayan (4), Muhammad Sulaiman Khan v. Muhammad Yar Khan (5) and Noor Ali Chowdhuri v. Koni Meah (1)—and has been referred to with approval by the Privy Council in Kistokinker Ghose Roy v. Burrodacaut Singh Roy(6). Granting, however, that the decree of the Appellate Court is the decree to be executed, the further question arises whether that decree incorporates the original date fixed for payment of the redemption money, or modifies the original decree by prescribing that the money shall be paid within six months of the appellate decree.

As the decree of the Appellate Court is drawn, there is in words no modification of the original order, but the decree of the first Court is simply confirmed as it stands. In Govindan v. Chapputti, which has been followed by the District Judge and by the learned Judge in the miscellaneous Court, a date (March 31st, 1887) was actually fixed in words to be the date within which the property must be redeemed. In the case before us the direction is that the plaintiff do pay the money "within six months from the date of this decree," and the decree is dated December 19th, 1887. The cases are, therefore, not quite parallel, though we doubt whether the fact that January 19th, 1888, is not mentioned in the decree as the date within which redemption must be made can affect the case.

For the appellants we were referred to the decisions in Noor Ali Chowdhuri v. Koni Meah(1), Rup Chand v. Shams-ul-jehan (7), and Daulat and Jagjivan v. Bhukandas Manekchand (2). These no doubt support the contention of the appellant, though the Bombay Court recognized the difficulty of holding that a confirmation and incorporation of a decree should be attended with a change of time, though nothing is said to that effect.

In coming to the conclusion referred to above, the different High Courts have not noticed the proviso to Section 93 of the Transfer of Property Act, by which it is provided that upon good cause shown, and upon such terms as it thinks fit, a Court may, from time to time, postpone the day fixed under Section 92 for payment to the defendant. This provision is in accordance with the practice of English law, and it gives the Court

---

(1) 18 C. 18.  (2) 11 B. 173.
(3) Before Kermar and Parker, JJ. Appeal against Appellate Order 23 of 1888.
JUDGMENT.—The plaintiff was barred by non-payment at the day fixed. The pendency of the appeal by the defendant could not have the effect of relieving plaintiff from redeeming within the proper time. The appeal is dismissed with costs.
full diisco-[173] tionary power to act, from time to time, as circumstances may require.

It is evident that, unless a plaintiff either makes use of this proviso, or applies for execution of the decree, he is liable to find himself deprived of the fruits of his decree by the defendant adopting the simple expedient of first preferring an appeal and then withdrawing it as soon as the time for redemption has expired. An instance of this is the case of Patloji v. Ganu (1).

The payment of the redemption money by the plaintiff within the time allowed by the decree is a condition precedent to his being allowed to execute the decree, and though a decree passed on an appeal preferred by the defendant may give plaintiff a fresh starting point of time within which he may execute, it does not necessarily, unless the appeal decree so declares, give him an extension of the time during which he must fulfil the condition precedent. Clearly the mere pendency of the appeal will not extend the time—Patloji v. Ganu (1).

When the defendant has preferred an appeal, he will naturally not be willing to accept from plaintiff the redemption amount, and if plaintiff pays it into Court his capital will be idle. The Legislature has, however, provided a remedy (Section 93, Transfer of Property Act), and plaintiff can either apply for extension of time during the pendency of the appeal, or, by applying for execution, compel defendant to furnish some adequate security which will protect his interests.

While recognizing, therefore, that the decree of the Appellate Court is the only decree capable of execution, we think it is open to doubt whether that decree, when it simply purports to incorporate and confirm the decree of the Court of first instance, can be held to vary that decree by the grant of further time during which redemption may be made, the time fixed by the original decree having already expired, without express words to that effect.

But, inasmuch as the decree of the Appellate Court becomes the final decree in the suit, we think that Section 92 of the Transfer of Property Act imposes upon that Court the duty (if the decree of the first Court has not been executed) of prescribing a date, within six months of the date of that decree, within which plaintiff must pay the redemption money to the defendant or into Court.

[174] In this respect the decree of the Appellate Court is defective, and we think the proper course would have been to give the plaintiff time before passing orders on the execution petition to apply to the District Court to amend the decree in accordance with the statutory directions contained in Section 92 of Act IV of 1882. Taking this view, we set aside the orders that have been passed and remand the application for execution to the Court of first instance, in order that the District Munsif may act in accordance with these directions.

The question not being without difficulty, we shall make no order as to costs.
SAMAYYA v. NAGALINGAM

15 M. 174.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Handley.

---

SAMAYYA AND ANOTHER (Plaintiffs), Appellants v. NAGALINGAM
AND OTHERS (Defendants and Fourth Defendant's Representatives),
Respondents.* [6th and 19th November, 1891.]

Transfer of Property Act—Act IV of 1882, Sections 67, 68—Usufructuary mortgage—
Dispossession of mortgagee—Suit for sale, Costs.

The plaintiff, at the request of the mortgagors, paid off part of the debt due on
a usufructuary mortgage to one of two mortgagees thereunder, and was placed
by the mortgagors in possession under a usufructuary mortgage of that part of the
mortgage premises which has been in the enjoyment of the mortgagee so paid off,
who executed a release.

The other mortgagee under the first mortgage obtained a decree for sale on the
footing of that instrument, and the mortgage premises were sold "subject to the
establishment" of the plaintiff's claim: the decree holder purchased and afterwards
assigned his rights to two of the present defendants who dispossessed the
plaintiff. The plaintiff now sued the mortgagees and mortgagees and the
defendants above referred to:

Held, the plaintiff was not entitled to a decree for sale.

Semble: the plaintiff might have sued to have the sale, which had taken place
at the suit of the first usufructuary mortgagee, declared to be invalid as against
him.

[R., 21 M. 476 (F.B.); D., 26 B. 241 (245) = 3 Bom. L.R. 876.]

SECOND appeal against the decree of G. T. Mackenzie, District Judge
of Kistna, in appeal suit No. 299 of 1889 modifying the [175] decree of
V. Suryanarayana, District Munsif of Guntur, in original suit No. 462 of
1888.

Suit on a usufructuary mortgage, dated 18th May 1885, and executed
in favour of plaintiff No. 1 (the father of plaintiff No. 2) by defendant
No. 5 and his sons defendants Nos. 6 to 8. The principal sum secured
by the mortgage was Rs. 225. The mortgage instrument, after reciting the
debt and describing the mortgage premises, proceeded as follows:

"We have delivered to your possession the two plots within these
boundaries, assessed at Rs. 10 and measuring acres 1-61 of seri wet land,
for five years from the year Puthelika to the end of the year Virodi.
"You shall, therefore, cultivate the said land as you like and be enjoying
the produce thereof in lieu of the interest on the above sum. We shall
ourselves be paying the water-cess and other sist payable for that land
every year. We shall pay you the said principal of Rs. 225 from the
other properties we possess within five years. If we fail to pay the
Sirkaa sist in any year, you shall regard this very bond as a sale-deed for
this land in consideration of the said amount of principal and take
possession of it. If we fail to pay you the amount of principal within the
15th Falguna Suddha of the said Virodi year, you shall regard this very
bond as a sale-deed and take possession of the land. If we pay you the
amount of principal before the 15th Chaitra Suddha of any year within
the said five years, you shall put us in possession of our land. Usufruc-
tuary mortgage bond executed to this effect with our consent. Dated
"as above."

* Second Appeal No. 418 of 1890.
The mortgage premises comprised in the above mortgage were referred to in the suit as plots B and E. These plots, together with other pieces of land referred to as plots A, C, D and F, were comprised in a usufructuary mortgage, dated 27th May 1879, and executed by defendants Nos. 5 and 6 in favour of the father of defendant No. 3, one Betra Pantulu and defendant No. 4. It was now alleged in the plaint that these three mortgagees originally held the lands in separate enjoyment, defendant No. 4 holding plots B and E; and that subsequently, viz., on 21st April 1885, Betra Pantulu transferred his interest in the mortgage to defendant No. 3 (a minor), who thereupon, his father having died, became the holder of plots A, C, D and F. It appeared that plaintiff No. 1 paid off defendant No. 4 at the [176] request of the mortgagees, who, having obtained a release from defendant No. 4, executed the mortgage now in suit on 18th May 1885 and placed plaintiff No. 1 in possession of plots B and E.

In 1886 defendant No. 3 by his mother and next friend obtained a decree against defendant No. 4 and the mortgagees for the balance of the money due under the mortgage of 27th May 1879 and for the sale of the mortgage premises. He accordingly brought the six plots of land to sale in execution, but the plaintiffs intervened and the land was sold "subject to the establishment" of the plaintiffs' claim to plots B and E. The decree-holder became the purchaser at the Court sale; and subsequently sold the land to defendants Nos. 1 and 2. These vendees then dispossessed the plaintiffs, who accordingly sued as above for the sum due on the mortgage of 18th May 1885 and for sale of the mortgage premises. Defendant No. 3 was joined as defendant by his mother and guardian.

The District Munsif passed a decree as prayed. On appeal the District Judge ruled that the plaintiffs in a suit on a usufructuary mortgage were not entitled to a decree for sale; but, observing that it was not disputed that the mortgage debt was a family debt, he proceeded to hold:—

"Plaintiffs may have a decree for the mortgage money against defendants Nos. 5, 6 and 7 and against the share in the family property of defendant No. 8, who is a minor, with interest at 6 per cent. per annum from date of plaint to date of payment. The judgment of the lower Court is modified accordingly. As this litigation has been caused by the erroneous action of defendant No. 3, he will bear all the costs throughout of all the parties."

The plaintiffs preferred this second appeal on the following grounds:—

"The plaintiffs are under the circumstance entitled to obtain a decree for sale of the properties B and E and the declaration prayed for in the plaint.

"The plaintiffs virtually stand in the position of defendant No. 4, and are entitled to all the rights which the said defendant had under his mortgage.

"The original mortgage was split up by the mortgagees themselves, and defendant No. 3 had by his conduct abandoned his rights over plots B and E. The said defendant and those who claim through him are now estopped [177] from contending that the plots B and E continued to be liable to the claims of the other two mortgagees.

"A suit for sale is maintainable under the terms of the contract.

"If the sale to defendant No. 3 under the decree is invalid, defendants Nos. 1 and 2 have no right to deprive the
plaintiffs of their possession, and the plaintiffs are at any
rate entitled to the declaration asked for and possession.
Even if the plaintiffs are mere puisne-mortgagees, they may be
permitted to redeem the prior mortgage, if it was really
subsisting in respect of plots B and E."
S. Subramanya Ayyar and P. Subramanya Ayyar, for appellants.
Anandacharlu, for respondents.

JUDGMENT.

It is not clear what the Lower Courts intended to find to have been
the effect of the division between the three original usufructuary mort-
gagees, the third defendant’s father, defendant No. 4 and Betra Pantulu.
The Munsif in paragraph 14 of his judgment finds that there was an
agreement that each mortgagee should discharge his debt from the usufruct
of the plots that went to his share, and that an agreement must be inferred
that one should have no further claim on the plots that went to the other.
If this were the effect of the division, then the plots B and E were only
subject to the fourth defendant’s share of the mortgage-debt, which was
extinguished by his release, and therefore they came into the first plaintiff’s
hands upon the occasion of the usufructuary mortgage to him free from
any claim under the original mortgage and could not be sold in execution
of the third defendant’s decree upon that mortgage. But the above
finding of the Munsif is inconsistent with another part of his judgment,
paragraph 20, where he holds that every part and parcel of the mortgaged
property is liable to every pie of the debt, which again appears to be
inconsistent with the last part of the same paragraph. The District Judge
appears to agree with the Munsif as to the fact of the division, but has
not found distinctly as to its effect. But we think it is not necessary
to call for a finding on this question, as the case can be disposed
of on the facts as found. We agree with the District Judge that as
usufructuary mortgagees the plaintiffs cannot sue for sale of the
mortgaged property. It is argued for the appellants that the
circumstances mentioned in Section 63 of the Transfer of Property Act
having occurred, that section gives them the right to sue for the mortgag-
debt, and therefore, by implication a right to sue to enforce the debt by
sale of the mortgaged property. We cannot concur in this reasoning,
assuming the circumstances contemplated by Section 63 exist in this
case.

Sections 67 and 68 deal with three kinds of rights of mortgagees,
_viz._, foreclosure, sale and suit for the money due, Section 67 being
concerned with the two first and Section 68 with the last. Section 68
declares the right of the mortgagee to sue for the mortgage money in
certain cases, but it does not affect the provisions of Section 67 as to his
right to foreclosure or sale, and that section expressly denies to a
usufructuary mortgagee the right to sue for foreclosure or sale. It is
true third defendant was also only a usufructuary mortgagee and therefore
had no right to sue for sale of the mortgaged property, and the decree
for sale and the sale under it might have been set aside as regards plots
B and E at the instance of plaintiffs who were no parties to that suit.
Plaintiffs might, therefore, have sued to have the sale declared invalid as
against them and as a necessary consequence to be put in possession of
the plots B and E, of which they have been illegally dispossessed. This,
however, is not the suit plaintiffs have brought, and we do not think
the present suit can be allowed to be converted into one of that nature.
They have mistaken their remedy and must be content with the decree for the money which they have obtained and against which there is no appeal.

It is unnecessary to decide whether the District Judge was right in holding that the circumstances contemplated by Section 68 of the Transfer of Property Act as entitling a mortgagee to sue for the mortgage money exist in this case, as there is no appeal against that part of the decree. The appeal fails and is dismissed without costs, as the conduct of third defendant’s guardian in bringing the property to sale and of first and second defendants in dispossessing plaintiffs was illegal.

On behalf of third defendant, a minor, a memorandum of objections is presented by his guardian objecting to that part of the decree of the Lower Appellate Court which makes him liable for all the costs of all parties throughout. This is clearly wrong. The minor cannot be made personally responsible for the act or defaults of his guardian or of the first and second defendants.

We think the proper decree as to costs is that all parties do bear their own costs throughout. We shall modify the decree of the Lower Appellate Court accordingly. We make no order as to costs of the memorandum of objections.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

OAKSHOTT AND OTHERS (Plaintiffs) v. THE BRITISH INDIA STEAM NAVIGATION COMPANY (LIMITED), (Defendants).*

[4th and 8th December, 1891.]

Presidency Small Cause Courts Act—Act XV of 1882, Sections 37, 69—Application to Full Bench for retrial—Case stated.

The Full Bench of a Presidency Court of Small Causes cannot state a case for the opinion of the High Court on an application for a new trial made under Act XV of 1882, Section 37.

[D., 20 M. 358 (359) = 7 M. L.J. 140.]

CASE stated under Section 69 of Act XV of 1882 and Section 617 of the Civil Procedure Code by the Judges of the Court of Small Causes, Madras, in Small Cause Suit No. 22581 of 1890 on their file.

The Acting Advocate-General (Hon. Mr. Wedderburn) for plaintiffs.

Mr. K. Brown, for defendants.

JUDGMENT.

The first question referred to us by the Full Bench of the Small Cause Court is whether a hearing of an application for a new trial by a Full Bench under Section 37 of the Presidency Small Cause Act XV of 1882 can be said to be the hearing of a suit within the meaning of Section 69 of the said Act so as to entitle the Court to state a case for the opinion of the High Court either on its own motion or at the requisition of either party.

Section 69 of the Presidency Small Cause Act provides for a reference to the High Court in two cases (1) when two or more Judges sit

* Referred Case No. 32 of 1891.
together in any suit and differ in their opinion as to any question of law or usage having the force of law, and (2) if any such question arises in any suit in which the subject-matter is over Rs. 500 in value and either party requires such reference. The concluding clause of the section provides for the course to be adopted by the Court in both of the above cases: it is to draw up a statement for the opinion of the High Court of the facts of the case, and either postpone judgment or deliver judgment contingent upon such opinion.

It was urged by the learned Counsel for the defendant company that the words "in any suit" were wide enough to include an application for a new trial under Section 37, and we were referred to the judgment of Sir Barnes Peacock in Ishan Chunder Singh v. Haran Sirdar (1) in which it was ruled that an application for a new trial under the Mofussil Small Cause Act XI of 1865 was a point in the proceedings previous to the hearing of a suit within the meaning of Section 1, Act X of 1867, and that the opinion of the High Court upon a question of law could be asked for upon such an application, per contra we were referred by the learned Advocate-General to the remarks of Sargeant, C.J., and Farran, J., in Ralli Brothers v. Goculbhai Mulchand (2).

The language used in Section 1, Act X of 1867, appears to us clearly distinguishable from that used in Section 69, Act XV of 1882. Although an application for a new trial may undoubtedly be "a point in the proceedings previous to the hearing of a suit," yet the words "in any suit" in the later Act appear to pre-suppose that a suit is actually pending. If the application for a new trial is rejected, the suit is not revived, and it becomes impossible to give effect to the direction in the last clause of Section 69, viz., to reserve judgment or give judgment contingent upon such opinion. We are fortified in this opinion by the fact that the High Court of Calcutta has taken a similar view in Nusservanjee v. Pursutum Doss (3), in which it was held, following the principle laid down in Hall v. Joachim (4), that if in hearing an application for a new trial the Judges thought it advisable to take the opinion of the High Court, their proper course was to grant a new trial, so that the point could be properly [181] raised. In an application for a new trial no judgment could be given which would be a contingent judgment within the meaning of the Presidency Small Cause Act. We must answer the first question referred to us in the negative. We cannot, therefore, consider the other points referred.

Costs in this Court to follow the result of the reference.

Champion and Short—Attorneys for plaintiffs.
Barclay, Morgan and Orr—Attorneys for defendants.

15 M. 181.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

KERALA VARMA (Plaintiff), Appellant v. CHADAYAN KUTTI AND OTHERS (Defendants), Respondents.* [12th November, 1891.]

Court Fees Act—Act VII of 1870, Section 10, Clause II, Section 12, Clause II.

The plaintiff sued four persons to recover, with arrears of rent, possession of three parcels of land and obtained a decree in the Court of a District Munisif.

* Second Appeals No. 1952 of 1890 and 527 of 1891.

(1) 11 W.R. 525. (2) 15 B. 376. (3) 11 C. 298. (4) 12 B.L.R. 34.
The suit was valued at Rs. 489-9-0. Defendant No. 4, who claimed to be entitled as jemmi to one of the parcels, preferred an appeal. The District Judge held that the suit should have been valued at Rs. 1,164-8-0, and he made an order that additional Court Fees should be paid accordingly; the order not having been complied with, he made an order “original suit rejected.” He subsequently referred the appeal for disposal to a Subordinate Judge, who accordingly passed a decree, allowing the appeal of defendant No. 4 with costs. On appeal against the above order and decree:

Heid, that the order of the District Judge was irregular and the appeal should be restored to the file of the Subordinate Judge to be disposed of according to law.

SECOND Appeals against the order and decrees of J. P. Fiddian, Acting District Judge of North Malabar, and of C. Gopalan Nayyar, Subordinate Judge of North Malabar, in appeal suit No. 278 of 1889, being an appeal against the decree of S. Subramanya Ayyar, District Munisif of Cannanore, in original suit No. 278 of 1889.

The plaintiff sued four defendants to recover, with arrears of rent, three parcels of land demised to the karnavan of defendants 182 Nos. 1 and 2. The District Munisif passed a decree for the plaintiff, against which defendant No. 4, who asserted a jemmi right over part of the land in question, preferred an appeal.

In that appeal the Acting District Judge of North Malabar, considering that the suit had been improperly valued, made an order on 14th March 1890 as follows:

“Plaintiff will be called on to pay Rs. 56-10-0, balance payable on all three items, on or before the 7th June, or show cause; or his suit will be dismissed.”

On 7th July 1890 he made a further order as follows:—“Respondent (plaintiff) appeared on 2nd July 1890, but failed to show cause. Original suit rejected.”

On 26th July 1890 the Acting District Judge referred the appeal to the Subordinate Court for disposal. The Subordinate Judge considered the above orders to have been made under Court Fees Act—Act VII of 1870,—Section 10, Clause II, and Section 12, Clause II, and said “as the original suit has been wholly rejected by the above order of the District Judge, it seems to me that the fourth defendant’s appeal should be allowed with costs,” and decreed accordingly.

The plaintiff preferred second appeal No. 1252 of 1890 against the order of the Acting District Judge and second appeal No. 527 of 1891 against the decree of the Subordinate Judge.

Sankara Nayar and Ryru Nambiar, for appellant.

Mr. Gantz, for respondents.

JUDGMENT.

The order of the District Judge in dismissing the suit for failure of plaintiff to pay additional stamp duty demanded was irregular for the following among other grounds. In the first place he had no jurisdiction over the whole subject-matter of the suit, the appeal by fourth defendant relating to one item only. Secondly, the appeal had not been admitted when the order was passed, and therefore the matter was not before the Judge in such a shape that he had jurisdiction to make any order. The order of the Subordinate Judge reversing the decree so far as the fourth
defendant was concerned after the original suit had been already dismissed was clearly ultra vires. We set aside the decrees and orders both of the District Judge and of the Subordinate Judge and direct the Subordinate Judge to replace the appeal on his file and to dispose of it according to law. Costs to follow result.

18 M. 183 = 2 M.L.J. 19.

[183] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

NARAYANA AND OTHERS (Defendants), Appellants v. RANGA (Plaintiff), Respondent.* [17th July and 27th October, 1891.]

Religious office, transfer of—Transferee not solely entitled in succession to transferrer.

In a suit against the muqtoress or trustee of a temple, the plaintiff sought a declaration of his right to perform the puja in the temple, and an injunction restraining the defendants from interfering with the exercise of such right.

It appeared that the office of pujari was hereditary in the plaintiff’s family, that it had been held by the plaintiff’s undivided uncle (deceased), that he transferred it in 1880 to the plaintiff’s father (deceased), in succession to whom the plaintiff now claimed it. The High Court called for a finding as to whether the plaintiff’s father was the sole heir next in succession to his transferrer, and it was found that he had three brothers:

Held, that the transfer of the office to the plaintiff’s father was invalid, and the suit should be dismissed.

[Appr., 19 M, 211 (214)= 4 M.L.J. 289; R., 27 M, 192 (196)= 13 M.L.J. 341; 10 Ind. Cas. 399 (400).]

SECOND Appeal against the decree of S. Subbayyar, Subordinate Judge of South Canara, in appeal suit No. 380 of 1888, affirming the decree of M. Mundappa Bangara, District Munsif of Karkal, in original suit No. 374 of 1887.

The plaintiff alleged that the office of pujari in a certain temple was hereditary in the plaintiff’s family, that the office was held by Baba Batta (deceased), that he, in 1880, transferred it to the father (deceased) of the plaintiff, who now sued the muqtoress of the temple for a declaration of his right to perform puja, and for an injunction restraining them from interfering with the exercise of this right.

The transfer to the plaintiff’s father was evidenced by a Mukiarnama filed as Exhibit A, whereby, as well as the office in question, certain other rights and some property was also assigned, and it was provided that the assignee should pay various creditors therein named.

The District Munsif passed a decree as prayed, which was affirmed on appeal by the Subordinate Judge.

[184] The defendants preferred this second appeal.

Ramachandran Rau Saheb and Pattabhirama Ayyar, for appellants
Bhashyam Ayyangar and Narayana Rau, for respondent.

JUDGMENT.

It is argued that the finding that the plaintiff’s family had an hereditary right to the office ought not to be accepted, and our attention is drawn to Exhibits I, II, F, III, IV, and V, and also to Exhibits O, VI to XVII. Nothing is urged to show that they have been misconstrued, or not duly

* Second Appeal No. 686 of 1890.
considered by the Court below. Exhibit I only shows that the award A 
was not thought to favour the claim set up by the then plaintiff. The 
words in Exhibit II "you should act with consent. &c.," are not inconsis-
tent with the plaintiff's case. They only imply that in the conduct of the 
puja, the son was to act subject to the direction and control of the mock-
tersors. As regards Exhibits F and III, the ground on which the suit to 
which they refer was dismissed was that there had been a prior partition. 
Though the District Munsif dealing with the review petition remarks that 
"the office is dependent on the pleasure of the dharmakartas," we cannot 
say that the Courts were wrong in not attaching weight to the remark in 
the face of the other evidence in the case. As to Exhibits IV, V, and 
N, the Subordinate Judge is not in error in saying that the finding in 
Exhibit N was not set aside by the High Court. As to the security-bonds, 
we agree with the observation of the Subordinate Judge. On the whole 
we are satisfied that there are no grounds for questioning the finding as to 
the matter of hereditary right.

The next question argued is that the office was not alienable, and 
that no effect ought to be given to Exhibit A.

It has no doubt been established by a series of decisions that the 
sale of a religious office is illegal—Rajah Vurmah Valia v. Ravi Vurmah 
Kunhi Kutty (1) and Kuppa v. Dorasani (2). But it is urged that the 
plaintiff's father, the grantee under Exhibit A, was the nearest heir of 
Baba Bhatta, who is now dead, and that the transfer in his favour was 
in the nature of a relinquishment by way of anticipating his legal right. 
The District Munsif found that the plaintiff's father was nearer in the 
line of descent than defendant No. 15, who was appointed by the mock-
tersors.

[185] On this point the Subordinate Judge recorded no opinion, though 
the Munsif's finding was objected to. Before determining whether the 
implement A is or is not valid, we shall ask the Subordinate Judge to find 
whether at the date of Exhibit A the plaintiff's father was the sole heir 
next in succession of Baba Bhatta. Finding is to be returned within six 
weeks from the date of receipt of this order, when seven days, after the 
posting of the finding in this Court, will be allowed for filing memorandum 
of objections.

Fresh evidence may be taken by the Subordinate Judge by consent. 
The Subordinate Judge returned a finding to the effect that the 
plaintiff's father had three brothers.

This second appeal having come on for final hearing, the Court 
delivered judgment as follows:—

JUDGMENT.—(FINAL)

We have already decided that the office in question is an hereditary 
one. The question now is whether the transfer of it by the last holder to 
the plaintiff's father was a valid one. According to general principles, a 
religious office cannot, prima facie, be made the subject of alienation. The 
succession to such an office is governed, in the first instance, by the 
will of the founder, and, in the absence of direct evidence on that 
point, by usage of the particular institution from which the founder's will 
may be inferred. A religious office appears to us to stand with reference 
to alienability on a different footing from private property. It was argued
at the last hearing on the authority of the case of Mancharam v. Pran-
shankar (1) that the holder of a religious office may transfer it to
one who is in the line of descent, whether he be the next heir or a
possible future heir, and that the plaintiff's father was, in the present
instance, the next heir. The finding, however, returned by the Subordi-
nate Judge shows that he was not the sole next heir, because he had three
brothers. In Kuppa v. Dorasami (2) it is observed by the learned
Judge, with reference to a contention that the alienation was of the
same caste and sect as the alienor: "To hold so would tend to
public mischief in inducing needy incumbents of hereditary religious
offices, who desired to sell them to give a dishonest recognition to
qualifications which, in fact, were not the qualifications demanded by
[186] the nature of the office." Unless the alienor is the sole heir, the
alienor might be under the temptation to make the office the subject of
bargain and thereby defeat the intention of the founder. It was in this
view that we called for a finding at the former hearing. We are not
prepared to dissent from the dictum above quoted, and to hold that in the
absence of special usage an alienation would be valid if made in favour
of any person other than the sole immediate heir.

It was then argued that in the case before us the brothers of the
plaintiff's father consented to the alienation in his favour, and that there
is evidence to that effect on the record.

On looking at the evidence of Lakshman Joishi, one of the brothers
we find no distinct admission regarding the office. Moreover this point
was not taken at the last hearing, nor were we asked to call for a finding
as to the alleged consent. We cannot at this stage allow this point to be
raised and order a new trial regarding it. Of course it is not intended
that those who may have a claim by hereditary right, the legal heir,
should be in anywise prejudiced by this judgment. We must reverse
the decree of the Courts below and dismiss the suit. Under the circum-
stances we direct each party to bear his own costs throughout.

---

**15 M. 186.**

**APPELLATE CIVIL.**

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr.
Justice Wilkinson.

**MUTTAKKE AND OTHERS (Defendants Nos. 1 to 16 and 18 to 41),
Appellants v. THIMMAPPA AND OTHERS (Plaintiff), Respondents.**

[6th October and 18th November, 1891.]

**Aliyassanta Law—Specific Relief Act—Act I of 1877, Section 42—Declaratory relief—
Limitation Act—Act XV of 1877, Schedule II, Articles, 127, 144.**

In a suit in which the plaintiffs sought declarations that they were members of
an undivided Aliyassanta family with the defendants, that certain property
belonged to the family, and that plaintiff No. 1, the senior member of the family,
[187] was entitled to have the lands registered in his name, the defendants
denied the allegations in the plaint, and pleaded that the suit for declarations only
was not maintainable, and that it was barred by limitation. It was found that
the plaintiffs had separated themselves from the defendants, and had for more than
twelve years been excluded to their own knowledge from the joint family property:

*Appeal No. 131 of 1890.

(1) 6 B. 298.

(2) 6 M. 76.
Held, that, if as alleged by the plaintiffs, plaintiff No. 1 was the de jure ejaman of the family, he was entitled to the possession and management of the family property, and a suit for a mere declaration of his right would not lie—Chandu v. Chatur Nambiar, 1 M. 381, distinguished.

Per cur: "We are of opinion that Article 127 applies to this case, and that the plaintiffs, having separated themselves from the defendants, have for more than twelve years been to their own knowledge excluded from the joint family property, and that their suit to enforce a right to share therein is barred"—Mahalinga v. Mariyamma, 12 M. 462, distinguished.


 Appeal against the decree of S. Subbayyar, Subordinate Judge of South Canara, in original suit No. 41 of 1888.

The plaintiffs claiming to be members of an undivided Aliyasantana family with the defendants, prayed for a declaration to this effect, and for declarations that certain property referred to in the plaint was their joint family property, and that plaintiff No. 1 was the senior member of the family, and as such entitled to have the revenue registry of the lands changed into his name. The plaint further set out that Sanka Rai, who was the son of Akkamma, a member of the plaintiffs' branch of the family, had managed the property till his death in 1887 on behalf and by the consent of plaintiff No. 1. The defendants denied the various allegations in the plaint, alleged that the plaintiffs had never been in possession of the property in question, and pleaded that the suit was not maintainable as being for declarations only, and because other persons being interested in the claim should have been joined as plaintiffs, and also that it was barred by limitation.

The Subordinate Judge framed the following issues:—

(i) Are the plaintiffs and defendants members of an undivided Aliyasantana family?

(ii) Are the plaintiff properties the joint family property of the said family?

(iii) Did Sanka Rai referred to in the plaint manage the plaintiff lands on behalf of and with the consent of the first plaintiff?

(iv) Were the properties Nos. 8, 9, 10, 16 and 17 the self-acquisition of the deceased Sanka Rai?

(v) Whether Sanka Rai was managing the plaintiff lands on behalf of and with the consent of the first plaintiff as stated in paragraph 2 of the plaint? And is the action barred by limitation?

(vi) Is the suit unsustainable for want of the permission referred to in Section 30 of the Code of Civil Procedure in consequence of plaintiff's omission to adopt the preliminary procedure prescribed by the said section?

(vii) Is the suit for a declaratory decree maintainable?

The Subordinate Judge recorded findings on all these issues in favour of the plaintiffs. With reference to the first and second he cited Munda Chetti v. Timmaju Hensu (1) and Korapen Nayar v. Chennan Nayar (2); with reference to the third he cited Nambiantan Nambudiri v. Nambiantan Nambudri (3) and Mahalinga v. Mariyamma (4): as to the fifth he said "I have already stated that the management of Sanka Rai must have been on behalf of the de jure ejaman, who is the eldest among the plaintiffs; and

(1) 1 M.H.C.R. 380.
(2) 6 M.H.C.R. 411.
(3) 2 M.H.C.R. 110.
(4) 12 M. 462.
"if the possession of the junior members is the possession of the ejamans, there is manifestly no bar by limitation," and his judgment proceeded as follows:

"If the decision in Appasami Odayar v. Subramanya Odayar (1) is applicable to the case of Aliyasantana properties, it would appear that the omission of the plaintiffs' branch to take up the actual ejamanship when it came to their turn about eighteen or twenty years ago on the death of Appa Rai would constitute laches; but I do not think that Clause 13 of Section 1 of the Limitation Act XIV of 1859 is applicable to Aliyasantana families; for it refers to a suit for a share of family property not brought within twelve years from the date of the last participation of profits. The right of an Aliyasantana member is a right to maintenance in the family house and to the benefit enjoyment of the property so long as he remains there—Subbu Hegadi v. Tongu (2).

No share can be claimed in Aliyasantana properties as declared by the judgment in Munda Chetti v. Timmaju Hensu (3) and therefore the Clause 13 is inapplicable. The said clause was further held to be inapplicable to a suit brought for division after twelve years—Subhajyan v. Sankara Subhajyan (4). The same remark applies to Article 127 of the present Act and the corresponding article of the previous Act.

A suit for ejamanship, if regarded as a suit relating to a right to immovable property, would be barred by the rule prescribed in Clause 12 of Section 1 of Act XIV of 1859, which prescribes twelve years from the date of the cause of action. The cause of action to plaintiffs accrued when the defendants denied the plaintiffs' membership of the family in the Kottala proceedings.

The period of limitation prescribed by the present Act, Article 42, and the previous Act, Article 143 is twelve years. The rulings under these sections con-[189] template cases of possession and dispossession, in which case it had been held that it was for the plaintiff to prove possession within twelve years.

In cases falling under Article 144 it has been held that nothing but hostile possession in defendants for the period of twelve years accompanied by a denial of the plaintiffs' rights made to plaintiffs' knowledge can constitute adverse possession—Sayad Nyamtu v. Nana (5), Sarsuti v. Kunj Behari Lal (6), Karan Singh v. Bakar Ali Khan (7), Dadoba v. Krishna (8) Chandmal v. Bachraj (9). In one case for thirty years there was admittedly no possession in plaintiff, and yet it was held insufficient to create a bar—Nilo Randhara v. Govind Ballal (10). In another case non-participation in profits was held insufficient to create exclusion. From 1863 to 1972 the plaintiff (a Government servant) did not participate—Dinkar Sadasiv v. Bhikaji Sadasiv (11). The decisions in Hansji Chhipa v. Valabhb Chhipa (12) and Kali Kishore Roy v. Dhununjoy Roy (13) show that mere lapse of any time would constitute no bar such as that contemplated by the Act of limitation. Maintenance at the family house which an Aliyasantana man can claim cannot be refused except after demand Narayan Rao Ramchandra Pant v. Ramabai (14) followed in Ramanamma v. Sambayya (15) which overruled a former decision in Abbakku v. Ammu

(7) 5 A. 1. (8) 7 B. 34. (9) 7 B. 474.
(13) 9 C. 228. (14) 9 B. 415. (15) 12 M. 347.
1891

NOV. 18.

APPEL-

LATE

CIVIL.

5 M. 186.

15 Mad. 190 INDIAN DECISIONS, NEW SERIES [Vol.

"Shettali" (1). Eajamanship, which admittedly accrued in 1872 could not be barred, because the defendants did not profess to hold adversely.

If it is said that in 1859 hostile possession was asserted against "a member of the plaintiffs' branch to the plaintiffs' knowledge, a cause of action accrued, such cause of action was only a cause of action to claim a share, which having been subsequently declared not allowable, the plaintiffs cannot be found fault with. I find this issue also in plaintiffs' favour.

"Sixth Issue."—The objection under Section 30 of the Code of Civil Procedure is untenable. The right claimed is not one that accrues to the whole of the members of the plaintiffs' branch.

"Seventh Issue."—A declaratory suit is maintainable in such cases "vide Tirumalathammal v. Venkataramanaiyan (2). I find this last issue also in plaintiffs' favour."

Mr. D'Rosario and Narayana Rau, for appellants.

Ramachandra Rao Saheb and Fernandez, for respondents.

JUDGMENT.

This is a suit by certain persons claiming to be members of an undivided Aliyasantana family for a declaration (i) that plaintiffs and defendants are members of an undivided family, (ii) that plaintiff No. 1 is the senior member of the family, and as such entitled to get the kudtala, or revenue registry of the lands transferred to his name.

The defendants denied that the plaintiffs and defendants were members of an undivided Aliyasantana family, and that the property was joint family property, and asserted that for more than [190] a century the property had been in their exclusive possession, and that a declaratory suit would not lie.

The Subordinate Judge held that a declaratory suit was maintainable, and that the suit was not barred by limitation. These two points have been fully argued before us, and we are of opinion that the decision of the Subordinate Judge cannot be maintained.

The case on which the Subordinate Judge relied in support of his opinion that a declaratory suit would lie, Chandra v. Chathu Nambiar (3) is clearly distinguishable from the present case. That was a suit by the karnavan of a Malabar tarwad, for a declaration that certain property was the common property of the tarwad, and that the plaintiff was entitled to transfer of the revenue registry of the land to his name. All that this Court decided was that, under the circumstances of the case, the plaintiff was entitled to a declaration that the property was the property of the tarwad, so that he might move the Revenue authorities to register his name. But the Collector would not have been bound to effect the transfer. He was no party to the suit, and, though, no doubt, he would respect the decree of the Court, he may have had reasons which would have justified him in refusing to comply with the application even when supported by the decree. Moreover in that case the status of the plaintiff as karnavan of the tarwad was not denied, the defendants relying on an alleged family custom that self-acquisitions of members did not on their death lapse to the tarwad. In this case the status of the plaintiffs as members of the family is denied. The plaintiffs have admittedly been for a long time living on their own "anaytaka" property apart from the defendants, who had sole undisturbed possession and enjoyment of the plaint.

(1) 4 M.H.C.R. 137. (2) 2 M.H.C.R. 378 (381). (3) 1 M. 361. 482
property. If, as is alleged by the plaintiffs, the plaintiff No. 1 is the de jure ejaman of the family, he is entitled to the possession and management of the family property, and a suit for mere declaration of his right will not lie.

The fifth issue as originally framed ran thus: "Were plaintiffs in possession or management within twelve years, and is the suit barred by limitation?" Subsequently the plaintiffs put in a petition praying that the issue might be amended so as to show that the question at issue was "when were the plaintiffs excluded from sharing the joint family property." The amendment was [199] opposed, but the Subordinate Judge amended the issue as follows: "Whether Sanka Rai was managing the plain lands on behalf of and with the consent of the plaintiff No. 1 and is the action barred by limitation." He held that though Sanka Rai had no express permission to manage on behalf of any of the plaintiffs, yet a permission must be presumed by law and relied upon Mahalinga v. Mariyamma[1]. The case is not in point, as it was not questioned there that the senior female was the de jure ejaman, and the only question was whether, according to the general Aliyasantana usage, the senior male excludes the senior member of the family when she is a female. In the circumstances of that case, it was, the Court held, rightly presumed that management was by the sufferance of the ejaman for the time being. We do not think that the learned Judges who decided that case intended to hold, as the Subordinate Judge appears to think, that no lapse of time can affect the rights of a person who claims to be the ejaman of an Aliyasantana family.

With reference to Article 127 of the second schedule of the Limitation Act, the Subordinate Judge appears to hold that it is not applicable to the present suit, because no definite share can be claimed in Aliyasantana properties. No doubt it was decided in Munda Chetti v. Timmaju Hensu[2] that the Aliyasantana law does not allow compulsory division, but this is not a suit for a share, nor does Article 127 refer to such a suit. What the plaintiffs really seek by the present suit is to enforce their right to share in joint family property. Assuming for the sake of argument that the property is joint family property, the defendants' pleader contends that the plaintiffs have been excluded therefrom for a century. It appears to us that the only conclusion which can be come to upon the evidence is that the plaintiffs' branch long ago severed their connection with the defendants' branch. They have for the last fifty or sixty years lived apart on the property acquired by their paternal ancestors. There is no reliable evidence to show that they have, within the memory of the present generation, had any community of property with the defendants' branch. The evidence of the plaintiffs' witnesses as to visits paid to Pavur Gutta, cultivation work carried on there, and joint performance of ceremonies is vague, contradictory and unsatisfactory.

[192] We are not prepared to assent to the proposition laid before us by Mr. Ramachandra Rau Saheb that a member or a branch of an Aliyasantana family is, after complete separation from the parent branch for any number of years, entitled on demand to participate in the original property of the family. To entitle a person or a branch to retain their rights the connection with the family must be kept up, either by exercise of the right to share in the joint family property by joining in the sacra, by intermarriage or otherwise. In the present case the whole evidence points

---

(1) 12 M. 462.
(2) 1 M.O.H.E. 380.
to separation or exclusion, or both. The right of the three branches into which Akkamma’s family has become divided was admittedly denied so long back as 1869, and though the plaintiffs' branch purchased the rights of the excluded branch in the same year, they have never taken any steps to enforce the right. It is, however, argued that the right of the plaintiffs' branch has never been actually denied, and that in an Aliyasantana family the possession of one member being the possession of all, it must be held that the defendants had possession on behalf of the plaintiffs, and that such possession has never become adverse. It has been held by the Privy Council that Article 144 of the Limitation Act only applies where there is no other article which specially provides for the case. But even if Article 144 did apply to this case, we should hold that the possession of the defendants had long since become adverse to the plaintiffs, as it is evident that the defendants have held the land on their own behalf and not on behalf of the plaintiffs. But we are of opinion that Article 127 applies to this case and that the plaintiffs having separated themselves from the defendants have, for more than twelve years, been to their own knowledge excluded from the joint family property and that their suit to enforce a right to share therein is barred.

We reverse the decree of the Subordinate Judge and dismiss the plaintiffs' suit with costs throughout.

15 M. 193 (F.B.)

193 APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, and Mr. Justice Shephard.

REFERENCE BY THE BOARD OF REVENUE UNDER SECTION 46 OF THE INDIAN STAMP ACT, 1879.*

[13th October, 1891.]

Stamp Act—Act I of 1879, Section 3, schedule I, Article 13—Bond—Attestation.

A company agreed to pay £220,000 in five instalments for the cost of constructing a railway, on the terms, among others, that debentures on the railway should be handed over to the company on each payment being made, and that in the event of the other party failing to perform his liabilities as to the construction of the railway, the company should be entitled to sell the debentures, and also to recover damages and also to discontinue payments of the above instalments. It was also provided that the company should be at liberty to retain £40,000 as compensation for risk, expenses, &c. The agreement was sealed with the seal of the company in the presence of two Directors and the Secretary:

 Held, that the instrument was liable to stamp duty as a bond for £220,000 under Act I of 1879.

[R., 11 Bcm. L.R. 386 (389).]

CASE referred by the Board of Revenue under Section 46 of the Indian Stamp Act, 1879.

The case was stated by the Board of Revenue as follows:—

"The Debenture Company bind themselves to pay £220,000 minus £40,000. It is doubtful whether the stamp should be calculated on the £220,000 as previously decided by the Board or on the net amount only or on what and under what article of Schedule I, if not under Article 13

* Referred Case No. 15 of 1891.
as a bond; and the Board would be glad of the decision of the High Court on this point."

The document in question was an agreement, dated the 20th December 1889 and made between Richard Woolley of the one part and the Union Debenture Company thereinafter called the Debenture Company of the other part. It recited an indenture, dated 26th February 1886, and made between the Secretary of State for India of the one part and the Nilgiri Railway Company of the other part, whereby it was agreed among other things that the Railway Company should construct a railway on land to be provided by the Secretary of State and pay to the credit of the Government of Madras Rs. 25,00,000 as therein provided. It further recited an agreement made between the Nilgiri Railway Company of the one part and Richard Woolley of the other part, whereby it was among other things agreed that Richard Woolley should upon receiving possession from the Railway Company of the land required for the Railway, construct the same and that the Railway Company should create and issue debentures to the amount of £220,000 to bear interest and be secured as therein provided, and that the said debentures should be issued to Richard Woolley, and that the Railway Company should pay the sum of Rs. 25,00,000 to Richard Woolley, or as he should direct in the manner provided for in the agreement of 26th February 1886, and that Richard Woolley should subscribe or procure substantial subscriptions for the whole share capital of Rs. 25,00,000 of the company. The document proceeded as follows:

"And whereas the said Richard Woolley has applied to the Debenture Company to supply him with funds for the purpose of making all requisite payments in respect of the subscription to the shares of the Railway Company and in respect of the other obligations incident to the said recited agreement which the company have agreed to do to the extent in the instalments subject to the deductions and otherwise in the manner hereinafter appearing upon the terms of the said Richard Woolley selling and making over to the Debenture Company in manner hereinafter appearing the whole of the said debentures for two hundred and twenty thousand pounds so to be issued to him as aforesaid and such fully paid up shares of the Railway Company as hereinafter mentioned and upon the other terms and conditions hereinafter appearing. Now it is hereby agreed as follows that is to say:

1. The Debenture Company shall pay and provide for the purposes of this agreement the sum of two hundred and twenty thousand pounds in the instalments and at the dates following that is to say:

- £25,000 on or before the 21st day of December 1889.
- £40,000 on or before the 31st day of March 1890.
- £50,000 on or before the 31st day of October 1890.
- £50,000 on or before the 31st day of March 1891.
- £55,000 on or before the 31st day of October 1891.

Provided always that the first second third and fifth of the said instalments shall be subject to the deductions hereinafter particularly mentioned.

2. Upon and simultaneously with the making by the Debenture Company of the aforesaid payments the said Richard Woolley shall cause to be handed to the Company for their own absolute use and benefit the whole of the debentures so issued to him as aforesaid in equivalent amounts and by the like instalments that is to say:
1891
OCT. 13.
FULL
BEACH.
15 M. 193
(F.B.).

£25,000 such debentures on or before the 21st day of December 1889.
£40,000 such debentures on or before the 31st day of March 1890.
£50,000 such debentures on or before the 31st day of October 1890.
£50,000 such debentures on or before the 31st day of March 1891.
£55,000 such debentures on or before the 31st day of October 1891.

[195] 3. For the purposes of these presents the whole of the said
debentures shall forthwith or as soon as the same are issued be delivered
by the Railway Company with the concurrence of the said Richard
Woolley to the branch at Madras of the Agra Bank Limited for transmis-
sion by such Bank to its Head Office in the City of London to be held
by the said Bank as stakeholder for the purposes hereinafter mentioned.

[Clause 4 prescribed the mode in which the payments were to be
made by the Debenture Company, and provided that on each payment
being made an equivalent amount of debentures was to be delivered to the
Company. Clause 5 contained provisions as to the form of the debentures
and the mortgage securing the same. In Clause 6 the instrument dealt
with the accrual and payment of interest on the debentures.]

7. The sums paid by the Debenture Company to the said Richard
Woolley shall be duly applied by him first in payment of all moneys
payable by him or by the subscribers procur’d by him in respect of the
said shares in the Railway Company and subject thereto in fulfilling the
other obligations under these presents and his said agreement with the
Railway Company.

8. In addition to the said debentures and as further consideration
for the payments so to be made by the Debenture Company as aforesaid
the said Richard Woolley shall so soon as the shares in the Railway
Company shall have been fully paid up make over and transfer
to the Debenture Company or as they shall direct. Three thousand such
fully paid-up shares of Rupees one hundred each such shares shall unless
the Debenture Company and the said Richard Woolley shall otherwise
agree be those numbered 8 to 3007 inclusive.

[Clause 9 provided for the contingency of a public issue of the
debentures under the agreement with the Railway Company.

9(a). The said Richard Woolley shall finish and equip the said rail-
way in accordance with his said agreement with the Railway Company
within the time limited by the said indenture of the twenty-sixth February,
one thousand eight hundred and eighty-six, or such further time (if any)
as may be allowed by the Secretary of State and shall otherwise perform
and fulfill the obligations and liabilities undertaken by him in his said
agreement with the Railway Company and shall use his best endeavours
to procure the said railway to be duly started and worked and the said
debentures of the company and the shares thereof to be thereby rendered
valid and marketable securities and property.

10. In case the said Richard Woolley shall fail to perform and fulfil
the obligations and liabilities mentioned in the last preceding clause the
Debenture Company shall forthwith thereafter give notice to the said Ric-
hard Woolley specifying the breach or breaches of which it complains and if
the same shall be capable of remedy requiring the said Richard Woolley to
remedy the same and if the said Richard Woolley fails within the space of
three months after the receipt by the said Richard Woolley of such notice
to remedy the same or if such breach shall be irreparable then immedi-
ately upon giving such notice the Debenture Company shall be entitled to
damages against him which shall be estimated on the footing that but for
such failure the debentures which have then been handed over by the said
Bank to the Debenture Company would have been worth ninety-five per
cent. of the full nominal value thereof and on the further footing that the
actual value of the said debentures after such failure is the price which the
Debenture Company is able to obtain for them by selling and disposing
of them by public auction after due publicity shall have been given
by advertisement and otherwise of such intended sale within three
[186] calendar months or if the Debenture Company is unable within
such period to sell or dispose of the said debentures at all or at any rea-
sonable price then that the value of the debentures so unsold is either the
highest price offered for them and declined or if no price whatever has been
offered then nothing but if in case such breach shall be capable of remedy
the said Richard Woolley shall within the space of three months after the
receipt of the beforementioned notice remedy the breach or breaches
complained of in such notice then the damages to which the Debenture
Company shall be entitled against him shall be ascertained by referring
the question to arbitration in pursuance of clause sixteen hereinafter
contained. Provided always that the Debenture Company shall before it
shall sell or dispose of the Debentures in the events mentioned in the first
part of this clause offer the same debentures for sale to the said Richard
Woolley at ninety-five per cent. of the nominal value thereof and the said
Richard Woolley shall be at liberty within two months after the same
shall have been so offered to purchase the same debentures in which event
the purchase money therefor shall be payable by two equal half-yearly
instalments with interest at the rate of five per cent. per annum on the
instalment or instalments for the time being remaining unpaid calculated
from the date on which the said debentures shall have been so offered to
the said Richard Woolley up to the date of payment of such instalment or
instalments respectively the first of such instalments to become due and
payable three months after the date on which the said Richard Woolley
shall elect to purchase the said debentures or at such earlier date or dates
as the said Richard Woolley shall elect. Provided always that in case of
default as aforesaid and any damages being thereby occasioned to the
Debenture Company the said Richard Woolley shall upon payment of such
damages together with the reasonable costs of the Debenture Company be
entitled to receive from the Debenture Company the whole of the said
debentures.

11. In case the said Richard Woolley shall after receiving possession
of the necessary land or a substantial part thereof make any unreasonable
delay in the commencement of the said railway and works or after having
commenced the same shall fail to prosecute the same with due diligence to
the satisfaction of the Secretary of State or shall otherwise fail in some
material respect to fulfil the obligations and liabilities undertaken by him in
his said agreement with the Railway Company or in these presents in such
manner as to prejudice the security intended to be hereby given to the
Debenture Company then and in such case the Debenture Company shall
forthwith thereafter give notice to the said Richard Woolley specifying the
obligations and liabilities which he has so failed to perform and of which it
complains and if the same shall still be capable of performance requiring the
said Richard Woolley to perform the same and if the said Richard Woolley
fails within the space of three months after the receipt of such notice to do
so or if any such obligation or liability shall no longer be capable of perform-
ance the Debenture Company may by notice to the said Richard Woolley
elect to discontinue the payment of the remaining instalments to be paid
and provided by the Debenture Company and shall thereupon be freed from
all obligation and liability to pay or provide the same such discontinuance 
shall not affect the right of the Debenture Company to any debentures 
already handed to them nor their right to have the said three thousand 
shares fully paid up and transferred to them or as they shall direct nor their 
right to damages for breach of this agreement. Provided nevertheless that 
in the event of any such default as aforesaid on the part of the said Richard 
Woolley the Debenture Company shall not be bound to make any further 
payment of the money payable by it hereunder notwithstanding that the 
due date for the [197] payment of the same may have arrived unless and 
until the said Richard Woolley shall within the time herein before limited have 
madem good such default to their reasonable satisfaction. Provided always 
that in case the Debenture Company shall on any such alleged default elect 
to discontinue payment as aforesaid the remainder of the said two hundred 
and twenty thousand pounds debentures not then already handed over to 
the Debenture Company by the said Agra Bank shall thenceforth be held 
by the said Bank as a security for the payment of the amounts due or to 
become due from the said Richard Woolley or other the holders of the 
said shares to be subscribed for as hereinbefore provided to the Railway 
Company upon and in respect of the said shares and for the purpose of 
raising such amounts the said Richard Woolley or the said Bank at his 
request may sell or mortgage the said debentures or any of them and the 
Bank so acting at the request of the said Richard Woolley shall not be 
bound to enquire whether any such alleged default has actually occurred 
or whether the Debenture Company shall have elected to discontinue pay-
ments as aforesaid and subject thereto the same shall be held by the said 
Bank as a security to the Debenture Company for any damages or other 
claims against the said Richard Woolley under these presents or other-
wise and the Debenture Company shall for enforcing such damages or 
other claims against the remainder of the said debentures have subject as 
aforesaid all the powers and remedies of mortgagees by deed and may at 
any time give good receipts for such debentures to the said Bank.

12. Notwithstanding anything hereinbefore contained the Debenture 
Company shall be entitled to deduct and retain out of the first three and 
the fifth instalments of money so to be paid and provided by them as 
aforesaid the following sums as compensation for expenses risk commission 
stamp duties payable in India (if any) and in England upon the said 
Debentures and in England only upon the said Debenture mortgage also 
all legal expenses of the said Debenture Company in England and in India 
and otherwise in respect of the transaction aforesaid that is to say—

(1) From the first instalment of twenty-five thousand pounds payable on or before the twenty-first day of December next of the sum of four 
thousand pounds leaving twenty-one thousand pounds only to be actually 
paid and provided together with one half of the cost of stamping in India 
The Debenture mortgage not exceeding five hundred pounds.

(2) From the second instalment of forty thousand pounds payable on 
or before the thirty-first day of March one thousand eight hundred and 
ninety the sum of eight thousand pounds leaving thirty-two thousand 
pounds only to be actually paid and provided.

(3) From the third instalment of fifty thousand pounds payable on or 
before the thirty-first day of October one thousand eight hundred and 
ninety the sum of eight thousand pounds leaving forty-two thousand 
pounds only to be actually paid and provided.

(4) From the fifth instalment of fifty-five thousand pounds payable 
on the thirty-first October one thousand eight hundred and ninety-one
the sum of twenty thousand pounds leaving only thirty five thousand pounds to be actually paid and provided. Provided always and it is here-
by agreed and declared that for the purpose of ascertaining the amount
of Debentures to be handed over to the Debenture Company and the
moneys to be paid on account of the said shares in the Railway Company
and for all other the purposes of these presents the said four respective
instalments shall notwithstanding the respective deductions aforesaid be
deemed to have been paid and provided by the Debenture Company in
full.

[198] 13. In case of any default by the Debenture Company to pay
the moneys aforesaid by the instalments and on the dates aforesaid the
contractor or his agent or attorney in England may give the Debenture
Company notice by prepaid letter addressed to it at its registered office
for the time being requiring the Debenture Company to pay the moneys
then due and payable hereunder within one month from the date of the
receipt of such notice and unless the said moneys shall be paid to the
said Agra Bank within the time prescribed by such notice. The Agra
Bank shall thereupon hand over to the said Richard Woolley or as he shall
direct the whole of the said Debentures then remaining in the custody of
the said Bank and his receipt shall absolutely exonerate the said Bank
from any liability to account therefor and the Debenture Company shall
thereupon cease to have any interest in or claim against the said Deben-
tures or the said three thousand fully paid-up shares but nothing in this
clause contained shall be deemed to affect or prejudice the rights of the
said Richard Woolley against the Debenture Company for damages in
respect of any such default.

[The remaining clauses of the instrument provided for the reference
of disputes to arbitration, &c., &c.]

In witness whereof the said Richard Woolley has hereunto set his
hand and the Debenture Company has caused its common seal to be
hereunto affixed the day and year first above written.

The common seal of the Union Debenture Company Limited was
affixed hereto in the presence of

(Signed)———- Directors.
(Signed)——— Secretary.

Signed by the abovenamed Richard Woolley in the presence of

(Signed) RICHARD WOOLLEY.

The Government Pleader (Mr. Powell), for the Board of Revenue.

JUDGMENT.

We are of opinion that the instrument must be stamped as a bond
for the payment of £220,000.
[199] APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

RAJARAM AND OTHERS (Plaintiffs Nos. 1, 2, 4 and 5), Appellants v.
NARASINGA (Defendant), Respondent.*

[14th and 17th December, 1891.]

Landlord and tenant—Construction of lease—Word of inheritance.

A fixed permanent ijara patta confers no rights on the heirs of the demise.

[R., 11 C.L.J. 401 (403) = 5 Ind. Cas. 500; 8 O.C. 61 (63); D., 21 M. 503 (505); L.B.R.
(1896—1900) 330.]

APPEAL against the decree of P. Narayanasami Ayyar, Subordinate
Judge of Salem, in original suit No. 6 of 1888.

Suit for a declaration of the plaintiffs' title as ijaradars of the village
of Chinnamottur attached to the mitta of Chinnavappampattu and for
possession of the village with mesne profits.

The plaintiffs claimed under the following document which was filed
as Exhibit K:

"Confirmed permanent ijara (lease) patta granted by Jeyaram Lala
and Latehama Bhoy. Zamindars of Ambarpeta mitta, in favour of
Dowlatram Lala, son of Latehama Doss, Monyagar, residing in Valayam-
pattu.

"Particulars of rent fixed per year, according to the permanent beriz
"for the village of Chinnamottur attached to Ambarpeta mitta given to
"you, are—
""Rs. 590-3-1.

"We have given permanent lease having confirmed the permanent
"muchalka you have executed for the sum of rupees five hundred and
"ninety, annas three and pie one; you should pay the money in the
"mitta treasury according to the kistbandies fixed in each year within
"the 30th and obtain receipts. No remission will be given if there should
"be any loss by excess or want of rain or by the acts of the ruling power
"or by God. You should act in accordance with Bittajagaru's
"Aramayishe and Paramayishe Damasha (list showing the proportion
"of provisions supplied gratis). Besides this, fishery, fruit trees and
"[200] wood trees, &c., belong to you only. To this effect we have
"executed and given this confirmed permanent ijara (lease) patta."

Fasli 1266, 10th Margali of the
year Nala, 22nd December 1856.

(Signed) Jeyaram Lala.

Jeyaram Lala with the consent of
Latehama Bhoy.

It was admitted that the village had been the property of Vasudeva
and Hari Lala, who in 1848 leased it to Jeyaram Lala, the defendant's
brother-in-law, and Dowlatram Lala, the brother and father of the first
and second plaintiffs respectively. The plaint set out, with reference to
the above instrument, as follows:

" Afterwards, the said Vasudeva Lala and Hari Lala having died,
the said village of Chinnamottur was in fasli 1266, on 10th Margali of
the year Nala, 22nd December 1856, permanently leased out after them

* Appeal No. 7 of 1891.
by the late mittadars Joyaram Laha, younger brother of the said Vasudeva Laha, and Lakshmi Bhoj, wife of the said Vasudeva Laha, solely to Dowlatram Laha, on condition of paying the circar peishcush amounting to Rs. 590-13-1 per year, and, accordingly, he, and after him, his undivided brothers and family members, the first plaintiff and Ram Laha, the father of plaintiffs 3, 4 and 5, had been enjoying it uninter-
ruptedly until the end of 1876."

It was further alleged that in 1877 Joyaram Laha (since deceased) denied the plaintiffs' title, ousted them unlawfully and sold the village to his brother-in-law, the defendant.

Plaintiffs Nos. 1, 2, 4 and 5 preferred this appeal.

Mr. Norton and Parthasarathi Ayyangar, for appellants.

Ramasami Mudaliar, for respondents.

JUDGMENT.

SHERPARD, J. — Two questions are raised by this appeal. It is contended, on the plaintiffs' behalf, that the Subordinate Judge was wrong in his finding of fact with reference to the instrument on which the plaintiffs found their claim; and on the defendant's side it is urged that by that instrument the plaintiffs claiming as the heirs of the original grantee, who died in 1867, acquired no title. On the question of fact, I am unable to agree with the decision of the Subordinate Judge, for, in my opinion, there is abundant evidence to prove the execution of the instrument (Exhibit K); but, in the view I take, it is unnecessary to discuss the evidence, because the construction which I think must be put on the instrument is fatal to the plaintiffs' claim.

The instrument is described as a fixed permanent ijara patta, and it provides for a rent to be paid according to the permanent beiz. There are no special words to show that it was to operate beyond the lifetime of the grantee, Dowlatram. The words translated "fixed, permanent" seem to be nearly equivalent to the words istemrari mokurari common in instruments, which come before the High Court of Bengal. Dealing with a case in which the instrument under discussion contained this expression, the Judicial Committee observed that they thought it to be established that "the words istemrari mokurari in a patta do not per se convey an estate of inheritance," and they proceeded to hold that, in that particular case, the intention to create a perpetual grant had not been sufficiently indicated (Tulshi Pershad Singh v. Ramnarain Singh) (1). No distinction in favour of the plaintiffs can be pointed out between the instrument before the Privy Council and that which we have to construe. On the contrary, in the former, there was a clause, which, at least, showed that the grantor intended to bind his heirs. In Gopayyan v. Balaji (2) cited for the defendant, the same view was taken in this Court. There is nothing in the circumstances since the death of Dowlatram to favour the contention of the plaintiff. In my judgment, the plaintiffs have failed to prove their title and the appeal must be dismissed. I agree that each party should bear his own costs.

PARKER, J. — The Subordinate Judge has found that the lease-deed (Exhibit K) has not been satisfactorily proved. The learned counsel has, I think, shown to demonstration that this finding cannot be supported. Not only does Exhibit Q prove that a document, identical in terms with Exhibit K, must have been filed in 1859 in the proceedings before the Tahsildar, which ended in the decision Exhibit P), but Exhibits G and R,

(1) 12 C. 117.
(2) Second Appeal No. 607 of 1874, unreported.
dated the day after the execution of Exhibit K, also support the document. The genuineness of Exhibit G is not impugned, and it shows that the original permanent ijara was granted in 1848 for Rs. 650 to Jeyaram Lala and Dowlatram Lala by the deceased Vasudeva Lala and Hari Lala, the Zemindars of the mittah. Exhibit S is a copy of G, which copy was also filed in 1859.

Exhibit H is a takid addressed by Dowlatram to the karnam Alagiri Ayyar in fasli 1268, and Exhibit J four days later shows that Jeyaram Lala resigned his share in the lease in favour of Dowlatram and informed the village officers accordingly. Exhibit O shows clearly that Exhibit K must have been produced in 1859.

Dowlatram Lala died in 1867. After his death, we find suits were brought against his brothers (Exhibits A and B), alleging a fresh agreement in April 1868 for a permanent lease at a permanent beriz of Rs. 590-15-7 (being an increase of 13 annas and 6 pies on the rate fixed in Exhibit K). Exhibit VIII is the answer to the plaint B, and Exhibit VI, the judgment, and Exhibit CC, the appeal judgment. The permanency of the lease was not disputed.

Exhibits C, D, BB, XI and XII show subsequent litigation between the same parties and their representatives. These documents go to show a fresh permanent lease in 1867, the year of Dowlatram Lala's death.

The plaintiffs, in contending for the hereditary character of the lease, rely on the words "Kayam Saswata" in Exhibit K. I agree with Mr. Justice Shephard that it is not easy to distinguish these words from istemrari mokurari, which the Privy Council has held do not per se convey an hereditary estate unless used in conjunction with words denoting from "generation to generation" (naslan bad naslan) or "with sons" (ba farzand). Tulshi Pershad Singh v. Ramnarain Singh (1). In this case, however, the conduct of the parties, not less than the language of the instrument, raises a presumption that the lease was not intended to be hereditary. There was one ijara to Jeyaram Lala and Dowlatram Lala in 1848 at a beriz of Rs. 650, a second in 1856 to Dowlatram Lala alone for Rs. 590-3-1 (Exhibit K), and a third in 1867 for Rs. 590-15-7 to Rajaram Lala and Rama Lala. On these grounds, I am of opinion that the appeal must fail and should be dismissed. As a false defence was set up, I would direct that each party bear his own costs in the appeal.

18 M. 263-2 M.L. J. 1.

[203] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

ARUNACHELLAM (Petitioner and Purchaser), Appellant v.
ARUNACHELLAM AND OTHERS (Counter-Petitioners and Defendants
Nos. 8 and 10, and Sureties Nos. 1 to 9), Respondents.*

[16th 17th and 29th September, 1891.]

Civil Procedure Code, Sections 211, 253, 318, 610—Construction of order giving effect to judgment of Privy Council—Mesne profits—Cost of management—Interest—Sureties for execution of decree.

Land was put up for sale and purchased in execution of a decree. The sale was confirmed, and the purchaser was put into possession. On appeal against

* Appeal against Order No. 20 of 1889,
(1) 12 C. 117.
the order confirming the sale, the High Court held that the sale had been vitiated by certain irregularities and set it aside. The purchaser preferred an appeal to the Privy Council against the judgment of the High Court. While the appeal was pending, he was compelled to deliver up possession of the land, but security was furnished under an order of the Court by persons not being parties to the suit for its redelivery to him, and for the payment of mesne profits, in the event of his appeal being successful. Meanwhile, the land in question was placed in charge of a receiver on the nomination of other persons holding decrees against the judgment-debtors. On appeal the Privy Council reversed the order of the High Court. The purchaser was accordingly replaced in possession of the land; and be applied for execution in respect of the mesne profits against the respondents in the Privy Council and the sureties. The Court of First Instance dismissed the application as against the sureties and limited the applicant’s claim against the others to the net income of the land, less the cost of management by the receiver, and allowed him no interest:

Held. (1) the order must be taken to have been made under Civil Procedure Code, Section 610 and an appeal lay therefrom.

(2) although the appeals to the High Court and the Privy Council related to the order confirming the sale and not to that by which possession was awarded, and the order in Council did not direct payment of mesne profits, yet such payment was within its purview as being a benefit by way of restitution fairly and reasonably consequent upon it. Rodger v. The Comptoir D’Escompte de Paris (L.R., 3 P.C., 465) followed.

(3) the application was rightly dismissed against the sureties.

(4) the charges involved by the appointment of the receiver should not have been allowed against the petitioner, since they were not necessary in the ordinary course of prudent management.

[204] (5) interest at 6 per cent. should have been allowed to the petitioner on the mesne profits for each year from the end of the year to the date of payment.

[R., 25 B. 409 (413); 23 C. 212 (215); 31 M. 330 (332) = 3 M.L.T. 317; 2 Bom L.R. 203 (209); 109 P.R. 1906 = 1 P.L.R. 1907.]

APPEAL against the order of S. Gopalachariar, Subordinate Judge of Madura (East), made on execution-petition No. 72 of 1888, in original suit No. 44 of 1879.

In original suit No. 44 of 1879, on the file of the Subordinate Court of Madura (East), the plaintiff therein obtained a money decree in execution of which certain land was attached and brought to sale as the property of defendants Nos. 8 and 9, of whom the latter was the father of defendant No. 10.

The present petitioner was the purchaser at the Court sale, who had paid into Court Rs. 20,500 as the purchase money; the first and second respondents to his petition were the eighth and tenth defendants above referred to, the remaining respondents were persons who had given security for the delivery of the land in question, together with mesne profits thereon to the purchaser under the circumstances mentioned below. The purchaser had already obtained possession of the property; by his present petition he sought to recover Rs. 25,782-15-10 for the mesne profits accrued on the land during the period (from 26th February 1885 to 30th June 1888), while he was out of possession, by attaching the sale-proceeds which remained in Court and also the property which was the security furnished by respondents Nos. 3—11 as above.

The petitioner’s purchase took place on 28th July 1882; and he obtained possession in the first instance on 15th October 1882; but, on 16th October 1883, the High Court made an order setting aside the sale to him. On 3rd December 1883, he applied for leave to appeal against this order to Her Majesty in Council and also made an application under Civil Procedure Code, Section 608 (3) that he should be permitted to remain in possession, the “purchase money paid into Court being treated
as security for the mesne profits. Pending the disposal of these applications, viz., on 26th February 1885, respondents Nos. 1 and 2 were placed in possession, but, on 13th April 1885, the High Court admitted the petitioner's appeal to Her Majesty in Council, and, with reference to his other application, ordered that respondents Nos. 1 and 2 (by their guardians) should furnish security for the payment of the mesne profits and the re-delivery of the land in case that appeal should be successful. In pursuance of the last-mentioned order, after a prolonged inquiry, a surety bond was executed in February 1886, charging the property to which the second part of the present petition related. In the interval, viz., in October 1885 the land, which had been sold to the petitioner, was placed in the possession of a receiver appointed by the Court on the motion of other persons who held decrees against respondents Nos. 1 and 2.

The Privy Council delivered judgment in the above appeal in favour of the petitioner and the order in Council upon this judgment was received on 14th August 1888, in pursuance of which he was put into possession on 25th August 1888.

To the present petition various objections were raised, upon which and upon the petition the following questions arose for determination, which were summarized by the Subordinate Judge, in paragraph 25 of his order (referred to in the judgment of the High Court) as follows:

(1) "Whether the application is not sustainable against defendant "No. 8.
(2) "Whether the tenth defendant's interest also passed by the sale "or not, and, if not, should any and what share be excluded on his "account?
(3) "What is the amount of net income due to the petitioner for each "of the faslis in question?
(4) "Whether the sureties can be proceeded against by this appli- "cation.
(5) "To what extent and for what amount are the several sureties or "their properties liable?
(6) "Whether the deposit money should be first proceeded against by "petitioner or other properties of the minors exhausted, before the sureties' "properties are pursued."

The Subordinate Judge held as to the first and second questions that the contentions of respondents Nos. 1 and 2 were clearly unsustai- nable. On the 3rd question, he held that the total sum payable, in respect of the net income for the four faslis 1294—1297, was Rs. 17,965. In arriving at this sum, he allowed to the petitioner no interest, observing that there was no provision for such allowance in the decree and referring to Hurro Doorga Chowdhrami v. Maharani Surut Scondari Debi (1), but he did allow to respondents Nos. 1 and 2 the full collection charges incurred during the receiver's management. As to the remaining ques- tions, [206] he pointed out that, in his view, the security had not been given for the performance of any order in Council, but merely for the payment of mesne profits during the period of the defendant's possession before such order was made, and held that respondents Nos. 3—11 could not be made liable in the present proceedings, their obligation being an independent one and not comprised in the decree and not coming within the purview of Civil Procedure Code, Section 253.
The petitioner preferred this appeal on the following grounds:—
(1) "The Subordinate Judge is wrong in holding that the appellant cannot obtain restitution by proceeding against the sureties in execution proceedings, but must resort to a regular suit against them.
(2) "The Subordinate Judge overlooked the definition of mesne profits in disallowing the interest on the amount of net income of each fasli on the ground that interest is not allowed on such amounts in the decree.
(3) "In ascertaining the amount of mesne profits, the Subordinate Judge is wrong in deducting from the income the salary of, and the charges incidental to, the appointment of a receiver."
(4) "The Subordinate Judge ought to have awarded the actual amount of mesne profit for fasli 1297, though it was in excess of the probable amount estimated by the appellant."

Respondent No. 1 preferred a memorandum of objections on the following ground, inter alia that "the purchaser is not entitled to recover mesne profits in execution proceedings. His remedy, if any, is by regular suit."

Bashyam Ayyangar, for appellant.
Subramanya Ayyar, Krishnasami Ayyar, Seshagiri Ayyar, and Sundara Ayyar, for respondents.

JUDGMENT.

This is an appeal from an order made by the Subordinate Judge of Madura with reference to the order of Her Majesty in Council, dated the 29th June 1888. The appellant is the purchaser at the Court sale held in execution of the decree in original suit No. 44 of 1879 on the file of the Subordinate Court and respondents Nos. 1 and 2 are the eighth and tenth minor defendants in that suit. The properties, which the appellant purchased, were put up to sale as belonging to the first respondent and to the ninth defendant, the father of the second respondent, and knocked down to the appellant, as the highest bidder, on 28th July 1882. An application was afterwards made, on behalf of the respondents, under Section 311 of the Code of Civil Procedure, to set aside the sale on account of certain irregularities, but the Subordinate Judge disallowed their objection. He then passed an order confirming the sale under Section 312, granted a certificate to the appellant under Section 316, and placed him in possession of the properties purchased under Section 318 on the 15th October 1882. From the order confirming the sale, respondents Nos. 1 and 2 appealed to the High Court under Section 588, and, on the 16th October 1883, the High Court considered that the sale was irregular and reversing the order of the Subordinate Judge, made under Section 312, set aside the sale. The representatives of the first and second respondents applied to be put back in possession, and, on the 26th February 1885, the Subordinate Judge replaced the properties sold in their possession. Meanwhile, the appellant applied for leave to appeal to the Privy Council, and, on the 13th April 1885, the High Court admitted his appeal and ordered that respondents Nos. 1 and 2, by their guardians, should furnish security for redeelivery without waste of the properties sold to the appellant and for mesne profits if its order, setting aside the sale, should be reversed by the Privy Council. Pursuant to that order, security was furnished for Rs. 10,000 and Rs. 5,000 on 2nd November 1885 and 20th February 1886. Meanwhile, several creditors, who had obtained decrees against respondents Nos. 1 and 2, attached the villages, which were put up to sale in July 1882, and, on their application, the Subordinate Judge appointed a receiver. From
October 1885 the receiver held the villages on behalf of the decree-holders, and the collections, which he remitted to the Subordinate Court from time to time, were applied in satisfaction of their decrees. On the 27th June 1888, the Judicial Committee heard the appeal from the order of the High Court, and held that that order should be reversed, that the order of the Subordinate Judge should be affirmed, and that the respondents should pay the appellant’s costs throughout.

On the 29th June 1888, Her Majesty in Council passed an order in accordance with the judgment of the Judicial Committee, and, on the 14th August 1888, the High Court transmitted that order to the Subordinate Court for execution. The appellant then applied to be put back in possession of the villages purchased by him on the ground that he was entitled to restitution and the Subordinate Judge restored possession to him on the 25th August 1888. The appellant then claimed mesne profits from the 26th February 1885, when respondents Nos. 1 and 2 were put back in possession with reference to the order of the High Court to the end of Fasli 1297 or 30th June 1888. He sought to recover them in execution proceedings not only from respondents Nos. 1 and 2 by attachment of the said amount deposited in Court, but also from their sureties by attachment of properties offered as security. The respondents resisted the application and the several questions raised by them for decision are set forth by the Subordinate Judge in paragraph 25 of his order. The Subordinate Judge held that the appellant was entitled to recover mesne profits from respondents Nos. 1 and 2 by application for restitution and found that the amount payable for such mesne profits was Rs. 17,965. But he was of opinion that the appellant was not entitled to proceed against the sureties, respondents Nos. 3 to 11, summarily or by way of execution and that his remedy against them was by a regular suit. Accordingly, he permitted execution against respondents Nos. 1 and 2 for the amount mentioned above, and dismissed the appellant’s application so far as it related to enforcement of liability of the sureties, respondents Nos. 3 to 11. In the view which the Subordinate Judge took of the case, as against the sureties, he did not consider it necessary to determine the fifth and sixth questions mentioned in paragraph 25 as arising upon their contention. To this order, both the appellant and respondents Nos. 1 and 2 object and six questions are argued before us, two for the latter and four for the former, the other questions not being pressed upon us.

It is urged for respondents Nos. 1 and 2 that no appeal lies from the order made by the Subordinate Judge. The order in question was made in enforcement of the order of Her Majesty in Council and it can only be made under Section 610 of the Code of Civil Procedure, which renders the rules applicable to execution of original decrees also applicable to enforcement of that order. Any party aggrieved by an order made in execution of a decree of the Subordinate Judge is entitled to appeal, and the objection is, therefore, one which cannot be supported.

The next contention is that the Subordinate Judge has misconstrued the order of Her Majesty in Council, that it did not direct payment of mesne profits, and that such payment was not within its purview. It is also urged that the Subordinate Judge placed the appellant in possession under Section 318 and that there was no appeal to the Privy Council from the order made under that section. The formal order of Her Majesty in Council declares that the appeal was allowed, that the order of the High
Court was reversed, and that the order of the Subordinate Judge was confirmed, and directs the several Courts and all parties concerned to conform to it. The true construction is not simply that the relief awarded in terms by the order restored should be continued to the appellant from the date of it, but also that every benefit fairly and reasonably consequential upon it should likewise be continued to him. That was the construction put by the Judicial Committee upon a similar order in Rodger v. The Comptoir D’Escompte de Paris (1). It is true that the order, which the High Court set aside on appeal, and which the Privy Council restored, was the one made by the Subordinate Judge, confirming the sale to the appellant under Section 314 and that it said nothing further than that the sale was confirmed. But Sections 316 and 318 which are peremptory directed what relief or benefit should be conferred upon him when an order confirming the sale was made; and the former ordered the issue of a certificate as a title-deed and the latter, the delivery of the property purchased. The three Sections 314, 316, and 318 are, when read together, related to each other, the first as declaring that the purchaser has a valid title, the second as directing that statutory evidence of such title be furnished to him, and the third as giving effect to the sale by transfer of possession without the intervention of a regular suit. The declaration, therefore, that the order of the Subordinate Judge is restored includes a direction necessary to continue to the appellant the consequential benefit which the appellant had secured under Section 318 when the High Court set aside the order of the Subordinate Judge. This is also apparent from the respondent’s action when the High Court set aside the sale under Section 314, and he claimed under that order to dispossess the appellant who had been placed in possession under Section 318, and to be put back in possession though there had been no appeal to the High Court from the order made under that section. We are of [210] opinion that a benefit by way of restitution is clearly within the purview of the direction embodied in Her Majesty’s order in Council. It does not appear that this objection was taken when the High Court transmitted Her Majesty’s order for execution to the Subordinate Court.

No other objection contained in the memorandum of objections is pressed and we dismiss it with costs.

Passing on to the objections taken by the appellant, the first and the main contention is that the Subordinate Judge erred in holding that the sureties could not be proceeded against except by a regular suit in respect of mesne profits to which he is entitled by way of restitution. The sureties being no parties to the order made by Her Majesty in Council, their liability could only be enforced on general principles by a regular suit in the absence of a special statutory direction on the subject. This is conceded, but our attention is drawn to Section 253 of the Code of Civil Procedure and to the words in Section 610, “in the manner and according to the rules applicable to the execution of its original decree,” and it is argued that Section 253 ought to be read as part of Section 610. It might be so if there was no special provision inconsistent with such contention in Section 610 as amended by Act VII of 1886, Section 58. That section provides that “in so far as the order awards costs to the respondent, it may be executed against a surety therefore to the extent to which he has rendered himself liable, in the same manner as it may be executed against the appellant.” On comparing it with Section 253, it is apparent that

(1) L.R. 3 P.C. 465.
the words, “in so far as the order awards costs to the respondent” are substituted for the words in Section 253, “the decree may be executed.” The intention it suggests is to make the rule contained in Section 253 part of Section 610 only so far as the order of Privy Council awards costs to the respondent. On the view that the rule embodied in Section 253 was intended to be included by the words, “according to the rules applicable to the execution of its original decree” there is no necessity for the amendment; nor is it sensible. It is suggested that we may treat it as surplusage or as introduced by way of illustration, but we cannot accede to this suggestion without departing from the recognised rules of interpretation. There is reason to think that the amendment was made with reference to a conflict of opinion on the subject between the different High Courts. In Bans Bahadur Singh v. Mughla Begam (1) which was decided in January 1880, the question whether the general words in Section 610 “according to the rules applicable to execution of its original decrees” include the rule contained in Section 253, was considered by the Full Bench of the Allahabad High Court. The majority of the Court held that it did, but two of the learned Judges dissented from that opinion. In that case there were two references and one of them related to a surety-bond which secured the costs of the Privy Council, whilst the other covered the whole decree appealed against including the decreetal amount and the costs. The learned Chief Justice, who delivered the judgment of the majority of the Court, observed that the legal question was the same in both and must be answered in the same way. The answer was that all the rules applicable to execution of original decrees including Section 253 were made part of Section 610, the ground of decision being that sureties were intended to be placed on the same footing with defendants, and that there was no reason why a distinction should be made between persons who became sureties in the Original Court before decree and those who became such in the appellate Court before the appellate decree. The dissenting Judges, however, held that the liability of a surety rested on his bond and not on the decree, and that Section 253, which introduced a rule of substantive law among the rules of procedure, was limited to the class of sureties mentioned therein, and could not be extended to sureties who became such when an appeal was preferred to the Privy Council, and that the general words in Section 610, “rules applicable to execution of original decrees,” referred only to rules of procedure and did not include a rule of substantive law embodied in Section 253. In Radha Pershad Singh v. Phulji Koo (2), the same question was considered by a Divisional Bench of the High Court at Calcutta with reference to an application for execution against a surety in respect of costs awarded by the Privy Council, and the learned Judges who decided that case, concurred in the opinion of the dissenting Judges in the Allahabad case. The effect of similar words used in Section 583 was considered by Divisional Benches of the High Courts at Bombay and at Madras in Venkata Naik v. Baslingappa (3) and Thirumalai v. Ramayyar (4) and the Judges who decided those cases agreed with the majority of the Allahabad High Court. All these decisions had been passed except Thirumalai v. Ramayyar (4) before the amendment was introduced, and, though Section 610 was amended, Section 583 was not similarly amended. The amendment was apparently made with reference to the conflict of opinion between the High Courts at Allahabad and Calcutta, and the insertion of the words, “in so far as the order awards costs,” to the

---

respondent becomes significant when it is remembered that the majority of the Judges of the High Court at Allahabad held that the whole order, whether it related to costs or the decretal amount, might be enforced against the surety in execution. It is clear, therefore, that the amendment contemplated a distinction between the order as to costs and the other orders and declared that the surety might be proceeded against in respect of the former, implying thereby that but for the amendment, Section 253 should not be treated as incorporated with Section 616 by the general words, “according to the rules applicable to the execution of original decrees.” Having regard to the circumstances in which the amendment was made and to the principles on which the use of a special phrase may be held to evidence no special intention on the part of the Legislature as laid down in Hough v. Windus (1), we are of opinion that the order of the Subordinate Judge is right so far as it refused the appellant’s application to proceed against the sureties in execution in respect of their liability for mesne profits.

The second question argued in support of this appeal relates to interest claimed on mesne profits from the end of the fasli on which they became due to the date of payment. The expression "mesne profits" is explained in Section 211 as including interest on such profits and the respondents Nos. 1 and 2 are ordered to pay mesne profits to the appellant, on the ground that such payment is consequential on the order of the Privy Council. Again, whenever money paid on account of a decree since reversed on appeal is ordered to be refunded, the refund is ordinarily directed to be made with interest. Jaswant Singh v. Dip Singh (2), Ram Sahai v. The Bank of Bengal (3), and Rodger v. The Comptoir D’Escompte de Paris (4). The case of Hurro Doorja Chowdhurni v. [213] Maharani Saurat Soonndari Debi (5) on which the Subordinate Judge relies is not in point, the ground of decision being that interest was disallowed by the decree and that in execution the Court is not at liberty to amend it. Nor is Chakku Modan Isana v. Dullabh Dwarka (6) in point, for it is only an authority for the proposition that the cases contemplated in Section 211 form an exception to the common law rule about interest and it was decided with reference to Section 196, Act VIII of 1859, which did not define mesne profits as including interest. We think that interest at 6 per cent. per annum should be awarded on the mesne profits for each fasli from the end of that fasli to the date of payment and that the order of the Subordinate Judge should be varied accordingly.

The third objection argued relates to the order of the Subordinate Judge so far as it debits against the appellant the salary of the receiver and his establishment. The receiver was appointed certainly not for the appellant's benefit, or at his request, but at the instance of the first and second respondents' creditors and for their benefit. The Subordinate Judge considered that, under Section 211, the defendants should not be charged with anything more than what they had actually received. But for the intervention of the first and second respondents, judgment-creditors, it is clear that the appointment of a receiver would have been unnecessary, and it does not appear just that the appellant, who was dispossessed by the respondents Nos. 1 and 2, should bear a charge consequent on their act and not shown to be necessary in the ordinary course of prudent

management. This objection must, we think, also be allowed and the order appealed against amended.

The only other objection taken on appeal relates to the difference between the average income for Fasli 1297 and the amount claimed by the appellant. The Subordinate Judge disallowed the difference, because it was in excess of the amount actually claimed by the appellant. We must take the agreement on which the Subordinate Judge acted to have been made subject to the rule that no more than what the appellant himself claimed was to be awarded to him. We disallow this objection.

The order of the Subordinate Judge will be amended to the [214] extent indicated above and confirmed in other respects. Costs will be paid proportionately by appellant and first and second respondents, but the other respondents are entitled to their costs, as many sets as there are separate pleaders.

15 M. 214—2 M.L.J. 127=1 Weir 617.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

THIAGARAYA AND OTHERS (Petitioners) v. KRISHNASAMI (Complainant).* (3rd, 4th and 9th February, 1892.)

Penal Code, Section 499, exception X—Defamation—Privilege—'Mala fides'—Privilege exceeded.

The complainant, a Brahman, who had been put out of caste, was re-admitted by the executive committee of the caste after performing expiatory ceremonies. This re-admission was not approved of by the accused, who formed a faction of the caste; and they, after an interval of six months, distributed in the bazaar to all classes of the public printed papers in which the complainant was described as a 'Doshi' or wick, which signified that he was a person unfit to be associated with. The accused were charged with the offence of defamation. They pleaded privilege, and it was admitted that they had acted without malice:

Ueda, that the accused had not acted in good faith and that the publication was not under the circumstances privileged and protected by Penal Code, Section 499, except ion X, and that the accused were accordingly guilty of defamation.

[R., 19 B. 703 (706); 33 M. 67 = 3 Ind. Cas. 955 = 10 M. L.J. 714 (718) = 6 M.L.T. 290.]

PETITION under Sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of Sultan Mouideen Sahib, a Presidency Magistrate, Black Town, Madras, in Criminal revision case No. 18872 of 1891.

The facts of the case, as stated by the Magistrate, are as follow:—

"One Akilandayya, a Smarta Teugu Brahman of the Valvanad sect, went to England with his wife and two minor children daughter and son aged five and two years respectively. Having stayed there for some time, he returned to India with his family. He and his wife were, of course, expelled from caste under the [215] shastra for having committed the sin of crossing the sea. So were the poor children, who were taken by their parents to England. It was announced by the community to which the family belonged that those who associated with the members thereof would be guilty of Pathitha Samsarga Dossum, i. e., the sin of associating with the fallen or outcastes.

* Criminal Revision Case No. 600 of 1891.
"One Davalla Venkatakrishnayya is the brother of the wife of the aforesaid Akilandayya. It is said that this man lived with the family after its return from England for a year and a half and performed the cunnathanam (marriage ceremony) of his niece Akilandayya's daughter and upanayanam of his nephew Akilandayya's son. He was under the circumstances, as the accused would have it, guilty of Pathitha Samsurga.

It is contended by the accused that under the shastras no penance or any purificatory ceremony (prayaschithum) could exonerate him from the sin, and that death alone was his prayaschithum.

The aforesaid Davalla Venkatakrishnayya, however, submitted a petition (see Exhibit No. 1) to the second and third accused begging of them to consider his case and re-admit him into caste. The matter lay in abeyance. In the meantime he submitted another petition to one Chivakulu Krishnayya, the elected president of the executive committee (see Exhibit B) praying for re-admission. Upon this, a meeting was duly convened in the matter and the members proceeded to take action in the matter of the petition. It was decided that Davalla Venkatakrishnayya should be admitted into caste on his performing certain expiatory ceremonies. This being done, Davalla Venkatakrishnayya was duly admitted into caste. There were now two factions in the community—one adhering to the views of the committee declaring Davalla Venkatakrishnayya eligible for re-admission, and the other dissenting from them. The prosecutor belongs to the former faction and the accused to the latter.

The accused, indignant at the decision of the prosecutor's faction, gave publicity to this Telugu hand-bill marked as Exhibit A, the subject-matter of the present charge. In this publication they say the prosecutor and others are the associates of Davalla Venkatakrishnayya and therefore guilty of Pathitha Samsurga. They publicly declare them to be dasbis or Samsarga dasbis. This and the latter part of the publication are what the prosecutor [216] complains to be, contemplative. Six hundred copies of A were struck off and maliciously distributed to all classes of people.

The accused admit the publication. The first accused is the proprietor of the printing press at which the hand-bill was printed and issued. The rest are the signatories.

The Acting Advocate General (Hon. Mr. Wedderburn), for petitioners.
The Crown Prosecutor (Mr W. Grant), for complainant.

JUDGMENT.

COLLINS, C.J.—The accused were convicted of the offence of defamation under Section 500 of the Indian Penal Code, and the question I have to decide is whether the evidence is sufficient to support the conviction, or whether the accused can claim the benefit of any of the exceptions to the section. The accused are Brahman, and the complainant is also of that caste. It appears that one Akilandayya, a Smart Telugu Brahman, went to England with his wife and family, and, by doing so, committed a caste offence. He was, therefore, expelled from caste under the shastras for having committed the sin of crossing the sea. The brother-in-law of Akilandayya associated with Akilandayya, and apparently thereby committed an offence against caste. He, however, petitioned and submitted his case to Chivakulu Krishnayya, the elected president of the executive committee, and, at a meeting in February 1891 duly convened, it was
resolved that Davalla Venkatakrishnayya should be re-admitted into caste after performing certain expiatory ceremonies. The present accused, however, objected to this, and in August 1891 they published a statement setting forth the facts of the case, the grievous results that must follow if Brahmins associated in any way with persons outcasted, and naming the complainant as one of the "sinners" who associated with Davalla Venkatakrishnayya. A number of copies of the paper containing this statement was distributed to the public by one of the accused in the bazaar. The evidence satisfies me that the word "doshi" or sinner signifies a person unfit to be associated with, and is therefore prima facie clearly defamatory.

The Acting Advocate-General for the accused contends that the accused are protected by the tenth exception to Section 499 of the Indian Penal Code. "It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good." The Crown Prosecutor, however, points out that, although Davalla Venkatakrishnayya was re-admitted to caste in February 1891, the statement complained of was made in August 1891, and that the defamatory matter being published and scattered broadcast amongst the people generally, it was not done in good faith, and that the accused being admittedly only a faction of the Brahman, had no right to act in the way they did. To bring this case within exception X of Section 499 of the Indian Penal Code, it must be proved that the accused intended in good faith to convey a caution to one person against another, that such caution was intended for the good of the person to whom it was conveyed, or of some person in whom that person was interested, or for the public good, and that the caution should be conveyed by the proper means. The defamatory statement was in this case distributed indiscriminately. It cannot be said that it was necessary to caution every pariah who received a copy of the statement against associating with certain Brahmins, or to inform all Madras that the complainant was a doshi. It must also be borne in mind that Davalla Venkatakrishnayya had been re-admitted into caste by at least a portion of the Brabman community, and it would be intolerable to allow a few dissentients to circulate defamatory statements about a person, because they believed that in a caste dispute a wrong conclusion was arrived at. I believe that there was an utter absence of good faith in the proceedings the accused chose to take; that the manner in which the publication was made was unnecessary and in excess of the purpose for which the privilege was allowed, and therefore not protected. In The Queen v. Sankara (1), the guru of N published a notice declaring N to be an outcaste and sent by post a registered post-card of similar purport to N. It was held by TURNER, C.J., and MUTTUSAMI AYYAR, J., that the mode of publication adopted by the defendant, i.e., sending the notice on a post-card, vitiated the privilege and indicated a conscious disregard of the complainant's legal right, and that, therefore, legal malice had been made out and the defendant was guilty of defamation. See also Williamson v. Freer (2) and Somerville v. Hawkins (3). It is not suggested that the publication was for the public good. As I find that the accused did not act in good faith, none of the other exceptions to Section 499 of the Indian Penal Code can protect them.

(1) 6 M. 391. (2) L.R. 9 C.P. 399. (3) 10 C.B. 563.
I hold, therefore, that the conviction was right, and I would dismiss the petition.

PARKER, J.—I am of opinion that the circulation of the warning to members of the caste would certainly be privileged, and here it is admitted that there was no malice. The evidence, however, shows that six hundred copies of Exhibit A were struck off and promiscuously distributed to all classes of people in the bazaar. Such a mode of publication would destroy the privilege, since the communication would be made to persons who had no corresponding interest in it, and the mode and extent of the publication would be more injurious to the complainant than necessary.

It is then urged by the Acting Advocate-General that all castes are interested that the Brahmans who frequent the temple should not be contaminated, but, on reading Exhibit A carefully, I do not find it alleged that others than Brahmans were unable to eat the food offered, because some of those to whom chits had been granted were "sinners." The Magistrate finds that the question only affects the Brahman class of the Hindu community, and is not one in which the general public is interested. That finding on revision must be accepted.

For these reasons, I agree that we should not interfere with the conviction, and dismiss the petition.

Ranganadhams, Attorney for petitioners.

15 M. 219.

[219] APPELLATE CIVIL.


RAMAN (Plaintiff), Appellant v. CHANDAN AND OTHERS (Defendants), Respondents.* [23rd November, 1891.]

Revenue Recovery Act—Act II of 1864 (Madras), Section 59—Abkari notification referring to that Act—Sale to recover sum due from an Abkari render—Limitation for suits to recover land so sold.

The right of selling toddy at certain places was put up to auction by the Collector under a notification which required that payments should be made at fixed periods and that the purchaser should take out licenses as therein provided, failing which the shops concerned might be resold and any loss accruing to Government recovered under the Revenue Recovery Act, Madras. The plaintiff bid at the auction and his bid was accepted. He sought to withdraw from the contract, but the sale to him was confirmed, and on his failure to make the payments above referred to the rights purchased by him were resold at a lower price, and his house was attached and sold as under the Revenue Recovery Act to realise the loss occasioned to Government by the resale. In a suit, in 1886, to recover the house from the defendant who had purchased it and been placed in possession in June 1886.

Held, (1) that the suit was not barred as having been brought more than six months after the date of the sale;
(2) that the sale was ultra vires;
(3) that the plaintiff having brought his suit within the twelve years' period of limitation was entitled to recover.

[D., 26 M. 698 (639).]

SECOND appeal against the decree of J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 246 of 1890, reversing the

* Second Appeal No. 260 of 1891.
decree of S. Subramanya Ayyar, District Munsif of Cannanore, in original
suit No. 165 of 1888.

Suit to recover possession of a house.

In March 1885 the plaintiff made a bid for the right of selling toddy
at certain places in Cannanore for the following twelve months, and his
bid was accepted; the Collector's notification under which the auction
was held contained, among others, the following provisions:

"As soon as the result of the auction is declared, the deposits made
by the unsuccessful bidders will be returned to them. The [220] persons
who bid are accepted shall at once deposit a further sum of Rs. 15 for
each shop other than the first shop knocked down to them; and shall within
ten days from the date on which the acceptance of their bids is notified to
them, deposit such further sum as, with the original deposit of Rs. 15 per
shop, will make up an amount equal in each case to two mon's rent.
They shall also take out licenses on the conditions hereinafter set forth,
fauling which the shops may be resold at their risk or be otherwise disposed
of, and any loss accruing to Government thereby shall be recoverable
from them under (Madras) Act II of 1864."

The plaintiff subsequently sought to withdraw from the sale but the
sale to him was confirmed. He did not make the payments required by
the above notification, and the sale to him having been on that account
cancelled, a fresh auction was held, at which the right in question was
purchased for a smaller sum. In June 1886 the house now in question
was attached and sold by the Collector as under the Revenue Recovery
Act, 1864, to realise the difference between the amount of the plaintiff's
bid and the price paid by the second purchaser, and defendant No. 3
purchased it.

The District Munsif passed a decree as prayed. On appeal the
District Judge reversed the decree on the ground that the suit was brought
after the expiry of the six months period prescribed by the Revenue
Recovery Act, 1864, for suits to set aside a sale for arrears of revenue.

The plaintiff preferred this second appeal.

The Acting Advocate-General (Hon. Mr. Wedderburn), for appellant.
Respondents were not represented.

JUDGMENT.

The District Judge was in error in holding that Section 59 of Act II
of 1864 applied to the suit, inasmuch as the sale by the Collector was
not a proceeding under the Act, as there is no provision in Act II of 1864
for treating the sum payable for plaintiff as revenue. The sale was ultra
vires, and plaintiff had twelve years within which to bring his suit. We
set aside the decree of the Lower Appellate Court and restore that of the
Munsif. Appellant will be entitled to his costs in the Lower Appellate
Court.

There will be no costs in this Court.
QUEEN-EMPERESS v. SOMMANNA

15 M. 221 - 2 M.L.J. 120 = 1 Weir 133.

[221] APPELLATE CRIMINAL.

Before Mr. Justice Wilkinson and Mr. Justice Subrahmanya Ayyar.

QUEEN-EMPERESS v. SOMMANNA. [*] [25th and 28th January, 1892.]

Penal Code, Sections 183, 186 — "Voluntarily."

A District Judge ordered that the house of the defendant in a suit pending before him be searched and certain property brought to the Court, and appointed a commissioner to carry out this order. The commissioner went to the house, but the defendant shut the doors and would not admit him. A crowd collected, and the commissioner felt it would be unsafe to proceed to carry out the order by force, and was unable to do so otherwise. The defendant was prosecuted and sentenced under Penal Code, Section 186:

Held, that the facts disclosed no offence under that section.

[R. Rat. Unrep. Cr. Cas. 250 (851).]

Petition under Criminal Procedure Code, Sections 435, 439, praying the High Court to revise the judgment and sentence of T. Rama Rau, Sub-Divisional Magistrate of Cuddapah, in criminal appeal No. 40 of 1891, confirming the judgment and sentence of the Second-class Magistrate of Pullampet in calendar case No. 102 of 1891.

The facts of the case as found by the Sub-Divisional Magistrate were as follows:

In a certain civil suit the District Judge of Cuddapah issued a commission to P. Trinakala Rau, First-grade Pleader, to search the house of the accused and remove certain property thereto the District Court. The commissioner accordingly went to the village of the accused and, having read out the order, asked him to allow it to be executed. The accused remained inside his house and, closing the doors against the commissioner, obstructed the execution of the commission in spite of repeated requests addressed to him. The commissioner tried for several hours to effect an entrance into the house, but did not succeed. He invoked the assistance of the Village Magistrate and got some impediments to force open the doors. But, seeing that the accused was a wealthy and influential merchant, and that there was a crowd round his house, the commissioner feared that there might be a disturbance of the public peace if he resorted to that measure. He then reported the matter to the nearest police station house officer. But by the time the police arrived the plaintiff, on whose behalf the commission had been issued, had come to terms with the defendant and requested the commissioner not to execute it.

The Acting Advocate-General (Hon. Mr. Wedderburn), for petitioner.

The Government Pleader and Public Prosecutor (Mr. Powell) in support of the conviction.

JUDGMENT.

The petitioner was convicted by the Second-class Magistrate of Pullampet under Section 183, Indian Penal Code, of resistance to the taking of property by the lawful authority of a public servant and sentenced to two months' rigorous imprisonment and a fine of Rs. 200. On appeal the Sub-Divisional Magistrate confirmed the sentence, but altered the finding to one of an offence under Section 186, Indian Penal Code, and the only question now is whether the ingredients of the offence have

* Criminal Revision Case No. 591 of 1891.
been made out. On behalf of the petitioner it is urged that there was nothing more on his part than non-compliance with an order which he was not bound to obey. On the part of the Crown it is argued that there was active obstruction and a threatened breach of the peace. There is nothing in the judgment of the Sub-Divisional Magistrate to lead us to think that it was the petitioner who gathered the crowd, nor on referring to the evidence of the commissioner do we think that it can be held that it was through the instrumentality of the prisoner that the crowd came together. It would seem to have been a very orderly crowd which collected upon hearing that an inventory was to be made of all the goods and chattels in the house of the principal merchant in the place. All that is found is that the commissioner, who appears to have acted throughout in a very injudicious manner, read out the order and asked the petitioner to be allowed to carry it out, and that petitioner, without giving any answer, remained inside his house with closed doors. We do not think that mere failure to comply with the request of the commissioner amounts to such obstruction as is contemplated in Section 186. The use of the word “voluntarily” seems to us to indicate that the Legislature contemplated the commission of some overt act of obstruction, and did not intend to render penal mere passive conduct. It was not asserted that petitioner barricaded his doors or assaulted the commissioner, or took any active step to oppose the execution of the commission. He merely shut himself up in his house and took no notice of the commissioner. His object apparently was not to obstruct, but to gain time for the compromise, which later on in the day was effected. The conviction cannot be sustained, and we accordingly set it aside, and the fine, if paid, will be refunded.

15 M. 223.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

NARAYANACHARIAR (Plaintiff), Appellant v. RANGA AYYANGAR AND ANOTHER (Defendant and Supplemental Respondent), Respondents.*

[4th and 10th December, 1891.]

Rent Recovery Act—Act VII of 1865 (Madras), Sections 8, 9, 10—Suit for a patta—Denial of tenancy by landlord.

In a summary suit brought under Rent Recovery Act (Madras) to compel the defendant to give a patta to the plaintiff for certain land which plaintiff claimed to hold from him, the defendant denied that the plaintiff was his tenant:

_Held, that the Collector was bound to try this question so raised and not to refer the parties to a regular suit for its determination._

[FO., 17 M. 140 (142)=4 M.L.J. 26]

SECOND appeal against the decree of W. F. Grahame, District Judge of Tinnevelly, in appeal suit No. 180 of 1889, affirming the decision of T. Varada Rau, Acting Head Assistant Collector of Tinnevelly, in summary suit No. 3 of 1889.

The plaintiff brought this suit to compel the defendant, from whom he alleged he held certain land, to give him a patta in respect thereof.

* Second Appeal No. 1593 of 1889.
The defendant denied the tenancy, and the Head Assistant Collector dismissed the suit, observing:—"As a question regarding the existence or otherwise of the relationship of landlord and tenant has arisen in this case, the matter must be determined in the regular way."

[224] The District Judge concurred in the opinion so expressed.
The plaintiff preferred this second appeal.
Sadagopachariar, for appellant.
Sankara Menon, for respondents.

JUDGMENT.

The District Judge is no doubt right in holding that Section 10 of Madras Act VIII of 1865 has reference to proceedings under Section 9 only, but it does not, in our opinion, follow that in a summary suit under Section 8 the Collector is debarred from adjudicating upon the question whether the relation of landlord and tenant exists between the parties.

He is to try the case, and the plaintiff's case is that he is a tenant and entitled to a patta which defendant denies. To say that the Collector is to hold his hand and make no further inquiry, merely because the landlord denies that plaintiff is his tenant is to put it in the power of the landlord always to deprive the tenant of the remedy by summary suit given him by Section 8. If upon inquiry the Collector finds that plaintiff does not hold land under the landlord, that may be a reason for dismissing the suit, but the issue whether the plaintiff is or is not a tenant of the defendant must be properly tried and determined on the evidence and not on the mere word of the defendant.

We must reverse the decree of the lower Courts and remand the suit of the Head Assistant Collector for trial on the merits.

Appellant is entitled to his costs in this and the Lower Appellate Court.


APPELLATE CRIMINAL.

Before Mr. Justice Parker and Mr. Justice Shephard.

ABDUL KHADAR AND OTHERS (Petitioners), v. MEERA SAHEB (Counter-petitioner).* [5th and 15th January, 1892.]

Criminal Procedure Code, Sections 195, 435, 478—Forged documents filed in Court—Prosecution ordered by Court.

Certain documents having been put into Court in a suit pending before a District Munsif, but not given in evidence, the District Munsif made an order for the prosecution of the parties who so put them in, on the ground that the documents were forgeries:

 Held, (1) that the High Court had power to revise the proceedings of the District Munsif;

(2) that the District Munsif was not competent to go beyond the record;

(3) that the order was wrong and should be set aside.

[Diss., 19 P.R. 1897 (Cr); 2 Weir 177; R., 32 A. 74 (76) = 6 A.L.J. 993 = 10 Cr. L.J. 497 = 4 Ind. Cas. 105; 10 C.L.J. 564 = 14 C.W.N. 390 = 4 Ind. Cas. 710 (712); 5 M. L.J. 922 = 2 Weir 602; Rat. Unrep. Cr. Cas. 895 (897); Expl. 20 M. 338 = 7 M.L.J. 311 = 2 Weir 175.]

PETITION under Sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of T. T. Rangachariar, * Criminal Revision Case No. 528 of 1891.
1892
JAN. 15

APPEL- LATE
CRIMINAL.

15 M. 224 = 2 M. L. J. 148
= 2 Weir 174.

District Munsif of Paramagudi, in register case No. 1 of 1891, and to stay further proceedings in the said register Case No. 1 of 1891.
Mr. Norton, for petitioners.
Mahadeva Ayyar, for counter-petitioner.

JUDGMENT.

The District Munsif purports to be acting under Section 478, Criminal Procedure Code. The words "any such offence" relate to offences referred to in Section 195, and such of those offences as fall under Sections 463 and 471, Indian Penal Code, must have been committed by a party to any proceeding in any Court in respect of "a document given in evidence in such proceeding."

In the present case a decree against defendants Nos. 2, 3 and 5 has been passed upon the 8th of the plaintiffs. The suit against fourth defendant is still undisposed of, and the documents, alleged to be forgeries, have been put into Court, but are not yet given in evidence, inasmuch as the suit has not been tried.

It is not competent to the Court to go beyond the record—Zemindar of Sivanjiri v. The Queen (1).

We have no doubt as to the power of the High Court to interfere on revision.

The proceedings of the District Munsif must be set aside and the present prosecution dropped.


[226] APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

NAGAMUTHU AND OTHERS (Defendants Nos. 1, 2 and 4), Appellants v. SAVARIMUTHU (Plaintiff), Respondent. [12th November and 15th December, 1891.]

Civil Procedure Code, Section 444.—"Parties to the suit"—Questions relating to execution—Separate suits.

A plaintiff, alleging that her husband (deceased) had advanced money on the security of land belonging to a family of four Hindus, sued them to enforce his lien and obtain a decree. The representatives of one of the defendants only appealed, and the decree was reversed as regards them. The decree was executed against the other defendants by the attachment and sale of their shares of the land, and the plaintiff recovers the purchase. The successful appellants obstructed her in her attempt to obtain possession, and she now sued them for partition of the three-quarters share purchased by her;

Held, that the suit was not precedence by Civil Procedure Code, Section 444.

[9., 23 M. 316 (351); 19 M. 311 (831); R., 23 M. 361 (867) (P. B.); 15 C. P. L. R. 106 (110); D., 22 M. 181 (182).]

SECOND appeal against the decree of H. H. O'Farrell, Acting District Judge of Trichinopoly, in appeal suit No. 146 of 1888, affirming the decree of V. Swaminatha Ayyar, Additional District Munsif of Trichinopoly, in original suit No. 559 of 1887.

Suit for the partition of certain land and for possession of a three-quarters share therein. The land in question had belonged to an undivided

* Second Appeal No. 1997 of 1890.

(1) 6 M. 29.
family consisting of four brothers, of whom the oldest (Chinnamuthu Veram) was the father of the defendants, and it was mortgaged to Srinivasa Thathachari. While this mortgage was subsisting the four brothers effected a partition, and a question was subsequently raised whether the land above referred to was left in common or fell to the share of Chinnamuthu. It appeared, however, that in 1854 he mortgaged it to Maruthanayakam Pillai to pay off the other mortgage. In 1879 one of his brothers, Kuppuumuthu, brought a suit to redeem the mortgage of 1854 and by the consent of the mortgagee obtained a decree for possession, conditional on his paying the mortgage amount into Court, which he did, having previously borrowed from the present [227] plaintiff’s husband, as she now alleged, Rs. 600 on the security of the same land. Subsequently, in the same year, Chinnamuthu sued to redeem the same mortgage, which he alleged he had, in great part, paid off. This suit was dismissed, and the decree dismissing it was confirmed on appeal on the ground that the plaintiff’s remedy, if any, was to be sought against the decree-holder who had paid the money into Court. Chinnamuthu sued his brother and failed, it being found that the land was not his divided property, but belonged to the family in common. In 1854 the present plaintiff sued Chinnamuthu and his brothers to enforce the mortgage lien of her husband (deceased). In the Court of First Instance the plaintiff was held to have a valid charge to the extent of Rs. 400, and a decree was passed for that amount. Against this decree an appeal was preferred by the sons of Chinnamuthu alone, and the decree was reversed as against them. It remained, however, in force as against the other defendants and was executed by the attachment and sale of their three-quarters share in the land. The plaintiff was the purchaser at the Court sale, and having been obstructed by the sons of Chinnamuthu in her attempts to obtain possession, she now sued as above for partition.

The District Munsif passed a decree for the plaintiff, which was affirmed on appeal by the District Judge.

The defendants preferred this second appeal.

Mr. Subramaniam, for appellants.

Ramasami Mudaliar, for respondent.

JUDGMENT.

SHEPHERD, J.—The only question argued was whether the maintenance of the suit was precluded by the provisions of Section 244 of the Civil Procedure Code by reason of the plaintiff and the defendants having been parties to a prior suit. As far as the plaintiff is concerned, there can be no doubt that, although it is in the character of purchaser at the sale in execution of her decree that she now brings the suit to secure possession of the lands sold to her, she is, nevertheless, a party to the suit in which the decree was obtained within the meaning of Section 244 of the Civil Procedure Code. The defendants, also having been defendants in the prior suit, are parties to that suit, and none the less so, because ultimately it was as against them dismissed, while as against their co-defendants, who did not appeal, the decree in the plain it’s favour remained standing. But, although both the plaintiff and [228] the defendants are parties to the former suit, I do not think that the question now raised is one arising between the parties to the suit in which the decree was passed and relating to the execution, discharge or satisfaction of the decree” within the meaning of the section. As between the plaintiff and the defendants no such question can arise, because
there is no decree against the defendants to be executed, discharged or satisfied. They are not judgment-debtors of the plaintiff. No doubt the present suit is occasioned by the decree-holder's desire to give effect to his decree, and may be said to arise out of the execution of his decree. But in my opinion, regard being had to the language of the section, a question relating to the execution of the decree presupposes a person against whom execution is sought and cannot arise as between the decree-holder and persons who, as far as concerns execution, are complete strangers. In the present case the defendants were dismissed from the prior suit on appeal. But a much stronger case might be put to illustrate the inconvenience of giving a larger operation to the section. For instance in a suit against two defendants the plaintiff might withdraw the suit against one with or without liberty to bring a fresh suit and obtain a decree against the other. The defendant against whom the suit was withdrawn would of course be a party to the suit in which the decree was passed. But he would have no concern in the execution of the decree, and in my opinion no question relating to the execution could arise between him and the decree-holder. If it be correct to say that the object of the section is to put a limit to litigation and prevent one suit growing out of another, it is clear that in such a case as the one put the section ought not to be applicable. It cannot have been intended to prohibit suits between persons as between whom no adjudication in respect of their right has as yet taken place.

In my opinion the District Judge was right in the conclusion at which he arrived, and therefore the appeal should be dismissed with costs.

WILKINSON, J.—I am of the same opinion. The question is not, as the District Judge puts it, whether the present suit is a part of the execution proceedings, but whether, within the meaning of Section 244, Civil Procedure Code, the plaintiff and defendants were parties to the suit, in which the decree was passed. In one sense no doubt they were so, and the defendants, having been [229] allotted their costs in appeal are or were entitled to take out execution of the decree. But the question at issue between the parties in the present suit is not one relating to the execution, discharge or satisfaction of the decree in that suit. The defendants are not, with reference to the subject-matter of the present suit, judgment-debtors, but occupy the position of third parties, who, being in possession of the land for which the plaintiff has obtained a decree, obstruct delivery to her. If the provisions of Section 244 applied, it must be held that the plaintiff could execute her decree as against the defendant. But if the plaintiff were to take out execution proceedings against the defendants, she would be met by the plea that there is no decree to be executed, the decree so far as the defendants were concerned having been quashed. None of the cases quoted in argument apply. In Viraraghava v. Venkata (1) the parties were parties to the suit in which the decree was passed. In Vallabhan v. Panuunni (2) the parties were the decree-holder and the judgment-debtor, and in Mutta v. Appasamie (3) the question was one relating to the execution of the decree between the representative of the original decree-holder and one of the judgment-debtors, the decree-holder having become, as the plaintiff in this case has, the purchaser of the property. The present defendants cannot, in my opinion, be regarded as occupying any one of these positions. The second appeal fails and is dismissed with costs.

(1) 5 M. 217. (2) 12 M. 454. (3) 18 M. 504.
VENKATASUBBAYA v. VENKAYYA

15 M. 230 = 1 M.L.J. 577.

[230] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

VENKATASUBBAYA (Plaintiff), Appellant v. VENKAYYA (Defendant), Respondent.* [26th October, 1891.]

Mortgagor and mortgagee—Mortgage by conditional sale before Transfer of Property Act—Redemption.

Suit, in 1889, to redeem a mortgage of 1880, which contained a provision that, if the mortgage money was not paid in March 1882, the mortgage premises should become the absolute property of the mortgagee:

Held, that the plaintiff was entitled to redeem. Ramasami Sastrigal v. Samyappanayakan (4 M. 179) explained and followed.

F., 14 M.L.J. 347 (349); R., 6 S.L.R. 178 (180); U.B.R. (1897—1901), 502.]

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 461 of 1890, reversing the decree of M. Ramayya Pantulu Garu, District Munsif of Bapatla, in original suit No. 279 of 1889.

A suit to redeem the following mortgage:

"Hypothecation bond, dated the 11th Ausvayuja Bahulan of the year Vikrama corresponding to 29th October 1880, executed to Roddy, son of Itturi Venkatramudu, Kamma by caste, living by cultivation, and residing at Thathapudi Agraharam attached to the sub-district of Narasarowpet, Narasarowpet taluk, Kistna district, by Venkatasubbiah, son of Guntupalli Sivaramiah, Brabman living by agraharam inams and residing at Mattugipudi attached to the sub-district of Narasarowpet in Narasarowpet taluk in the said district.

"The amount taken from you as loan on account of my urgency is Rs. 500. I bind myself to pay this principal with interest at 1 per cent, per month on the 30th Chaitra Bahulan of the year Chithrabanu (29th March 1882). Particulars of property hypothecated to you by me until the discharge of the amount are as follows:

[Here follow boundaries.]

"As I have hypothecated to you 10 acres 73 cents, situated within these four boundaries and the inam land of 10 acres 80 [231] cents, bearing a quit-rent of Rs. 1-4-0 per year out of my half share in the inam land bearing D. No. 769 held by me and Guntupalli Kotlingayya and Narasayya in the village of Marutur, I bind myself to pay your money on the said fixed date and redeem my hypothecated property. In default of payment of money on the said date, I bind myself to give over possession of the said land to you treating this as an absolute sale-deed for the amount of the said principal and interest, to file a deed of consent and cause your name entered in the accounts. I or my heirs shall not raise any claim in respect of this. This hypothecation deed is executed with my consent."

[Signed] GANTUPALLI VENCATA SUBRAYA,

The defendant was the grandson of the mortgagee.
The District Munsif passed a decree as prayed.
The District Judge, on appeal, reversed this decree observing:

"It is thus necessary to inquire what were the relative positions of this plaintiff and of the defendant's grandfather in March 1882, when the

* Second Appeal No. 1154 of 1890.

511
stipulated period expired. The defendant’s grandfather was in possession of the Tatapudi lands as tenant, so no further transfer of the land was necessary and, on the stipulated sale, it became his property. The Marur land was in possession of the shepherd tenants, and so, from that date, the right to collect rent from them passed to defendant’s grandfather. The registered document must be held to have taken effect. I think that the District Munisif, in his finding on the first issue, has overlooked the fact that no further sale was necessary.

"The dates of the mortgage and of the sale are prior to the date upon which the Transfer of Property Act came into force. Upon the authority of Rama Isami Sastry v. Samiyappanayakan (1) the District Munisif held that the plaintiff may nevertheless retain. It is now contended, on behalf of defendant, that the decision upon which the Munisif relies, applied only to mortgages of date prior to 1875, and that, as this mortgage was executed in 1860, after the decision in Thunbuswamy’s case (2) was published, it must be presumed that the parties knew of that decision. There is much force in this contention."

Mr. Michel and K. Subramanyam Ayyar, for appellant.
Bhushyam Ayyangur, for respondent.

JUDGMENT.

[232] In Rama Isami Sastry v. Samiyappanayakan (1), the majority of the Court adopting the rule laid down by the Privy Council in Thunbuswamy Mooldy v. Hossain Rowthen (2) held that mortgages executed subsequent to 1858 shall be treated according to what the Privy Council considered to be the erroneous course of decisions, nothing was expressly decided in that case as to how long this rule shall be followed, but the principle kept in view appears to be that that which had been, though erroneously, supposed to be the law in Madras should be followed as to mortgages after 1858 until the Legislature interfered to settle the law. In the present case the District Judge has laid down a new rule, that mortgages executed after the date of the Privy Council decision in Thunbuswamy Mooldy v. Hossain Rowthen (2) in 1875 must be treated as governed by the principle of that decision. We are not prepared to adopt this principle, and so still further unsettle rights created by mortgages in this Presidency. We consider that under the Privy Council ruling the Courts of this Presidency are at liberty to apply the doctrine of English Courts of Equity to mortgages executed after 1858 until the Legislature settled the law, as it has now done, by the Transfer of Property Act. It is not in favour of the new rule which the District Judge propounds that there has been no decision to that effect in Madras, though it is now sixteen years since the Privy Council decision in Thunbuswamy Mooldy v. Hossain Rowthen (2).

We think the District Munisif’s view was right, and we reverse the decree of the Lower Appellate Court, and restore that of the Munisif. Respondent must pay appellant’s costs in this and the Lower Appellate Court.

(1) 1 M. 1579.
(2) 1 M. 1=2 I.A. 241.
MAHADEVA v. KUPPUSAMI  
15 Mad. 234

15 M. 233.

[233] APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Subramanya Ayyar.

MAHADEVA (Plaintiff) v. KUPPUSAMI (Defendant).*
[11th January, 1892.]

Civil Procedure Code Section 356 — Insolvency proceedings — Receiver, commission of, how computed.

A receiver appointed in insolvency proceedings under the Civil Procedure Code is entitled to a lien for the amount of his commission on the net assets remaining after payment of the charges specified in Civil Procedure Code, Section 356 (b), (c) and (d).

CASE stated under Section 617 of Act XIV of 1882 by C. Venkoba- 
chariar, Subordinate Judge of Tanjore.

The case as stated disclosed the following facts:—

A receiver was appointed in the matter of insolvency petition No. 2 of 1888 on the file of the Subordinate Court, Tanjore, to realise and distribute the assets of the insolvent under Civil Procedure Code, Section 356, and he was to receive 5 per cent. commission. He was unable to collect any debts due to the estate, but he realised Rs. 3,675 by the sale of certain immovable property of the insolvent, and he now applied for payment of his commission out of the sale-proceeds. This application was opposed by persons to whom the immovable property had been mortgaged.

The amount of the scheduled debts was Rs. 5,670 and it was found that the payment of the secured debts would almost exhaust the estate.

The question referred was as follows:—

Is the receiver entitled under the Court’s order appointing him receiver to a commission of 5 per cent. on the sum realized, which may remain after discharging the charges of the kind specified in Clauses (b) and (c) of Section 356, Civil Procedure Code, or on the balance remaining after discharging the secured debts specified in Clause (d), and whether the phrase “balance so distributed” means the balance, which remains after the payment of charges [234] mentioned in Clauses (b) and (c) only or of Clauses (b), (c) and (d) together?

Pattabhiramayyar for plaintiff.
R. Subramanya Ayyar, for defendant.

JUDGMENT.

We are of opinion that the receiver is entitled to remuneration at the rate fixed by the late Subordinate Judge, but for the amount of that fee, he is only entitled to a lien to the extent of 5 per cent. upon the sum remaining as net assets after the charges specified in Clauses (b), (c) and (d) of Section 356 have been paid. The question whether the opposing creditor’s claim is a debt secured by mortgage is not before us. See ex parte Browne in re Maltby (1).

* Referred Case No. 37 of 1891.

(1) L.R. 16 Ch. D. 497.
1891
DEC. 15.
APPEL-
LATE
CIVIL.

SUBBARAZU AND OTHERS (Defendants Nos. 2 to 6), Appellants
v. VENKATARATNAM AND ANOTHER (Plaintiff and Defendant No. 1),
Respondents.  
[27th November and 15th December, 1891].

Hindu Law—Partition—Mortgagor and mortgages—Redemption—Successive mortgages
on family property—Assignment of equity of redemption.

Two brothers constituted an undivided Hindu family. The eldest mortgaged half of certain family lands to P and the other half to the father (since deceased) of the contending defendants, and placed the mortgages respectively in possession. Neither mortgage was binding on the younger brother who mortgaged his share of the same land to the plaintiff. The plaintiff obtained a decree on his mortgage and attached and brought to sale in execution and himself purchased the half share of his mortgagor, and having afterwards purchased the share of the elder brother and come to a settlement with P, now brought a suit for a moiety of the land in the possession of the contending defendants as forming part of the half share of his mortgagor:

Heled, (1) that the contest being between strangers to the family, and the plaintiff having purchased the entire rights of the family in the land in question, the plaintiff was not defective for want of a prayer for the partition of the whole property of the family.

(2) that the plaintiff being the assignee of the elder brother could not deprive his mortgagee of a portion of their security without asking for an account and offering to pay whatever might be due on the footing of the mortgage.


SECOND appeal against the decree of E. H. Hannett, Acting District Judge of Godavari, in appeal suit No. 351 of 1889, affirming the decree of Lakshminarayana Rau, District Munsif of Rajahmundry, in original suit No. 152 of 1889.

Suit for possession of a moiety of certain land which had been the property of an undivided Hindu family consisting of two brothers. The plaintiff had acquired the rights of both brothers in the lands in question. Defendants Nos. 2 to 5 held a mortgage from one of the brothers earlier in date than the transfer of his rights to the plaintiff. Defendant No. 1 was the widow and representative of the mortgagee.

The further facts appear sufficiently for the purposes of this report from the judgment of the High Court.

Both of the Lower Courts decreed in favour of the plaintiff. Defendants Nos. 2 to 6 preferred this second appeal.

Srirangachariar, for appellants.

Ramasami Mudaliar, for respondent No. 1.

JUDGMENT.

Venkataramu and Sreeramulu were undivided brothers. They owned 13 odd acres of inam land in Penkarametta as well as other property. Venkataramu, who was the elder brother, mortgaged a moiety of the land in Penkarametta to one Peddiah, and the other moiety to the father of defendants Nos. 2 to 6 and put each of his mortgagees in possession of
6 acres 59 cents, that is of the whole land. Both the Lower Courts have found that these mortgages were not binding on Sreeramulu and the finding is not impeached on second appeal. Sreeramulu mortgaged his share of the land in Penkarametta to the plaintiff, who, having obtained a decree on his mortgage in original suit No. 132 of 1887, purchased in execution Sreeramulu’s half share, and having settled with Peddiah and purchased the share of Venkatarazu, now sues for a moiety of the land in the possession of the defendants Nos. 2 to 6, on the ground that Sreeramulu was entitled to that moiety. Both the Lower Courts have decided in his favour, and defendants Nos. 2 to 6 appeal. In the first place it is contended that the suit was not sustainable, as the plaintiff was bound to sue for a partition of the whole family property and could not maintain a suit for a specific portion only. In support of this contention reliance is placed on Venkatarama v. Meera [236] Labat (1), but that case is distinguishable from the present. There the conflict was between a stranger who had purchased from one member of the joint family, his share in a specific land and the members of the joint family. Here the contest is between strangers. The plaintiff having purchased the rights of the only members of the joint family in the Penkarametta land stands in the shoes of the joint family, and therefore the general principle on which the case above referred to was decided has no application to the present case. For the same reason, the case relied on by the respondents’ pleader—Chinna Sanyasi v. Suriya (2)—is not in point. The plaintiff cannot set up the right of Sreeramulu to affirm the mortgage by Venkatarazu to defendants Nos. 2 to 6, appellants, and claim by partition to recover that share to which the alienation could not extend, because he stands in the shoes of Venkatarazu. If he represented Sreeramulu alone, he might perhaps avail himself of the right recognized in the latter case, but, having five years prior to the present suit purchased all the rights of defendant’s mortgagor, he cannot now maintain a suit for Sreeramulu’s half share. What he purchased from Venkatarazu was the right of redemption, and he cannot seek to deprive Venkatarazu’s mortgagors of a portion of their security without asking for an account and offering to pay whatever may be due on the footing of the mortgage. The suit in its present form was clearly not maintainable. The defendants are entitled to say “you stand in the shoes of our mortgagor “and you cannot reprobate your mortgage to us and plead that you had “no right to give us possession of a moiety of the land. You had, at “the time you granted the land, an undoubted right to a moiety, and you “cannot oust us without discharging your liability.” We fail to see what answer there is to this. Plaintiff is the owner by purchase of the whole land, and if he wants possession of the whole land, he must discharge his vendors’ debts on the land and not seek by setting off the rights of one of his vendors against the other to deprive defendants of their security. The decrees of the Courts below must be reversed, and the suit dismissed with costs throughout.

---

(1) 13 M. 275.
(2) 5 M. 196.
15 Mad. 237

[237] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Mutthusami Ayyar, Mr. Justice Parker, and Mr. Justice Shephard.

Pichayee (Petitioner) v. Sivagami (Counter-petitioner).†

[9th October, 1890 and 12th January and 13th March, 1891.]

Civil Procedure Code, Section 596—"Value of the subject-matter of the suit"—Civil Courts Act (Madras)—Act III of 1873, Section 14.

Civil Courts Act (Madras) III of 1873 does not control the construction of Civil Procedure Code, Section 596, and under that section the real market value of the matter in dispute is the test as to whether or not an appeal lies to the Privy Council.

[F., 60 P.R. 1905=150 P.L.R. 1905; R., 34 B. 267 (273)=12 Bom. L.R. 149; 31 C. 301 (303).]

PETITION under Section 595 of the Code of Civil Procedure for the grant of a certificate to appeal to Her Majesty in Council in appeal No. 166 of 1887 on the file of the High Court, Madras.

The case is stated sufficiently for the purposes of this report in the judgment of the High Court.

Subramanya Ayyar and Pattabhirama Ayyar, for petitioner.

Bhaskar Ayyangar, for counter-petitioner.

The case came on for disposal before MUTTUSAMI AYYAR and WILKINSON, JJ.

JUDGMENT.

The affidavits put in by the petitioner and counter-petitioner will be forwarded to the Subordinate Judge, who will be directed to ascertain and report what is the market value of the subject-matter of the suit. It is argued by the counter-petitioner’s pleader that the second clause of Section 596, Civil Procedure Code, does not apply to this case. We do not now decide that point, but it will be open to argument on receipt of the report of the Subordinate Judge. Both sides will be at liberty to adduce evidence.

The finding is to be returned within six weeks from the date of receipt of this order, and seven days, after the posting of the finding in this Court, will be allowed for filing objections.

[In compliance with the above order, the Subordinate Judge submitted a finding to the effect that the market value of the lands in question exceeds Rs. 10,000.]

This petition coming on again for hearing before MUTTUSAMI AYYAR and BEST, JJ., on receipt of the finding of the Lower Court, the Court referred the matter to the Full Bench as follows:—

ORDER OF REFERENCE TO FULL BENCH.—"A question is raised in this case as to what is meant by the phrases 'value of the subject-matter of the suit in the Court of First Instance' and 'value of the matter in dispute on appeal' occurring in Section 596 of the Code of Civil Procedure.

It is contended on one side that the market value is meant and reference is made to the decisions of the Privy Council in Mohun Lall Sookul.

† Civil Miscellaneous Petition No. 662 of 1889.
v. Bebee Doss (1) and Baboo Lekraj Roy v. Kanhyaa Singh (2) add also to a ruling of the Sadr Court printed at page 5 of Chamier's Rules of Practice.

On the other hand it is contended that it is the value as calculated in the Court of First Instance under the law now in force.

The question is one of general importance which we think desirable to refer for the opinion of the Full Bench.

This reference came on for hearing and was argued before a Full Bench, consisting of Collins, C.J., Muttusami Ayyar, Parker and Shephard, JJ.

JUDGMENT.

Collins, C.J.—The point submitted to the Full Bench is what is meant by the phrases "value of the subject-matter of the suit in the Court of First Instance" and "value of the matter in dispute on appeal" occurring in Section 596 of the Code of Civil Procedure relating to appeals to Privy Council.

It is contended on the one side that the market value is meant, and on the other side that it is the value as calculated in the Court of First Instance.

The rules of the Privy Council, dated 1838, declared that no appeal shall lie to the Privy Council unless the value of the matter in dispute in such appeal shall amount to the sum of Rs. 10,000 at least.

In Mohan Lall Sookul v. Bebee Doss (1), the Privy Council held, in a case in which the value was laid in the plaint as being under Rs. 10,000, that as the calculation was estimated with [239] reference to the stamp duty only, if satisfactory evidence was produced that the real or market value of the property exceeded Rs. 10,000, leave to appeal would be granted; and in Gourmoney Debia v. Khaja Abdool Gunny (3), the same course was adopted. In Baboo Lekraj Roy v. Kanhyaa Singh (2), Sir James Colville in the judgment of the Privy Council says, "The stamp duties imposed for fiscal purposes are calculated on a certain rule fixed by law, but the right of appeal depends on the value, which is a matter of fact."

In 1874 the Privy Council Appeals Act was passed and Section 5 enacts that "the amount or value of the subject-matter of the suit in the Court of First Instance must be Rs. 10,000 or upwards, and the amount or value of the matter in dispute on appeal to Her Majesty in Council must be the same sum or upwards," and these words are incorporated in Section 596, Code of Civil Procedure.

I do not think that the words "value of the subject-matter in the Court of First Instance" in any way affect the right of appeal when the real value of the subject-matter is Rs. 10,000. If it was intended to bind the applicant to the value indicated by the amount paid as stamp duty, the Legislature would surely have said so, and it ought not to be assumed that the Legislature intended to take away from the subject or limit such an important privilege as the right to appeal to the Privy Council without the words being clear and explicit.

It has been suggested that these words were added in the Act of 1874 to prevent costs being added to the matter in dispute so as to raise the value by the addition of costs to over the sum of Rs. 10,000, but this appears to be mere surmise.

(1) 7 M.I.A. 428. (2) 1 I.A. 317. (3) 8 M.I.A. 268.
I am of opinion, in answer to the reference, that the real market value of the matter in dispute is the test as to whether an appeal to the Privy Council lies.

MUTTUSAMI AYYAR, J.—I am also of the same opinion. Having regard to Section 616, Clause (b), I do not think that the value of the matter in dispute on appeal to Her Majesty in Council and of the subject-matter of the suit in the Court of First Instance is any other than the market values. The only effect that can reasonably be given to the first part of Section 596 is [240] that of excluding costs incurred in the Court of First Instance in fixing the value of the matter in dispute on appeal. Otherwise, there would be no necessity for referring to the value of the subject-matter of the suit in the Court of First Instance. I do not consider that Madras Civil Court's Act (Act III of 1873, Section 14) can be permitted to control the construction to be put upon Section 596 which is applicable to the whole of British India.

PARKER, J.—I agree.

SHEPHARD, J.—I am of the same opinion and agree with Muttusami Ayyar, J., in thinking that the object of the allusion to the Court of First Instance was to exclude costs.

15 M. 240 = 1 M.L.J. 750.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

LAKSHMI NARASIMHA (Plaintiff), Appellant v. ATCHANNA AND OTHERS (Defendants), Respondents.* [1st December, 1891.]

Civil Procedure Code, Sections 373, 647—Application for execution struck off for non-payment of process fees—Subsequent application.

A decree-holder having applied for execution of his decree, notice was issued to the judgment-debtors, and their property was attached, but the applicant failed to pay the process fees, and the application was struck off, and no leave to make a fresh application was obtained under Civil Procedure Code, Section 373:

Held, that the decree-holder was entitled to apply again for execution of his decree.

APPEAL against the order of M. B. Sundara Row, Subordinate Judge of Ellore, in appeal against order No. 372 of 1890, reversing the order of Vepa Krishnamurthi, District Munsif of Ellore, in execution petition No. 1037 of 1890.

Application for the execution of the decree in original suit No. 588 of 1875 on the file of the District Munsif of Ellore. It appeared that an application for execution of this decree had been made on 11th July 1887, and, after notice to the judgment-debtors, their property was attached, but the decree-holder, having failed to pay batta, that application was struck off on 10th August [241] 1887, and the decree-holder, obtained no permission to make a fresh application under Civil Procedure Code, Section 373. The District Munsif held that the above circumstance was no bar to the present application, which he accordingly granted. But the Subordinate Judge, on appeal, reversed his order on the authority of Radha Charan v. Man Singh (1).

* Appeal against Appellate Order No. 5 of 1891.

(1) 19 A. 392.
AUGUSTINE v. MEDLYCOTT

The decree-holder preferred this appeal.  
Ramachandra Rau Sahab, for appellant.  
Parthasaradhi Ayyangar, for respondent.

JUDGMENT.

The ruling in Radha Charan v. Man Singh (1) has never been adopted as the correct view of the law in this Presidency, see Ramanadan v. Periatambé (2) or in Calcutta and Bombay, see Wajihan alias Abijan v. Bishwanath Parshad (3) and Shankar Bisto Nadgir v. Narsinghrao Ranchandra (4)—and we cannot follow it.

The order of the Subordinate Judge must be set aside and that of District Munsif restored. Appellant is entitled to his costs in this and in the Lower Appellate Court.

15 M. 241.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Subrahmanya Iyengar.

AUGUSTINE AND OTHERS (Defendants), Appellants v.  
MEDLYCOTT AND OTHERS (Plaintiffs), Respondents.

[11th, 14th, 15th and 19th January, 1892.]

Civil Procedure Code, Sections 15, 530, 578—Evidence Act, Sections 57, 87—Public charitable trust—District Court, jurisdiction of—Books of history.

A church at Palayur and the property appertaining to it were in the possession of certain of the yogakars or parishioners, who had been elected haikars or churchwardens, but whose election had since been superseded in favour of three other persons who now sued to recover possession. The plaintiffs were Roman Catholics; and with the three persons above referred to were joined as plaintiffs the Vicar Apostolic, the Vicar appointed to the church by him, and two other persons representing the Roman Catholic yogakars. The defendants were Chaldean Syrian Christians and with those in possession were joined as defendants the Chor Episcopos, the Vicar appointed to the church by him, and four persons representing the other yogakars.

[232] The plaint was framed under Civil Procedure Code, Section 539, and contained, besides a prayer for possession, prayers for a declaration that the church, &c., was held on trust for worship according to the faith and discipline of the Church of Rome, and for injunctions against the defendants. The suit was tried by the District Judge in whose Court it was instituted, although the defendants pleaded that it was within the jurisdiction of the Subordinate Court, Section 539 being inapplicable. He passed a decree as prayed, holding that the church, &c., was dedicated to the trust stated in the plaint, although it had been diverted from the purposes of that trust for a time. In coming to this conclusion, he referred to a Portuguese work dated 1606, "India Orientalis Christiana," published in 1794, and Hough's "History of Christianity in India" published in 1839.

Held, (1) that the suit not being one brought by beneficiaries against trustees, nor for any of the purposes mentioned in Civil Procedure Code, Section 539, that section had no application;

(2) that, although the suit should accordingly have been brought in the Subordinate Court, the District Judge had jurisdiction to try it;

(3) that the District Judge was justified in referring to the books above referred to;

(4) that the decree was right, on its appearing that the church, &c., had been held on the above trust from 1599 to 1882 with a doubtful interruption for one year, although the original trust may have been different.

* Appeal No. 13 of 1891.

(1) 12 A. 599. (2) 6 M. 250. (3) 18 C. 462. (4) 11 B. 467.
APPEAL against the decree of A. Thompson, Acting District Judge of South Malabar, in original suit No. 1 of 1890.

Suit instituted with the consent of the Advocate-General under Civil Procedure Code, Section 539.

Plaintiff No. 1 was the Vicar Apostolic of Trichur, exercising as such authority over all Romo-Syrian churches (i.e., Roman Catholic churches in which the Syrian rite is observed) within that vicariate; plaintiff No. 2 was the vicar of one of such churches situate at Palayur; plaintiffs Nos. 3 to 5 were the kaikars or wardens of that church; plaintiffs Nos. 6 and 7 were members of the yogam of the church, and they sued as representing all the yogakars or parishioners "remaining in obedience to the faith and discipline of the Church of Rome."

Defendant No. 1, who used the designation of Chor Episcopa, claimed authority over the Palayur church by virtue of his appointment by Bishop Mellus, described in the plaint as a schismatic from the Church of Rome, but stated by the defendants to be the lawfully constituted ecclesiastical authority to whom the Chaldean Syro-Christian community was subordinate in all spiritual matters. Defendant No. 2 was the vicar appointed under his authority. Defendants Nos. 3 and 4 had been elected kaikars by a meeting of the yogam in 1887 at the same time as plaintiff No. 6, and in October 1889 they had been declared by a magisterial order to be in possession together with him of the church and the property appertaining to it, and to be entitled to retain such possession until evicted by due course of law. The other defendants were members of the yogam of the church and were sued as representing all such yogakars as were not in obedience to the faith and discipline of the Church of Rome. The plaint contained the following paragraphs as to the history and constitution of the church:

"The plaint church, together with all the property appertaining thereto, as described in the schedules hereunto annexed, belongs to the yogakars, in trust, to use and cause to be used, the same for the worship of God in the communion and according to the faith and discipline of the Church of Rome, in obedience to the authority on that behalf ordained for the time being by His Holiness the Pope of Rome, and is included within the Vicariate Apostolic of Trichur.

"In or about the year 1599 the yogakars of the plaint church came into the communion of the Church of Rome; and from that time until the present, except for a short time hereinafter spoken of, the said church has ever been used for the worship of God in the communion and according to the faith and discipline of the Church of Rome in obedience to the Bishops or Vicars Apostolic or other authority for the time being appointed or sanctioned in that behalf by the Pope of Rome. In pursuance of such faith and discipline the vicar and clergy of the said church, except as is stated in the 6th paragraph herein, have ever been exclusively priests in communion with the said Church of Rome and appointed to the plaint church by the Bishops, Vicars Apostolic, or other authority aforesaid sanctioned in that behalf as aforesaid.

"For the more convenient management of the secular affairs of the plaint church and properties it has ever been, and still is, the custom of the said yogam, subject to confirmation by and under the authority of the said Bishops, Vicars Apostolic or other authority aforesaid periodically to elect out of their number certain men called kaikars for the
purpose of such management. The 3rd to 5th plaintiffs were so elected as kaikars in the month of July 1889 in the place and stead of the 3rd and 4th defendants and 6th plaintiff formerly elected as aforesaid.

[244] In or about the year 1874 the aforesaid Bishop Mellus came to Malabar pretending to have been appointed by His Holiness the Pope to be Metran over the Romo-Syrian churches in Malabar. Deceived by the said Bishop Mellus, certain of the yogakars of the plain church, in disobedience to the authority of His Holiness, and contrary to the faith and discipline of the Church of Rome, in or about the year 1876, yielded themselves to the authority of the said Bishop Mellus, and so remained until by decrees of the High Court of Madras given in respect of certain other Romo-Syrian Churches in Malabar in like case with the plain church, it was declared that the said Bishop Mellus had no authority over the said churches; whereupon, in or about the month of September 1886, the yogakars of the plain church with the then kaikars and the second plaintiff, he then being the vicar of the said church, returned to their allegiance to the Church of Rome by a submission made to the Gobernador of Cranganore, who at that time was the local ecclesiastical superior of the said church under the authority of His said Holiness, and so remained until the 14th July 1889.

The prayers of the plain were for declarations that the church was subject to the jurisdiction of the Vicar Apostolic of Trichur; that the yogam held the church, &c., on the trust mentioned in paragraph 3 of the plaint; that plaintiffs Nos. 3 to 5 were the duly appointed kaikars; there were also prayers for possession of the church, &c., and for injunctions against the defendants and their section of the yogam.

The defendants denied the right of the plaintiffs to the reliefs claimed, and alleged as to history and constitution of the church as follows:

"The plain church, together with all the property appertaining thereto, belong, and have ever belonged from the date of its foundation, exclusively to the Chaldean Syrian Christian community in Palyur, Orumanya, Chavakad, Iringaprom, Guruvayur and other ansoms in British Malabar, and in Ariyannur and Choovullor desoms in Choondapavirthi in the Cochin State; have ever been devoted exclusively to the faith, and have remained in the uninterrupted possession and control of the said community. The said church and its properties have never at any time belonged to the Church of Rome, and have never been [245] subject to the temporal or ecclesiastical jurisdiction of the Pope of Rome or of any authority subordinate to the Pope of Rome. The plain church has ever since its foundation followed the practice, ritual and communion of the Chaldean Church at Babylon, and has been subject solely to the jurisdiction of the Patriarch of Babylon in all spiritual matters. But the present Patriarch of Babylon having been, contrary to custom, appointed to his office by the Pope of Rome, the said Chaldean Syrian Christian community do not now hold themselves subject to his spiritual authority.

No person other than the said Chaldean Syrian Christian community and their duly appointed kaikars has any voice in the temporal concerns of the plain church.

"The said community of Chaldean Syrian Christians assembled in yogam elect from among their members annually, or at such other intervals as they deem fit, three persons called kaikars to manage the property of the church during their time of office and to act subject to the directions of the said community in all matters. The kaikars have
never been elected subject to the confirmation of any spiritual authority,
Roman Catholic or Chaldean Syrian.

The defendants 3 and 4 and sixth plaintiff are the present kaikars.
The third defendant is the present senior or head kaikar and, as such,
in possession of all the title-deeds and properties of the said church.

Further, the defence of limitation was raised, and it was pleaded that
the suit should have been brought in the Subordinate Court and was
wrongly brought under Civil Procedure Code, Section 539.

The District Judge held that the plaintiffs had established their
allegations and passed a decree as prayed. In his judgment he referred
(in paragraphs 8 and 9) to a Portuguese work by Fr. Antonio de Gomeca,
published at Coimbra in 1606, to the India Orientalis Christiana, by
Father Paulinus of Saint Bartholemew published in Rome in 1794, and to
Hough's History of Christianity in India.
The defendants preferred this appeal.
Mr. Norton, for appellants.
Mr. Gover, for respondents.

JUDGMENT.

The first point taken before us is that the suit is not one within the
scope of Section 539 of the Civil Procedure Code, and hence
will not lie in the District Court. The District Judge held that, though
the suit was not one for any of the five kinds of relief specially described
in that section, the relief sought for came under the words "such further
or other relief as the nature of the case may require."

It appears to us that the suit is not of the class contemplated in
Section 539 at all. That section deals with suits brought by beneficiaries
against trustees, or for any of the special purposes mentioned in Section
539; whereas this suit is brought by persons claiming to be the de jure
church-wardens entitled to possession of the building against their pre-
decessors in office whose term has expired and who refused to surrender
possession and have usurped possession of the church and become trespassers.
Plaintiffs Nos. 1 and 2 on the one side and defendants Nos. 1
and 2 on the other are joined in the suit in order to obtain a declaration
at the same time as to the purposes of the trust, as to which the
defendants, members of the congregation, are not in accord with the
plaintiffs.

We are of opinion, therefore, that the suit should have been brought
in the Subordinate Court; but we do not think it necessary on that ground
to reverse the decree and return the plaint for presentation to the proper
Court. The District Court had undoubtedly jurisdiction to try the suit,
and we agree with the view taken by the High Courts of Allahabad and
Calcutta as to the effect of Section 15 of the Civil Procedure Code—Nidhi
Lal v. Masoor Husain (1) and Matra Mondal v. Hari Mohun Mullick (2).
In this case the suit has been fully tried on the merits by a Court which
had jurisdiction to try it, and it would be manifestly unfair to direct an
unnecessary re-trial on account of an irregularity not affecting the
merits.

The next point urged is that all the defendants’ witnesses were not
examined. We find that issues were settled on 30th July 1890, and the
suit was then posted for final hearing on 14th October. On 7th October
the defendants applied for summonses for 17 witnesses, many of whom

(1) 7 A. 230.
(2) 17 C. 155.
were resident in the Cochin State. The trial began on 14th October and continued for several days, but not till 24th October did the defendants ask for an adjournment on the ground that all their witnesses were not present. It was not then stated that the summonses had not been issued, and there is nothing before us to show that they were not issued. The Judge rightly held that the defendants had been guilty of negligence and refused an adjournment. It is true that further time was asked for in September in order to obtain instructions and evidence from the Patriarch of Babylon, but this necessity (if real) does not excuse the defendants in neglecting to summon till too late witnesses who resided in their own immediate neighbourhood. Nor was the necessity for instructions from Babylon mentioned in the petition of 24th October.

Passing to the merits, it was next objected that the District Judge was not justified under Sections 57 and 57 of the Evidence Act in referring to the works spoken of in paragraphs 8 and 9 of his judgment. In this contention also we are unable to agree. Of those works, the first was published more than 200 years ante Iitem motam, the second in 1839, and the third, India Orientalis Christiana, was published at Rome in 1794 and is of recognized historical authority. So far, therefore, as these books related to matters of public history, the Judge was justified in referring to them.

With reference to the general history of Christianity in Malabar we may also refer to Logan’s Malabar Manual. Practically, however, there is no dispute as to the events which led to the Synod of Diamper in 1599, or to the fact that Archbishop Meneses in that year brought the Syrian churches in Malabar into subjugation to the Church of Rome. By decree VIII, session III of that synod the acknowledgment of the Patriarch of Babylon as supreme pastor was expressly forbidden under pain of excommunication. It is true no doubt as pointed out by the District Judge that after the synod several of the Syrian churches reverted to Nestorian doctrines and united themselves to what is known as the Jacobite church; but we may point out that the Jacobite Bishop sent out in 1653 (Mar Ignatius) was sent by the Patriarch of Antioch and not by the Patriarch of Babylon. It appears (Manual, p. 209) that the present community of Syrian Christians, not under allegiance to Rome, is at the present day under the Patriarch of Antioch, and we are not referred to any historical work which shows that there is any body of Christians now in Malabar reverting allegiance to Rome which is under the jurisdiction of the Patriarch of Babylon. It is a significant fact [248] that the defendants have never alleged that the Palayar church is under the Patriarch of Antioch, yet that prelate now represents those Nestorian doctrines which were held in Malabar anterior to the Synod of Diamper. It is remarkable that, while the defendants now claim that the trust should revert to the ancient faith, notwithstanding the lapse of time during which the authority of Rome has been impressed upon the trust, they do not claim to be subordinate to the only patriarch who now exercises spiritual jurisdiction in Malabar over congregations professing the Nestorian doctrine.

It was urged that the evidence to show that the Palayar church came under the jurisdiction of Rome at the Synod of Diamper was but meagre. The facts shown, if not many in number, are, however, significant. and there is absolutely no evidence on the other side to show that from 1599 to 1861 the Patriarch of Babylon exercised any jurisdiction over their church. In Hough’s History of Christianity in India, Vol. II, page 314, published in 1839, reference is made to the arrival of two Carmelite monks on the
Malabar Coast in 1657 after the martyrdom of Bishop Attala and to the
dissatisfaction of the Jesuits and Portuguese at their arrival. The narrative
tells of their arrival at Palayur, one of the parishes in the diocese of
Angamale (a Roman Bishopric), and that the cattanar (the rector of the
place) concealed himself in order to avoid the unwelcome visitors. This
certainly tends to show that at that time Palayur was under the jurisdiction
of Latin Bishops.

There can, we think, be no doubt that the Palayur church, entered in
the list of Catholic churches at page 267 of *India Orientalis Christiana*,
is the church now in dispute. Palayur is supposed to be one of the most
ancient churches in Malabar, and it can hardly be supposed its name would
be omitted in such a list. The mark affixed to the name shows that
Palayur was one of the churches destroyed by fire by the army of
Tippu Sultan.

It is scarcely possible that there can be stronger evidence as to what is
really the faith and discipline of any church than the rituals in use in that
church. Those in use at Palayur are the Syrian rituals prescribed for the
use of the Malabar Romo-Syrian churches, and are printed at the Press of
the Propaganda at Romo. Had the church not been Romo-Syrian, it is
inconceivable such books would have been either supplied by the Propaganda
or [249] have been allowed to be used in the church by any of the metrans
under a schismatic patriarch. It is not even suggested that from 1599 up
to the present date any other ritual has been used. The oral evidence
likewise points to the inference that up to the coming of Mar Thoma in
1861 the Palayur church was subject to the jurisdiction of the Roman
Bishop of Viraipoli.

It is admitted that Mar Thoma was sent by the Patriarch of Babylon
in 1861, and that the Palayur church placed itself under him. Whether
he came or professed to come with or without the sanction and authority
of the Papal See there is no evidence to show; but his stay was short,
and he left India in 1862. The defendants contend that after his
departure the Palayur church remained under the authority of a metran
appointed by the Patriarch of Babylon, while the plaintiffs assert that the
church then submitted to the "Gubernador" of Cranganore.

A large number of documents were put forward as showing that the
Gubernador exercised jurisdiction over the Palayur church subsequent to
1861 and up to the coming of Bishop Mellus in 1874. It is objected
before us in appeal that these documents were not proved and that they
were not produced at the right time. No such objections appear to have
been taken in the Court below, and the Judge found that their genuineness
was proved. A similar objection was taken in the Chittapur case and
overruled—*Bishop Mellus v. The Vicar Apostolic of Malabar* (1). The
documents unquestionably show that jurisdiction was exercised by the
"Gubernador."

It may be noted as curious that the Palayur church did not on the
departure of Mar Thoma again submit itself to the jurisdiction of the
Bishop of Viraipoli. In explanation, it is suggested that discipline was
 lax, and that so long as the churches did not place themselves under
heretical bishops, the Roman authorities were not very particular which
Latin Bishop was acknowledged. This explanation is by no means
improbable. It was in 1861 that, in accordance with a concordat made
between the Vatican and the King of Portugal, commissioners were sent out

---

(1) 2 M. 295.
to define the jurisdiction of the Goanese prelates and the Vicars Apostolic under the control of the Propaganda. It was not, however, until 1887 that the whole of the Roman churches of the Syrian rite [250] (Palayur included) were handed over to the Vicar Apostolic of Trichur by the Vicar-General of the Portuguese mission at Cranganore (vide Exhibit T T.

It is then contended that, at any rate, since the arrival of the Bishop Mellus in 1874 the Palayur church has ceased to acknowledge the jurisdiction of the Pope of Rome, and has returned to the Syro-Chaldean faith as it existed previous to 1599. Upon a careful examination of the evidence, we are not prepared to hold that Bishop Mellus came to Malabar in the character of a bishop repudiating the supremacy of the See of Rome. The book marked C C C C † shows conclusively that in 1663 he was a Roman Catholic Bishop, and, as such, published a book which was printed at the Press of the Propaganda at Rome, of which the preface written by himself expressly asserted the supremacy of the Pope and denounced the Nestorian heresy to which he is now alleged to be an adherent. The first defendant admits that this book is now used in the schools under him.

Bishop Mellus was no doubt sent to Malabar by the Patriarch of Babylon. Exhibit D D D D is a certified translation of the Syriac letter of the Patriarch introducing him to the church at Trichur. Nothing can be clearer from that letter than that the patriarch himself at that time acknowledged the jurisdiction of the Roman See. It is quite clear that the real object which the patriarch had at heart was that the Romo-Syrian churches of Malabar should be exempted from the jurisdiction of the Latin Bishops and placed under a Bishop of the Syro-Chaldaic rite. For that object he had twice visited Rome, and it is quite clear from what he says that it was not the supremacy of the Pope, but the supervision of the Propaganda which the Romo-Syrian church so strongly objected to. It is apparent from the letter itself that his petition to the Pope was unsuccessful, for he goes on to say that in his capacity of Patriarch of Babylon (no mention is made of the Pope's approval) he sends Bishop Mellus, though he anticipates he will meet with opposition from the Propaganda on his arrival in Malabar. Exhibit XVIII, † which contains the [251] introduction given by the Patriarch to Her Majesty's Consul-General at Bagdad, and is forwarded to the Bombay Government, contains the same complaint against the tyranny of the Roman Propaganda, against which the protection of Her Majesty's Government is requested.

There is considerable evidence that on first arrival in Malabar Bishop Mellus professed to have come with the authority of the Pope. That authority was, however, soon questioned in a suit brought against him by the Vicar Apostolic of Malabar (Bishop Mellus v. The Vicar Apostolic of Malabar(1)) in which the bull which he professed to hold from the Pope was denounced as a forgery. The evidence leaves no doubt that in course of time he was excommunicated by the Pope and was then recalled by the Patriarch of Babylon. Before leaving Malabar he appointed the first defendant as Chor Episcopa, but there is nothing to show that this

* A letter from the Vicar-General, Cranganore, to Bishop Medlycott, dated 24th January 1888.
† Directorium spirituale a Reverendissimo Domino Elia Joanne Mello auctum, printed at the Propaganda in Rome in 1663.
‡ Certified copy of the Proceedings of the Madras Government, Political Department, dated 16th October 1874.

(1) M. 293.
appointment was ever approved by the patriarch, and the validity of any appointment under such circumstances may well be questioned. Exhibit XXIII is the pastoral letter addressed by Bishop Mellus to his flock in 1882 on taking leave of them. It does not allude to the circumstances under which he was undoubtedly recalled, and contains no repudiation of the supremacy of the Pope, but contains an earnest appeal to remain faithful to the ancient Chaldean faith notwithstanding the interference of "foreigners."

The inference, therefore, to be drawn from this evidence is that the Palayur church in submitting originally to the authority of Bishop Mellus never intended to repudiate the supremacy of the Roman See. Dr. Mellus held himself out as long as he could as having come with the sanction of the Pope; when that illusion was dispelled, he set up the plea that the Patriarch of Babylon had the right to appoint him; but he was then recalled by the patriarch. On his departure the yogan and kaikars did no doubt submit themselves for a time to the authority of the first defendant, who now denies the supremacy of the Pope, though there is no evidence that he himself is an adherent to Nestorian doctrines.

That the vicar and the kaikars did again submit themselves to the Pope in 1886, and that Bishop Medlycott did visit and [252] formally assume jurisdiction over the church there is no reason to doubt. But even had the first defendant held uninterrupted possession since 1882, that fact could make little difference. We have seen that from 1599 till 1882, with the doubtful interruption of one year (1861), the church had been held upon a trust for the worship of God according to the faith and discipline of the Church of Rome, and that being the case, the fact that the Palayur congregation prior to the Synod of Diamper in 1599 may have been Nestorian in doctrine is immaterial. The objects of the original trust, if different, have long since ceased to exist, and the profession for 290 years of the faith, doctrine and discipline of the Roman Catholic Church according to the Romo-Syrian ritual is amply sufficient to impress a trust of that character upon the funds and property of the Palayur church. We have no doubt that the decision of the Judge upon this main contention is right.

Objection was then taken that plaintiffs Nos. 3 and 5 were not duly elected as kaikars. The point does not appear to have been strongly pressed in the Lower Court, and we do not think there is sufficient reason to hold there was any technical informality in summoning the meeting. The plaintiffs, at all events, represent that part of the yogan who are desirous of rescuing the property of the church from men who are seeking to divert the use of the trust to purposes alien to its proper object, and are on that ground entitled to succeed.

We can see no reasonable objection to the form of the decree. The language certainly would not preclude the See of Rome from transferring spiritual or ecclesiastical jurisdiction to any other Vicar Apostolic, and it is quite clear that those members of the yogan who repudiate the objects of the trust have for the time disqualified themselves from the exercise of the right to take part in its management.

The appeal must, therefore, be dismissed with costs.
GOMAI v. SUBBARAYAPPA

15 M. 253.

[253] APPELLATE CIVIL.

Before Mr. Justice Shephard, and Mr. Justice Handley.

GOMAI (Plaintiff), Appellant v. SUBBARAYAPPA AND ANOTHER (Defendants), Respondents.* [3rd November, 1891.]

Transfer of Property Act—Act IV of 1882, Section 59—Unregistered mortgage—Personal covenant to pay.

An unregistered mortgage-deed executed in 1885 contained a personal covenant by the mortgagees to pay the debt secured thereby:

 Held, the mortgagee was entitled to sue on the covenant and obtain a personal decree against the mortgagees.

[F., 25 M. 396 (396); R., 32 M. 410 = 1 Ind. Cas. 1 = 19 M.L.J. 584 (589); 17 M.L.J. 469 (471); D., 18 M. 29 (30).]

SECOND appeal against the decree of W. C. Holmes, Acting District Judge of Bellary in appeal suit No. 42 of 1890, reversing the decree of W. Gopalachariar, District Munsif of Bellary, in original suit No. 115 of 1888.

Suit to recover principal and interest due on the following instrument executed by defendants No. 1 and 2 in favour of the plaintiff and not registered:

"Mortgage-deed executed jointly by Subbarayappa, son of Bysani Narayanaappa, and Seenappa, son of Polepally Dasappa, Komaties, living by trade, and residing in Brucepattah, Bellary, to Gomaji Garu, son of Marwadi Fitajee, living by trade, and residing in Brucepattah, Bellary, on the 3rd of Aswija Bahula of the year Parthiva, corresponding to 26th October 1883, is as follows:-

"After deducting the cash paid on settling to-day the account of principal and also interest relating to the pro-note written and executed in your name, by both of us together, on the 13th Chaitra Sudham of the year Tharana, we having become indebted in a remainder of Rs. 600, in words six hundred only, have executed this deed in your name.

Therefore, the description of the immovable property—

* * *

"Having mortgaged as security for your amount three immovable properties in all, we have made over to you the [254] sale and mortgage-deed connected therewith. Having settled interest for the said amount at Rs. 1½ per cent, per mensem, of us both that is present will pay the principal and also interest—your principal and interest—on your demand. When you so demand, if there should be any obstruction on your part, without paying the principal and interest, you are at liberty to sell according to your pleasure the mortgaged properties and to receive the proceeds, and to recover the remaining debt-amount from our other real and personal properties and from us. Till your amount is liquidated, we will have no right to make a gift of, or to sell or to mortgage, &c., the mortgaged properties. If payment of any kind whatever not mentioned in this deed should be pleaded as having been made, a Court of Justice should not accept our word.

The District Munsif passed a personal decree for the money claimed, holding that such a decree was not precluded by the want of registration,

The District Judge, on appeal, reversed this decree.
The plaintiff preferred this second appeal.
Rama Rau, for appellant.
Parthasaradhi Ayyangar and Rangachariar, for respondent.

**JUDGMENT.**

In our opinion, the judgment of the District Judge is clearly wrong. By the terms of the instrument sued on, the defendants covenanted to pay the money, and, at the same time, the plaintiff was empowered to sell the property and realize the amount. Had the document been registered, it would have been competent to the plaintiff either to proceed on the covenant or to sue for sale of the mortgaged property. The decision in Mattongeny Dossee v. Ramnarain Sadkhan (3) is distinguishable.

We must reverse the decree of the District Judge and remand the appeal for disposal on the merits. The respondents must pay the costs of this appeal. Other costs to be provided for in the revised decree.

---

**15 M. 255—2 M.L.J. 29.**

[255] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

NARAYANA (Defendant No. 4), Appellant v. SHANKUNNI AND OTHERS (Plaintiffs and Defendants Nos. 1 to 3), Respondents.*

[22nd September and 5th October, 1891.]

Specific Relief Act—Act I of 1877, Section 42—Declaration—Consequential relief—Civil Procedure Code, Section 53—Amendment of plaint.

A karar was executed by members of two Malabar tarwads, by which the tarwad of the plaintiffs and defendants Nos. 1 and 2 was amalgamated with that of which defendant No. 3 was a karvan; part of the property of the plaintiff's branch was in the possession of defendants Nos. 1 and 3, and part of it was held under demises from defendant No. 3.

The plaintiffs sued for a declaration of their title to this property and for a declaration that the karar was not binding on them. An issue was framed on the question whether the suit was maintainable for want of a prayer for all relief consequential on these declarations:

 Held, (1) that the suit was not maintainable for want of a prayer for possession of the lands under demise;

(2) that the plaintiffs should not be permitted on appeal to amend the plaint on appeal by the addition of such a prayer.

[N.F., 7 Ind. Cas. 567 (668) = 8 M.L.T. 358 = (1910) M.W.N. 498; F., 18 M. 405 (407); 39 M. 450 (455); 5 Ind. Cas. 690 = 20 M.L.J. 301 = 7 M.L.T. 311; R., 28 B. 382 (386); 21 M.L.J. 952 = 10 M.L.T. 356 = (1911) 2 M.W.N. 397 (390); D., 17 M. 292 (294).]

APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in original suit No. 9 of 1887.

The plaintiffs alleged that they together with defendants Nos. 1 and 3 constituted the Vadakambat tarwad, plaintiff No. 1 being the present

* Appeal No. 149 of 1888.

(1) 7 M.H.C.R. 396. (2) 8 M. 182. (3) 4 C. 93. (4) 9 C. 520.
NARAYANA v. SHANKUNNI

18 Mad. 257

karnavan; that by a karar, now claimed to be invalid, executed by defendants Nos. 1 and 2 and representatives of the other defendants' tarwad, the two tarwads were amalgamated; that of the property of the plaintiffs' tarwad, the tarwad house was in the possession of defendant No. 3 as karnavan of the defendants' tarwad as per schedule B, and certain land in that of tenants to whom it had been demised by defendant No. 3 as per Schedule A to the plaint. The prayer was for a decree (1) declaring that the karar was invalid as against the plaintiffs, and that the defendants, other than defendants Nos. 1 and 2, had no right to the property above referred to or to the rents thereof, but that the same was vested in the plaintiffs' tarwad; (2) showing the defendants' claim upon, and possession of, the tarwad house specified in Schedule B and directing the defendants Nos. 3 to 17 to restore it to the plaintiffs; (3) ordering that the defendants Nos. 3 to 17 do deliver to the first plaintiff all the subsidiary deeds and kychits in respect of the lands mentioned in Schedule A; (4) ordering that the defendants Nos. 3 to 17 do pay costs with interest; (5) and by granting such other reliefs as to the Court seems fit.

Issues were framed raising the questions among others, "whether the plaintiffs are entitled to a decree as prayed for?" and "are the plaintiffs bound to ask for consequential relief under the circumstances mentioned?"

The Subordinate Judge made the declarations prayed for and decreed that defendant No. 3 surrender to the plaintiffs the house mentioned in Schedule B and the title-deeds of the properties mentioned in Schedule A.

The defendants preferred this appeal on the following among other grounds:

"The plaintiffs are not entitled to a declaratory decree, so far as the properties in A are concerned. They ought to have prayed for consequential relief or possession."

Sankaran Nayar and Rynu Nambiar, for appellants.

Rama Rau, for respondents.

JUDGMENT.

The only question which it is necessary for us to determine is whether the suit can in its present form be maintained under Section 42 of the Specific Relief Act. The plaint contains no prayer for possession of the properties mentioned in Schedule A, though the right which it is sought to establish is the right to set aside the karar and the amalgamation effected thereby of the plaintiffs' branch and that of the defendants Nos. 3—17 into a single tarwad, and so to establish the exclusive title of the plaintiffs' branch to those properties.

The effect of the declaration must practically be to restore the plaintiffs' branch to the position which it occupied prior to the date of the karar, and to restore its exclusive possession and title. The separate allotment and possession to which they claim to be entitled is clearly a consequential relief within the meaning of Section 42. There is also a distinct averment in the plaint that plaintiff No. 1 is the lawful karnavan of his branch, and a decree awarding possession of a house and title-deeds to him in that capacity has also been claimed and obtained. It is no doubt true that most of the properties mentioned in Schedule A are stated to be in the possession of tenants, but we observe that they are held under demises granted by defendants Nos. 1 and 3 in accordance with the stipulations contained in the karar, and the possession of the tenants can only
be regarded as the legal possession of the demisors, which is clearly adverse to the title which the plaintiffs desire to establish. The fact therefore that the tenants are in actual possession is no ground for the plaintiffs omitting to claim possession as against the defendants. Our attention is drawn to the fact that defendant No. 1, who is a member of the plaintiffs' branch, is in joint possession with defendant No. 3, who is the karmavan of the other branch, but such possession is distinct from the possession which the plaintiffs are entitled to claim. If the present suit were instituted by him, defendant No. 3, he would be bound to claim separate possession of the properties mentioned in Schedule A in supersession of the arrangement embodied in Exhibit I. We are therefore of opinion that plaintiffs are not entitled to maintain the present suit without praying for possession of the properties as consequential relief.

It is suggested for the respondents that we should allow them to amend the plaint by adding a prayer for possession. We observe that the objection that the suit was not maintainable under Section 42 was taken in the Court below on 15th August 1887, and that the plaintiffs instead of asking for permission to amend the plaint contended that the suit was maintainable and took a fresh issue in regard to it. This is not a case in which the objection is taken for the first time in appeal, and we do not consider that the decisions in Limba Bin Krishna v. Rama Bin Pimplu (1), Chomu v. Umma (2), and in Abdulkadar v. Mahomed (3) are in point.

Nor is this a case in which the amendment was asked for and refused in the Court of First Instance. It is not therefore on all fours with Tildesley v. Harper (4), or Kurtz v. Spence (5). On the other hand, the objection was taken in the Court below, and the plaintiffs elected to take an issue and to allow the suit to proceed subject to the risk of an adverse decision. It is true that, as a general rule, the plaintiff may be permitted even on appeal to amend the plaint when he had framed it bona fide under a mistake or erroneous advice, and the other party could be adequately compensated by an award of costs, but it must be observed that such amendment might possibly create a necessity for fresh written statements and for fresh issues and practically amount to a trial de novo from the commencement, it is much more convenient to leave the plaintiffs to the liberty of maintaining a suit for ejectment, so that the opposite party might in no way be prejudiced in his defence or harassed with a second trial of the same suit. Under the circumstances we do not consider that this is a case in which we should allow the suit to be changed into one for ejectment at this stage. We reverse the decree of the Subordinate Judge on the ground that a declaratory suit will not lie and dismiss the suit with costs.

---

(1) 18 B. 548. (2) 14 M. 46. (3) 15 M. 16.
(4) 10 Ch. D. 393. (5) 36 Ch. D. 770.

530
THANIKACHELLA v. SHUDACHELLA

15 M. 258.

APPELLATE CIVIL.

Before Mr. Justice Parker.

THANIKACHELLA AND ANOTHER (Defendants), Appellants v. SHUDACHELLA (Plaintiff), Respondent. [12th November, 1891.]

Limitation Act—Act XV of 1877, Schedule II, Articles 99, 132—Payment of entire rent by a co-tenant—Suit for contribution.

One of two persons, having a joint holding from a mittadar, paid the whole of the mittadar’s dues for one year, and more than three years after the date of payment he sued the other for contribution:

 Held, the payment did not create a charge on the land, and the suit was consequently barred by limitation.

[D., 26 M. 686 (703) (F.B.).]

APPEAL against the order of P. Narayanasmami Ayyar, Subordinate Judge of Salem, in appeal suit No. 271 of 1889, reversing the decree of T. S. Krishna Ayyar, District Munsif of Krishnagiri, in original suit No. 133 of 1889, and remanding the suit for re-trial.

The plaintiff and defendants were described in the plaint as owners each of one moiety of two permanent ijarah villages held on pattas in the plaintiff’s name, on which a certain sum was annually payable to the mittadars; the plaintiff, it was alleged, paid the whole of this sum for one year on 29th August 1885, and he now sued for contribution.

The District Munsif held the suit was barred by limitation and dismissed the suit. The Subordinate Judge on appeal reversed the decree and remanded the suit, holding, on the authority of Seshagiri v. Pichu (1), that the payment constituted a charge and the period of time applicable was twelve years in the Limitation Act, Schedule II, Article 132.

The defendants preferred this appeal.

Mr. Norton, for appellants.
Sivasami Ayyar, for respondent.

JUDGMENT.

The case quoted by the Subordinate Judge was under the Revenue Recovery Act, not under Act VIII of 1865.

The suit, however, is not for rent, but for contribution on account of a payment made by plaintiff in defendants’ interest. There is no provision of law making such a claim a charge upon immoveable property. Article 99 of the Limitation Act applies.

The decree of the Subordinate Judge must be reversed and that of the District Munsif restored. The appellants are entitled to their costs in this and in the Lower Appellate Court.

Appeal against Appellate Order No. 134 of 1890.
(1) 11 M. 459.

531
APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Mutthusami Ayyar, and Mr. Justice Shephard.

REFERENCE UNDER STAMP ACT, SECTION 50.*
[13th October, 1891.]

Stamp Act—Act I of 1879, Schedule I, Article 54—Release—One-anna adhesive stamp—
Full stamp duty leviable.

A release chargeable with four-annas stamp duty was executed on paper bearing
a one-anna adhesive receipt stamp:

 Held, that in calculating the stamp due the one-anna stamp ought not to be
taken into consideration.

Semble: A Collector is entitled under Stamp Act, 1879, Section 50, to refer
to the [260] High Court the decision of a Provincial Small Cause Court admitting
in evidence an insufficiently stamped instrument on payment of duty and a
penalty.

Case referred under Act I of 1879, Section 50, by V. A. Brodie,
Acting Collector of South Canara.
The case was stated as follows:

A document on plain paper purporting to be a release in respect of
Rs. 28, and stamped with a one-anna adhesive receipt stamp, was
produced in small cause suit No. 28 of 1889 on the file of the District
Munsif of Karkal. Impounding the deed under Section 33 of Stamp Act,
the Munsif admitted it in evidence under Section 34 after levying there-
on annas 3 as stamp duty and Rs. 5 as penalty.

The amount for which the release was granted (viz., Rs. 28) required
a stamp of annas 4 under Article 54 (a) and 13 of Schedule I; and in
levying only annas 3 on account of duty the Munsif appears to have
taken into account the one-anna adhesive stamp which the instrument
bore.

As, however, the action of the Munsif in making allowance for the
one-anna adhesive stamp was opposed to the ruling of the High Court in
Reference under Stamp Act, Section 46 (1), the matter was brought to the
notice of the District Judge. That officer, while concurring in my
opinion that the document ought to have been treated as unstamped,
declined to interfere on the ground of want of jurisdiction, the Munsif's
order admitting the deed in evidence having been passed by him when
sitting as a Small Cause Court, from which no appeal lies to the District
Court; and references are to be made to the High Court, and Section
49 of the Stamp Act and Section 617 of the Code of Civil Procedure
being inapplicable to the case.

The case was then reported to the Board of Revenue, which has held
that, though under Section 27 of the Provincial Small Cause Courts' Act
IX of 1887, a decree or order made by a Court of Small Causes is final,
the High Court having, under Section 25, power to call for the record of
any case and to pass such orders as it thinks fit, would be the Court to
which references would be made by the Provincial Small Cause Courts,
and that applications may be made to it under Section 50 of the Stamp
Act.*
Counsel were not instructed.

JUDGMENT.

Following the decision in Reference under Stamp Act, Section 46 (1), we hold that in calculating the stamp due on the document, which is a release, the one-anna adhesive stamp ought not to have been taken into account.

15 M. 261.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Handley.

AMMAYEE (Defendant), Appellant v. YALUMALAI AND ANOTHER (Plaintiffs), Respondents.* [1st December, 1891, and 4th January and 23rd February, 1892.]

Succession Act—Act X of 1865, Section 50, Clause 3—Attestation—Initials of witness.

Stambo:—If the attesting witnesses affix their initials at the time of witnessing the execution of a will it is sufficient compliance with the terms of Section 50 of the Indian Succession Act.

[R. I N.L.R. 14 (10).]

APPEAL against the judgment of Wilkinson, J., sitting on the original side of the High Court in testamentary suit No. 2 of 1890.

In this case two persons, as executors appointed by the will of Cunneappa Chetty deceased, propounded and sought probate of a testamentary instrument signed by the deceased and attested by three witnesses, of whom only one signed his name in full and the others only wrote the initial letters of their names.

The question was raised whether the instrument propounded was duly attested with reference to the provisions of Indian Succession Act, Section 50, Clause 3, and, upon this question, the judgment was as follows:—

WILKINSON, J.—The preliminary question for determination in this case is whether the attesting witnesses signed the will. There were three attesting witnesses to the will, only one of whom has signed his name in full, the other two witnesses having merely affixed the initials of their names. The question is whether they have complied with the requirements of Clause 3, Section 50 of the [262] Indian Succession Act which lays down that each of the witnesses must sign the will.

There can be no doubt that the legislature intended to draw a marked distinction between the action required of the testator and that required of the witnesses as regards the mode of their signature. The testator, the Act says, shall sign or shall affix his mark to the will, whereas each of the witnesses must sign the will. If the legislature had intended that witnesses should be permitted to affix their mark in place of their signature, there was no reason why the words "or affix their mark" should have been omitted in Clause 3. I am of opinion that the cases Fernandez v. Alves (2) and Nitye Gopal Sircar v. Nagendra Nath Mitter Moosun (3) were rightly

* Appeal No. 17 of 1890.

(1) 9 M. 97. (2) 3 B. 362. (3) 11 C. 429.
decided, and that it is necessary for the validity of a will that the signature of at least two witnesses should appear on the will.

But that does not dispose of this case unless it be held that initials are not a signature, but are merely equivalent to a mark, and I am not prepared to go so far. In a case reported as In the goods of Christian (1), Sir H. Jenner Fust is reported to have said "The attesting witnesses to the codici have affixed their initials only. I am not aware that the witnesses can be required to sign their names. I am of opinion that there is a sufficient subscription on their parts." In that case the same witnesses, who initialled the codici, had signed the will, but that does not alter the case, as the codici required subscription as much as the will itself. There is, therefore, distinct authority for holding that it is sufficient for an attesting witness to a will to affix his initials in place of his full signature, and I see no reason why I should not follow it. There is, it seems to me, considerable difference between a mark and the initials of the witness' name, and I am not prepared to assent to the argument of the learned Advocate-General that initials of a witness' name must be regarded in the same light as a mark. I concede that, in all probability, the reason why the legislature required that the witnesses should sign their names was to require strict proof of execution, but initials are quite capable of identification, and it would, I apprehend, amount to forgery if feigned initials were inserted. The law does not require witnesses to sign their names in full, and I am, therefore, disposed to hold that, so far as the witnesses' signatures are concerned, the will before me is a valid will. [263]

The rest of the judgment is not material for the purposes of this report.

This appeal came on for disposal before Collins, C.J., and Handley, J., and the above question was again raised.

The Acting Advocate-General (Hon. Mr. Wedderburn,) and Mr. R. F. Grant, for appellant.

Mr. W. Grant, for respondents.

JUDGMENT.

We have no doubt that the learned Judge in the Court below was right in holding that the will was rightly attested.

It is admitted by the learned Acting Advocate-General for appellant that, according to English Law, it is sufficient if the attesting witnesses affix either their marks or their initials. In the recent case of Margary v. Robinson (2) the testator, two days before his death, being paralysed and partly speechless, expressed his wishes by signs which were interpreted to a medical man who wrote them down on a card. The testator made a cross with a pencil in the middle of the writing on the card and the same medical man and another placed their initials on the back of the card. The will was held to be duly executed and attested. But it is contended that the Indian Succession Act, Section 50, which is made applicable to wills of Hindus by the Hindu Wills Act, by providing that the testator "shall sign or shall affix his mark to the will" and that the attesting witnesses "must sign the will," makes a distinction between the testator and attesting witnesses and precludes the latter from merely putting marks or initials in attesting the will. In support of this contention, Fernandez v. Alves (3) and Nitye Gopal Sircar v. Nagendra Nath Mitra Mozumdar (4) are quoted. In these cases it was held that it was not

---

(1) 2 Robertson, p. 110. (2) L.R. 12 P. D. 8. (3) 3 B. 382. (4) 11 C. 429.
sufficient for the attesting witnesses to put their marks to the will. We wish not to be understood as agreeing with these decisions. It seems to us open to argument that the principle of the English decisions as to what is a sufficient "subscribing" within the meaning of the English Act applies equally as to what is a sufficient "signing" by an attesting witness within the meaning of the Indian Act. But it is not necessary to decide that question in this case, for we agree with Mr. Justice Wilkinson that the Bombay and Calcutta decisions referred to do not apply to initials of an attesting witness, which stand on an entirely different footing from marks. The Act does not provide that the attesting witnesses should sign in full and we know of no authority for the proposition that initials are not a signature. On the contrary it has been held that they are equivalent to a signature to an acknowledgment under the Limitation Act. In our opinion, if the attesting witnesses affix their initials at the time of witnessing the execution of the will, it is a sufficient compliance with the terms of Section 50 of the Indian Succession Act.

[After a consideration of the evidence, their Lordships recorded their finding as follows:—]

Upon the whole we must hold that it is not proved that the deceased M. Chinna Cunneappa Chetty signed the will in question being fully aware of its contents and of the nature of what he was doing.]

Narasimhachari, attorney for appellant.
Branson & Branson, attorneys for respondents.

15 M. 264.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

MADHAVI (Plaintiff), Appellant v. KELU and OTHERS (Defendants), Respondents.* [11th January, 1893.]

Civil Procedure Code, Section 13—"Res judicata" between defendants.

The plaintiff, a junior member of a Malabar tarwad, alleged that the karnavan had assigned to her his kukanom right over certain land, and that she had obtained a fresh demise from the jenmi and placed a tenant in possession. The tenant was dispossessed by the present karnavan, and in 1898 sued him and the plaintiff to recover possession of part of the land. That suit was dismissed on the ground that the above allegations of the plaintiff were unfounded. She now sued the present karnavan for possession of the entire land:

 Held, that the claim of the plaintiff was res judicata as far as it related to the land in question in the former suit, but not as to the rest.

[F., 22 A. 386 (390); 29 M. 515 (516); R., 24 A. 112 (117); U.B.R. (1907), 2nd Qr., C.P.O., 8. 13; D., 19 A. 65 (63).]

[265] SECOND appeal against the decree of J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 747 of 1889, affirming the decree of A. Chatu Nambiyar, District Munshi of Nadapuram, in original suit No. 257 of 1889.

Suit to recover possession of three parambas. The plaintiff and defendants Nos. 1 and 2 were members of the same tarwad, of which defendant No. 1 was the karnavan, and it was alleged in the plaint that the land in question had been demised by the jenmi to a previous karnavan of the tarwad on kukanom tenure in 1861, and that in 1885 the plaintiff, to

* Second Appeal No. 812 of 1890.
whom the kannavan had assigned his rights, obtained a fresh lease of the land and sub-leased it to one Kunhammed, whose possession was subsequently disturbed by Sankaran Adiodi, the new kannavan of the plaintiff's tarwad. It appeared that Kunhammed had sued the last-mentioned kannavan and the present plaintiff in original suit No. 506 of 1886 on the file of the District Munsif of Nadapuram to recover possession of two of the parambas in question. In that suit the kannavan denied the right of the present plaintiff to the land, alleging that there had been no assignment and no lease to her in 1885, and on appeal this contention prevailed and the suit was dismissed. It was now pleaded that the plaintiff's claim was res judicata. This plea prevailed in both the Lower Courts.

The plaintiff preferred this second appeal.

Sankaran Nayor and Byru Nambiar, for appellant.

Sankara Menon, for respondents.

JUDGMENT.

It is argued for appellant that the suit is not barred by res judicata because the plaintiff in the former suit was a tenant of present plaintiff, and present plaintiff was only a formal party (second defendant) in that suit, and Brojo Behari Mitter v. Kedar Nath Mozumdar (1) is quoted in support of this contention. That case certainly does seem to support the appellant's arguments, but the decision in Venkayya v. Narasamma (2), not dissented from in Chandu v. Kunhammed (3), is a direct authority for the proposition that a matter may be res judicata in a subsequent suit, although the parties in that suit, between whom the matter was decided, were arrayed as co-defendants in the former suit and not as plaintiff and defendant, if the matter in dispute in the second suit formed the subject of active controversy between the co-[266] defendants in the former suit. There can be no question that in the former suit and the present case the question whether the land in dispute was the property of the tarwad of the present plaintiff, then the second defendant, was the subject of active controversy between the present plaintiff and the then kannavan of the tarwad. The present plaintiff's title was put forward by the then plaintiff and actively supported by the present plaintiff. This case comes, therefore, within the principle laid down in Chandu v. Kunhammed (3) and we must follow the decision of this Court in preference to that of the High Court of Calcutta.

Lastly it is argued for appellant that the plea of res judicata applies only to item 2 in the present suit, as the remaining two items were not in dispute in the former suit. It appears that there were only two parambas in question in the former suit, while in this there are three, and the appellant's vakil states that one of the parambas in the former suit is not in question in this. The respondent's vakil can give us no information on this point, and we must, therefore, hold that the whole suit is not shown to be barred by res judicata and reverse the decrees of the lower Courts and remand the appeal for decision on the merits with reference to the foregoing observations.

Costs of this appeal to be dealt with in the revised decree.

It has also been argued that the question of res judicata could not be decided by the judgment in the former case without the decree, which was not produced. No doubt the decree ought to have been produced, and we direct the District Judge to receive it in evidence at the further hearing of the appeal.

(1) 12 C. 580. (2) 11 M. 201. (3) 14 M. 324.
SHANGARA v. KRISHNAN

15 M. 267-2 M.L.J. 93.

[267] APPELLATE CIVIL.

Before Mr Justice Parker and Mr. Justice Wilkinson.

SHANGARA (Plaintiff) Appellant v. KRISHNAN AND OTHERS
(Defendants) Respondents.* [3rd and 11th November, 1891.]

Civil Procedure Code, Section 13—"Res judicata"—Suit by benamidhar.

In a suit to recover a parcel of land, the plaintiff’s case was that it had been purchased by him benami in the name of his brother, who had sued the present defendants to obtain possession in 1887, but had been negligent in the conduct of the suit which was consequently dismissed. It was found that there had been no negligence in the conduct of the suit, and that it had been instituted with the plaintiff’s knowledge:

Held, that the plaintiff was bound by the decree in the former suit, and could not recover on his secret title.

[R., 15 A. 69 (77); 21 A. 380 (388); 22 B. 672 (678); 30 M. 245 = 17 M.L.J. 174; 13 C.P.L.R. 33 (36); 4 C.W.N. 283 (285); 3 L.B.R. 14; 10 O.C. 263 (267).]

SECOND appeal against the decree J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 263 of 1890, affirming the decree of A. Venkataramana Pai, District Munsif of Tellicherry, in original suit No. 166 of 1889.

Suit to recover possession of land. The plaintiff’s case was that he had obtained a conveyance of the land in the name of his brother, defendant No. 1, whom he placed in management of it; that defendant No. 1 leased it to defendant No. 2 and subsequently brought original suit No. 610 of 1887 against defendant No. 2 and defendant No. 3, who claimed to be the jenmi to recover possession; that suit was not proceeded with due diligence and was consequently dismissed.

The District Munsif held that there was no negligence in the conduct of the previous suit and that the present claim was res judicata and dismissed the suit. The District Judge on appeal upheld these findings, distinguishing as to the latter point Gour Sundar Lahiri v. Hem Chunder Chowdhury (1) and Hari Gobind Adhikari v. Akhoy Kumar Mozumdar (2) and affirmed the decree of the District Munsif.

[268] The plaintiff preferred this second appeal.

Sankaran Nayar, for appellant.

Ryru Nambiar, for respondents.

JUDGMENT.

Original suit No. 610 of 1887 was instituted by the defendant No. 1, the plaintiff’s brother, who is alleged by the plaintiff to have been his agent, the property which defendant No. 1 sought to recover in the above suit having been purchased in his name benami for the plaintiff. The question is whether the plaintiff is bound by the decision in that case. The presumption is that the benamidhar instituted the suit with the authority and consent of the true owner Gopi Nath Chobey v. Bhugwat Pershad (3); and the lower Courts have found upon the evidence that the suit was instituted with the knowledge of the plaintiff. He is therefore as much bound by the decree as if he had himself instituted the suit, and

* Second Appeal No. 1338 of 1890.

(1) 16 C. 355. (2) 16 C. 361. (3) 10 C. 697.
the present suit is barred as being res judicata. The plaintiff stood by
and permitted his undivided brother to sue for possession. There was
nothing to put the person in possession upon inquiry as to who was the
real owner, and it is too late now for plaintiff to be allowed to recover on
his secret title. The second appeal is dismissed with costs.

15 M. 268 = 2 M.L.J. 95

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and
Mr. Justice Handley.

SHAN MAUN MULL AND ANOTHER (Representatives of
Defendant No 2), Appellants v. MADRAS BUILDING
COMPANY, (Plaintiff), Respondent.*

[19th, 20th October and 24th November, 1891.]

Transfer of Property Act — Act IV of 1882, Sections 3, 78, 101—Priority of mortgages—
Gross negligence—Extinguishment of charges — Registration Act — Act III of 1877,
Sections 17 (d), 48—Notice by registration.

In a suit for the declaration of the priorities of mortgages and for foreclosure, it
appeared that the mortgage premises had been purchased by the mortgagee from
the second defendant and others in 1879, under a conveyance containing a covenant
that they were free from incumbrances, and the mortgagee then received inter
aee [269] a collector's certificate, which was required in another title-deed also
handed over to him. The premises were mortgaged to defendant No. 2, who was
an experienced auction in 1879 and to the plaintiff company in 1893 and again in
1884 and were conveyed absolutely by the mortgagee to defendant No. 2 in 1886.
The mortgagor executed a rent agreement to the plaintiff company on the occa-
sion of each of the mortgages of 1883 and 1884. The above mortgages were regis-
tered, but the plaintiff company and defendant No. 2 had no notice of the
respective dates of their mortgages and conveyance of any previous incum-
brance. The plaintiff company received the title-deeds of the estate from the
mortgagor (but not the Collector's certificate) on the execution of the mortgage
of 1893; the second defendant alleged that he had held them under a prior incum-
brance which was consolidated in the mortgage of 1879, and that before the
execution of that mortgage the mortgagor had obtained them from him for the
purpose of obtaining a Collector's certificate and had told him that the
Collector had retained them, in order to account for their not being replaced in
his custody:

Held, (1) that the plaintiff company were not affected with constructive
notice of the mortgage of the second defendant by reason of its registration or
of their failure to search the registry or to inquire after the Collector's cer-
tificate.

(2) that the second defendant not having given a reasonable explanation of his
conduct in leaving the title-deeds with the mortgagee four years after his mort-
gage, lost his priority by reason of his gross negligence under Transfer of Property
Act, Section 78, apart from the circumstances raising a suspicion of fraud on
his part.

Quaere: whether the case might not have been decided against the second
defendant on the ground that his mortgage was merged in the conveyance of
1886.

[Disr., 26 B. 538 (542); N. P., 18 B. 444 (448); Appr. 23 C. 790 (794); 27 C. 369
(369); 7 C.W.N. 11 (17); R., 27 B. 452 (472); 31 M. 7=17 M.L.J. 499 (500)
= 3 M.L.T. 87; 6 Bom. L.R. 1043 (1050); 13 C.P.L.R. 43 (46); 7 Ind. Cas.
269 (269); 24 M.L.J. 654 (671).]

* Appeal No. 43 of 1890.
APPEAL against the judgment of Mr. Justice Shephard in Madras Building Company v. Rowlandson and another (1). That was a suit by the plaintiff company for a declaration of the priority of their two mortgages over a mortgage of December 1879, under which defendant No. 2 claimed to be interested in the same premises and for foreclosure. The mortgagor, Mrs. Anne Smith, was an insolvent, and defendant No. 1 was the Official Assignee of Madras and as such Assignee of her estate. The learned Judge passed a decree as prayed, and the executor of defendant No. 2 (deceased) preferred this appeal.

Mr. E. Norton and Mr. R. F. Grant, for appellants.

As to registration we rely upon the Bombay authorities that registration is constructive notice to every one. If the Court adopts this view, there is no ground on which the plaintiffs can claim priority, see also Gangadhara v. Sivarama (2). The Madras Hindu Union Bank v. C. Venkatramiah (3). Damodara v. Somasundara (4). As to "gross negligence," &c., in Transfer of Property Act, Section 78, see The Madras Hindu Union Bank v. C. Venkatramiah (5), Evans v. Bicknell (5). The question is what was the intention with which the papers were handed over.

[Collins, C. J.—We ought to know what sort of person Mrs. Simith was.]

Yes, there was an oversight in that respect; neither side called her. Unless defendant No. 2 acted with a fraudulent intention to enable the mortgagor to act as she did, he should not lose his priority. Northern Counties of England Fire Insurance Company v. Whipp (6). His intention was not to defeat any one’s right for none other has been created: it could not have been to enable Mrs. Smith to affect his title prejudicially.

[Handley, J.—There is no evidence where the documents were between 1873 and 1883.]

He said he never got them back after 1878. In Damodara v. Somasundara (4) again, the intention in parting with the deeds was to enable money to be raised on them. But mere finding of negligence would not disentitle defendant No. 2 to stand in his right as first incumbrancer; it is a question of his motive.

[Collins, C.J.—The deeds were only given back, he said, to remain in her possession to get the Collector’s certificate.

Handley, J.—He was not to believe anything she said.]

Again, we claim that the plaintiffs were affected with notice, because the deeds handed to them referred to a Collector’s certificate which was not handed to them and after which they should have inquired.

[Handley, J.—A stronger case is necessary to postpone a legal mortgage to an equitable, than an equitable to an equitable. As between holders of equal rights, it wants less than if the mortgage to be postponed is legal, and the other equitable.]

The Court will not impute fraud or dishonesty unless it is proved.

[Handley, J.—Fraud is not necessary under Transfer of Property Act, Section 78.]

A money lender would not leave documents with another for the purpose of invalidating his own title to weaken his own security, L.R., 26 Ch. D., 494-5. The explanation he got, as to procuring a certificate, in his view was reasonable and sufficient, and it is the reasonableness

---

(1) 19 M. 383.
(2) 19 M. 425.
(3) 8 M. 256.
(4) 19 M. 425.
(6) L.R. 26 Ch. D. 492.
of the explanation in his view that is to be considered. Also he said he
never had had occasion to apply for a certificate before.

[Handley, J.—Does that matter? He was in the habit of taking
mortgages.

Collins, C.J.—How produced no books. What came of the money got
from the plaintiff?]

That does not appear. The directors were guilty of gross negligence,
and at least contributed to the mortgagor's fraud. They held no consultation
together, and had no conversation with Mrs. Smith.

Story, § 105, Churaman v. Balli (1), Fry v. Tapson (2), Lloyd's
v. Kent (5), Farrand v. Yorkshire Banking Company (6) were also referred to.

Mr. Michell and Mr. K. Brown, for respondents.

The second defendant by his fraud and gross neglect lost his priority,
Transfer of Property Act, Section 78. He knew that, by allowing the first
defendant to keep the title-deeds, he enabled her to raise money on them,
her possession of them raising the presumption that there was no
subsisting mortgage on the property, and thus probably to pay off some of
her debt to him on his mortgage. This was fraud on his part. In Northern
Counties of England Fire Insurance Company v. Whipp (7) there was only
carelessness without any element of fraud on the part of the Company
(the prior mortgagees). But even gross negligence, without fraud, postpones the
prior mortgagee under the Transfer of Property Act. In The Madras Hindu
Union Bank v. C. Venkatramiah (8) it was held that an element of fraud is
not necessary; gross negligence is sufficient. It was also in that case
held that the first mortgagees retaining some of the title-deeds, while
parting with the principal ones, makes no difference. In Damodara v.
Somasundara (9), Kervan, J., attached considerable weight to the fact that
the mortgagor was in possession of the mortgaged property. The mort-
gagor was in possession in the present case. Kervan, J. also held, in that
case, that the prior mortgagees was postponed through his gross negligence,
notwithstanding the [272] subsequent mortgagee was guilty of some
negligence. See also Hewitt v. Loosemore (10), National Provincial Bank
of England v. Jackson (11), Briggs v. Jones (12), Mumford v. Stohwasser (13),
Union Bank of London v. Kent (5).

The burden lay on the second defendant to explain his conduct,
from which the presumption of fraud arises, but this he failed to do.
He ought to have cited the first defendant and the Collector of Madras;
he has only called his gumastah. The second defendant is stopped by
his conduct from denying the plaintiff's claim: Mayor, &c., of Merchants
Evidence Act, Section 119.

The view taken by the Bombay High Court in Lakshmanadas Sarup-
chand v. Dasrat (15), and the cases referred to in the judgment in that case
that registration amounts to notice, has not been adopted by the Madras
High Court. In Gangadhara v. Sivarama (16), Turner, C.J., said: "It
has not as yet been held in this Court that registration is notice." The

(1) 9 A. 599.
(2) L.R. 28 Ch. D. 268.
(3) L.R. 29 Ch. D. 221.
(4) L.R. 39 Ch. D. 725.
(5) L.R. 39 Ch. D. 298.
(6) L.R. 40 Ch. D. 182.
(7) L.R. 26 Ch. D. 493.
(8) 12 M. 424.
(9) 12 M. 439.
(10) 9 Hare 449.
(11) L.R. 39 Ch. D. 1.
(12) L.R. 10 Eq. 92.
(13) L.R. 18 Eq. 556.
(14) L.R. 21 Q.B.D. 160.
(15) 6 B. 165.
observation in the judgment in the Madras Hindu Union Bank v. C. Venkataramiah (1) that "registration would be notice" was obiter dictum. If the legislature had intended that registration should operate as notice, it would not have left such an important effect unexpressed in the Acts. In the Yorkshire Registration Act (47 and 48 Vic., c. 54) there is a section (1a) expressly making registration under the Act to be notice. When there is fraud or gross negligence, non-registration will not avail against the effect of such fraud or gross negligence, Kettlewell v. Watson (2).

Section 78 of the Transfer of Property Act contains no exception of the case of a prior mortgage which has been registered, although the legislature had before them the decision in Lakshmandas Sarupchand v. Dasrat (3) which was prior to the passing of that Act.

The second defendant's mortgage of 1879 was merged in the sale to him of 1886, and thereby extinguished. The question as to merger depends on the question what was the intention of the party paying off the prior charge? Did he intend to keep it alive or not? Gangadhar v. Sivarana (4) Mohesh Lal v. Mohant Bawan Das (5), [273] Gokaldas Gopaladas v. Puranmal Premshukhdas (6), in which it was held that the doctrine laid down by the Court of Chancery in Toulmin v. Steere (7) was not to be applied to cases in India, even apart from the provisions of the Transfer of Property Act. In Gokul Das Gopal Das v. Rambux Senchand (9), the first mortgage was held to have been kept alive, because the third mortgagee had notice of the second mortgage, and therefore an intention to keep alive the first was presumed. In the present case, the second defendant has stated in his deposition that when he made the purchase in 1886, he did not know of the mortgage to the plaintiff. He cannot therefore be held to have intended to keep alive his mortgage.

Mr. E. Norton in reply.

JUDGMENT.

It is an admitted fact that the three principal title-deeds relating to the property in question in this suit, which should have been in the possession of the late second defendant as mortgagee under a deed of mortgage from Mrs. Annie Smith of the 5th December 1879, were in September 1883 in the possession of the mortgagor, who was thereby enabled to obtain a loan of Rs. 10,000 from the plaintiff company on executing to them a mortgage of the property in question dated 15th October 1883, and subsequently to obtain a further sum of Rs. 500 by way of further charge on the same property. The explanation which the second defendant gave of the title-deeds being out of his possession was that he was in possession of them in 1878, having obtained them on the occasion of taking a prior mortgage from Mrs. A. Smith, but gave them up to her in that year to enable her to obtain a new Collector's certificate in her name, that such new Collector's certificate was issued in May 1878 and handed to him, but he did not receive back the title-deeds from Mrs. A. Smith and on asking her for them was told that they were retained by the Collector, with which answer he was satisfied and took no further steps to obtain the title-deeds. We understand from the judgment that the learned Judge who tried the case did not believe this explanation and we see no reason whatever to differ from him. It is possible that the first part of the story is true and that the title-deeds were given up by the second
defendant to Mrs. Smith to enable her to get the new Collector's certificate, but we agree with the learned Judge that it is incredible that the second defendant, [274] a sowar of experience, who, on his own admission, had a good deal to do with mortgages and who is well known in this Court as having been concerned in much litigation connected with mortgage transactions, could have believed that it was the practice for the Collector to retain possession of title-deeds handed to him on the occasion of a new certificate being applied for—not to retain them temporarily, but to keep them altogether—and that he should have believed this extraordinary statement merely on the word of Mrs. Smith and should never have made inquiries as to its truth at the Collector's office. This part of the second defendant's story rests only upon the evidence of himself and of his relative and agent Hunsraj, and we think the learned Judge was amply justified in rejecting it as incredible.

The case is therefore one of a first mortgagee, who allows the title-deeds, nearly 4 years after his mortgage, to be in the possession of the mortgagor and gives no reasonable explanation of their being so in her possession, and the question is whether he is on that account to be postponed to the second mortgagee, the plaintiff company. The law under which this question has to be decided is unquestionably Section 78 of the Transfer of Property Act, for the inducing the plaintiff company to advance money on the security of the property in question took place after the Act came into force. That the allowing the title deeds to be in the hands or at the disposal of the mortgagee nearly 4 years after the date of his mortgage was gross neglect on the part of the second defendant in the ordinary meaning of the words can hardly be doubted. We think it would be so even if his explanation were believed and a fortiori when it is not believed. But it is argued that the words "gross neglect" in Section 78 of the Act must be understood in the limited sense in which they are used in the English decisions on the subject, viz., as meaning such gross neglect as is evidence of fraud or complicity in fraud. No doubt the tendency of the English decisions and especially since the case of the Northern Counties of England Fire Insurance Company v. Whipp (1), where the previous cases were classified and summarized, has been to refuse to postpone the owner of the prior legal estate to a subsequent equitable incumbrancer merely on the ground of gross negligence unaccompanied by any element of fraud. We are [275] not prepared however to hold that the words "gross neglect" in Section 78 of the Transfer of Property Act must necessarily be read by the light of the English decisions. On the contrary the language of the section "where through the fraud, misrepresentation or gross neglect, &c." seems to us to indicate an intention to make gross neglect of itself and apart from fraud a reason for postponement of the prior mortgagee and this view is strengthened by the use of the word "misrepresentation," which is not necessarily fraudulent misrepresentation. The framers of the Indian Act must have considered the English decisions prior to the Northern Counties of England Fire Insurance Company v. Whipp (1), and if they had wished to limit the application of the words "gross neglect" to cases where there was an element of fraud could have done so by appropriate words. And it is in our opinion strictly in accordance with the principles of equity that a person who, by his gross neglect, enables another to commit a fraud shall suffer for that fraud. We should therefore hold that, under Section 78 of the Transfer of Property Act,

(1) L. R. 26 Ch. D. 482.
apart from the question of fraud, the second defendant having been guilty of gross neglect in allowing the title-deeds to be out of his possession and thereby allowing the plaintiff company to be induced to advance money on the security of the mortgaged property should be postponed to the plaintiff's mortgage.

It may be noted that such was the view of the law taken by the Madras High Court before the passing of the Transfer of Property Act in Somasundra Tambiran v. Sakkavai Pattan (1). In that case, after quoting some Sudder Court decisions on the subject and commenting on the English cases and in particular the then recent case of Thorpe v. Holdsworth (2), the learned Judges quoting the words from that case—"The mere possession of the title-deeds by a second mortgagee, though a purchaser for value without notice, will not give him priority. There must be some act or default on the part of the first mortgagee to have this effect," observe:—

"We consider this to be a just and reasonable rule to be applied to this country. The non-possession of the title-deeds by the first mortgagee is a circumstance which certainly calls for explanation on his part, but it may be explained; and if he can satisfy the Court that the absence of the title-deeds was reasonably [276] accounted for to him, at the time when he obtained his mortgage, or that he was subsequently induced to part with them upon such grounds and under such circumstances as to exonerate him from any serious imputation of negligence, he ought not to lose his priority, because the mortgagee may afterwards have dishonestly handed over the title-deeds to a second mortgagee." The decisions upon Section 78 of the Transfer of Property Act in The Madras Hindu Union Bank v. C. Venkatramiah (3) Damodara v. Somasundara (4) adopt the same principle though they are professionally based upon the English decisions.

But even on the principle of the English decisions we agree with the learned Judge that second defendant should be postponed. The case of Hewitt v. Loosemore (5) quoted in the judgment and which has not been dissented from in later cases is directly in point. There it was held that the Court will not impute fraud or gross and wilful negligence to the prior mortgagee if he has bona fide inquired for the title-deeds and a reasonable excuse has been given for their non-delivery, but otherwise will impute fraud or gross and wilful negligence. Here on the finding of the learned Judge in which we concur there was no bona fide inquiry for the title-deeds or reasonable excuse for their non-production, and the Court therefore will impute fraud, or gross and wilful negligence which is evidence of fraud, to the second defendant and will therefore postpone him to plaintiff. It is argued for appellant that the circumstances of the case negative fraud on the part of the second defendant, for it could not have been to his advantage that the title-deeds should be out of his possession. As to this it must be said that we have very little evidence as the exact nature of the pecuniary transactions between the second defendant and Mrs. Smith; and that little only the statements of himself and his agent. He admitted that he had other money dealings with her besides the mortgage in question. We know from the documents that he advanced money on mortgage of this very property to former owners of it and joined them in conveying it to Mrs. Smith in January 1878. According to his own story, he immediately obtained a mortgage of the

---

(1) 4 M. H. O R. 369.  (2) 38 L. J. Ch. 194.  (3) 12 M. 424.  (4) 12 M. 429.  (5) 9 Hare 449.
property from Mrs. Smith in February 1878. Then he takes the mortgage in December 1879 and subsequently sues Mrs. Smith [277] on this mortgage and withdraws the suit on her selling the property to him and she conveys it to him by deed of 19th August 1886. Even then he does not profess to have made any inquiry about the title-deeds, for he says he first knew of the mortgage to the plaintiff company at the end of 1887. And this, although the conveyance to him by Mrs. Smith, contains the very unusual covenant on her part that she had delivered to him "all the title-deeds and other muniments of title in anywise relating or appertaining to the said premises." Mrs. Smith filed her petition and schedule in the Insolvent Court in February 1888. All these circumstances combined with the unexplained absence of the title-deeds from the second defendant's hands do in our opinion raise a strong suspicion of fraud or complicity with fraud on the part of the second defendant such as would be sufficient to justify his being postponed to the plaintiff's mortgage even on the principle of the latest English cases.

This is of course assuming that the plaintiff company had no notice of the second defendant's mortgage. It is not alleged that they had actual notice, but it is argued that the second defendant's mortgage being registered and registration being legal notice, they must be taken to have had notice. In support of the contention that registration is legal notice, we are referred to the cases decided by the Full Bench decision in Lakshmandas Sarupchand v. Dasrat (1), where the question was fully considered and it was declared that in Bombay the Courts had adopted the rule which prevails in America, and had held that registration does amount to notice to all subsequent purchasers and mortgagees of the same property. In the English and Irish Courts, as admitted by the learned Judges of the Bombay High Court in the above case, the current of decisions has been the other way, though with an occasional expression of dissent from the principle by some of the Judges. As far as we know the High Courts of the other presidencies have not followed the High Court of Bombay in holding that registration is notice. In Gangadhar v. Sivarama (2), Turner, C.J. observed:—"It has not as yet been held in this Court that registration is notice." Under these circumstances we prefer to follow the English and Irish decisions and to hold that registration is not of itself notice to subsequent purchasers and mortgagees. To hold otherwise might have the effect of seriously disturbing titles created upon the understanding that the law here was the law of the English and Irish Courts. Upon the abstract question of the comparative expediency of the one rule or the other we say nothing. Much is to be said on both sides. It is for the legislature if it considers that it is expedient to make notice one of the effects of registration to so enact in express words, as is done in the latest Yorkshire Registration Act 47 and 48 Vict., Cap., 54. The Indian legislature must have been aware of the conflict between the English and Irish decisions and those of the Bombay High Court upon the subject, and yet in laying down what shall be the effect of registration and non-registration they have abstained from declaring that notice to subsequent purchasers and mortgagees shall be one of the effects of registration. We think it is not the province of the Courts to do that which the legislature has abstained from doing. In the [278]

---

* Exhibit 3 — ED.

(1) 6 B. 168.
(2) 6 M. 246.
judgment in The Madras Hindu Union Bank v. C. Venkataramiah (1) the words occur "Registration would be notice to subsequent lenders, but without it how is a prior mortgage to be discovered?". We do not understand that it was intended by those words to lay down the rule that registration of itself would amount to notice. The first mortgage there was unregistered and it was pointed out that this was a reason for extra caution on the part of the first mortgagee in parting with the title-deeds, as a subsequent purchaser or mortgagee would not be able to discover the prior mortgage by searching the registry. The question whether registration amounted to notice or not was not raised in that case.

Upon this question we are referred by the learned Counsel for the appellant to the last clause of the definition of notice in the Transfer of Property Act, Section 3—"A person is said to have notice of a fact when he actually knows that fact or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, &c." We shall show hereafter when dealing with another part of the argument for appellant that in our opinion the plaintiff company was not guilty of any wilful abstention from inquiry or of gross negligence. No doubt the persons acting on behalf of the company [279] did not make search in the Registration Office, and had they done so they would have discovered the second defendant's mortgage. It would have been more prudent had they done so, but we are not prepared to lay down as a general principle that non-search of the registry is such gross negligence as to disentitle a subsequent purchaser or mortgagee to relief, for to do so would be practically to make registration notice, which, for other reasons, we have declined to do. In Damodara v. Somasundara (2) the prior mortgage was registered and it was held by Kernan, J. that the subsequent mortgagees were not guilty of such negligence as to disentitle them to priority over the first mortgagee on the ground of his gross negligence in parting with the title-deeds. We do not think that the plaintiff company by reason of the non-search in the Registration Office for incumbrances can, under the circumstances, which we shall consider more fully hereafter, be said to have been guilty of wilful abstention from a search which they ought to have made within the meaning of Section 3 of the Transfer of Property Act.

It is further argued for the appellant that even if the plaintiff company would be entitled to priority over the second defendant by reason of his gross negligence with regard to the title-deeds, they themselves have been guilty of such gross negligence as to disentitle them to priority. With the matter of negligence in not searching in the Registration Office we have already dealt. It is also charged against them that they omitted to inquire for the Collector's certificate and that their attention should have been particularly directed to the matter of the certificate by the recital in one of the title-deeds (Exhibit B3) of the old Collector's certificate, which, if they had asked for, they might have got upon the track of the new certificate and of the second defendant's mortgage. As to this we observe that the same document (Exhibit B3), which was a conveyance by the second defendant and some previous mortgagees to Mrs. A. Smith, contains a covenant that the property was then (January 1878) free from incumbrances. This of itself would divert persons, dealing with Mrs. Smith and having no reason to suspect her of dishonesty, from inquiry
as to incumbrances. The documents which showed a legal title in Mrs. Smith being in her possession, the absence of the Collector's certificate would not of itself be sufficient to arouse suspicion. The company's agents ascertained that Mrs. Smith was in possession of the property and she put them into possession by executing a rent agreement in their favour. Although they might have been more careful, we do not think that they were guilty of such gross negligence as to disentitle them to relief.

We have dealt with the case on the assumption that the second defendant was entitled to rely on his mortgage of 1879. It is argued for respondent that that mortgage is merged in his purchase of 1886. In August 1886, Mrs. A. Smith conveyed the property to second defendant, the consideration stated in the deed (Exhibit 111) being Rs. 15,000 made up of Rs. 14,291-10-6 due on the mortgage of 1879 and Rs. 420-5-6 cash. The conveyance says nothing about keeping alive the mortgage, on the contrary it appears on the face of it to extinguish it, for it conveys the property free from incumbrances and the consideration includes the amount due on the mortgage. The appellant's Counsel relies on Section 101 of the Transfer of Property Act as keeping the mortgage of 1879 alive for the benefit of the second defendant. That section enacts that "where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares by express words or necessary implication that it shall continue to subsist, or such continuance would be for his benefit." Declaration express or implied there was none. The mortgage can only be saved from extinction by the latter words of the section on the ground that the continuance of the incumbrance would be for the second defendant's benefit. We are inclined to think that these words must have reference to the time when the conveyance was executed and it is not clear that it could be said that at that time it would have been for his benefit that the mortgage should not be extinguished. And it is doubtful whether the mortgage could be considered to be kept alive even if it were for his benefit to do so in the face of the deed of conveyance which seems to extinguish it. We are not sure that the case might not have been decided against the second defendant on this ground. But we have followed the Lower Court in giving him the benefit of the doubt on this point and deciding the question of priority between his mortgage and the plaintiff's.

[281] We confirm the decree of the Lower Court and dismiss the appeal with costs.

D. Grant, Attorney for appellants.

Branson and Branson, Attorneys for respondent.
Malar Law—Makkatayam rule of inheritance—Custom of Tyars in South Malabar.

A community, following the Makkatayam rule, must not be taken to be necessarily governed by the Hindu law of inheritance with all its incidents.

Accordingly, when a member of the Tyar community in Calicut following that rule, alleged and proved a custom that brothers succeeded to self-acquired property in preference to widows, it was held that the Court should give effect to it.

[Appeal, 19 M. 1 (2); R., 17 M. 194 (185); 19 M. 140 (441).]

SECOND appeal against the decree of A. Thompson, Acting District Judge of South Malabar, in appeal suit No. 282 of 1890, reversing the decree of T. V. Anantan Nayar, Principal District Munsif of Calicut, in original suit No. 904 of 1888.

Suit for a declaration that the plaintiff was entitled to the self-acquired property left by his brother (deceased) whose widow was defendant No. 1. The parties were Tyars, admittedly following the Makkatayam rule, and the plaintiff alleged that his claim was in accordance with the custom governing them. Upon the allegation, the fourth and fifth issues were framed as follows:

"What is the law of succession which governs the parties.
"Whether, according to the law of succession which governs the parties, the plaintiff, the undivided brother of the deceased or his widow, the defendant, is his legal representative in respect of his self-acquired properties."

The District Munsif recorded findings on these and the other issues in favour of the plaintiff and passed a decree accordingly. [282] The District Judge reversed this decree for reasons which appear from the judgment of the High Court.

The plaintiff preferred this second appeal.

Sunda Arunachal, for appellant.

Ramachandra Ayyar, for respondent No. 1.

This second appeal came on for hearing before PARKER and HANDLEY, JJ., who delivered judgment as follows:

JUDGMENT.

The judgment of the District Judge appears to be based upon the assumption that, because a community is said to follow Makkatayam, it must be taken to be governed by the Hindu law of inheritance with all its incidents. This is not so. The word 'Makkatayam' is generally used in Malabar to denote the succession of sons in contradistinction to Marmakkatayam or succession of nephews.

The case set up in the plaint was that, under the law by which plaintiff's family was governed, the brother succeeded to self-acquired property in preference to the widow. The fourth issue settled was what
1892 MARCH 7.
---
APPEL.
LATE
CIVIL.
---
15 M. 281.

is the law of succession which governs the parties. The Munisif held that it was proved that by the law of succession governing Tiyars of Calicut, the brother succeeded in preference to the widow.

The Judge has treated the succession of the brother as a special custom deviating from the ordinary law. This way of treating the case rests upon the fallacy abovementioned; that the ordinary law of the Tiyars of Calicut is the Hindu law pure and simple. We must ask the present District Judge to re-hear the appeal and return findings on the fourth and fifth issues with reference to the foregoing observations.

Finding to be returned within six weeks from the date of the receipt of this order; and seven days, after the posting of the finding in this Court, will be allowed for filing objections.

[In compliance with the above order, the District Judge submitted his findings as follows:—

(1) The High Court have directed me to submit fresh findings on the fourth and fifth issues in this case.

(2) The parties are Tiyars of Calicut, who follow Makkatayam, and the question to be considered is whether, according to the law or custom followed by such Tiyars, the self-acquisition of a member of an undivided family devolves on his undivided co-par.\[283\]eners or is inherited by his widow. The District Munisif, after a careful consideration of all the evidence before him, found that the custom among the Makkatayam Tiyars of Calicut was that the self-acquisition of a member of an undivided tarwad went on his death to the tarwad, and that the widow was entitled to nothing more than maintenance. That finding appears to me to be the only one which the District Munisif could have arrived at on the evidence produced before him. It is also, I may add, in accordance with what I understand is the custom among Makkatayam Tiyars in South Malabar.

(3) I accordingly return a finding on the fourth and fifth issues to the effect that, according to the law of succession which governs the parties, the plaintiff, as the undivided brother of the deceased, is his legal representative in respect of his self-acquired properties.]

This second appeal having come on for final hearing, the Court delivered judgment as follows:—

JUDGMENT (FINAL).

We must accept the finding of the present District Judge.

The evidence is to the effect that the Tiyars of Malabar are not governed by the Hindu law pure and simple, but that their usages, with regard to divorce, re-marriage and inheritance are not entirely in accordance with the Hindu law, though the succession of sons does obtain among them.

There is legal evidence that in South Malabar, or, at all events, in Calicut taluk, the brother succeeds to self-acquired property in preference to the widow.

The decree of the Lower Appellate Court must be reversed, and that of the District Munisif restored. The appellant is entitled to his costs in this and in the Lower Appellate Court.
VENKATARAYADU v. VENKATARAMAYYA

18 M. 284.

1891
Nov. 24.

APPELLATE CIVIL.


VENKATARAYADU AND OTHERS (Representative of defendant No. 5 and Defendants Nos. 6 to 9), Appellants v. VENKATARAMAYYA AND ANOTHER (Plaintiffs), Respondents.*

[24th November, 1891.]

Hindu Law—Karnam, hereditary office of—Enfranchisement of endowment...Devolution of land enfranchised.

The holder of a hereditary office of karnam had two undivided sons, in favour of one of whom he resigned his office. Subsequently a revision of the village establishment took place, the new karnam was removed from the office, and the lands, which constituted its endowment having been enfranchised by the Inam Commissioner, a title-deed in respect of them was issued to him. After his death without issue his nephews sued to establish their right to the land:

_Held_, that the land passed to the grantee personally and not to his family, and, consequently, devolved on his death, as private property.

[Dis. 26 M. 339 (351); F. 23 M. 47 (48); R. 21 M. 47; 22 M. 204 (206); 30 M. 434 (436) = 17 M. L.J. 101 = 2 M. L.T. 101 (F.B.); 7 M. L.J. 248 (249).]

Second appeal against the decree of M. B. Sundara Rau, Subordinate Judge of Ellore, in appeal suit No. 50 of 1888, reversing the decree of R. Hanumantha Rau, District Munsif of Tanuku, in original suit No. 94 of 1885.

Suit for the possession of certain land with mesne profits.

One Seetanna held the hereditary office of karnam of Tanuku, of which the land now in question formed the endowment. He had two sons undivided from him, of whom one was the father of the plaintiffs, and the other (Venkata Narasiah) was the husband of defendant No. 2. Seetanna having grown old, resigned his office in favour of Venkata Narasiah, who became karnam in his place; the land was enjoyed by them in common. Subsequently a revision of the village establishment took place, Venkata Narasiah was removed from the office of karnam, and the endowment of the office was enfranchised by the Inam Commissioner who issued to Venkata Narasiah a title-deed in respect of the land in question. After the death of Venkata Narasiah, the land was registered in the name of defendant No. 2 as his heiress and she alienated it to defendants Nos. 4 to 17.

The plaintiffs sought to recover the land as property belonging to their family, or, by virtue of a hereditary title, claiming that defendant No. 2 was entitled to maintenance only.

The District Munsif held that the suit was not maintainable. The Subordinate Judge passed a decree for the plaintiffs. He referred to the case cited in the judgment of the High Court and said—

"The facts of that case widely differ from those on which the present case stands.

"In that case the office-holder had never a hereditary right to the office. He was a stranger, and the lands were enfranchised in his name. Plaintiff was one of the persons who had a hereditary right to the office. He was an adopted son of one of the persons who had a

* Second Appeal No. 2 of 1891.
"similar right. Soon after his adoptive father's death, the lands were
resumed by Government, and the application made on his behalf for
restoration of such lands to the plaintiff was rejected. No further steps
were taken to have this order of rejection set aside in appeal for more
than three years after that order, and the lands were enfranchised in the
name of defendant, the office-holder, who had no hereditary right to it.
After enfranchisement of the lands in the name of the office-holder, the
plaintiff lodged his suits for the lands. His claim was rejected by the
High Court on the ground that he held no office at the date of enfran-
chisement, and that the plaintiff had therefore no title to the lands. The
case shows a contest between a newcomer to the office and one whose
claim to it and the lands was rejected some years ago.

The present case is this. Sestanna, the father of Venkata Narasayya,
resigned his office in favour of his son on account of his old age,
and the latter was enlisted as a karnam in his stead. Both the father
and Venkata Narasayya lived together and enjoyed the profits of the
lands, until the latter's death. Plaintiffs are sons of an undivided
brother and they are men having a hereditary right both to the office
and emoluments thereof on the death of Venkata Narasayya or his
father.

On the death of the appellant, plaintiff, in the case in which the
Full Bench decision was passed, had no such hereditary right, for they
do not stand in the line of heirs to one another."

[286] Defendants Nos. 5 to 9 preferred this second appeal.
Bashyam Ayyangar, for appellants.
R. Subramanya Ayyar, for respondents.

JUDGMENT.

We think that the decision of the Subordinate Judge is opposed to the
principles laid down in the Full Bench decision in Venkata v. Rama (1).
The land which formed the emolument of the office of karnam did not
become the family property of the person appointed to the office, although
he may have had an hereditary claim to the office. The land was designed
to be the emolument of the person into whose hand the office of the
karnam might pass and was inalienable by him. The effect of enfran-
chisement was to free the lands from their inalienable character and to
empower the Government to deal with them as they pleased. The grant
of them to Venkata Narasiah was not a grant to the undivided family, of
which he formed a unit, but to him personally, and the future succession
and transmission of the land was placed in the same position as any other
private property. The plaintiffs were neither holders of the office at the
time of enfranchisement, nor in possession of the lands, and their suit,
therefore, was, as the Munsif held, not sustainable. We reverse the decree
of the Subordinate Judge and restore that of the Munsif with costs in this
and the Lower Appellate Court.

(1) 8 M. 249.
HAYAGREEVA v. SAMI

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Houldby.

HAYAGREEVA (Plaintiff), Appellant v. SAMI and ANOTHER (Defendants), Respondents.* [27th October and 11th November, 1891.]

Ensuements Act—Act V of 1882, Section 24—Rights accessory to an easement.

The plaintiff having in a previous suit obtained a decree declaring his right of having the roof of his house projecting over the defendants’ land, and discharging water thereon, now sued for a declaration of his right to go upon the defendants’ land for the purpose of repairing the roof:

[287] Held, that the plaintiff was entitled to the right claimed as being accessory to the easement already established, but that it should be exercised only once a year and after notice to the defendants.

[Р., 16 Ind. Cas. 893 (894).]

SECOND appeal and memorandum of objections against the decree of L. A. Campbell, Acting District Judge of Coimbatore, in appeal suit No. 32 of 1890, modifying the decree of V. Malhari Rau, District Munsif of Coimbatore, in original suit No. 623 of 1888.

The facts of the case are stated above sufficiently for the purpose of this report.

The District Munsif passed a decree as prayed. The District Judge on appeal modified this decree “by directing that the repairs in question be done within three months from this date.”

The plaintiff preferred this second appeal.

Balaji Rau, for appellant.
Ramachandra Aggar, for respondents.

JUDGMENT.

We think that the Lower Courts were right in holding that the plaintiff’s right to go into defendants’ land for the purpose of repairing his wall and roof was a right accessory to the easement which was established in the former suit of having the roof of his house projecting on defendants’ land and discharging the water on defendants’ land; and the Lower Appellate Court was quite right in holding that there must be some limit of time to the exercise of such accessory right; but we think it was in error in only allowing the right to be exercised on one occasion and thus rendering further litigation necessary when other repairs become necessary in future. We shall modify the decree of the Lower Appellate Court by providing that plaintiff’s right of entering upon defendants’ land to repair his roof and wall shall only be exercised once a year after one month’s notice to defendants and between the hours of 9 A.M. and 5 P.M. Each party will bear his own costs of this second appeal.

The memorandum of objections is dismissed with costs.

* Second Appeal No. 1198 of 1890.

551
[288] APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

KAMMATHI AND OTHERS (Plaintiffs Nos. 1 to 3) Appellants v.
KUNHAMED (Defendant No. 2), Respondent.*
[2nd and 12th November, 1891.]

Court Fees Act—Act VII of 1870, Section 10, Clause ii, Section 12, Clause ii, Schedule II,
Article 17, Clause vi—Order in appeal by defendant for payment of fee by plaintiff—
Notice.

The plaintiffs, having raised a claim to a kanom attached in execution of a
decree against their undivided brother, which was allowed in part, now sued
for a declaration of their title to four-fifths of the kanom amount, affixing to
the plaint a Rs. 10 stamp. The plaintiffs obtained a decree, against which the
defendant appealed to the District Court. While the appeal was pending the
District Judge, holding that the Court fee paid on the plaint was insufficient,
ordered that the plaintiffs should pay the balance due on an ad valorem compu-
tation of the fee, and, in default, that the suit should stand dismissed.
The plaintiffs first became aware of this order on the 26th March; the balance
was not paid within the time fixed by the District Judge for the payment to
be made, and on the 28th March he accordingly made an order dismissing the
suit.

 Held, that plaint was sufficiently stamped, and that in any case the order dis-
missing the suit while the appeal was till pending was irregular.

[ R., 31 C. 511 (512).]

SECOND appeal against the decree of J. P. Fiddian, Acting District
Judge of North Malabar, in appeal suit No. 822 of 1889, reversing the
decree of A. Venkataramana Pai, District Munsif of Tellicherry, in original
suit No. 57 of 1889.

The facts of the case appear sufficiently for the purpose of this report
from the judgment of the High Court.
The Acting District Judge cited Naraina Puter v. Aya Puter (1) as
supporting his order dismissing the suit.
Plaintiffs Nos. 1 to 3 preferred this second appeal.
Narayana Rao, for appellants.
Byru Nambar, for respondent.

JUDGMENT.

Defendant No. 2 having obtained a decree against defendant No. 1, the
undivided brother of the plaintiffs, attached a kanom of Rs. 400. Plainti-
iffs put in a claim which was allowed to the extent of Rs. 250 only.
They then instituted the present [289] suit to establish their right to four-fifths of the kanom amount. They obtained a decree
in the Court of the First Instance, and defendant No. 2 appealed. The
District Judge, being of opinion that the proper stamp duty had not been
paid, called upon defendant No. 2, the appellant to pay additional
Court-fees. This appears to have been done. Thereupon, the District
Judge called upon the plaintiffs (respondents Nos. 1 to 4 in the Lower
Appellate Court) to show cause why they should not pay additional
Court-fees. The plaint had been stamped with a Rs. 10 stamp, but
the Judge was of opinion that ad valorem fees should be paid,
and, as the plaintiffs failed to pay the same within the date fixed,
he dismissed the suit. His order is supported on the ground that, by Section 12, Clause ii, Act VII of 1870, the Court of Appeal was authorized to require the plaintiffs to pay the additional Court-fee, and, by Section 10, Clause ii, was bound to dismiss the suit, inasmuch as the additional fee was not paid within the time fixed by the Court. This was the view taken by a Bench of the Calcutta High Court in Shama Soondary v. Hurro Soondary (1), where the decision of the Appellate Court, on the question of the stamp duty, was undoubtedly correct. But the proper stamp duty, in the present case, where the plaintiffs sought to establish their title by getting the summary order set aside, was Rs. 10 under Clause vi, Article 17, Schedule II of the Court-fees Act, Vithal Krishna v. Balkrishna Janardan (2), and the order of the Judge calling upon the plaintiffs to pay ad valorem fees was wrong. Moreover there is nothing to show that the order of the Judge was communicated to the plaintiffs, who, on the 26th March filed an affidavit to the effect that they had, on that day, for the first time, received intimation of the orders of the Court. At the same time they put in a petition together with the required fee. Notwithstanding this, the Judge, on the 28th idem, dismissed the suit. In any case the order dismissing the suit, while the appeal was still pending, was irregular.

The appeal is allowed, and the order of the Judge dismissing the suit is set aside with costs.

[290] APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Handley.

SHIVA DEVI (Plaintiff), Appellant v. JARU HEGGADE AND OTHERS (Defendants), Respondents.* [23rd November, 1891.]

Civil Procedure Code, Section 111—Transfer of Property Act—Act IV of 1882, Sections 2, 76—Waste by mortgagee in possession—Possession after date fixed for payment—Interest.

In a suit in 1888 to recover principal and interest due on a usufructuary mortgage executed on 16th June 1870 which contained a covenant for repayment of the secured debt on 16th June 1878, the defendant pleaded and proved that the mortgagees had permitted certain buildings on the mortgage premises to fall into a ruinous condition and it appeared that the mortgagees had remained in possession after June 1878:

Held, (1) that the defendant was entitled to have the amount of the loss occasioned by the plaintiff’s failure to make repairs brought into the mortgage accounts under Transfer of Property Act, Section 76, and a separate suit by him for that amount was not necessary.

(2) that the profits derived by the mortgagee after the date fixed for repayment should be regarded as having been enjoyed in lieu of interest.

SECOND appeal against the decree of S. Subbayyar, Subordinate Judge of South Canara, in appeal suit No. 282 of 1889, affirming the decree of S. Raghunathaya, District Munsif of Karkal, in original suit No. 201 of 1888.

The facts of the case are stated above sufficiently for the purpose of this report.

(1) 7 C. 348. (2) 10 B. 610.
1891

The plaintiff contended that the defendant could not recover in
respect of the plaintiff’s waste by way of set-off under Civil Procedure
Code, Section 111. As to this the Subordinate Judge held that that
section had no application to the case which was governed by Transfer of
Property Act, Section 76. As to his claim to interest the Subordinate
Judge said:—

"The next question is whether the plaintiff is entitled to claim any
interest. She is admittedly in possession of the mortgaged property
under the mortgage deed, which provides that the mortgagee should
appropriate the profits in lieu of interest and that [291] "the mortgagor
should not claim surplus profits or the mortgagee a higher interest than
12 per cent. per annum; but the plaintiff contends that the money was
repayable on the 15th June 1878, and that after that date the stimulation
for appropriation of the proceeds towards the interest is not obligatory.
"BaldeoPanday v. Gokal Rai (1) and Mansob Ali v. Gulab Chand (2). In
the absence of evidence on either side to show the income of the property,
it must be presumed that the income did not fall short of the 12 per cent.
interest agreed to be paid under the bond. Otherwise the mortgagee
would have brought his suit soon after the expiry of the term. I think,
therefore, that interest was properly disallowed."

The plaintiff preferred this second appeal.

Narayana Rau, for appellant.
Pattabhirama Ayyar, for respondents.

JUDGMENT.

The first point raised is that the set-off was wrongly allowed,
and in support of this contention we were referred to the decision in
Raghu Nath Das v. Ashraf Hussain Khan (3). We do not think the
case has any application. The point here raised was not there taken and
that decision was prior to the passing of the Transfer of Property Act.
We agree with the Sub-Judge that Section 76 applies. The question is
one of procedure and the estimation of the loss caused to the mortgagor
by the failure of the mortgagee to make necessary repairs is an item which
must be considered in determining the accounts in settlement of the
mortgage.

It was a paramount duty for the mortgagee to make such necessary
repairs, and we cannot accept as valid the excuse that to do so would
diminish his interest or profits.

We think the Subordinate Judge rightly held that as the mortgagee
continued in possession after 13th June 1878 the profits must be regarded
as having been enjoyed in lieu of interest.

The appeal is dismissed with costs.

(1) 1 A. 603. (2) 10 A. 85. (3) 2 A. 252.
KRISHNATYA v. BELLARY MUNICIPAL COUNCIL

15 M. 292.

[292] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice,
and Mr. Justice Wilkinson.

KRISHNATYA (Plaintiff), Appellant v. THE BELLARY MUNICIPAL COUNCIL (Defendant), Respondent.*

[27th November, 1891.]

District Municipalities Act (Madras)—Act IV of 1884, Section 169—Suit for declaration of title against a Municipality—Parties.

The plaintiff sued a Municipal Council, under the Madras District Municipalities Act, for a declaration of his title to a certain structure situated in the limits of the Municipality and of his right to put a roof over it. The structure was found to belong to the plaintiff:

Held (1), that the Secretary of State was not a necessary party to the suit.

(2), that the Municipal Council had no discretion under Section 169 of the above Act to prevent the plaintiff from dealing with the structure, provided he did not interfere with the convenience of the public or with any sanitary regulations.

[R., 2 Bom. L.R. 572 (577).]

Second appeal against the decree of W. C. Holmes, Acting District Judge of Bellary, in appeal suit No. 58 of 1890, reversing the decree of W. Gopalachari, District Munisif of Bellary, in original suit No. 162 of 1889.

The facts of the case are stated above sufficiently for the purpose of this report.

The District Munisif passed a decree for the plaintiff. The District Judge on appeal reversed this decree. He said as to the two questions above referred to—

"One of the grounds of appeal is that the Secretary of State should have been joined as a defendant. Section 23 of the Municipal Act (IV of 1884) vests in the Municipal Council all public streets. As under an English statute, I think it should be held that only the surface of the soil, and as much of it in depth as is necessary for doing all that is reasonably and usually done in streets, vested in the Municipality (Maxwell on the Interpretation of Statutes, pp. 109 and 377). Strictly speaking, therefore, I think the Secretary of State should be joined as a party in a suit of this nature.

"There is a further question whether, under Section 169 of the Municipal Act, the Municipal Council has not a discretion as to granting a license to put up a verandah over the nyals, even though they be on private property. On the 1st May 1889, the Chairman of the Bellary Municipal Council gave a license to the plaintiff 'to rebuild the walls on both sides of the pyal' in front of his house, but permission for roofing the outer pyals was refused. On the 30th May 1889, on plaintiff having again petitioned, after a sub-committee had inspected the place, the chairman informed the plaintiff 'that the sub-committee considered that permission ought not to be granted for roofing the nyals; hence this petition is rejected,' In the orders passed by the Chairman the section under which the Municipality refused to grant the permission prayed for is not stated, but it would appear that Section 169 left the

* Second Appeal No. 192 of 1891.
granting or not of the permission prayed for to the discretion of the
Municipality."

The plaintiff preferred this second appeal.

Rama Chandran Rau Saheb, for appellant.

Ramasami Mudaliar, for respondent.

JUDGMENT.

We fail to see any reason why the Secretary of State was a necessary
party to the suit. The real question to be determined was whether the
pyal, which plaintiff wanted to roof over, was his private property or not.
The District Munsif found, upon a careful review of the evidence, that
the pyal was plaintiff's private property, he and his ancestors for the
last fifty years having exercised acts of ownership over it. The defendant,
on the other hand, adduced absolutely no evidence to show that the
ground occupied by the pyal ever formed part of the street. The District
Judge does not decide that the pyal is not private property, but merely
remarks that the proof of plaintiff's right cannot be considered very
satisfactory. It is argued that this must be held to be a finding that
the pyal is not private property. If we thought so, it would be necessary to
ask the Judge to reconsider his decision as the evidence seems to us
overwhelming, but we do not consider that he intended to set aside the
finding of the District Munsif as to the question of plaintiff's right. With
reference to Section 169 of the Act (Madras Act IV of 1884), we think that
the Judge has misinterpreted it. It must be read in connection with [294]
the definition of the word street in Section 3. According to that, private
property is exempted from the action of the Commissioners. It seems to
us absurd to suppose that Section 169 empowers the Commissioners to
prevent a person dealing with his own property, provided he does not
interfere with the convenience of the public or with any sanitary regulation.
If the pyal in front of a house is not private property, the Municipal
Commissioners would undoubtedly have the right to grant or withhold a
license for roofing it, but when, as in the present case, the pyal is private
property, the right of the Commissioners to interfere cannot arise, until
the owner's building projects beyond his own limits. In the words of the
section, the erection must not cause any public inconvenience. We
reverse the decree of the District Judge and restore that of the Munsif
with costs in this and the Lower Appellate Court.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Wilkinson.

PARATHAVI (Plaintiff), Appellant v. SANKUMANI AND OTHERS
(Defendants), Respondents.* [8th December, 1891.]

Court Fees Act.—Act VII of 1870, Schedule I, Article 1—Cancellation of an agreement
to sell—Ad valorem fee.

The plaintiff had executed an agreement to sell certain property in discharge
of mortgages executed on his behalf during his minority. He now brought a
suit alleging that the agreement had been extorted from him, and praying for a

* Appeal No. 26 of 1891.
declaration that the agreement was not binding on him and for any other relief
"which the Court considers to be reasonable."

Held, that the plaintiff was bound to pay Court-fees upon the value of his
interest in the document sought to be invalidated.

[R., 28 M. 490 (492).]

APPEAL against the decree of E. K. Krishnan, Subordinate Judge of
Calicut, in original suit No. 20 of 1889.

[296] The plaint began as follows:—

"A karar is executed and registered on the 15th karkidakam 1061
"(29th July 1886) jointly by the first defendant, and, by his compulsion,
"defendants Nos. 2 to 4 and the plaintiff, stipulating to sell and purchase
"lands that will be sufficient for interest at the rate of Rs. 5 for Rs. 100
"and 5 paras of paddy for 100 fanams, on the rent that will be fixed by
"arbitrators, on the lands charged with Rs. 60,500 follows:—Rs. 30,000
"under a panayam deed executed on the 10th karkidakam 1057 (20th July
"1882) on 254 items of land, the joint of the plaintiff's tarwad, by defend-
"ants Nos. 2 to 4 and mother, Kochukurumpa, and others in the capacity
"of the plaintiff's guardian, together with Rs. 17,000, under 3 purum-
kadum deeds, on the same lands, thus Rs. 47,000 and Rs. 13,000 on
"settling the past accounts and Rs. 500 paid ready money, thus altogether
"amounting to Rs. 60,500."

The plaint proceeded to allege that the instrument of 29th July 1886
had been executed under coercion and that the debts secured by the other
documents above referred to were not binding on him. The prayers of
the plaint were as stated above.

The Court fee stamp affixed to the plaint was Rs. 10 only. The
Subordinate Judge held that this was insufficient and ordered the payment
of an ad valorem fee on Rs. 60,500. This payment was not made and the
Subordinate Judge rejected the plaint.

The plaintiff preferred this second appeal.

Sankaran Nayar, for appellant.

Ramachandra Ayyar, for respondent, No. 1.

JUDGMENT.

We are of opinion that the plaintiff was bound to pay duty upon the
value of his interest in the document, the invalidity of which he sought to
have declared. He had executed an agreement to sell certain property, in
discharge of mortgages executed on his behalf during his minority. His
agreement virtually amounted to a ratification of those mortgages, which
he cannot avoid, so long as the agreement executed, after he attained his
majority, stands. A declaration of the invalidity of that document would
afford plaintiff relief of a very substantial character, and we think that
plaintiff was not entitled to sue for a bare declaration and to stamp his
plaint accordingly. The appeal fails and is dismissed with costs.
1892
JAN. 6.

[296] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Handley.

MARIATHODI (Defendant No. 1), Appellant v. APPU (Plaintiff),
Respondent." [6th January, 1892.]

Civil Procedure Code, Section 43—Res judicata—Omit to sue."

The plaintiff, having previously obtained against his brother, defendant No. 1, who had been the managing member of their family a decree for partition of the family property including certain debts scheduled in the plaint therein, now sued to recover his share of certain other family debts collected by defendant No. 1 without the plaintiff’s knowledge:

Held, that the claim was not barred by Civil Procedure Code, Section 43.

[R., 23 B. 597 (602).]

SECOND appeal and memorandum of objections against the decree of V. P. DeRozario, Subordinate Judge of South Malabar, in appeal suit No. 638 of 1890, modifying the decree of M. Achuthan Nayar, District Munsif of Nedunganad, in original suit No. 105 of 1888.

The plaintiff’s case was summarized by the Subordinate Judge as follows:

"Plaintiff states that plaintiff and first defendant are brothers; that plaintiff brought suit No. 17 of 1886 for his share of the family properties which were in first defendant’s possession, and obtained a decree: that first defendant and his son, second defendant, fraudulently collected large sums of money from several creditors of their family and illegally retained it in their possession; that he had no notice of this at the time when his suit for partition was filed; that he was aware of this only recently, and that he is entitled to a proportionate share thereof. Plaintiff therefore sues to recover his share in 16 items of family debts alleged to have been collected and misappropriated by first defendant, and to recover the arrears of mahr or which had accrued before the passing of the decree, but which he had to pay to the jenni."

[297] The District Munsif passed a decree for the plaintiff which was in substance affirmed by the Subordinate Judge.

Defendant No. 1 preferred this second appeal.

Sundara Ayyar, for appellant.
Sankaran Nayar, for respondent.

JUDGMENT.

We think the Lower Courts were right in holding that the suit was not barred in any part by Section 43 of the Civil Procedure Code. The former suit by plaintiff was for a general partition of the family property and in that suit he obtained a declaration that he was entitled to 1/4 of the debts due to the family. In the present suit he sues for some of the debts which, he alleges, were collected by the managing member, first defendant, without his knowledge. It is clear that plaintiff’s omission to claim from 1st defendant in that suit a share of debts, which he did not know had been recovered, cannot be a bar to his now suing for that purpose.

* Second Appeal No. 105 of 1891.
The words "omit to sue" in Section 13 must refer to an omission which might have been avoided, not to an omission to claim that which a party could not know he was entitled to.

As to the items 1 to 4, 9, 10, 12, 13, and 14, the Subordinate Judge finds that they are clearly proved, and that decision cannot be questioned in second appeal. As to items 5 and 11 we think the decision of the Subordinate Judge is correct.

The memorandum of objections relates to items on which the Subordinate Judge has given decisions upon the evidence and we must refuse to discuss them.

The appeal and memorandum of objections are dismissed with costs.

15 M. 298.

[298] APPPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

ANNAMALAI (Plaintiff), Appellant v. SUBRAMANYAN (Defendant), Respondent. [7th January, 1893.]


The plaintiff sued on the Small Cause side of a Subordinate Court before the Small Cause Courts Act, 1887, came into operation, to recover with interest from the date of suit, Rs. 500 the value of crops alleged to have been illegally carried away by the defendant, while the plaintiff was in possession. The defendant raised a plea to the jurisdiction of the Court, and the Judge, without recording any decision on its validity, directed that the plaint be presented on the regular side of the Court for the reason that it raised questions of complexity. It was so presented after the above Act had come into operation. The plaintiff obtained a decree which was reversed on appeal. A petition of second appeal was presented by the plaintiff. The defendant objected that no second appeal lay under Civil Procedure Code, Section 586:

Held, that the objection should prevail, since the suit was not excepted from the jurisdiction of the Small Cause Court under the Provincial Small Cause Courts Act of 1887.

F. 85 M. 726 (737) = 21 M. L.J. 412 (443); 11 Ind. Cas. 31 = (1911) 2 M.W.N. 180; R., 23 C. 864 (994); 119 P.R. 1891; 94 P.R. 1890 = 39 F.L.R. 1901.

SECOND appeal against the decree of H. T. Ross, Acting District Judge of Madura, in appeal suit No. 770 of 1889, reversing the decree of S. Gopalachari, Subordinate Judge of Madura (East), in original suit No. 63 of 1888.

The facts of the case were stated by the District Judge as follows:

"Plaintiff and defendant are uncle and nephew, and this suit is to recover from defendant Rs. 500 (with interest and costs) the estimated profits for fasilis 1294 to 1296 on certain shares in the Dharmasana village of Kurukkattai, which plaintiff claims under a division effected by an award of arbitrators, dated the 17th October 1881, and which, he alleges, were wrongfully taken by defendant and others in the 3 fasilis aforesaid.

"Plaintiff first filed this plaint on 29th June 1887 as small cause No. 227 against the first defendant and others, of whom [299] he subsequently exonerated two. On 30th September 1887, plaintiff obtained

* Second Appeal No. 107 of 1891.
1892 Jan. 7.

APPEL
LATE
CIVIL.

15 M. 298.

an ex parte decree against first, fifth and sixth defendants. On 21st
November 1888, the ex parte decree against first defendant was set aside and the small cause suit re-opened as against him. Defendant thereupon raised his present defence questioning plaintiff’s title to the property, and he also objected to the jurisdiction of the Court on the ground that the plaint had been presented on 29th June 1887, i.e., two days before the new Small Cause Act (IX of 1887) came into force. The Subordinate Judge, without deciding the latter objection, considered that, in view of the complicated question of title raised by the defence, it was not a proper case for a Small Cause Court to decide, and he directed the plaint to be returned to plaintiff for presentation in the proper Court. The plaint was accordingly taken back by plaintiff and represented, with no alteration, on the ordinary side of the Sub-Court on 4th December 1888. For the purposes of jurisdiction the property, the title to which was in dispute, was valued at Rs. 2,550, being 15 times the estimated net profits of fasli 1296. Under the Court’s orders, plaintiff was made to pay stamp-duty over again on the Rs. 500 sought to be recovered from defendant.

The Subordinate Judge passed a decree for the plaintiff. This decree was reversed on appeal by the District Judge for reasons not material for the purposes of this report.

The plaintiff preferred this second appeal.

Krisnasami Ayyar, for appellant.

Bhashyam Ayyangar and Desikachariar, for respondent.

JUDGMENT.

The preliminary objection is taken on behalf of respondent that no second appeal lies under Section 586 of the Code of Civil Procedure, as the value of the suit does not exceed Rs. 500, and it is of a nature cognizable by a Court of Small Causes, and, we think, the objection must prevail. It is argued for appellant that the case falls within Clause 31 of Schedule II of the Provincial Small Cause Courts Act IX of 1887, and that the suit was, therefore, not cognizable by a Court of Small Causes. The question is what was the nature of the suit as originally filed, and, in our opinion, this suit, in its inception, was not a suit for the profits of immovable property within the meaning of Clause 31 of Schedule II of Act IX of 1887. This suit is in effect brought to recover the value of crops alleged to have been illegally carried away by defendant while plaintiff was in possession. This is not a suit, in our opinion, exempted from the jurisdiction of the Small Cause Court by Clause 31, Act IX of 1887. The suit was therefore of a nature cognizable by a Court of Small Causes within the meaning of Section 586 of the Civil Procedure Code, and no second appeal lies; and it makes no difference that, in the course of investigation of the suit, it appeared that defendant, in carrying off the crops, was acting under colour of some claim of title to the land.

We agree generally with the principles laid down in Krishna Prosad Nag v. Maizuddin Biswas (1), the authority of which is not shaken by the decision in Sriram Samanta v. Kalidas Dey (2).

The second appeal must be dismissed with costs.

The memorandum of objections also must be dismissed with costs.

(1) 17 C. 707.

(2) 18 C. 316.
SUBBARAYA v. KYLASA

Before Mr. Justice Parker and Mr. Justice Shephard.

SUBBARAYA (Plaintiff) v. KYLASA AND OTHERS (Defendants), Respondents. [11th and 15th December, 1891.]

Hindu law—Inheritance—Step-sister's son.

A step-sister's son is entitled to inherit under the Hindu law in force in the Madras Presidency.

APPEAL against the decree of G. D. Irvine, District Judge of Coimbatore, in original suit No. 2 of 1890.

The plaintiff sued for possession of certain property left by Ramasami Mudaliar, deceased, the brother of the plaintiff's mother. An issue was raised as follows:—"Was plaintiff's mother the uterine sister or only the half-sister of Ramasami Mudaliar?" The finding on this issue was that Ramasami Mudaliar and the plaintiff's mother were children of the same father by different wives. The District Judge held that the plaintiff was not within [301] the line of inheritance to Ramasami Mudaliar, and dismissed the suit without trial of various other issues which were raised on the pleadings.

The plaintiff preferred this appeal.

Ramachandra Ayyar, for appellant.

Rama Rau and Sadagopachariar, for respondent No. 11.

Ramasami Mudaliar, for respondents Nos. 8, 9 and 14.

Mahadeva Ayyar, for respondents Nos. 5 and 6.

Ragavendra Rau, for respondents Nos. 4 and 21.

JUDGMENT.

The question is whether the plaintiff, whose mother is found to have been the step-sister of Ramasami Mudaliar, now deceased, stands in the line of inheritance to him?

If he were the son of Ramasami’s sister of the full blood, there can be no doubt that he would be so entitled, being a bandhu of the deceased; but it has been argued that a step-sister’s son does not stand on the same footing as a sister's son, and, with regard to the cases cited, it is said that they are of no authority in this presidency.

Apart from those cases we are of opinion that the position of the step-sister’s son cannot be distinguished from that of the sister’s son. The relationship between the maternal uncle and his sister’s son or step-sister’s son is alike that of sapinda, for, in both cases, there is a common grandfather and "the relation of sapindas arises from connection as parts of one body." See Mitakshara cited in Amrita Kumari Debi v. Lakknarayan Chuckerbully (1) and Mari v. Chinnammal (2). As to the other condition requisite to make the plaintiff a bandhu there is no doubt, for clearly he is sprung from a different family. It was contended that the decision in Mari v. Chinnammal (2) with reference to the position of the step-mother was adverse to the present claim; but that contention is answered by the observation that the exclusion of a woman in no way involves the exclusion of her offspring. There are several cases in which the

* Appeal No. 40 of 1891.

(1) 2 B.L.R. F.B. 28 (33).
(2) 8 M. 107 (126).
children have rights which their mother would not have (Mayne's Hindu Law, § 492, Rayaninagari v. Vencata Gopala Narasimha Rau (1).) The observation of Mutrusami Ayyar, J., in Mari v. Chinnammal (2) seems to show that, in his opinion, the right of the step-sister's son must [302] be recognized. For these reasons we are of opinion that the judgment of the District Judge must be reversed, and the suit remanded for trial. Costs to abide event.

15 M. 302—2 M.L.J. 112.

APPELLATE CIVIL.

Before Mr. Justice Shepharà and Mr. Justice Subramanya Ayyar.

BAIRAGULU AND ANOTHER (Plaintiffs), Appellants v. BAPANNA (Defendant), Respondent. 

Civil Procedure Code, Sections 244, 258—Suit for declaration of satisfaction of a decree—Satisfaction of decree out of Court.

A judgment-debtor, alleging that he had entered into an agreement with the decree-holder in satisfaction of his decree, and that the latter had, in breach of such agreement, procured the issue of a warrant of attachment, now sued for a declaration that the decree had been satisfied, and prayed also for the cancellation of the warrant of attachment:

Held, that the suit was not maintainable.

[F., 12 C.W.N. 485 (487); Appr., 21 C. 437 (445); 31 C. 480 (485) = 8 C.W.N. 395; R., 20 A. 254 (258); 11 C.L.J. 91 (95) = 4 Ind. Cas. 402.]

SECOND appeal against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in appeal suit No. 367 of 1889, affirming the decree of V. Subramanya Ayyar, District Munsif of Ongole, in original suit No. 111 of 1889.

The facts of the case are stated above sufficiently for the purpose of this report.

The plaintiff preferred this second appeal.

Seshagiri Ayyar, for appellants.

Ramachandra Rau Sahab, for respondent.

JUDGMENT.

The suit has been dismissed on the ground that the matter in question, viz., the satisfaction of the decree is a matter which should be dealt with by the Court in execution of the decree, and not by a separate suit.

It is clear that it is of this nature.

The effect of Section 258 of the Civil Procedure Code is only to exclude proof of an uncertified agreement in execution proceedings. It does not limit the operation of Section 244. The [303] case of Viraraghava v. Subbakka(3) is cited by the appellants' pleader. This case shows that an action for the breach of the contract to certify adjustment of the decree may be brought; but it is not authority for the position that a suit to declare that a decree has been satisfied will lie. The appeal is dismissed with costs.

* Second Appeal No. 810 of 1891.

(1) 6 M.H.O.R. 278.  (2) 8 M. 107 (126).  (3) 5 M. 897.
JAGANATHA (Plaintiff), Appellant v. GANCHI REDDI AND OTHERS - (Defendants), Respondents.  

Evidence Act—Act I of 1872, Section 115—Estoppel—Execution-purchaser without notice of mortgage.

The plaintiff sued to realise his security under a mortgage executed to him by defendant No. 1, by sale of the mortgage premises which were in the possession of defendants Nos. 2 and 3. It appeared that the plaintiff had previously attached and brought to sale the mortgage premises in execution of a decree against defendant No. 1, and that the other defendants had purchased at the Court sale, without notice of the plaintiff's mortgage, which was not referred to in the attachment lists or sale certificates:

Held, that the plaintiff was estopped from setting up his present claim.

SECOND appeal against the decree of O. Wolfo Murray, Acting District Judge of North Arcot, in appeal suit No. 139 of 1890, affirming the decree of S. Subba Rau, District Munsif of Chittur, in original suit No. 372 of 1889.

The facts of the case are stated above sufficiently for the purposes of this report.

The District Munsif dismissed the suit and his decree was affirmed on appeal by the District Judge.

The plaintiff preferred this second appeal.

Rama Rau, for appellant.

Parthasaradhi Ayyangar, for respondents.

JUDGMENT.

We think the plaintiff is estopped from recovering on the mortgage when he has allowed the auction purchaser to buy without notice in a suit in which he himself brought the property to sale—see Agarchand Gumanchand v. Rakhoo Hanmant (1)

The second appeal is dismissed with costs.

16 M. 304 = 2 M.L.J. 122.

GOPALASAMI (Defendant No. 1), Appellant v. ARUNACHELLA, (Plaintiff), Respondent.  

Transfer of Property Act—Act IV of 1882, Section 68—Personal decree against mortgagor.

Suit for a personal decree on a usufructuary mortgage which contained no express covenant to pay, but, provided that if the mortgagor repaid the secured debt before a certain date (now passed), he should be replaced in possession. The mortgage premises had been attached in execution of a decree obtained by a third party against the mortgagor, and a claim preferred by the plaintiff having

* Second Appeal No. 477 of 1891.
† Second Appeal No. 289 of 1891.

(1) 12 B. 678.
been erroneously rejected and the premises sold, he was dispossessed. The mortgagees accordingly brought his suit as above:

Held, that the plaintiff was not entitled to maintain the suit either under the terms of the mortgage or under Transfer of Property Act, Section 68.

[Pt. 10 A. 191 (193); R., 21 A.W.N. 52; 4 C.L.J. 246 (251).]

SECOND appeal against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatnam, in appeal suit No. 938 of 1889, affirming the decree of C. Srinangachariar, District Munsif of Shiyali, in original suit No. 126 of 1889.

The facts of the case are stated sufficiently for the purpose of this report in the judgment of the High Court. The decrees of the Lower Courts were for the plaintiff. The defendant preferred this second appeal. Subramanya Ayyar and Sadagopa Chariar, for appellant.

Mr. Gantz, for respondent.

JUDGMENT.

The plaintiff obtained a usufructuary mortgage of certain lands and held possession of the same until he was ousted by a person who purchased the property in execution of a money decree held by the latter against the first defendant, the mortgagor.

The plaintiff now sues for the recovery of the mortgage money.

[305] The mortgagor did not bind himself to repay the mortgage amount. The clause in the instrument of mortgage, relied on by the plaintiff, merely provides that if the mortgage money be repaid at the end of any fasli within the 27th May 1886, the mortgagor should be put back into possession of the lands. The Subordinate Judge was, therefore, in error in holding that there was a promise to pay.

The circumstances under which the plaintiff was dispossessed were these. Before the lands in question were sold by the Court, the plaintiff preferred a claim based upon his mortgage; but it was disallowed on the ground that, at the date of the mortgage, the property was under attachment on account of a decree held by another creditor of the present defendant. It is, however, now admitted that there was no sale on account of debt due under the latter decree, and that the debt for which the property was eventually sold was not a claim enforceable under that attachment. Section 276 of the Civil Procedure Code had, therefore, no application to the case. The mortgage to the plaintiff was valid against the creditor who subsequently got the property attached and sold, and became the purchaser thereof. The order rejecting the claim was wrong; but the plaintiff took no steps to have it set aside and allowed the purchaser to obtain possession of the lands sold.

The defendant had nothing to do with the claim put in by the plaintiff or the order passed thereon, and it is clear that the defendant was in no way responsible for the erroneous order or the plaintiff’s omission to question it by a suit.

It is argued for the plaintiff that the failure of the defendant to pay up the judgment debt, which led to the sale entitles the plaintiff to sue for the money under Clause (b) of Section 68 of the Transfer of Property Act. This contention is unsustainable. The creditor, who held the money decree, had a right to bring to sale the equity of redemption possessed by the defendant in the lands, and the defendant was at liberty to allow such equity to be conveyed by Court sale for his debt. The sale thereof could not properly have affected any of the plaintiff’s rights as
mortgagor and the defendant cannot be treated as having thereby com-
mited a wrongful act or default whereby the mortgagor was deprived of the
whole or any portion of his security, within the meaning of Clause (b) of
Section 68.

[306] The next contention is that the defendant failed to secure the
possession of the mortgage property to the plaintiff. In support of this
stress is laid on the words in Clause (c) of Section 68 "without disturbance
by any other person," and on the absence in the clause in question of
any qualifying provision, such as that contained in Section 7 of the
English Conveyancing Act of 1881, where the covenant is stated to
be "against lawful interruption or disturbance by the person who conveys
as beneficial owner or any other person not being a person claiming in
respect of an estate or interest subject whereunto the conveyance is expressly
made." Though the last part of Clause (c) is not as clear as it should be,
yet we cannot think that the Legislature intended to make the mortgagor
liable for the wrongful acts of third parties. Covenants for quiet
enjoyment, however generally expressed, must be understood as applying
merely to the acts of those claiming by title. The rule is the same
whether the covenant is a covenant in law, or an express covenant to
indemnify not against an individual named but against all persons. The
reason of the law is clear. For it would be unreasonable to hold that the
grantor could either foresee or prevent the tortious acts of strangers, and
the remedy against the such tortious acts is against the wrong doers (Hayes
We see no warrant for thinking that the Legislature meant to depart from
so sound and well established a rule. In our opinion, the proper
construction to be placed upon the words "any other person" in the
concluding part of Clause (c) of Section 68 is to interpret them to mean any
other person having a title.

Upon the facts admitted, the mortgage to the plaintiff was binding
upon the purchaser who ousted him. It was not alleged that the defendant
committed any breach of the implied contract under Clause (b) of Section 65
in respect of the defence of the mortgagor's title should the mortgagor's
possession be unlawfully disturbed. If the plaintiff placed himself in a
position which precluded him from objecting to his dispossession by the
purchaser at the Court sale, the defendant was not answerable for such a
state of things.

We must allow the appeal, reverse the decrees of the Courts below,
and dismiss the suit with costs.

(1) Vaughan's Rep cts. 118.
CHINNAMMAL AND ANOTHER (Plaintiffs Nos. 1 and 2), Appellants 
v. VARADARAJULU AND ANOTHER (Defendant and Plaintiff No. 3), 
Respondents.* [9th April, 5th May and 4th December, 1891 
and 5th January, 1892.]

Hindu law—Law of inheritance—Custom—Illegitimate son of a Sudra—Specific Relief 
Act—Act I of 1877, Section 42—Further relief.

The widows of a shrotriemdar, who was a Sudra, brought a suit for a declaration 
of their title by inheritance to his lands, against his illegitimate son, who had 
been registered as shrotriemdar in lieu of his deceased father, and to whom certain 
of the raiyats had attorned. The defendant claimed to be legitimate according 
to the customary law governing the family, although his parents might not have 
been married at the time of his birth, by reason of his parents having 
performed the ceremony of pariyam before his birth:

Held, (1) that the suit was not precluded by Specific Relief Act, Section 42, 
proviso;
(2) that the defendant was illegitimate and that the plaintiffs were 
accordingly entitled to one-half of the lands in question, and the defendant was 
etitled to the other half.

Observations on the allegation and proof of a custom in derogation of the 
general Hindu law of inheritance.

[For., 33 M. 236 (227) = 4 Ind. Cas. 299 = 20 M.I.J. 359 = 7 M.L.T. 26; 5 P.R. 1908 = 99 
4 Ind. Cas. 356 = 101 P.R. 1909; Appr., 25 M. 736 (741) R.; 14 C.W.N. 576 =, 
5 Ind. Cas. 591 (533); (1911) 2 M.W.N. 384 (395).]

APPEAL against the decree of S. T. McCarthy, District Judge of 
Chingleput, in original suit No. 5 of 1889.

The plaintiffs sued for a declaration of their title to certain shrotriem 
lands in succession to Thanappa Naick, their late husband, who died in 
September 1885. They alleged that they were in enjoyment of the land, 
but that the defendant, claiming to be the son of the deceased shrotriemdar, 
had tried to collect rent from the raiyats in occupation.

The defendant pleaded that he was the legitimate son of the deceased, 
and the third issue was framed with reference to the plea as follows:—
"Whether the defendant is the son and legal heir of the deceased 
Thanappa Naick?"

Evidence was given to show that the defendant's father and mother 
were not married at the time of his birth, whereupon the [303] defendant 
set up a custom in support of his legitimacy, the nature of which is 
discussed in the judgment of the High Court. On this point the District 
Judge found that the defendant's parents were not married at the date 
of his birth, but had performed the ceremony of pariyam, and held that the 
defendant was legitimate under the customary law to which he was subject.

An issue was also raised as to whether the suit was bad by reason of 
the proviso of Specific Relief Act, Section 42, for want of a prayer for relief 
consequential on the declaration sought. On this issue the District Judge 
ruled in favour of the defendant, finding that "the defendant's name has 
been entered on the register in lieu of that of the deceased Thanappa

* Appeal No. 119 of 1890.
Naick," and that "it was established that the defendant, through his lessee, is constructively in possession of the suit properties, and that the plaintiffs are not."

The District Judge accordingly passed a decree, dismissing the suit.

The plaintiffs preferred this appeal.

Mr. Johnstone, Mr. Subramanyam and Ethiraja Mudaliar, for appellants.

Srirangachariar, for respondents.

JUDGMENT.

We are unable to agree with the District Judge that the plaintiffs are precluded from obtaining a declaratory decree by the proviso to Section 42 of the Specific Relief Act. The oral evidence as to possession of the disputed lands is, as the Judge admits, very conflicting, and the documents on which he relies in coming to the conclusion that possession is with the defendant are, in our opinion, worthless as evidence of possession. Exhibit V is a rent agreement in favour of the defendant, dated 11th January 1883, long after the dispute arose between the plaintiffs and the defendant. It is not proved that the executant of this rent agreement obtained possession of the house to which it relates. If he is the same person as the defendant's ninth witness, he was not asked about this, and he is the defendant's gunasta. And even if it were proved that the house in question is occupied by a tenant of the defendant, it is a small portion of the property in dispute, and against such a fact, if proved, would have to be set the admitted fact that the plaintiffs are in possession of the family house. Exhibit VI consists of a series of documents called irusalamabs, purporting to show that kist for two shrotiem villages forming part of the property in question was paid by the defendant, and sent to the treasury from the village munsil's office for faslis 1295 to 1298. That kist was so paid is of itself no evidence of possession. Admittedly the defendant was registered as the shrotriemdar by the Revenue authorities soon after the death of the late shrotriemdar Thanappa Naicker, but this would neither give him the legal title nor put him in possession of the lands. Kist would only be received by the Revenue authorities from the registered shrotriemdar, so that the payment of kist would not carry the matter any fur her than the registration of the shrotriem in the name of the defendant. Exhibit IX consists of 12 cultivation muchalaks by raiyats of one of the shrotriem villages in favour of the defendant's lessee Venkatachella Naicker. These again are executed in fasli 1297 or 1887-88 after the disputes between the plaintiffs and the defendant began. It would not be difficult for the defendant or his lessee to obtain such muchalaks from some of the raiyats. On the other hand, it is admitted that many raiyats of that same village did not give muchalaks to the defendant's lessee, and he filed suits to compel them to do so and obtained decrees (see copy judgment Exhibit VIII). It is admitted that these decrees have not been executed, and the raiyats, who were the defendants therein, have not attorned to the defendant's lessee. The District Judge attaches great weight to the fact that the plaintiffs produce no documentary evidence in support of their assertions that possession of the disputed property is with them; but it must be remembered that they are women, and widows, and would, therefore, not be so able to obtain documentary evidence of the kind produced by the defendant. It appears to us that the conclusion to be drawn from all the evidence as to possession is that possession of the whole property in dispute is neither with one nor the other of the contending parties. As
might be expected in the case of a dispute as to the title to lands, most of which are in the actual occupation of raiyats, some of the raiyats recognize one claimant as their landlord, and some the other. Such a case is eminently one in which a declaratory decree is desirable, to avoid multiplicity of suits and obtain a decision once and for all, which shall secure peaceful possession of the property. And we think there is nothing in the language of the proviso to Section 42 of the Specific Relief Act to prevent the Court passing a declaratory decree in this case. It is only if "the [310] plaintiff being able to seek further relief than a mere declaration of title, omit to do so," that the Court is precluded from making a declaration of title. And what further relief could the plaintiffs obtain in this suit? Not possession of the whole property in dispute, for admittedly the defendant is not in possession of the whole, and the raiyats, who do not recognize the defendant's title, would have to be made parties before possession of the lands in their occupation could be decreed to the plaintiff. And we can see no other prayer for relief which the plaintiffs could combine in this suit with the prayer for a declaration.

We must hold that a declaration of the plaintiffs' title can be made in this suit if their title is proved.

As to the plaintiffs' title, it is admitted that, as the widows of the late Thanappa Naicker, they are entitled to succeed to his property, unless the defendant is the preferential heir. The defendant is said to be the son of Thanappa Naicker by one Tolasi, who is said to have been married to Thanappa Naicker long after the defendant's birth; some of the witnesses put it at more than fifteen years after. The defendant in his written statement merely claims to be the lawful son of Thanappa Naicker, and, as such, to be his legal heir and representative. Apparently, in the course of the case, he set up some peculiar custom of his caste or family by which he was entitled to be treated as his father's legitimate son, notwithstanding his having been born before the marriage of his mother, and the District Judge considers such custom proved, and finds that the defendant is the son and legal heir of Thanappa Naicker. It is not all clear, however, what is the custom alleged or which the Judge considers proved, whether it is that the pariyam or betrothal ceremony is equivalent to marriage, and children born after that ceremony are legitimate, independently of any subsequent marriage, or whether a subsequent marriage is necessary to legitimize children so born. Nor is it clear whether the custom found by the Judge is a custom of the defendant's caste or only of his particular family, and, if the former, what his caste is. The Judge calls it Paligar or Yanadi. Neither of these terms is generally known as descriptive of a caste. The defendant's evidence as to the custom consists of the depositions of his second, third, fourth, fifth and sixth witnesses. He himself, examined as his seventh witness, makes no definite statement as to the custom. His second, third and fourth witnesses seem to [311] consider betrothal as equivalent to marriage and lay no stress on subsequent marriage as legitimatizing the children, while the fifth and sixth seem to imply that a subsequent marriage is necessary. The only other evidence to prove the custom consists of depositions made by some of the plaintiff's witnesses in an inquiry before the Tabsidar of Trivellore (Exhibits I, II, III, IV). These depositions are retracted by the plaintiff's witnesses in this case, and are only admissible for the purpose of contradicting them. They are no evidence of the custom. This is, in our opinion, wholly insufficient evidence on which to find a peculiar custom of marriage or legitimacy prevailing in the defendant's caste or family.
No judicial decisions recognizing the custom are proved. The only instances in which the custom is alleged to have been followed are in the defendant's own family. The custom is one contrary to the general law of marriage and inheritance prevailing amongst Hindus and requires strong evidence to support it. We notice also that the defendant's mother is said to have been of a different caste. That very loose notions of morality and of the sacredness of the marriage tie prevailed in the family to which the parties belong is probable enough, for Thanappa Naicker appears to have kept the defendant's mother and another woman in his house from the time they were girls and had children by them, and subsequently to have married them, having, in the meantime, married three other women. But something more than a prevailing low tone of morality in a family is required to establish a binding custom of legitimacy differing from the ordinary law.

It appears, however, from the evidence that sons born under circumstances somewhat similar to those of the defendant's birth have inherited property in the defendant's caste or family, and we think some further inquiry as to the existence of any peculiar custom in the caste or family ought to be made.

We shall direct the District Judge to return a revised finding on the third issue with reference to the above observations. He will require the defendant to put in a supplemental written statement, setting out precisely and accurately what is the custom he sets up, and will take such further evidence as the parties may adduce.

Finding is to be returned within two months from the date of the re-opening of the Court after recess, and seven days after [312] posting of the finding in this Court will be allowed for filing objections.

[In compliance with the above order, the District Judge submitted a finding, from which the following passages are extracts:—

The issue on which I am required to submit a revised finding is—whether the defendant (Varatharajulu Naicken) is the son and legal heir of the deceased Thanappa Naicken.

That he is the son of Thanappa Naick I think there is no reason to doubt. The evidence of the witnesses examined in the case shows that he was born of Tolasiammal after she and her elder sister were taken to the house of Thanappa Naick. It is further proved that Tolasi bore to Thanappa Naick a daughter named Sittammal before the birth of this defendant.

Is he his legal heir? This depends upon whether his mother was the legally married wife of Thanappa at the time of defendant's birth.

It is admitted on the side of the defendant that a marriage ceremony was gone through between Thanappa Naick and defendant's mother, Tolasi, some ten years after the defendant's birth. But it is contended that this ceremony was not necessary for the validation of the marriage, which had been completed by a ceremony called pariyam prior to Tolasi's coming to live in Thanappa's house. On the other hand the plaintiff's witnesses deny that there is any such ceremony as pariyam, and swear that there is no such custom as is alleged by defendant's witnesses of tying a second cord—a thali.

In the supplemental written statement put in by the defendant, as required by the High Court's order, this second marriage is said to be 'like marriage among Brahmans at the sixtieth year,' and it is explained that it is only performed in the case of 'men of position, if they like, when the family is in good condition and there are children.'
Of the witnesses examined on behalf of the defendant only one, namely, the fourteenth witness, Sahadeva Naick, admits having tied a second bottu to his wife, and he says he did so "because the first one was worn out" merely! He adds that there is no ceremony on such occasions and no feeding of relatives. Whereas defendant's thirteenth witness says there is "no difference between the ceremony of tying the second bottu and of the first paryām." [313] While defendant's eighteenth witness, Candasswami Naick, never heard of such a thing as tying second bottu. Defendant's fifteenth witness, Sendi Naick, says that, though he has not himself tied second bottu to his wife, he has an elder brother who did so. Defendant has not examined that elder brother, whereas Yegappa Naick (who seems to be the man) has been examined as plaintiff's fifteenth witness and denies having tied second bottu to his wife.

The witnesses examined on behalf of plaintiffs swear that their marriage ceremony is similar to that of other Sudras, and that there is among them no such thing as paryām marriage.

On a consideration of the whole evidence I am not satisfied that defendant's mother was at the time of his birth the legally married wife of Thanappa Naick. I consequently find on the issue that defendant Varatharajulu Naicken is not the legal heir of Thanappa Naick, unless it be as an illegitimate son, which is a question of law as to which I am not required to express any opinion.

This appeal having come on for final hearing, the Court delivered judgment as follows:

JUDGMENT (FINAL).

The District Judge has found that the defendant is the son of the late Thanappa Naick, but that his mother was not the legally married wife of Thanappa Naick at the time of his birth. He also finds that the family is a Sudra family. No good reason has been shown by either side for doubting the correctness of these findings, which, we think, are supported by the evidence, and we accept the findings accordingly. The defendant then being found to be the illegitimate son of a Sudra, the question is to what decree (if any) are the plaintiffs entitled?

For the appellants (first and second plaintiffs) it is contended that they are entitled to a declaration that the whole property, or at least half, belongs to them. Respondent No. 1, on the other hand, contends that the plaintiffs having failed to prove the right they set up, viz., a right to the whole property, their suit should be dismissed.

The authorities as to the respective rights of a widow and an illegitimate son are somewhat conflicting, but the following appears to be the general result so far as they are agreed. If there be a widow and daughters or daughters' son and an illegitimate son, the latter takes half the estate, leaving the other half to be [314] enjoyed as woman's estate by the widow and daughters or daughters' son in succession—Mayne's Hindu Law and Usage, 4th edition, § 507; Ranoji v. Kandoji (1), Parvathi v. Thirumalai (2), Shesgiri v. Girewa (3).

It is argued for appellants that the decision in Parvathi v. Thirumalai (2) is an authority for the proposition that the widow excludes the illegitimate son altogether, but we do not consider that such was the effect of that decision. That was a case of an imparible zemindari, and it was held that the illegitimate son of a Sudra zemindar did not exclude

(1) 8 M. 557.  (2) 10 M. 334.  (3) 14 B. 282.
his father's coparcener or widow from succession. But the principle that the illegitimate son is co-heir with his father's widow, daughter or daughter's son was expressly affirmed (see page 315).

For the respondents a recent decision of the Privy Council—Raja Jogendron Bhopati Hurri Chunder Mahapatra v. Nityanund Mansingh (1)—is quoted as deciding that the illegitimate son takes the whole as against the widow. When examined, however, this case does not support that proposition. In that case there had been a legitimate son who survived the father, and it was held in the case out of which the appeal arose—Jogendro Bhupati v. Nityanund Mansingh (2)—that the illegitimate son took as a coparcener with his legitimate brother, and, therefore, on the death of the legitimate son took the whole estate by survivorship, and this decision was affirmed by the Privy Council. There was no question there of the right of the widow of the father, but Mr. Mayne (4th edition, § 508), says that in such a case the illegitimate son would supersede the widow, and quotes the decision of the Calcutta High Court in this case in support of that view. This decision of the Calcutta Court was no doubt dissented from by this Court in Parvathi v. Thirumalai (3), and to that extent the authority of that Madras case is shaken by the Privy Council decision, but that does not affect the doctrine established by the Madras cases as to the right of the widow to at least half when the deceased has left no legitimate but only an illegitimate son.

The Madras decisions have made no distinction between the case of an illegitimate son by a slave girl and any other illegitimate son, provided the concubinage with the mother has been [315] continuous—Krishnagyan v. Muttusami (4). The result is that the plaintiffs are entitled to half of the property of the late Thanappa Naick in the plaint schedules set forth, and the defendant as the illegitimate son of Thanappa Naick is entitled to the other half, and we reverse the decree of the Lower Court and make a declaration accordingly. We think the appellants should have their costs, original and appeal, as the defendant has failed in establishing the case which he set up, and which has been the principal subject of contention in this suit, viz., that he was the legitimate son of Thanappa Naick. Both memoranda of objections are dismissed without costs.

---


APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SECRETARY OF STATE FOR INDIA (Defendant), Appellant v. BAVOTTI HAJI (Plaintiff's Representative), Respondent.*

[30th January and 30th April, 1890, and 16th and 22nd February, 1892.]


Certain land was notified under Madras Forest Act, 1882, to be constituted a reserved forest. One, alleging that the jeem title had been in his family for six or seven centuries, claimed to be the owner of the land. His claim was contested by Government on the allegation that the land had belonged to another family and had been escheated. The claimant admitted that he had not been in possession for six years before the date of the notification, Government having objected to his interfering with the land. It was found that his family had been in possession

* Second Appeal No. 631 of 1888.

(1) 17 I.A. 128 = 18 C. 151. (2) 11 C. 702. (3) 10 M. 334. (4) 7 M. 407.
for the previous sixty years at least, and that the alleged escheat was not proved:

Held, that the claim should be allowed.

Observations on the burden of proof and on the presumption of title arising out of possession.

[F., 19 M. 165 (166); 33 M. 1 = 5 Ind. Cas. 882 (883) = 20 M.L.J. 66 = 7 M.L.T. 126.]

SECOND appeal against the decree of A. F. Cox, Acting District Judge of North Malabar, in appeal suit No. 374 of 1887, reversing the decision of A. Thompson, Forest Settlement officer, Kanot, in claim case No. 108 of 1885.

[316] Claim preferred under Madras Forest Act, 1882, Section. 6, to certain land notified to be constituted a reserved forest under the provisions of that Act. The District Forest officer on behalf of the Secretary of State, alleged that the land in question had belonged to the Kanot Nambiyar and had been escheated to Government. The claimant alleged that his family had been the jammis of the land for six hundred or seven hundred years. The Forest Settlement officer found that neither of these allegations was established and dismissed the claim. The District Judge, on appeal, reversed this decision and allowed the claim, on the ground that the claimant's family had been in uninterrupted possession for more than sixty years.

The Secretary of State preferred this second appeal.

The Advocate-General (Hon. Mr. Spring Branson) and the Government Pleader (Mr. Powell), for appellant.

Mr. Gantz, Mr. Norton and Sankara Menon, for respondent.

JUDGMENT.

RUST, J.—This is an appeal by the Secretary of State for India, represented by the Collector of Malabar, against the decision of the District Court of North Malabar, allowing the claim of one Ponnamplath Parapranavan Kunhamed Haji to certain lands, of which it had been intended by the Governor of Madras in Council to constitute a reserved forest under the third and following sections of Madras Forest Act (Act V of 1882). A Forest Settlement officer was accordingly appointed, and, it is to be presumed, proceeded as required by Section 6 of the Act, when the above-named Kunhamed Haji (now respondent) came forward, claiming to be the owner of the land in question. The Forest Settlement officer thereupon inquired into the case, and, though he was not satisfied with the evidence adduced in support of the case, set up for Government, viz., that the land in question belonged to the Kanot Nambiyar and was escheated to Government, rejected the claim of the present respondent on the ground that he had failed to establish his title, the burden of proof being on him and not on the Government, as the latter occupied the position of defendant in the case.

On appeal, the District Judge reversed the decision of the Forest Settlement officer, remarking that, though there was an absence of proof of jamm title on the claimant's part, there was sufficient evidence to justify the conclusion that his family had been in uninterrupted possession for more than sixty years; while, on the other hand, no escheat was proved.

The first ground now taken on behalf of the Government in the second appeal is that the District Court erred in throwing the burden of
proof on the present appellant; and that, as the respondent had failed to prove his title to the lands claimed by him, his claim was rightly dismissed by the Forest Settlement officer.

I do not think it necessary, for the disposal of this appeal, to consider the general question on which side the burden of proof lies in cases of this kind; for, even assuming it to be on the claimant (respondent), I think he has proved a sufficiently lengthy possession to shift the burden on the opposite party. The documentary evidence adduced by him in support of his possession and enjoyment of the property in question is found by both the Lower Courts to be genuine; and there is in these Exhibits ix to xli enough proof of possession of different parts of the property in question by the respondent's family for a period of sixty years, i.e., from 1820 to 1880, when the respondent admittedly ceased to exercise rights of ownership in the property "owing to objections made by Government officers to his meddling with the land." The District Judge's finding of the claimant's family's possession for sixty years is no doubt arrived at by taking the period from the Malayalam year 988, i.e., 1813, mentioned in Exhibit ix, as the date of a previous lease, whereas, as has been pointed out by the appellant's counsel, there is nothing in Exhibit ix to identify the previously leased property therein mentioned with any portion of the property now in dispute. Consequently 1820, Malayalam year 995, is the date from which possession can be held to be proved by Exhibit ix; but when such possession is proved by the other documentary evidence to have continued till 1876, I do not see why it should be considered to have ceased then or at any time prior to 1880, when was admittedly passed the order prohibiting the claimant's interference with the land. In the absence of proof to the contrary, it is to be presumed that the possession of land proved to have extended from 1820 to 1876 continued till the prohibitory order of 1880, and, if so, the period does not fall short of sixty years. Moreover, the finding is not that the possession commenced in 1820, but merely that it is proved to have existed from that time. But is it necessary on the part of the claimant to give positive evidence of possession for sixty [318] years? As has been pointed out by the respondent's counsel, the period of sixty years prescribed by Article 149 of the Indian Limitation Act applies only to suits "by or on behalf of the Secretary of State for India," whereas the contention in the present case that the burden of proof is on the respondent is rested on the very circumstance that the latter and not the Secretary of State is the plaintiff in the suit. If so, it is not a suit "by or on behalf of the Secretary of State," and therefore the period of sixty years prescribed by the Indian Limitation Act is inapplicable. On the other hand, if the suit were to be held to be one by or on behalf of the Secretary of State and the burden of proof held to be on him, as plaintiff, it must undoubtedly fail: as both the Lower Courts have found that the escheat alleged has not been proved, Exhibit A being clearly worthless as evidence of the alleged escheat.

The presumption of ownership from the fact of possession cannot be held to prevail where, as in the present case, the possession of the appellant is found to have commenced only in 1880, when was issued the order prohibiting the respondent from interfering with the plaint property. The finding that the respondent was in possession even till 1876 (which is within twelve years prior to the commencement of this litigation) is sufficient to shift on to the appellant the burden of proving title. Moreover in the district of Malabar and in the tracts administered as part
thereof, the presumption is not that forest lands are the property of the Crown—Secretary of State v. Vira Rayan (1).

It is true that, as contended by appellant, no evidence, documentary or oral, has been produced by respondent of the exercise of acts of ownership by him or his family over the four hills noted in the margin. Considering that the appellant denied the respondent's claim as a whole, I do not think that the mere fact of his not having taken objection to each items separately can be held to be a tacit admission that all the property included within the boundaries, specified in the claim put in by the respondent constituted one single estate. On the other hand it is quite intelligible that the respondent failed to adduce evidence in support of his claim to these particular lands under the impression that the whole of the property in question was to be considered as a single estate, and that it was sufficient if he adduced evidence of his possession of different portions of such entire estate. He should, I think, be afforded an opportunity of proving that these lands were also in his possession till 1880, or that they are so situated as to justify the finding that they also belong to him. For this purpose, a plan is required showing all the lands included within the boundaries given in the claim petition (which is treated as the plaint in this case) in which map should be shown nominatim each and all of the lands the subject of this claim, and also (with reference to paragraph 6 of the memorandum of second appeal) any hill or land within these boundaries not claimed by the respondent. Further evidence may be adduced on either side before the District Judge, who will be required to consider the same together with the plan above referred to and submit his finding as to possession by respondent of the four hills—Vanancheri, Ellarad, Mtrakad and Chekkeri—in question within two months after the receipt of this order, when seven days, after posting of the finding in this Court, will be allowed for filing objections.

M.UTTUSAMI AYyAR, J.—This is one of those second appeals which relate to a considerable tract of forest land in Malabar. The contest in this case is as to the claimant's title to the property in dispute. Both the Lower Courts concur in finding that the claim of oscheat set up for the Crown has not been proved. They also agree in thinking that the claimant has proved adverse possession from 1820 to 1876. Differing, however, from the Forest Settlement officer, the District Judge finds further that the claimant has made out title as against the Crown by proving more than sixty years' possession. The question for consideration in this second appeal is whether the decision of the Lower Appellate Court is correct.

The first question argued before us is as to the burden of proof. I see no reason to doubt that it lay on the claimant in this case to prove his title in the first instance. The tract of land in dispute was constituted by the Government into a reserved forest under Madras Act V of 1882, and a notification was published to that effect in 1886. Land at the disposal of Government for that purpose is defined in the Act to include all unoccupied land. The claimant himself admitted that since the Malayalam year 1055 (1880) he ceased to be in possession owing to the objections taken [320] by the officers of Government to his meddling with it. Whether the Government was since actually in possession through its officers, or only

(1) 9 M. 175.
excluded the claimant from possession in 1880, the land was unoccupied for six years at the date of the proclamation within the meaning of the Act so as to cast the onus of showing title in the first instance on the claimant.

The next question urged upon us is that the finding on the question of title is one which we ought not to accept with reference to the provisions of Section 594 of the Code of Civil Procedure. The finding by the Court of First Instance is that from the Malayalam year 995 (1820) to 1876 the claimant has exercised a continuous series of acts of ownership in regard to some one or other of these hills. Referring to documents ix to xii and the recital in document ix of a prior lease of 1813, the Lower Appellate Court observed that it was impossible to escape from the conclusion that the claimant's family had more than sixty years' uninterrupted possession of the hills which they claim. The first objection taken to this finding is that Exhibit ix, dated 1820, which is the earliest document in evidence, is neither proved nor legally admissible. It purports to be the counterpart of a lease more than sixty years old, and comes from proper custody, and both the Lower Courts have considered it to be genuine. Moreover, no objection was taken to its reception in evidence in either of the Courts below, and there is other evidence in proof of acts of subsequent enjoyment. This objection must be overruled.

The second objection to the finding is that the recital of a prior lease of 1813 in Exhibit ix is no evidence of such lease. A reference to the document shows that it is doubtful if the plots mentioned in it as the subject of a prior lease are not different from those denised by the document, and there is nothing on the record to show that they are included in the property now in litigation. Again, such recitals are only evidence of reputation in the case of public or general rights, and the objection taken in appeal must prevail. There are, however, four presumptions which arise in favour of the claimant from the proved possession of his family from 1820 to 1876 and which materially support the finding of the Judge. In the first place, the prior possession of the claimant's family raises a presumption of title on his favour. It is true that the Forest Settlement officer refers evidence showing that the Government interrupted the claimant's possession in 1877 [321] and was in possession from 1880, and that the Judge does not apparently dissent from that view. It is clear, however, that the possession of the Government falls short of twelve years; and as both Courts find that its claim of escheat is not proved, the presumption of ownership arising in favour of the Government from present possession is met by the presumption of ownership arising in favour of the claimant from prior possession. In *Doe v. Hardinge* v. *Cooke* (1) the plaintiff showed a presumptive title arising out of twenty-three years' possession, and the defendant set up a latter possession of ten years. It was held, in the absence of proof of title on either side, that there was presumption against presumptions, which threw on the defendant the burden of establishing, if he can, a title of a higher description.

Another presumption in favour of the claimant's title arises from the fact that, though Exhibit ix shows that his family was in possession in 1820, yet it does not show that it commenced in that year only. In a case like this, in which he claimed that his family had the jenu title for six hundred or seven hundred years, or from time immemorial, there will arise a presumption that the possession of the family extended to a,

(1) 7 Bing. 346.
much earlier period than 1820, unless there is some circumstance in
the evidence to indicate that the possession originated at a particular
point of the time. Though Act V of 1882 throws the onus of proof
on the claimant in the first instance, yet it does not disable him from
proving his title against the Crown in the same way in which he is
entitled to prove it in a suit between party and party, nor take away
from him the benefit of presumptions arising in favour of his title
from possession. In the Singampatti case (1) possession was proved
only until 1818 and for less than sixty years, and yet it was held by this
Court that there was sufficient proof of title. Again, there is the further
fact that, though the claimant’s possession was interfered with in 1877,
and his right of possession was disputed, yet he was not actually dispossessed until 1880, when he was finally prohibited from meddling with the
lands in dispute. This again favours the contention that until he was
wholly dispossessed, his possession must be taken to have continued.
Further, it was observed in [322] Secretary of State v. Vira Rayan (2)
there was no presumption in Malabar that forest land belonged to the
Crown. For these reasons, I do not think that the second objection can
be supported.

The third ground of objection is that the District Judge has dealt with
the several hills in dispute as if they formed together one estate and
refused to no common characteristic nor peculiarity in support of his
procedure. This objection would be valid in regard to those hills as to
which there is no reliable evidence of prior possession from which
title can be presumed. On the view that prior possession is prima facie
evidence of title unless it is met by proof of title on the part of Government,
I am unable to uphold the contention that sixty years' possession must be
proved as regards each of the lands in dispute, unless there was some
common characteristic with reference to which possession of some hills
may be treated as the possession of all.

The next objection is that as regards the four hills mentioned in the
fourth ground in the memorandum of second appeal, there is no evidence
of prior possession. There is no documentary evidence regarding any of
them, and the Judge has expressed no opinion as to the weight due to the
evidence of witnesses 4 and 5, which is said to refer to Mutrad hill. I
concur in the order proposed by my learned colleague in regard to the
four hills.

With reference to the sixth ground of objection mentioned in the
memorandum of second appeal, it is desirable to have a plan showing
with precision the boundaries comprising the hills in regard to which the
claim is recognized.

For these reasons, I concur in the order proposed by my learned colleague.

[In compliance with the above order the District Judge returned a
finding to the effect mentioned in the following judgment of the High
Court.]

The second appeal having then come on for final hearing their
Lordships delivered judgment as follows:—

JUDGMENT (FINAL).

The finding of the Judge is that the claimant has not proved that he
was at any time in possession of any of the four hills now in question.

(1) Sivasubramanya v. Secretary of State for India, 9 M. 285 affirmed in P.C. sub.
(2) 9 M. 175.
and that none of these hills is so connected with those found to be the claimant's as to justify a finding that these hills also belong to the claimant.

[323] These findings have been objected to: but on looking into the evidence we find they are correct.

The result is that we disallow plaintiff's claim to these hills, i.e., Vanancherri, Ellarad, Mutrad, and Chekkari, and to this extent modify the decree of the Lower Appellate Court: while we uphold the decree in so far as it concerns the rest of the property claimed in this suit.

Each party will bear his own costs of this appeal.

**15 M. 323 - 1 Weir 366.**

**APPELLATE CRIMINAL.**

**Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.**

**Srinivasa (Complainant), Petitioner v. Annasami and Others (Accused), Respondents.** [8th, 9th and 22nd March, 1892.]

**Penal Code—Act XLV of 1860, Section 372—Illegal disposal of a minor—Revision.**

A dancing woman (fourth accused) of a temple applied to the manager (first accused) of the temple for the appointment of a girl under the age of sixteen, whom she had adopted as her daughter, to her "kothu" mirasi office to which duties were more or less connected with the preparation of provisions for the temple were attached. The manager, before whom the girl had sung and danced, ordered that she be placed on the pay abstract like other dancing girls, and she was employed in the above-mentioned duties about the temple for about five months. It appeared that the dancing women of the temple lived partly at least by prostitution, and there was evidence that the girl sang and danced in the temple, received wages, and wore a pattu (an emolument of marriage). The Magistrate upon these facts refused to frame a charge against the manager of the temple and the adoptive mother of the minor under Penal Code, Section 372.

**Held, per Collins, C.J. (Parker, J., diss.)** that the Magistrate should have framed a charge.

On a petition under Criminal Procedure Code, Sections 435, 439, preferred by the complainant who was a dismissed servant of the temple, after the prosecution had been pending for two years, it appeared that the girl had suffered no harm:

**Held, that whether or not the Magistrate should have framed a charge, the High Court was not bound to send the case for retrial.**


**PETITION under Sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order of discharge [324] passed on the accused in calendar case No. 3 of 1891 on the file of the District Magistrate of Madura.**

This case came before the High Court at an earlier stage of the proceedings, when the judgment was delivered which is reported ante. p. 41.† The facts of the case appear sufficiently for the purposes of this report from the following judgments of the High Court.

Mr. Wedderburn and Mr. Subramanyam, for petitioner.
The Advocate-General (Hon. Mr. Spring Branson) and Subramanya Ayyar, for accused No. 1.

* Criminal Revision Case No. 3 of 1892.
† 15 M. 41—Ed.
Ananda Charlu, for accused No. 4.

JUDGMENTS.

COLLINS, C. J.—The points that are to be decided in this case are, first, upon the evidence taken by the District Magistrate is there a prima facie case disclosed against the accused under Section 372 of the Indian Penal Code? and, second, ought the High Court to order the District Magistrate to frame a charge? There were four persons accused—the first, the manager of a temple; the second and third, the natural father and mother of the girl Pichaimuthu; and the fourth, a dasi of the temple with whom Pichaimuthu has been living for some years.

The case for the prosecution consisted of oral and documentary evidence; the witnesses were not cross-examined, and the District Magistrate held that the prosecution had failed to prove an offence, and, accordingly, discharged all the accused under Section 253 of the Criminal Procedure Code.

With respect to the second and third accused no evidence implicating them was given, and the District Magistrate was right in discharging them.

I have now to consider the evidence against the first and fourth accused, and to consider whether the District Magistrate was justified in refusing to frame a charge. Section 372 of the Indian Penal Code enacts that "whoever sells, lets to hire, or otherwise disposes of any minor under the age of sixteen years with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose shall be punished, &c."

It must be taken as proved in evidence in this case that the dasis of this temple live by prostitution and kovil wages (see [325] evidence of eleventh witness). The fourth accused, a dasi of the temple (of which the first accused is manager) and holding a kothu miras in that temple, became, in 1889, incapacitated from age and illness from performing her duties in the temple, and, sometime before November 1889, she, accompanied by Pichaimuthu, went to a dancing party at the private house of the Village Munsif's brother. The first accused was present, and the fourth accused told him that she had taught Pichaimuthu dancing and singing and requested first accused to appoint Pichaimuthu in her place in the temple. The girl Pichaimuthu must have been then thirteen or fourteen years of age (as her age is given in 1891 as sixteen).

She danced and sung before the first accused on this occasion, and it is stated that he gave her Rs. 5, and in answer to fourth accused's request that she should be appointed in her place, the first accused directed fourth accused to present a petition, and told the Tahsildar to take work from her. On this point the thirteenth witness says that the fourth accused asked the first accused that her dasi appointment should be registered in the name of the girl, and the fourteenth witness, herself a dasi, corroborates that statement. On the 27th November 1889 Exhibit A was sent by fourth accused directed to first accused, "Anasami Aiyar Avergal, Agent of the Sivaganga Zemindari." It is a petition by fourth accused describing herself as of the twelfth kothu miras of Tirukoshtiur temple, praying that the employment of Vairavi and taking paddy for pounding into rice attached to the said kothu miras, which is in her name, be entered in the name of her daughter Pichaimuthu, and the petition is endorsed by first accused thus:—"The person named in the petition may be entered if there be no other objection to the
mirs duties mentioned in this petition," and he signs as agent and manager. This petition, No. 87, is also initialed by the Tahsildar of the temple, who, on the 20th December 1889, makes the following order in the temple records (Exhibit B):

"Tiruku—Yadast No. 108. As per the endorsement order No. 87, of the 28th ultimo, passed on petition presented to the head office by dasi Periamuthurutnam (fourth accused) of the twelfth kothu in the Tirukoshtiyyur temple, enter for her duties her daughter Pichaimuthu in the pay abstract like other dasis and [326] take work from her. Yadast has already been sent. Cooked rice should be entered without entering pay.

(Signed) KRISHNIBARR, Tahsildar."

Exhibit B is also signed by the head gomastah, and is said to have been communicated to the monigar and the karnam. The evidence further shows that after this Pichaimuthu attended at the temple and did work. She also sang and danced. She received wages. She wore a pottu (an emblem of marriage), and this continued for five or six months. The fact that she danced and sung in the temple is proved by the fourth, sixth, thirteenth and fourteenth witnesses, the last named being a temple dasi, who says "Pichaimuthu has danced and done work in the kovil with us."

The fact that she wore a pottu in the temple is proved by the fourth, fifth and eleventh witnesses, but is denied by the girl herself in answer to a question put by the District Magistrate after the counsel for the accused had obtained permission to reserve cross-examination. After Pichaimuthu had been, as is stated, performing these duties in the temple for five or six months, Exhibit D was written by the Tahsildar to the first accused and a reply was sent, Exhibit E. The District Magistrate says on this part of the case that it is reasonably certain that Exhibits D and E originated in a fear of prosecution.

The Exhibits F and G are not proved to have come from the records of the temple, and, as the counsel for the prosecution did not prove who wrote them or from whence they came, the District Magistrate was right in not considering them in his judgment.

I have now to consider whether there was a prima facie case against the first and fourth accused. The District Magistrate does not say he disbelieves the oral evidence in toto; it is true that in paragraph 5 of his judgment he says that the evidence is "discrepant" as to whether the girl danced alone or with others at the private dance; that the evidence is "discrepant" as to whether she danced and sang in the temple, or whether she did only work, such as sweeping, drawing figures on the floor, &c., and that the evidence is also "discrepant" as to whether she at any time wore a pottu. There is no contradiction that I can observe in the material points of the evidence, except a denial of the girl herself that she wore a pottu, and that was, as I have [327] observed before, in answer to question from the District Magistrate; it is true that some witnesses give fuller particulars than others, but there is no material contradiction except the one I have noticed.

The District Magistrate also is of opinion that the pay abstracts show that her position was distinct from that of the regular dasis.

The principal point to be decided is, was there evidence of such disposal of the girl as is contemplated by Section 372? In other words, was there evidence that the accused disposed of the girl in such a way that
they knew it to be likely that she would be employed or used for the purpose of prostitution. I am of opinion that there was evidence of such a disposition. The first accused, at the request of the fourth accused, caused the girl to be borne on the books of the temple, and there is evidence that in consequence of the petition in Exhibit A being granted the girl was entered for her duties in the temple “like other dasis” — Exhibit B. The fact that there is no evidence of dedication of the girl to the temple is immaterial. I am of opinion that at the time she was appointed to do the duties of the fourth accused (admittedly a dasi of the temple) and when she was enrolled in the temple books, and attended at the temple for the purpose of performing those duties, there was a sufficient disposal of her to satisfy the words of Section 372, and it being in evidence that the dasis of this temple live partly at least by prostitution, the two accused knew it to be likely she would be employed or used for such a purpose. It was the duty, therefore, of the District Magistrate to have framed a charge.

The next point to be considered is whether or not the High Court is bound to send the case back to the District Magistrate and order him to frame a charge. I take into consideration the fact that there is no evidence that the girl was debauched during the time she was at the temple; that the prosecution is not conducted by the Government, but by a former servant of the temple who is prosecuting the accused, as the District Magistrate believes, out of spite against the first accused, that the first accused did, in May 1890, discharge the girl from her duties in the temple. I think, therefore, that the High Court is not bound to order the case to be retried, and I would dismiss the petition.

[328] PARKER, J.—The questions before us are (1) whether evidence taken establishes a prima facie case of an offence under Section 372 of the India Penal Code, and (2) whether, if it does, we should direct the District Magistrate to draw a charge.

As regards the documentary evidence I may observe that Exhibits F and G are not proved. They are not shown to be attendance registers kept in the temple in the ordinary course of business, nor is it shown they come from proper custody.

It is admitted that no evidence has been offered against the second and third accused. As against the first and fourth accused, the facts which appear in evidence are that first accused saw the girl Pichaimuthu at a private party and was pleased with her dancing and singing. The fourth accused (the girl’s adoptive mother and a dasi) then represented to first accused that she herself was sick and getting old, and requested that Pichaimuthu might be appointed to her mirasi office in the temple. The first accused told the mother to present a petition and told the temple Tabslidar he might take work from the girl. Exhibit A is the petition presented. It merely prays that the employment of Vairavi taking paddy for pounding rice and other duties attached to the twelfth kothu miras may be entered in Pichaimuthu’s name. It appears from other evidence that the duties enumerated are all more or less connected with the provisions of the temple. The endorsement on Exhibit A directs that Pichaimuthu’s name may be entered to the miras duties if there is no other objection.

It is found that the girl performed these miras duties above specified for four or five months. There is further evidence that the girl sang and danced in the temple and wore a pottu when she did so. The District Magistrate expresses himself as not entirely satisfied with the evidence that she sang and danced. He does not find whether she wore a pottu or
not, but the only witnesses who speak to this are those whose testimony is not accepted as to the singing and dancing.

On 28th May 1890 the then Tahsildar reported (Exhibit D) that Plochumuthu had been entered on the register and had done work connected with Vairavi, &c., (enumerating these duties as to provisions), but stated that, as pottu was not tied, she was not able to take her turn and do other duties before the swamy. He also said she was not of proper age. The agent replied blaming the late Tahsildar for omitting to notice this fact, and directed that [329] the girl be removed from service and her name struck off the acquaintance roll.

It is not necessary to notice Exhibit B. That document is not inconsistent with the above evidence, but as it was not written either by or to the first or fourth accused, and there is no evidence they ever saw it, it cannot affect the case.

This is the whole of the evidence in the case. It is not alleged that the girl has been actually daubed or that any attempt has been made to do so, and beyond the fact that by going to the temple she has been brought into association with dasis there is nothing to show that any harm has been done. As, however, her natural father and mother, as well as her adoptive mother, are all of the "dasi" caste, there can have been no change in her associations, which must have remained the same from her earliest childhood.

Do the facts found constitute a "disposal of" the minor within the meaning of Section 373, Indian Penal Code? There is no evidence of dedication to the deity or of the formal tying of pottu, so that there has been no such change in the girl’s status as would deprive her from contracting a legal marriage. Nor has there been any transfer of possession since the minor has lived at home and merely gone to the temple to perform certain services. All that is proved is that her name has been entered in the kothu miras, and that she has been sent to perform certain duties in the temple. She has not been formally dedicated and it is not at all clear that without dedication she is competent to hold the miras or to perform all the duties attached thereto. Her name may have been entered pro tempore, with a view to future dedication; but the question is whether such a disposal is complete.

The term "dispose of" has many meanings. In Webster’s Dictionary it is defined as (a) to determine the fate of, to exercise the power of control over, to fix the condition, employment, &c., of, to direct or assign for use; (b) to exercise finally one’s power of control over, to pass over into the control of some one else as by selling, to get rid of.

Seeing that the term in Section 372, Indian Penal Code, is used in conjunction with selling and letting to hire, it would seem that the Legislature rather contemplated some physical disposal for a mercenary purpose or the exercise of some power of control which would be final and irrevocable in its moral effects more [330] especially as the words used are "sells, lets to hire, or otherwise disposes of," thus suggesting other acts a quidem generis.

In this case there has clearly been no irrevocable disposal. The girl is not dedicated; there is no change in her status, and she is still free to marry; no physical possession of her person has been handed over; all that has been done is to register her name among the servants of the temple pro tempore and remove it when found unqualified. The District Magistrate does indeed say that this removal may have been the result of fear.
of prosecution, but this is a mere surmise. The evidence is not inconsistent with the rectification of a bona fide mistake.

Then as to the criminal intention, beyond the inference that it was intended Pichaimuthu should eventually become a dasi there is no evidence. It is not shown as to first accused at any rate that he intended she would become a dasi during her minority, and the terms of the endorsement on Exhibit A may bear out the Magistrate's view that the intention was to the contrary. That there was any intention to use the girl for the purpose of prostitution before she became a dasi, or whether she became a dasi or not, there is no evidence at all.

Cross-examination might have brought out the facts more clearly, but upon the evidence as it stands it appears to me very doubtful whether the offence of disposing of the girl for the purposes of prostitution can be held to be complete.

Penal provisions of law must be strictly construed, and must not be strained against an accused person. There is no reason to hold that the provisions of Section 372, Indian Penal Code, were directed against dasis as such, and it has been held in two cases—Venku v. Mahalinga (1) Queen Empress v. Ramanna (2)—that prostitution is not the essential condition or necessary consequence of becoming a dancing girl, and a fortiori it is not the necessary consequence of education to become one.

While, however, I am not able to agree with the learned Chief Justice that a technical disposal for the purposes named in Section 372, Indian Penal Code, has been completed, I agree with him that, in either view, no further inquiry is necessary. The prosecution has been pending against the accused for nearly two years. Enough has been done to warn the temple authorities of the danger they incur if acts are done which amount to the disposal of a minor for immoral purposes, even though the ceremony of dedication to the deity be omitted. The prosecution has been carried on by a dismissed temple servant who has been convicted of theft, and who has endeavoured to support his case against his late employers by the production of records which he has stolen from the temple. Further proceedings could only tend to the gratification of private malice, and are not called for either for the protection of the girl or for the public good. I concur, therefore, in dismissing this petition.

APPÉLIATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

ARUMUGA (Plaintiff), Appellant v. CHOKALINGAM AND OTHERS (Defendants), Respondents.* [11th and 14th March, 1892.]


Limitation Act, 1877, Schedule II, Article 138 is applicable to a suit brought by the assignee of a purchaser of land at a Court sale to obtain possession of the land.

[F., 23 B. 246 (247); 18 M. 144; R., 25 B. 275 (279); 31 C. 681 = S.C.W.N. 476 (479) (F.B.)]

* Second Appeal No. 539 of 1891.
SECOND appeal against the decree of R.S. Benson, District Judge of South Arcot, in appeal suit No. 95 of 1890, affirning the decree of P. Subramania Pillai, District Munsif of Vridhachalam, in original suit No. 366 of 1889.

Suit for possession of land sold to the plaintiff in 1883 by defendant No. 1, who had purchased it at a Court sale in April 1877. Neither had been in possession.

The District Munsif dismissed the suit, holding that the suit was barred by limitation. The District Judge on appeal affirmed the decree of the District Munsif.

The plaintiff preferred this second appeal.

Mr. Subramanyam, for appellant.
Mahadeva Ayyar, for respondent.

JUDGMENT.

MUTTUSAMI AYYAR, J.—This was a suit by a purchaser at a private sale from the son of a purchaser at a Court sale, who had not [332] obtained possession from the judgment-debtors. Both the Courts below held that it was barred by Article 138, second schedule of the Act of Limitations. I think that the decision is correct and that the appellant’s contention that Article 136 governs the claim is not tenable. If the suit was brought by the auction-purchaser, Article 138 would clearly apply. There is no reason to think that when it is brought either by his son or a purchaser claiming under him, the article ceases to be applicable. Reading Articles 136, 137 and 138 together, I think that Article 136 applies to suits brought upon claims not derived from purchasers at a Court sale. I would dismiss the second appeal with costs.

BEST, J.—The only point urged before us is that the Lower Courts are in error in holding that the plaintiff’s suit is barred by limitation. It is contended that Article 136 of Schedule II of the Limitation Act, and not Article 138 as held by the Lower Courts, is applicable to this case.

Plaintiff sues as assignee of the purchaser at a sale in execution of a decree, and it is contended that, though Article 138 might apply to a suit by the purchaser himself, it must be read strictly, and so read is inapplicable to such purchaser’s assignee. It has been held that the term “mortgagor” in Article 148 of the same schedule includes an assignee of a mortgage—Bhaqvan Sahai v. Bhaqwan Din (1), and even a co-mortgagor by whom the mortgaged property had been redeemed—Askfag Ahmad v. Wazir Ali (2), and there is no reason why the word purchaser in Article 138 should be strictly construed so as to exclude the assignee of such purchaser, who of course stands in the shoes of his assignor and can have no right as such assignee greater than that possessed by his assignor.

Article 136 is intended to apply to cases in which the vendor is at the time of sale not entitled to possession of the property sold, and consequently the institution of a suit for possession has to be deferred till the right of any third person to its possession has determined. Had plaintiff’s vendor purchased the property under such circumstances, no doubt plaintiff as his assignee would be entitled to the benefit of the further time allowed by Article 136. But this is not plaintiff’s case. His contention is merely that as his vendor was not entitled to possession of the property [333] purchased by him till the sale was confirmed, the limitation period must be counted from the date of confirmation of the

(1) 9 A. 97.
(2) 11 A. 493.
1892
MARCH 14.

APPEL-
LATE
CIVIL.

15 M. 331.

sale, and not from the date of the sale itself. This is, however, opposed
to the express provisions of article 138—Kishori Mohun Roy Chowdhry v.
Chunder Nath Pal (1), Seru Mohun Bania v. Bhagoban Din Pandey (2).

It is not denied that the judgment-debtors were in possession at the
date of the sale at which plaintiff's vendor, the first defendant, purchased
the property. The first defendant has allowed the suit to proceed ex parte
so far as he is concerned. The other defendants who have opposed the
suit are the parties in possession of the property. If this suit had been
brought against them by first defendant, it would clearly have been barred
under Article 138, and it is similarly barred under that article when
brought by plaintiff as assignee of the first defendant. This second appeal
fails therefore and must be dismissed with costs.

15 M. 333.

APPELATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Best.

GOVINDA (Plaintiff), Appellant v KRISHNAN (Defendant), Respondent.*

Malabar Law—Nambudri—Karnavan, decree against—Sale in execution.

A junior member of a Nambudri illom, of which he was held out as the
manager and de facto karnavan, contracted a debt for the purposes of the illom.
The creditor sued him on the debt, but did not implead him as karnavan, and,
having obtained a personal decree, attached and brought to sale in execution
property belonging to the illom. A son of the judgment-debtor now sued to set
aside the sale:

Held, that the sale should be set aside.

[R., 27 M. 375 (376).]

SECOND appeal against the decree of J. P. Fiddian, Acting District
Judge of North Malabar, in appeal suit No. 66 of 1890, reversing the
decree of V. Ramen Menon, District Munsif of Kavai, in original suit
No. 380 of 1888.

Suit by a member of a Nambudri illom to set aside the sale
of certain property belonging to the plaintiff's illom in execution of a
decree obtained against the plaintiff's father in original suit No. 363
of 1875 on the file of the Court of the District Munsif of Kavai. This
was a personal decree, and the judgment-debtor was not described as
karnavan.

The District Munsif passed a decree as prayed. This decree was
reversed on appeal by the District Judge, who held that it was proved
that the debt in question in the former suit had been "contracted for
ilлом necessity." The further findings of the District Judge on the facts
of the case appear from the following extracts from his judgment:

"Plaintiff does not seek in this suit to escape his personal liability,
but to set aside the sale of illom properties in execution of the decree in
original suit No. 363 of 1875 on the ground that the debt was not
"contracted for illom necessity.

"It is not denied that at the time the debt was contracted plaintiff's
father was a junior in the illom, but the evidence shows clearly that the

* Second Appeals Nos. 474 and 656 of 1891.

(1) 14 C. 644.
(2) 9 C. 602.
member senior to him spent his time in Travancore, and that plaintiff's father managed the illom affairs; but the Munisif found that the decree under which the property was sold was a personal one, and that there was no authority for holding that the debts of the manager if a junior were binding on the tarward, and that this decree debt was therefore not valid against the tarward.

I have no doubt, therefore, that plaintiff's father was held out to the world as the manager and de facto karnavan of the tarward, and I must hold that it is for plaintiff to prove that the debt was not one contracted for the tarward, especially as he seeks to set aside a Court sale.

Plaintiff preferred this second appeal.
Sankara Menon, for appellant.
Sankaran Nayar and R. R. Nambiar, for respondent.

JUDGMENT.

It has been held by the Full Bench in Ittiachan v. Velappan (1) that when the karnavan of a Malabar tarward has not been impleaded as such in a suit, and there is nothing on the face of the proceedings to show that it was intended to implead him in his representative character, tarward property cannot [335] be attached and sold in execution of the decree, even though it is proved that the decree was obtained for a debt binding on the tarward. Compare also Sankaran v. Pareathiy (2).

The Judge has found that the law applicable to plaintiff's family is that to which Nambudri Brahmans in the Malabar district are subject, i.e., Hindu law modified by special custom. Compare Vishnu v. Krishnam (3) and Vasudev v. The Secretary of State for India (4). As was found in Nilakandan v. Madhavan (5), "the customs of the Nambudris in the management and assignment of property do not differ from the customs of the Nayars. Impartiality is the rule, and the oldest member is the manager. . . . . . . . The only difference between a Nambudri illom and a Nayar tarward is in the former the offspring of the marriage and the married woman become members of the husband's illom, while the children of a Nayar woman become members of her own tarward." As was also noticed in that same finding, Vasudevan v. Narayana (6)—one of the earliest cases in which it was held that a decree obtained against the karnavan is not binding on members of the family who were not parties to the suit in which that decree was obtained or had not notice of the suit under Section 30 of the Code of Civil Procedure,—was a suit between Nambudris.

The decision in Nilakandan v. Madhavan (5) is that the principle of Hindu law, which imposes a duty on a son to pay his father's debt contracted for purposes neither illegal nor immoral, is not applicable to Nambudris. As the property is joint and impartible and belongs to the whole family, and the father has in it no definite share that could be made available for his individual debt or which devolves, on his death, to his son to the exclusion of the other joint members of the family, there is no room for the application of the rule of the pious duty of the son to pay the father's debts. The decrees of the Lower Appellate Court in both these suits must, therefore, be set aside and those of the Court of First Instance restored, and the respondent must pay the appellant's costs in each case, both in the Lower Appellate Court and in this Court.

(1) 8 M. 484.
(2) 12 M. 434.
(3) 7 M. 3.
(4) 11 M. 187.
(5) 10 M. 9.
(6) 6 M. 121.
THANDAVAN AND  ANOTHER (Plaintiffs Nos. 2 and 4), Appellants
v. VALLIAMMA AND OTHERS (Defendants), Respondents.*

[8th and 15th February, 1892.]


The widow, daughter and divided brother of a deceased Hindu, executed an instrument which provided for the distribution of his property, both moveable and immoveable as to which they had disputed. The document was not registered. The widow set up a will made by the deceased in her favour; the brother sued the widow for a declaration that the will was a forgery, but the Court held that it was genuine. He now sued the widow and daughter on the above instrument to recover his agreed share of the moveable property of the deceased. The widow set up the will, which the plaintiff averred was invalid according to the custom governing the family:

Held, (1) that the plaintiff was not precluded by the decree in the former suit from impugning the validity of the will;

(2) that the unregistered instrument was admissible as evidence in support of the plaintiff’s claim for the moveable property.

[F., 19 M.L.J. 228 = 4 M.L.T. 354 (357); R., 26 M. 760 (771); 10 Ind. Cas. 698 (699) = 7 N.L.R. 19; 4 L.B.R. 32; 21 T.L.R. 199.]

APPEAL against the decree of P. H. O’Farrell, District Judge of Trichinopoly, in original suit No. 40 of 1888.

Suit for possession of a one-third share in the moveable property of Paramasiva Chetti deceased, the brother of the plaintiff. The plaintiff alleged in the plaint that he was by custom entitled to the whole property; but the present claim was founded on an instrument, dated 28th December 1887, and made between the plaintiff and defendants Nos. 1 and 2, the widow and daughter, respectively, of the deceased, embodying the result of a compromise of disputes which had arisen between the parties as to their rights to the property. This instrument was not registered. Its terms (omitting formal parts) were as follows:

“The following is the arrangement made by us three consenting to the decision given by our relatives and friends who have attested this, and who, having been chosen arbitrators, heard the representations made by us three regarding our disputes on [337] the morning of this 28th day of the current December month after the death, which took place at 10 p.m., on the 27th Idem, of Paramasivan Chettiar, who was the younger brother of the said Appavu Chettiar, husband of Valliamma Ammal and father of Mangayarkarasi alias Tangathamal. We three shall divide into three shares, each of us taking a share, the balance remaining out of the moveables and outstanding debts, &c., after paying in common thereout. at the time of our division, the following items, namely, in accordance with what the said Paramasivan Chettiar expressed before his death, Rs. 700 in cash, and gold ornaments worth Rs. 300 to the said Mangayarkarasi alias Tangathamal, who is the daughter of the said Paramasivan Chettiar; Rs. 300 to Pichammal, who is the daughter of Appavu Chettiar and wife of Orayur Sivanthilingam Chettiar; Rs. 190 to Gengadhara Mudaliar on behalf of the charity to Sree
Matharbhutta Iswara Swami, the same being the balance remaining payable after deducting what was paid by the said Paramasivan Chettiar for that charity; and Rs. 150 to Veerabadra Chettiar's son Marudai Chettiar and cloth merchant Lakshmana Pillai, that amount being the total of Rs. 100 on account of Kailasanatha Swami Kovil, which stands in the Periya kadai street of the said fort and of Rs. 50 on account of Pillayar Kovil, which stands in the said street. The share taken by each of us shall be at his or her disposal with power of alienation, &c., at pleasure; and the others shall have no right or claim thereto, or interest therein, whatever. The immovable properties consisting of two strong terraced houses, which bear Municipal Nos. 11 and 12 and are situate in the southern portion of Periya Chetti street of the fort, and of nunjah lands lying in Kaluthimalalaiyatti, shall be enjoyed by the said Valliamma Ammal during her lifetime; and, after her death, the said Appavu Chettiar and his heirs shall perform her obsequies, &c., and the said Appavu Chettiar and others shall enjoy the said two houses and the said nunjah land with all rights thereto. The said Appavu Chettiar himself shall enjoy, with all rights thereto, the thatched house which fell to the share of the said Paramasivan Chetti. To this effect this karar-agreement was entered into among us three. This agreement shall be in the possession of Nagalingam Chettiar, son of Velayudan Chettiar of Orayur; and the key of the said house shall be with the cloth merchant [338] Lakshmana Pillai. The said Lakshmana Pillai shall put a lock and seal on the said house.

The plaintiff died during the pendency of the suit which was proceeded with by his sons.

The District Judge held that this instrument was bad for want of consideration and also by reason of its being unregistered. Defendant No. 1, among other defences, pleaded that she was entitled to the property under the will of her husband. In a previous suit brought by the plaintiff against this defendant for a declaration that the will in question was a forgery, a decree was passed for the defendant on a finding that it was a genuine will. The District Judge held that the plaintiff was now estopped from bringing into question the validity of the will.

On the abovementioned rulings, the District Judge dismissed the suit.

The plaintiffs preferred this appeal.

Mr. Subramanyam, for appellants.

Bhashyam Ayyangar and Pattabhirama Ayyar, for respondent, No. 1. Panchapagesa Sastri, for respondent, No. 2.

JUDGMENT.

SUBRAMANYA AYYAR, J.—One Paramasivan Chetti died on the 27th December 1887 leaving him surviving, his divided brother, the first plaintiff, his widow, the first defendant, and his daughter, the second defendant. The plaintiffs, Nos. 2 and 4, are the sons of the first plaintiff, who died after the institution of the suit.

The case for the plaintiffs is that the late first plaintiff was entitled, according to the custom of the caste, to succeed, to the exclusion of the first defendant, to the properties left by Paramasivan Chetti, that, on his death, disputes arose between the late first plaintiff, and the first defendant respecting his properties; that, through the mediation of certain persons, the disputes were settled and the terms of the settlement were embodied.
in an agreement executed between the first plaintiff and the first and second defendants on the 28th December 1887; that, according to the said agreement, the first plaintiff became entitled to one-third of the moveable properties and certain immovable properties left by Paramasivan. This suit is to recover the plaintiffs' one-third share of the moveable properties.

It was contended by the first defendant that the agreement sued on was obtained from her by coercion; that there was no consideration for it; and that it was not receivable in evidence. The custom alleged by the plaintiff was also denied and the first defendant claimed the whole estate of Paramasivan as his widow and also under his will.

In original suit No. 12 of 1887, the late plaintiff sued the first defendant for a declaration that the will set up by her was a forgery. It was held by the Court of First Instance, as well as by the High Court, on appeal, that the document impeached was genuine.

This decision, the District Judge held, in the present case, estopped the plaintiffs from questioning the validity of the will. He further held that the instrument of compromise was void for want of registration and was without consideration. He dismissed the suit and the plaintiffs' appeal.

I shall first deal with the objection that, as the document sued on was not registered, it was void. It was urged that the transaction evidenced by the document was indivisible, and, therefore, the plaintiffs could not be permitted to rely on the document or use it in evidence in respect of any part of the transaction in question. I think this contention is unsustainable. Section 49 of the Registration Act lays down that no document required to be registered by Section 17 shall, unless duly registered, "affect any immovable property comprised therein," or "be received as evidence of any transaction affecting such property." The object of the law is obviously to prevent documents which ought to be, but are not, registered from affecting immovable property and immovable property only. There does not seem to be any warranty for supposing that, if a document relating to both immovable and moveable property is not registered as required by law, then the document becomes wholly inoperative, not taking effect even as regards the moveable property comprised therein. The words of the section are the very reverse of what one would expect the Legislature to use if it was intended to render an unregistered document falling within the provisions of Section 49 inadmissible as evidence for any purpose whatever. On the other hand, the terms of the section clearly imply that it was not so intended.

The decision in Lakshmanama v. Kameswara (1) relied on for the respondent, when taken with the facts of the case, is, I think, [340] not in conflict with my view. The document A in that case was in reality a deed of gift of moveable and immovable properties executed in 1886. There was, no doubt, also an arrangement for a partition—not a partition on the footing of a pre-existing right—but a partition to carry out the gift made under the document itself. The Court in that case said "there can be no such thing as a partition apart from this document" and in effect held that the document could not be looked at for any purpose whatever, and that the transaction was void for want of registration.

In Mattongeney Dossee v.Ramnarain Sadkhan (2) the argument of indivisibility was urged and accepted in respect of a hypothecation bond

(1) 13 M. 281.
(2) 4 C. 83.
for money lent; but the contrary view was taken in *Krishto Lall Ghose v. Bonomalee Roy* (1). In the order referring the question for the decision of the Full Bench in *Ulfatunnisza Ekahjan Bibi v. Hosain Khan* (2), Wilson J., drew attention to the divergence between the views expressed in the two cases *Mattongney Dossee v. Ramnarain Sarkhan* (3), *Krishto Lall Ghose v. Bonomalee Roy* (1) just referred to. He explained that, according to the decision in *Mattongney Dossee v. Ramnarain Sarkhan* (3), the word "transaction" in Section 49 meant "the whole bargain," whereas, according to the opinion of the Judges who decided the case in *Krishto Lall Ghose v. Bonomalee Roy* (1), it meant "not the bargain but that term of the bargain which affects land." The Judges who formed the Full Bench decided that the true construction was that no document should be received in evidence of any transaction so far as it affected land, and that the view they took of the section rendered it unnecessary to consider whether the document of the kind then in question embodied one single transaction or might properly be said to contain more. The same view has been taken by this Court after the Registration Act of 1871 came into force—see *Stri Sesaththri Ayyengar v. Sankara Ayen* (4), *Jagappa v. Latchappa* (5), *Achho Baugamah v. Dhany Ram* (6) cannot be relied on, as that decision proceeded on the clause "no instrument required by Section 17 to be registered shall be received in evidence in any civil proceeding in any Court unless registered," which existed in Section 49 of Act XX of 1866; but nothing corresponding to this is to be found in the present Section [341] 49. Now, in dealing with the question of indivisibility of contracts, the rule laid down in the *Bishop of Chester v. John Freland* (7) must be borne in mind. There Hutton, J. said that "when a good thing and a void thing are put together in the same grant, the law makes such construction that the grant shall be good for that which is good and void for that which is void." For guidance in the practical application of this principle, (adapting the language of a writer of authority,) perhaps no better rule can be given than that if the part which is void be in its own nature separable and divisible, and there be no express stipulation or necessary implication which makes that which is void and that which is good absolutely one thing, and that which is void may be regarded not as a condition going to the essence of the contract, in such a case that which is good may be taken as distinct from that which is void. (Parsons on Contracts, 7th Edition, Vol. I, p. 494.) Construing the document in question with reference to these principles, I am of opinion that it is admissible in evidence in support of the plaintiffs' claim to the share of the moveable properties comprised therein.

The next question argued was whether the plaintiffs were entitled to question the validity of the will left by Paramasivan Chetti. The District Judge seems to me to be in error in considering that the plaintiffs were stopped by the decision in original suit No. 12 of 1887 from raising such a contention. The infringement of right complained of in that suit was that the first defendant put forward a fabricated document as the genuine will of her husband; whilst the infraction complained of in connection with the matter under consideration at present, is that Paramasivan himself purported to dispose by his will of property which, according to the alleged custom of the caste, he could not alienate. This latter case was not, in my opinion, matter which ought to have been made a ground

---

(1) 5 C. 611.  (2) 9 C. 520.  (3) 4 C. 83.  (4) 7 M.H.C.R. 396.
(5) 5 M. 119.  (6) 4 M.H.C.R. 378.  (7) Ley. 79.

In consequence of the view taken by the District Judge, he excluded the evidence which the parties were prepared to produce upon the main issues in the case. I would therefore set aside [342] the decree of the Lower Court and remand the suit for disposal according to law.

**BEST, J.**—I concur in finding that the suit is not barred by the previous suit (original suit No. 12 of 1887), and also that the agreement sued on is not inadmissible in consequence of its non-registration as evidence in support of the claim for the moveables, which alone are sought to be recovered in this suit.

Section 49 of the present Registration Act renders an unregistered document inadmissible as evidence of any transaction affecting immovable property, which is the kind of property expressly mentioned in the preceding clause and referred to as “such property” in the clause in which its non-admissibility as evidence is declared—see *Stri Seshathri Ayyenar v. Sankara Ayen* (3) and *Guduri Jayannadhom v. Rapaka Ramanna* (4), in the latter of which cases the decision of the majority of the Full Bench in *Achoo Bayamah v. Dhany Ram* (5) is referred to, but not followed because (as is remarked) “the new law has explicitly adopted the doctrine which the late Chief Justice of this Court believed to be derivable from the old, namely, that the object of Section 49 was solely to prevent instruments from being of legal force for any of the purposes which make registration compulsory under Section 17.” This last decision was also followed in *Jagappa v. Latchappa* (6). None of these cases are noticed in the judgment in *Lakshmanamma v. Kameswara* (7), which proceeds, moreover, mainly on the ground that the transaction evidenced by the document then in question was “one and indivisible.” Such, however, is not the case here. The partition of moveables, now sought to be enforced, can be effected quite independently of the immovable properties which are also included in the agreement.

The decision of a Full Bench of the Calcutta High Court in *Ulfatunnissa Khakijan Bibi v. Hosain Khan* (8) is also in accordance with the decisions in *Stri Seshathri Ayyenar v. Sankara Ayen* (3), *Achoo Bayamah v. Dhany Ram* (5) and *Jagappa v. Latchappa* (6).

I agree therefore in finding that want of registration is no bar to the admissibility of the agreement sued on as evidence for the purposes of this suit.

[343] As to the question whether the suit is *res judicata* by the decision in original suit No. 12 of 1887, it is to be observed that the object of that suit was merely to get a declaration that the will was not genuine. The property was not then sued for and it cannot be said that plaintiff ought in that suit to have questioned the validity of the will in case of its being found to be genuine.

I concur, therefore, in setting aside the Lower Court’s decree and remanding the suit for disposal according to law.

The costs hitherto incurred will be provided for in the decree to be passed by the Lower Court.

---

(1) 7 M. 364.
(2) 5 B. 589 (594).
(3) 7 M.H.C.R. 296.
(4) 7 M.H.C.R. 349.
(5) 4 M.H.C.R. 379.
(6) 5 M. 119.
(7) 18 M. 261.
(8) 9 C. 520.
SULTAN MOIDEEN v. SAVALAYAMMAL 15 Mad. 344

15 M. 343 = 2 M.L.J. 50.

APPELLATE CIVIL.

Before Mr. Justice Mutthusami Ayyar and Mr. Justice Best.

—

SULTAN MOIDEEN (Defendant No. 2), Appellant v. SAVALAYAMMAL AND ANOTHER (Plaintiff and Defendant No. 1), Respondents.*

[16th April, 1891 and 17th February, 1892.]

Civil Procedure Code, Sections 231, 258—Joint decree—Execution, application for—Uncertified payment to one decree-holder.

One of two holders of a joint decree applied for execution of the decree to the full amount. It appeared that the other decree-holder had received a certain sum from the judgment-debtor on account of the decree out of Court, but this payment had not been certified:

\[ \text{Hold, that the payment was valid only to the extent of the share to which the payer was entitled, and that this share having been ascertained and credit given for it, the decree should be executed in favour of the present applicant for the balance.} \]

\[ \text{[R., 26 A. 334 36=A.W.N. (1894) 34; 18 M. 464 (465); 25 M. 431 (447); 10 Ind. Cas. 6: 8 (59) = 21 M.L.J. 705 = 9 M.L.T. 465 = (1911) 1 M.W.N. 220; 1 N.L. R. 34 (49).]} \]

APPEAL against the decree of T. Weir, District Judge of Salem, on execution petition No. 444 of 1890, in which Savalayamma, one of two joint decree-holders, prayed for the execution of the decree in original suit No. 13 of 1883 on the file of the District Court of Salem.

The decree, which was passed in the terms of a compromise, was to the effect that the defendant should pay to the plaintiffs (viz. the present petitioner and one Appaji Chetti) jointly Rs. [344] 2,000 and interest in two instalments. The present application was for the execution of the decree for the full amount, and it was resisted on the ground, among others, that the defendant had paid out of Court Rs. 1,100 under the decree to Appaji Chetti. It appeared that no satisfaction of the decree had been bestowed.

The District Judge made an order as prayed. The judgment-debtor preferred this appeal.

S. Subramanya Ayyar, for appellant.
Mr. E. Norton, for respondents.

SHEPHERD, J.—If the payment actually was made to Appaji Chetti, I think the decree cannot now be executed, at any rate, as to the half share to which he was presumably entitled. I must ask the District Judge to find distinctly whether in fact the payment was made.

The finding will be returned within one month after the re-opening of the Court after the recess, and seven days, after the posting of the finding in this Court, will be allowed for filing objections.

In compliance with the above order, the Acting District Judge submitted his finding, which was to the effect that the Rs. 1,100 were paid by the judgment-debtor Sultan Moideen Ravuthan to one of the judgment-creditors, Appaji Chetti.

This appeal having come on again for disposal, it was referred to a bench of two Judges. It subsequently came on for disposal before MUTTUSAMI AYYAR and BEST, JJ.

* Appeal against Order No. 33 of 1890.
Sundara Ayyar, for appellant.
Mr. E. Norton, for respondents.

JUDGMENT.

The finding is that the sum of Rs. 1,100 was paid by the defendant to Appaji Chetti, one of two decree-holders. This finding is, however, not sufficient for the disposal of the case. A further finding is also necessary as to what was the share to which Appaji Chetti is entitled as between him and the first plaintiff Savalayammal. The payment made to Appaji Chetti can be held valid only to the extent of his share to which he is entitled:—See Tarruck Chunder Bhattacharjee v. Divendro Nath Sanyal (1), with the decision in which case we agree.

As to the contention that the application made by Savalayammal for execution of the whole decree was premature, we are [345] unable to rule that the first instalment was paid in conformity with the direction contained in the decree.

The payment was not certified by Appaji Chetti to have been received by him on behalf of both judgment-creditors, and it appears that he has applied the whole of the money for his own use. Having regard to Section 231 of the Code of Civil Procedure, a payment made out of Court to one of several joint creditors, and not certified by him as having been received or applied for the benefit of any, cannot be regarded as made in satisfaction of the decree, except for the purpose of determining what order should be passed under Section 231.

The District Judge should, therefore, ascertain what is the share due to Appaji Chetti, and, giving credit for the amount thus ascertained, execute the decree in favour of Savalayammal for the balance.

If Appaji Chetti's share should exceed Rs. 1,100, the District Judge will, of course, make such order as may be necessary to protect his interest as regards such excess.

The costs incurred hitherto to abide and follow the result.

AGGREGATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KELO (Plaintiff) Appellant v.
VIKRISHA AND ANOTHER (Defendants), Respondents.*
[6th April and 9th September, 1891.]

Civil Procedure Code, Sections 293, 295—Execution—Rateable distribution—Transfer of decree for execution.

Two decrees were passed against the same defendant in the Court of a District Munsif and on the small cause side of a Subordinate Court in the same district, respectively. The holder of the decree in the small cause suit attached and brought to sale the judgment-debtor's interest in a benefit fund. The other decree-holder applied for rateable distribution, his decree having been transferred for execution to the Subordinate Court directly and not through the District Court:

Held, (1) that the direct transfer of the decree of the District Munsif was not illegal:

* Appeal against Order No. 11 of 1890.
(1) 9 O. 891.
[349] (1) that the Subordinate Judge had inherent jurisdiction to execute the decree of the District Munsif;
(2) that the order for rateable distribution was right.

APPEAL against the order of E. K. Krishnan, Subordinate Judge of South Malabar, made on civil miscellaneous petition No. 1397 of 1889.

Govinda Menon obtained a money-decree in original suit No. 310 of 1889 in the Court of the District Munsif of Sheraud, and Kelu Menon obtained a money-decree against the same defendant in small cause suit No. 154 of 1889 in the Court of the Subordinate Judge at Calicut and attached and brought to sale, in execution, the defendant's interest in a benefit fund. Govinda Menon's decree had meanwhile been transferred to the Subordinate Court directly without the intervention of the District Court, and he applied for rateable distribution under Civil Procedure Code, Section 295.

The Subordinate Judge granted the application for rateable distribution. The decree-holder in the small causes suit preferred this appeal.

Sankara Menon, for appellant.
Govinda Menon, for respondent.

JUDGMENT.

The second respondent obtained a money-decree against first respondent in original suit No. 310 of 1888 on the file of the Sheraud Munsif. Appellant also obtained a decree for money against first respondent on the small cause side of the Subordinate Court at Calicut, in small cause No. 154 of 1889. In its execution, appellant attached the judgment-debtor's interest in certain kuri or benefit fund, brought it to sale, and realized Rs. 488. Meanwhile second respondent had his decree transmitted to the Subordinate Judge for execution, and then applied for rateable distribution under Section 295 of the Code of Civil Procedure. Appellant objected to this proceeding on three grounds, viz., (i) that the decree in second respondent's favour was collusive; (ii) that it was not transmitted to the Subordinate Judge for execution through the District Court; (iii) that the decree, being one passed in a regular suit, was not capable of being executed on the small cause side of the Subordinate Court. The Subordinate Judge disallowed these objections and ordered rateable distribution. To this order three objections are taken. It is argued that a District Munsif is not at liberty to transmit his decree to a Subordinate Judge for execution otherwise than through the District Court.

[347] In the case before us both Courts are in the same district, and the last paragraph of Section 223 is conclusive on this point. Another contention is that a decree passed by a District Munsif in the exercise of ordinary jurisdiction is not capable of being executed by a Subordinate Judge executing a decree passed by him in the exercise of his small cause jurisdiction. If both decrees were passed by the same Court, one on its regular and the other on its small cause side, there is no warrant in the language of Section 295 for the suggestion that they cannot be admitted to rateable distribution. The intention is to recognize the equal right of holders of decrees for money to share in the sale-proceeds realized by any one of them in execution, provided that the others have, prior to the realization, applied to the Court for execution. There is no apparent reason why a distinction should be made between one who holds a small cause decree and one who obtains a decree on the regular side. In this connection our attention is drawn to the decisions in Gokul Krishi Chunder v. Aukhil...
Chander Chatterjee (1) and Durya Charan Mojundar v. Umatara Gupta (2), wherein the decision in Narasayya v. Venkatkrishnayya (3) was dissaunted from. In the last-mentioned decision, a Divisional Bench of this Court held that Chapter XIX created an extraordinary jurisdiction in cases mentioned in the last paragraph of Section 223, and that a District Munsif was at liberty to execute, and that a District Judge was competent to transfer to him for execution, a decree for a sum in excess of the pecuniary limit of the ordinary jurisdiction of the former. But two Divisional Benches of the High Court at Calcutta considered that there was no intention to create an exceptional jurisdiction in District Munsifs to execute decrees for more than the value of their pecuniary jurisdiction, and that Section 223 ought to be read as if Section 6 was incorporated with it. It is not necessary to determine, for the purposes of this case, whether the District Munsif has jurisdiction to execute a decree passed by a Subordinate or District Court for more than Rs. 2,500; but it is sufficient to observe that the Subordinate Judge had inherent jurisdiction to execute the decree for money passed by the District Munsif of Shernad. We dismiss the appeal with costs.

The civil revision petition is also dismissed.

15 M. 348.

[348] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Wilkinson.

VENKAYYA (Defendant), Appellant v. VENKATAPPAYYA
(Plaintiff), Respondent.* [13th April and 5th May, 1891.]

CIVIL PROCEDURE CODE, SECTION 528 - DECREES ON AN AWARD - APPEAL.

After issues had been framed in a suit to wind up a partnership, the matter was referred to an arbitrator, who made his award, and with regard to certain property, not part of the partnership property, he referred the parties to a separate suit. A decree was passed in accordance with the award:

Held, that an appeal lies against a decree passed on an award, on the ground that the award was not legal; but that the award was not illegal by reason of its comprising the reference of the parties to a separate suit.

[R., 18 A. 422 (426); 25 C. 141; 22 M. 174 (173); 5 O.C. 14; 74 P.R. 1894.]

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 73 of 1889, affirming the decree of O. V. Nanjunda Ayyar, Acting District Munsif of Masulipatam, in original suit No. 85 of 1888.

The facts of the case are stated above sufficiently for the purposes of the report.

Pallabhirama Ayyar, for appellant.
S. Subramanya Ayyar and P. Subramanya Ayyar, for respondent.

JUDGMENT.

The first question we have to determine is one raised by the respondent whether any appeal lay from the decree and judgment of the District Munsif, which admittedly were in accordance with the award.

* Second Appeal No. 1659 of 1889.
It is laid down in Section 522 of the Code of Civil Procedure that no appeal shall lie from a decree passed in accordance with an award, except so far as the decree is in excess of, or not in accordance with, the award. It has been held that the effect of that section is that it is not enough for the Appellate Court to satisfy itself as to the mere correspondence of the decree and the award, but that the Appellate Court must so far look behind the decree as to satisfy itself that the award is a legal award. If the Appellate Court is satisfied that an award has been properly and regularly arrived at by an arbitrator or [349] arbitrators duly appointed, and that the decree is in accordance with the award, then, and then only, must the appeal be dismissed, Luckman Das v. Brijpal (1), Debendra Nath Shaw v. Aubhoy Churn Bagchi (2), Pugardin v. Moidin (3). A second appeal will of course lie to this Court on a point of law.

Now it is argued for the appellant that the award in the present case was illegal, because the arbitrator, after finding the plaintiff and defendant bad equal shares in the indigo vat at Kumarapallam and the Tekupalli sluice, directed the parties to settle those matters by a separate suit. The suit was brought to wind up a partnership. After issues had been framed, both plaintiff and defendant applied to the Court to refer to an arbitrator for disposal “the issues framed by the Court regarding the points in dispute.” The arbitrator having submitted an award without recording any finding on the seventh, eighth or ninth issues, the award was remitted. Application was made to set aside the final award on the ground of the misconduct of the arbitrator and the invalidity of the award which it was alleged had not been made within the period allowed by the Court. The objections were fully considered by the District Munsif and overruled, and a decree was passed in accordance with the award. On appeal the District Judge held that there was nothing illegal in the procedure of the arbitrator. We are not prepared to say that the legality of the award was in any way affected, because the arbitrator referred the parties to a separate suit with reference to two matters in which he found they had a common interest. If, as is suggested, the arbitrator virtually decided the indigo vat and the sluice were not partnership property, and that other parties had interests in these works, he was probably right in referring the parties to a fresh suit. He determined all the matters referred to him, but decided that, so far as the vat and the sluice were concerned, they were outside the partnership. Nor can we say that the award was illegal, because no witnesses were examined after remand. It appears that the defendant (appellant) himself dispensed with his witnesses. It has not been made out that there was any illegality in the award which was regularly and properly arrived at by an arbitrator duly appointed, and we therefore dismiss this second appeal with costs.
1891 SEP. 15. APPELLATE CIVIL. Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

VIRASAMI (Plaintiff), Appellant v. RAMA Doss AND ANOTHER (Defendants), Respondents.† [3rd and 15th September, 1891.]

Limitation—Suit for mutation of names in register—Parties.

The Collector of the district is a necessary party to a suit by a purchaser against his vendor to compel mutation of names in the register. Such a suit is not barred by limitation unless the Collector has refused without qualification to effect such mutation, neglecting the plaintiff's right to the land in question.

APPEAL against the decree of S. T. McCarthy, District Judge of Chingleput, in original suit No. 9 of 1887.

The plaintiff purchased from the first defendant two zamin villages on 6th March 1872 and sought to have his name substituted for that of the vendor in the registry. In May 1876, the Collector refused to effect the mutation of names for want of the consent of the vendor; and, again, in July 1882, he made an endorsement on an application of the plaintiff for mutation of names as follows:—"Registry cannot be transferred to the plaintiff's name unless he appears with his vendor." The plaintiff sued the vendor in 1887 for a decree "directing the registers of the zamin to be made in the name of the plaintiff instead of in the name of the defendant." The defendant pleaded, but failed to prove an agreement for a resale to him of the property in question.

The District Judge dismissed the suit as being barred by limitation. His decree was reversed on appeal (appeal No. 74 of 1888) by the High Court (MUTTUSAMI AYYAR and WILKINSON, JJ.),† and the suit remanded. Their Lordships said:—"We hold that Act I of 1876 has no application, that following Mangamma v. Timmapaiya (1), the Collector is a necessary party, and that time began to run from his refusal to register. We reverse the decree of the Lower Court, and remand the suit for [351] the Collector to be made a party, and direct that the suit be re-heard."

* Appeal No. 100 of 1890.
† N.B.—The following judgments in A. S. No. 74 of 1888 are given here in extenso for facility of reference.—Ed.

A. S. No. 74 of 1888.

[JUDGMENT (5th April 1889).

"On behalf of the appellant (plaintiff) it is argued that the suit is virtually a suit for declaration of title under Section 6, Act I of 1876, and that the cause of action arose, therefore, on the refusal of the Collector in 1882. On the other side it is contended that the suit, as framed, was not one for a declaration of title, and that if it were, it would run against plaintiff from the date of first refusal, and that Act I of 1876 has no application. The plaintiff, no doubt, is so framed that only alteration of the registry is specially prayed for, but it also contains a prayer for such other relief as the nature of the case requires. It would certainly be irregular to order change of registry in the absence of the Collector, Mangamma v. Timmapaiya (1), M.H.C.R. 934; but if the appellant is the real owner and has been since 1873 in possession, it would be hard to deny him that relief which the nature of the case entitles him to.

"We consider, therefore, that the suit might be treated as substantially one for a declaration of title. Having regard to the wording of Section 42 of the Specific Relief Act, we have no doubt that the cause of action would, in that case, accrue on the date the respondent refused to consent to the transfer of registry and not on the

(1) 3 M.H.C.R. 134.
The suit was re-heard and the District Judge again passed a decree dismissing it as barred under Limitation Act, Schedule II, Article 120. The plaintiff preferred this appeal.

Subramanya Ayyar and Sadgopachariar, for appellant.
Bhashyam Ayyangar, for respondent No. 1.
The Government Pleader (Mr. Powell), for respondent No. 2.

JUDGMENT.

The sales sued upon are in terms admittedly absolute, and the alleged agreement to re-sell, whenever the purchase money is repaid, is found by the Judge not to have been proved. This being so, the title to the property is in the plaintiff, and, as registry follows title, it is clear on the merits the plaintiff must succeed, unless the suit is, as held by the Judge, barred by limitation. The Judge finds that the Collector refused to register the plaintiff's name in May 1876, and, upon that finding, he considers that the claim is barred by Article 120 of the second schedule of the Limitation Act. He appears to us to have misapprehended our former judgment, wherein it was stated that the time would begin to run from the Collector's refusal to register. The refusal must be absolute and unqualified, negativing the plaintiff's right to the property, of which

"date of the sale. It would, however, be unnecessary to call for a distinct finding if "Act I of 1876 applied. On the applicability of this Act we reserve judgment."

[JUDGMENT (15th April, 1889)].

"The question raised in this appeal is whether, as held by the Judge, the suit was "barred by limitation. If Act I of 1876 applied the claim would not be barred, for the "period would then run from the date of the Collector's refusal in 1876. If the "Collector was made a party to the suit, as suggested in 3 M. H. C. R. 131, even then, "the right to sue would accrue only from the date of the Collector's refusal. Viewing "the suit as one for declaration of title, the period would run not from the date of sale, "but, as observed by the Judge, from the date on which the respondent denied the "appellant's right. It is contended for the appellant that each of the villages purchased "by the appellant was a distinct permanently settled estate, and that it had been "separately assessed prior to the purchase. It is contended for the appellant that "Madras Act I of 1876 will only apply where what is sold is not an entire permanently "settled estate, but only a portion which requires to be permanently settled estate, but "only a portion requires to be separately assessed and registered. The Act purports to "make better provision for the separate assessment of alienated portions of permanently "settled estates, and Section 1 provides that the alienor or alienee of any portion of a "permanently settled estate, or the representative of such alienor or alienee, may "apply to the Collector of the District, in which such portion is situate, for its registra- 

"tion in the name of the alienor and for its separate assessment to the land revenue, "Sections 5 and 6 provide that any person aggrieved by the fact of separate registration, "or by refusal to order separate registration, may sue in a Civil Court for a decree "declaring that such separate registration ought not or ought to be made, while Section "7 declares that any person, aggrieved by the apportionment of the assessment, may "appeal to the Board of Revenue and the order of the Board of Revenue shall be final, "These sections suggest that the intention was to regard separate assessment and "separate registration as distinct acts or descriptions of relief. The Act provides for "two things—separate registry and separate assessment of a portion of an estate. If "the Act applied to an alienation of the whole estate, the word "'apportion' would "be of no effect. In the present case, there is no necessity for any apportionment of "the assessment on the alienated portion, and all that is sought is its registry in app- "pellant's name. If the suit were treated, as it should be with reference to the frame "of the plaint, as one for change of registry, no question of limitation might arise, "and the appellant is entitled to insist that it should be so treated. We hold that "Act I of 1876 has no application, that following 3 M. H. C. R. 134 the Collector is a "necessary party and that time began to run from his refusal to register. We reverse "as the decree of the Lower Court and remand the suit for the Collector to be made a "party, and direct that the suit be re-heard. Costs of this appeal will be provided "for in the revised decree."

597
registry was sought. The evidence in the case discloses only a conditional refusal, and it does not show that the Collector ever denied the appellant's title, or that he did more than refuse to register unless and until the defendants appeared before him and admitted the plaintiff's title or the plaintiff obtained, what is equivalent to such admission, a decree of Court. The appellant's title being absolute upon the facts now found, we are of opinion that no question of limitation arises, and that the claim must be decreed with costs throughout.

15 M. 352 = 2 Weir 153 & 376 & 394.

[352] APPELLATE CRIMINAL.


QUEEN-EMpress v. Rama Tevan and Others.*

[30th March, 1892.]

Criminal Procedure Code, Sections 193, 287, 288, 339, 349—Conditional pardon to prisoner—Approver, trial of—Proof of confessional statements of accused.

Several persons were charged with dacoity. While the case was pending, two of the accused made confessional statements; afterwards a conditional pardon was tendered to them, and they were examined as witnesses by the Magistrate and subsequently on behalf of the prosecution in the Sessions Court, to which the other accused were committed for trial. They there denied that they had been taken as approvers, whereupon the Sessions Judge placed them in the dock, called on them to plead, and permitted the depositions made by them before the Magistrate, but not their confessional statements, to be read to the jury:

Hell, that the trial of the two persons, who had not been committed to the Sessions Court, was ultra vires.

Per curia: the Sessions Judge committed an irregularity in refusing to place on the record the confessional statements of persons whom he treated as accused.

It is unsafe to entrust approver, whose conditional pardon has been cancelled on trial, along with other prisoners, in the course of whose trial such approver has given evidence.

[23 B 393 (1910); 22 C. 50 (731); R., L.R.R. (1893-1900) 536 (537); 6 O.C. 295 (437).]

APPEAL against a conviction and sentence by T. Weir, Sessions Judge of Madura, in calendar case No. 116 of 1891.

The facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court.

The appellants were not represented.

Mr. Wedderburn, for the Crown.

JUDGMENT.

The procedure of the Sessions Judge in the disposal of this case was extremely irregular. Certain persons were charged with having committed dacoity. During the pendency of the case before the Magistrate, two of these persons, viz., M. Paryakaruppan and Ocha Tevan, made confessional statements on the 3rd and 27th October. On the 19th November the District Magistrate tendered a conditional pardon to these two persons, [353] who were thereupon examined by the Magistrate as witnesses on the 22nd November. They were not committed to the Sessions Court, but were sent up as witnesses. At the trial in the Sessions Court they were

* Criminal Appeal No. 31 of 1892.
examined on behalf of the prosecution as witnesses 1 and 2, and denied that they had been taken as approvers. This statement was undoubtedly false. The Sessions Judge thereupon placed them in the dock along with the other accused and called upon them to plead. The trial then proceeded. After the evidence for the prosecution and the statements of the prisoners 1-21 had been recorded, the Public Prosecutor proposed to put in the statements made by Perykaruppan and Ocha Tevan before the Magistrate on the 3rd and 27th October. The Sessions Judge refused to admit these statements on the record, but admitted and had read out to the jury the depositions given by these persons as approvers. They are marked Y and Z.

The Government Pleader admits that the Sessions Judge has no power to try these two persons, inasmuch as they had not been committed to the Court by any Magistrate competent to commit (Section 193). He also points out that the course which the Sessions Judge should have adopted was to have treated the evidence given by these two persons before the committing Magistrate as evidence in the case (Section 238), and have allowed the accused 1-21 to cross-examine them.

We are of opinion that this is so and that the trial of these two persons, who had not been duly committed to the Court was altogether ultra vires.

The Sessions Judge also committed another irregularity in refusing, contrary to the provisions of Section 287, to place on the record the confessional statements of persons whom he treated as accused. It is not optional with the prosecution to put in such statements.

We do not understand the remark of the Sessions Judge in paragraph 8 of his charge to the jury that these two persons (Perykaruppan and Ocha Tevan) have fallen back into their original position of accused persons, as they, on the face of the record, did not fulfil the condition on which they were pardoned. The Sessions Judge seems to have taken an erroneous view of the case and the law.

By Section 349, Act X of 1872, a Sessions Judge was empowered to commit or direct the commitment of any person who, having accepted an offer of pardon, did not conform to the conditions under which the pardon was tendered, but the present Code contains no such provision, and in Section 339 it is merely laid down that such a person may be tried for the offence in respect of which the pardon was tendered; but Section 193 provides that no Court of Session shall take cognizance of any offence as a Court of original jurisdiction, unless the accused has been committed to it by a Magistrate duly empowered.

It is impossible to say that the jury were not influenced by the inclusion of these two persons in the trial and by the admission of their depositions on the record. The other twenty-one accused were not allowed the opportunity of cross-examining them as to the truth or otherwise of their depositions. This was an irregularity which cannot but have prejudiced the accused persons.

Even supposing that the Sessions Judge had had power to try the two approvers, we concur with the learned Judges of Calcutta Court—The Queen v. Petumber Dhoobe (1) and The Queen v. Bipro Dass (2) that it is unfair to put an approver, whose conditional pardon has been cancelled, on trial along with the other prisoners, in the course of whose trial such approver has given evidence, and that the proper course is to defer taking

(1) 14 W. R. Cr. R. 10.  (2) 19 W. R. Cr R. 48.
action against the approver until the conclusion of the trial then proceeding.

We observe that the jury were not unanimous, the foreman finding only prisoners 1 and 2 and the approvers guilty.

We consider that there has been such misdirection as led to a serious miscarriage of justice, and we therefore, set aside the conviction and sentence of all the accused 1-23, and direct the retrial by the Sessions Judge of prisoners 1-21.

Ordered accordingly.

15 M. 355.

[355] APPELLATE CIVIL.


MAINE MOILLAR AND OTHERS (Plaintiffs), Appellants v.

ISLAM AMANATH AND OTHERS (Defendants), Respondents.*

[26th November, 1891.]


Certain Moplahs, described as "the Moklessa and Jamats" of a mosque, sued certain other Muhammadans, described as "members of the Puslar caste," alleging that the custom was for the defendants to attend the plaintiffs' mosque on Friday at the reading of the kutbah, and that the defendants had recently built another mosque a short distance off, and had "for two months been attempting to read the kutbah there." It was further alleged in the plaint that such reading of the kutbah was "quite contrary to the Muhammadan religion" and that the defendants nevertheless proposed to have the kutbah read, "whereby the kutbah of adoration conducted in our mosque will, according to religion, be fruitless." The prayer of the plaint was for an injunction, restraining the defendants from reading the kutbah in their mosque:

Held, that the plaint disclosed no cause of action.

[R., 17 M.L.J. 421 (422).]

SECOND appeal against the decree of W. J. Tate, Acting District Judge of South Canara, in appeal suit No. 367 of 1889, affirming the decree of J. Lobo, District Munsif of Kasaragod, in original suit No. 235 of 1888.

The facts of the case are stated above sufficiently for the purposes of this report. The District Munsif dismissed the suit, and his decree was affirmed on appeal by the District Judge, who quoted, with reference to the reading of the kutbah, Sadr Adalat Decisions, No. 1 of 1814. The plaintiffs preferred this second appeal.

Ramachandra Rau Saheb, for appellants.

Narayana Rau, for respondents.

JUDGMENT.

We agree with the Courts below that the plaint discloses no cause of action. The plaintiffs wish to prevent the defendants, who are also Muhammadans, from performing a service called "kutbah" in their own private mosque on Friday. The [356] ground on which they seek to obtain a permanent injunction is, not that the performance causes annoyance or

* Second Appeal No. 195 of 1891.
obstruction to them in the exercise of their own worship, but that it is contrary to the Muhammadan religion. It is not the province of the Courts to determine what is or what is not contrary to the Muhammadan religion, or to decide what religious service different sects of a community may hold in their own places of worship, provided the holding of such services cause no disturbance or illegal annoyance to the rest of the community, or does not infringe on the rights of their co-worshippers. It is argued that the Courts below should have decided whether the defendants were entitled to read the Kutbah. In the case referred to by the District Judge, this very point was put by the Judges of the Sadr Adalat to the Muhammadan Law officers, who replied "the performance of prayers on Friday, in which the reading of the Kutbah is included, is permitted alike in a mosque, or in a house, or in any other place which may be selected by common consent." The Pilgrims have, by common consent, selected the Moidin Palli mosque as the place in which they will have the Kutbah read, and they were within their rights in so doing, it having been found that the vicinity to the plaintiffs' mosque is not such as to cause either annoyance or disturbance to the plaintiffs and their co-worshippers. This second appeal fails and is dismissed with costs.

15 M. 356.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

EX PARTE RAGAVALOO CHETTI AND ANOTHER (Petitioners), Appellants in re RANGIJA CHETTI, Respondent.*

[15th and 18th December, 1891.]

Insolvency—11 & 12 Vic., Chap. 21, Sections, 9, 92—Petitioning creditors' debt—Joint debt.

A trader in Madras made a promissory note in the joint names of two merchants, trading together as members of an undivided Hindu family, on which Rs. 527 were due. On a petition by the holders of the note to have the maker adjudicated an insolvent:

Held, that the petitioning creditors' debt was sufficient to support the petition.

APPEAL against the order of Mr. Justice Wilkinson, sitting as Commissioner of the Insolvency Court, made on a petition to adjudicate a trader, one Suri Chetti Rangiab Chetti, an insolvent.

The petitioning creditors were Pasumarthi Ragavaloo Chetti and Alwar Chetti, described as merchants trading together as members of an undivided Hindu family. Their debt was Rs. 527 due to them on a promissory note made by Suri Chetti Rangiab Chetti in their joint names.

The petition came on before Mr. Justice Wilkinson.

Mr. R. F. Grant, for the petitioners.

Mr. K. Brown, contra.

WILKINSON, J.—Under Section 9 of the Act the persons who may petition the Court to adjudge that a person has committed an act of insolvency are—

(1) Any person being a creditor to the amount of Rs. 500.

(2) Two or more persons being partners in trade and creditors to the amount of Rs. 500.
(3) Two creditors whose debt amounts to Rs. 700.
(4) Three or more creditors whose debt amounts to Rs. 1,000.

The petitioners, P. Ragavachari Chettri and Alwar Chettri, describing themselves as "merchants trading together as members of an undivided Hindu family," their debt is Rs. 527. It is argued that they are not entitled to petition, inasmuch as their debt does not amount to Rs. 700. On the other hand, it is argued that they come under the first class; that the debt being joint, the two persons must be viewed as one creditor; that, unless this is done, petitioners and persons in like case have no relief under the Act. It is also argued, but the argument was not pressed that the petitioners are partners, and, as such, entitled to maintain the petition. I am of opinion that the petition is not maintainable. I do not see how the petitioners can be said to be a person, even though their debt is joint and their rights under the bond indivisible. Neither alone can transfer the promissory note or sue on it, and they clearly cannot come under the first class. Even if they are members of an undivided Hindu trading family, they cannot be said to be partners in trade in the sense in which the words used in the Act. They have not agreed to combine their professional labour or skill, and—though Hindu joint families may, in certain respects, resemble partnerships—they certainly are not partners. But, as certainly petitioners do come under class 3, and as their debt does not amount to Rs. 700, they cannot petition. I have been referred to Section 92, where it is laid down that words importing the singular number should be understood to include several persons as well as one person, provided that there be nothing in the context repugnant to such construction. In Section 9 the context is clearly repugnant to the construction of the words any person in class 1 as any one or more person or persons—such a construction would defeat the subsequent provisions.

The petition, therefore, be dismissed with costs.

The petitioning creditors prefer this appeal.

Mr. F. Norton (Mr. R. F. Grant, with him), for appellants.
Mr. K. Brown, for respondent.

JUDGMENT.

We cannot agree with the learned Commissioner in Insolvency that petitioners are not entitled, under Section 9 of the Insolvent Act, to petition for an adjudication of insolvency against their debtor. It appears to us that the construction put by the learned Judge upon Section 9 would prevent a Hindu joint trading family, or, indeed, any other joint creditors from obtaining an adjudication of insolvency whatever were the amount of their debts, for, in our opinion, the two last classes of persons named in the section, as entitled to apply, are intended to be separate creditors, whose debts amount, in the aggregate, to Rs. 700 and Rs. 1,000, respectively, and not joint creditors to whom one debt is due. In our view the object of this part of the section is to prevent a debtor from being harassed in respect of single small debts or a number of petty debts amounting to a small amount in the aggregate. This object is attained by providing that proceedings for an adjudication as an insolvent, shall only be taken in respect of single debts, whether due to a person or a partnership, amounting to Rs. 500 or of separate debts amounting to Rs. 700, or Rs. 1000, in the aggregate, according as the petitioning creditors are two or three in number. There seems no reason, having regard to the object of the provision, why...
joint creditors should be in a worse position in respect of one debt due to them than they would be if they were a single creditor in respect of the same debt. And we think the definition clause of the Act, Section 92, does allow the word "person" in Section 9 to be read as "persons," and that there is nothing repugnant to the rest of the section in such a reading, in the case of a single debt jointly due to several persons. In Section 48 the words occur "person and persons who would be a creditor," and similarly Section 9 might be read in the case of joint creditors "persons being a creditor." This seems to us the most reasonable construction to put upon the section. The other construction involves this, amongst other anomalies, that joint creditors, who are partners in trade, would be able to obtain an adjudication if their debt is Rs. 500, whereas joint creditors, who are not partners, would not be able to do so, unless their debts are Rs. 700 in the case of two and Rs. 1,000 in the case of three. There seems absolutely no reason for this distinction. In the present case the debt is due on a promissory note in favour of the petitioners jointly, and, we think, they come within the first class of persons named in Section 9 as entitled to obtain an adjudication of insolvency.

We are disposed also to think that they come within the second class "partners in trade." Members of a Hindu joint trading family may not be, in all respects, partners within the definition in the Contract Act, but it does not follow that they may not be partners for the purposes of Section 9 of the Insolvency Act. That they are partners in some sense has often been held. See Ram Lal Thakursidas v. Lakhmichand Muniram (1) and Samalbhai Nathulal v. Somnarain Mangal and Harikisan (2). But it is not necessary to decide that question now, as we hold that petitioners are entitled to apply for an adjudication of insolvency as joint creditors whose debt exceeds Rs. 500.

The order of the Insolvency Court must be set aside and the petition remitted to the learned Commissioner for disposal on the merits. Costs to abide the event.

[360] ORIGINAL CIVIL

Before Mr. Justice Shephard.

EX PARTE VITTA D OSS AND ANOTHER, PETITIONERS.

[6th October, 1891.]

Succession Act—Act X of 1855, Section 152—Executor, appointment of by implication—Administration with will annexed.

A Hindu died leaving a will whereby he bequeathed all his property whatever (including debts) to two of his sons, who now applied for probate of the will on the ground that they were appointed executors by implication:

 Held, that the sons were not entitled to probate of the will.

[LR., 1 N.L.R. 166; 73 P.L.R. 1903 = 15 P.W.R. 1907.]

PETITION for probate of the will of Govindoo Doss Jeo Kistna Doss deceased, the father of the petitioners, Balu Chiroonjev Vital Doss and Chiroonjev Krisan Doss who claimed to be entitled to probate as executors constructively appointed.

* Application for probate.

(1) 1 B. H.O.R. App. 51.  (2) 5 B. 36.
The will propounded was as follows:—

"Written by Sha Govindo Doss Jey Kistna Doss. I the undersigned write and give the following with my voluntary consent and while in the enjoyment of my senses. Balu Chiroonjeev Vittal Doss Chiroonjeev Krisan Doss are the heirs to my outstandings, debts, my house, Takoorjees Seva (or idols), utensils, &c., and my property whatever it may be. Chiroonjeev Nunoo Paramanund Doss has no right whatever in respect of my property. I have put my signature here below with my voluntary consent and while in the enjoyment of my senses in the presence of all. This is written at 4 o'clock at night on the 12th June of the year 1886.  

(Signed) GOVINDOO Doss Jey Kistina Doss.

"What is written above is correct. This was written while in the enjoyment of my senses. Therefore Chiroonjeev Vittal Doss and Krisan Doss are the owners of everything. No one should question them.  

"Witness 1.—Sookha Deva Lakhotia Govinda Dossjee signed this while in the enjoyment of his senses in my presence.

"Witness 1.—Mathura Doss Pashesia Govinda Dossjee signed this while in the enjoyment of his senses in my presence.

"[361] Sha Moothoora Doss Nathoo, witness.

P. V. Krishnasami Chetti, for petitioners.

The applicants are declared the heirs to the properties and of all outstandings and liabilities, i.e., they are directed to recover outstandings and pay debts. In other words they are charged with the duties of an executor. See In the matter of Monohur Mookerjee (1), In the goods of Raddika Mohan Sett (2), Mun Mohan Ghossal v. Puresh Nath Roy (3) and Wilkinson v. Adam (4).

JUDGMENT.

I do not think that the language used in this will is such that Krisan Doss can be said to be constructively appointed executor. My attention was called to the decision In the goods of Radhika Mohan Sett (3) in which the words of the will being somewhat similar the opinion was expressed that probate might be granted to the applicant as executor according to the tenor of the will. The case there mentioned does not bear out the proposition for which it is cited. In that case there was a direction that the person named should collect the testator’s estate and pay all just debts, in other words, that he should discharge the function of executor. That therefore is a totally different case from the present. On the other hand, when the testator left all his property and effects to his wife without giving any further directions, the Court held In the goods of Thomas Henry Oliphant (5) in accordance with the practice which had actually prevailed, that the wife was entitled to administer with the will annexed and not to probate.
In 1877 the plaintiff executed a deed of hypothecation to one of two partners to secure a loan obtained from them jointly. In 1881 the plaintiff sold interest in the hypothecated property to defendants Nos. 2 to 4 and it was arranged that the secured debt should be paid off by the vendees. They failed to do this, but in 1882 they executed a mortgage for the amount due in favour of the other of the two partners, and thereupon gave a written discharge to the plaintiff, who was found to have been acting in collusion with him to the disadvantage of his partner, the holder of the hypothecation bond. The latter brought a suit in 1885 upon the hypothecation bond and obtained a personal decree against the present plaintiff who was ex parte, the amount of the decree being declared to be charged against the land in the possession of defendants Nos. 2 to 4. Meanwhile, defendant No. 1, who was the assignee of the mortgage of 1882, had obtained a decree upon it against defendant No. 4. This decree not having been executed, he subsequently sued upon the mortgage again and obtained a decree against defendants Nos. 2 to 4. The plaintiff now sued to have the last mentioned decree set aside and recover the balance of the purchase-money from defendants Nos. 2 to 4. The Court of First Instance passed a decree for the amount claimed and declared it to be charged on the land. Defendant No. 1 preferred an appeal in which defendants Nos. 2 to 4 were joined by the Court of First Appeal. The decree of this Court dismissed the suit:

*Hold* (1) that defendants Nos. 2 to 4 were rightly joined as respondents by the Court under Civil Procedure Code, Section 559.

(2) that plaintiff, having allowed a decree to be passed against him ex parte in the suit of the holder of the hypothecation bond, and having obtained a collusive discharge from the other partner, was not entitled to recover against the defendants.

Second appeal against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in appeal suit No. 499 of 1889, reversing the decree of S. Dorasami Ayyar, District Munsif of Tiruturai, in original suit No. 34 of 1887.

In October 1877, the plaintiff borrowed Rs. 500 from a firm of traders consisting of Venkatarama Pillai and Rama Sastry Dikshitab, hypothecating certain land to the latter to secure the loan. The hypothecation deed was filed as Exhibit D. In June 1881, the plaintiff sold the hypothecated land, together with other land to defendants Nos. 2 to 4 for Rs. 700, of which Rs. 570 was arranged to be paid by them to Rama Sastry Dikshitab in satisfaction of the secured debt. This arrangement was not carried out. In November 1882, Venkatarama Pillai, who was the plaintiff's father-in-law, obtained from defendant No. 4 a mortgage (which was attested by the plaintiff) on the land in question to secure Rs. 671-3-0, being the sum payable under the arrangement above referred to. This mortgage was filed as Exhibit A. On the same day, Venkatarama Pillai gave the plaintiff a document which was filed as Exhibit B, stating that the hypothecation of 1877 was discharged by the mortgage of 1882. At the date of the last mentioned transactions, there had been a disagreement between Venkatarama Pillai and his partner, and the

*Second Appeal No. 1090 of 1890.*
1892

Subordinate Judge held that they were the result of collusion between the plaintiff and his father-in-law.

The mortgage of 1882 was subsequently assigned by Venkatasami Pillai to his brother-in-law, defendant No. 1, who brought a suit upon it (original suit No. 53 of 1885 on the file of the Subordinate Court of Negapatam) and obtained a decree against defendant No. 4 who paid the money into Court, where however it was ordered to be "detained," because a claim by Ramasami Dikhitar was apprehended.

Ramasami Dikhitar then brought a suit in the Court of the District Munsif of Tiru uraipundi (original suit No. 295 of 1885) on the hypothecation bond of 1877 against the present plaintiff, defendants Nos. 2 to 4, and another who had purchased some of the land from them. Neither Venkatasami Pillai nor defendant No. 1 was joined as a party. The present plaintiff was ex parte. The District Munsif passed a decree as praver against the present plaintiff personally and against the land.

Defendant No. 1 next brought original suit No. 56 of 1886 in the same Court against defendants Nos. 2 to 4 on the mortgage of 1882 and obtained a decree.

The present suit was brought against defendants Nos. 1 to 4 to set aside the last mentioned decree and to recover from defendants Nos. 2 to 4 Rs. 1,000, being Rs. 671-2-0, the unpaid balance of the purchase money due in respect of the transactions of 1881 2 together with interest.

The District Munsif refused to set aside the decree, but passed a decree for Rs. 671-2-0, the amount secured by Exhibits A and interest at 6 per cent., "re recoverable on the charge of the immovable property mentioned in the plaint." Against this decree defendant No. 1 preferred an appeal, to which defendants Nos. 2 to 4 were not parties till they were made so under Civil Procedure Code, Section 559, by the Subordinate Judge who then passed a decree dismissing the suit. The plaintiff preferred this second appeal.

Pattabhirama Ayyar, for appellant.

Bhashyam Ayyangar, for respondents.

JUDGMENT.

WILKINSON, J.—Two questions have been raised for determination in this appeal. The first question is whether the Subordinate Judge rightly exercised the discretion vested in him by Section 559 of the Civil Procedure Code by adding the defendants Nos. 2 to 4 and making them respondents in the appeal presented by the first defendant. The other question is whether the Subordinate Judge was right in holding that plaintiff must look to Venkatasami alone for relief. With reference to the first question, I think that defendants Nos. 2 to 4 were rightly added as respondents for there can be no doubt that defendants Nos. 2 to 4 were interested in the result of the appeal presented by the first defendant and that they were likely to be affected by the result of the suit. The suit was instituted to obtain a declaration that the transfer of a certain mortgage executed by the fourth defendant to one Venkatasami Pillai and the decree obtained thereon by first defendant against defendants Nos. 2 to 4 in original suit No. 56 of 1886 were not binding on the plaintiff, and to recover from defendants Nos. 2 to 4 and on the security of the property sold to them the sum of Rs. 1,000. The District Munsif, though he found that the prayer to set aside the decree in original suit No. 56 of 1886 was just and proper, gave the plaintiff a decree of Rs. 671-2-0 against defendants Nos. 2 to 4, and directed that, in default of payment within six months, the property conveyed to them by plaintiff should be
sold. This very property had been mortgaged to Venkatasami Pillai; and first defendant, his assignee, had, in original suit No. 56 of 1886, obtained a decree against defendants Nos. 2 to 4 for Rs. 671-2-0, the property mortgaged being rendered liable for his claim. It is evident [366] that defendants Nos. 2 to 4, although they had not appealed against the decree, were deeply interested in the questions which had to be determined and that the decision would affect their interests very materially. The fact that an appeal by them was time-barred does not affect the question, because the discretionary power conferred on the Appellate Court is not limited by any provision of the Limitation Act (Manickya Moyee v. Boroda Prasad Mookerjee (1)).

With reference to the second question also, I think that the decision of the Subordinate Judge was right and that, after having been a party to Exhibit A, and having accepted from Venkatasami the discharge (Exhibit B) of his debt to Ramasami Dikshitar, plaintiff cannot now be allowed to repudiate these transactions and to recover from defendants Nos. 2 to 4 the amount of the debt due to Ramasami Dikshitar which they originally undertook to pay. It may be that Ramasami Dikshitar has, in execution of the decree, obtained, in original suit No. 295 of 1885, recovered from plaintiff the sum originally lent to him with interest, but plaintiff allowed that suit to be heard ex parte instead of applying to have Venkatasami Pillai and first defendant added as parties and pleading discharge and non-liability. Plaintiff cannot rely on the allegation that Exhibit A was got up fraudulently, for he was a party to the fraud, if any, and accepted from Venkatasami Pillai, the partner of Ramasami Dikshitar, a full discharge of the bond executed by him to Ramasami Dikshitar. Venkatasami Pillai, being his father-in-law, plaintiff must have been aware of the value of the discharge granted by Venkatasami Pillai, and no reason is assigned why he omitted to plead this discharge in defence in original suit No. 295. I concur with the Subordinate Judge in thinking that plaintiff cannot recover against the present defendants and would dismiss the second appeal with costs.

MUTTUSAMI AYYAR, J.—I agree.

[366] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RAMUNNI (Defendant No. 4), Appellant v. BRAHMA DATTAN
(Plaintiff), Respondent.* [24th March and 25th April, 1893.]


The jenmi of land in Malabar sued in 1896 to redeem a kanom of 1849, to which it was subject, and obtained a decree which merely directed the surrender of the land to the plaintiff, on payment of the kanom amount and the value of improvements, within three months of the date of the decree. This decree remained unexecuted, the money not being paid. The jenmi now brought another suit to redeem the same kanom:

 Held, that the present suit was not barred by the former decree.

The nature of a kanom discussed.

* Second Appeal No. 1236 of 1891.

(1) 9 C. 355.

607

15 M 366 = 1892

FEB. 23.

APPEL-

LATE

CIVIL.

15 M 366 =

2 M.L.J. 175.
SECOND appeal against the decree of V. P. deRozario, Subordinate Judge of South Malabar at Palghat, in appeal suit No. 901 of 1890, affirming the decree of J. F. Pereira, District Munsif of Angadipuram, in original suit No. 215 of 1890.

Suit for redemption. The facts of the case appear sufficiently for the purposes of this report from the judgments of the High Court. The Lower Courts decreed for the plaintiff.

Defendant No. 4 preferred this second appeal.

Sankaran Nayar, for appellant.

Govinda Menon, for respondent.

JUDGMENTS.

MUTTUSAMI AYYAR, J.—This was a suit to redeem a kanom dated September 1849. Respondent is the present jemmi and appellant is the assignee of the kanom right. In original suit No. 493 of 1886, the former sued the assignor of the latter for redemption of the kanom, and obtained a decree which directed surrender of the property under kanom on payment of the kanom amount and the value of improvements within three months from the date of the decree, i.e., 28th June 1887. Respondent, however, failed to pay into Court the amount he was ordered to pay within the appointed time, and his application to execute the [367] decree afterwards was held barred. The decree however, contained no declarations that on default of payment on or before the due date, the mortgage be foreclosed or the property be sold. In January 1890 respondent brought the present suit for redemption and his claim was resisted on the ground that it was barred by the former decree. Both the Courts below decreed redemption and relief on the decisions of the High Court in Sami v. Somasundaram (1), Periandi v. Angappa (2) and Karuthasami v. Jaganatha (3). It is contended for appellant that respondent's right to redeem became extinct when the former decree ceased to be enforceable, and reliance is placed on the decision in Gin Savand Bal Savant v. Narayan Dhond Savant (4), Maloji v. Sagaji (5) and Anruth Singh v. Sheo Prasad (6).

There is a conflict between the decisions of the Madras High Court and those of the Bombay and Allahabad High Courts. The principle on which the former rests was explained by the late Chief Justice in Karuthasami v. Jaganatha (3) in the following terms:—

"In our judgment, the relation in which the mortgagor and mortgagees stood to one another was not terminated by the decree. It was intended by the decree that it should be terminated on the happening of a certain event which event has not occurred. The relation then still exists and the right to redeem is inseparable from the relation so long as it exists. An unexecuted decree for partition would not alter the relation of the members of a joint family."

The principle on which the Bombay cases proceeded was explained by Mr. Justice West in Gin Savand Bal Savant v. Narayan Dhond Savant(4). He observes:—"Where there is res judicata, the original cause of

---

(1) 6 M. 119.  (2) 7 M. 423.  (3) 8 M. 478.
(4) 7 B. 467.  (5) 13 B. 567.  (6) 4 A. 401.
"action is gone and can only be restored by getting rid of the res judicata." After stating that under the Roman and English law, a second suit might lie in certain cases, though there was a former decree, the learned Judge says that, "under the Anglo-Indian law it has long been recognized that a decree-holder must obtain satisfaction of his decree by execution, not by another suit. A new suit cannot be brought either on the original cause of action or, save in special cases, on the decree [388] in which that cause has become merged. The object of the legislation has been to prevent litigation on the same grounds and this would obviously be defeated by allowing a decree-holder to abstain from putting his decree in force and proceed again on the same cause as before." It must be noted here that the decisions of the Bombay High Court save that in Maloji v. Sagaji (1) were cited in Karuthasami v. Jaganatha (2), and the allusion to an unexecuted decree in a partition suit was apparently made in answer to the objection resting on the doctrine of res judicata.

Turning to the practice of the Court of Chancery in England, it was observed in the Bishop of Winchester v. Paine (3), decided in 1805, that it was established that if a bill filed by a mortgage for redemption was dismissed, the money not being paid at the time, such dismissal operated as a foreclosure, and was equivalent to a decree for a foreclosure. In Hansard v. Hardy (4) decided in 1812 it was ruled, however, that the dismissal for want of prosecution was not the same as a decree of dismissal for non-payment of the mortgage money at the day appointed. Again in Faulkner v. Bolton (5) decided in 1835 the Vice-Chancellor held that if the plaintiff in a suit for redemption did not pay the principal and interest at the time appointed, he should not be allowed to redeem, although before the motion to dismiss was made, he had tendered the amount due with subsequent interest. Until 44 and 45 Vict., Cap. 41, the practice in England was for the decree to direct that on failure of the plaintiff to pay the amount on the due date, the suit should be dismissed (Seton on Decrees, 5th edition, p. 1040), and such dismissal was held to operate as a judgment of foreclosure; but by Section 25 of 44 and 45 Vict., Cap. 41, the Court was empowered to order a sale in a suit for redemption.

Passing on to the Transfer of Property Act—Act IV of 1882, and reading Sections 58 to 93 in the light thrown upon them by the practice of the Court of Chancery in England, it seems to me necessary to keep in view certain important features of the scheme embodied in the Act. In the first place no suit for foreclosure is allowed by that Act in the case of a simple mortgage, and no suit is permitted either for foreclosure or sale to the holder of an [389] usufructuary mortgage (see Section 67). The mortgagor, however, is at liberty to sue for redemption, and in such suit, the Court is directed to pass a decree which is first, to ascertain the amount payable prior to redemption, next to fix a day for its payment within six months, and further direct when the mortgage is simple or usufructuary that in default of payment on the due date, the mortgaged property shall be sold (Section 93). It is thus observed that according to Act IV of 1882 an usufructuary mortgage is not entitled to sue either for foreclosure or for sale, and that a simple mortgagee may sue for sale but not for foreclosure, but that the Court is to order a sale in the case of a simple or an usufructuary mortgage when the mortgagor sues for redemption.

(1) 18 B. 567.  
(2) 8 M. 478.  
(3) 11 Ves. 199.  
(4) 18 Ves. 460.  
(5) 7 Sim. 319.
Another point to be borne in mind is that Section 58 which defines the several kinds of mortgage, as simple mortgage, usufructuary mortgage, mortgage by way of conditional sale and English mortgage, has reference to their pure forms, and that a transaction which forms the subject of a particular suit may combine in it one or more of such forms. Thus a simple mortgage contains a covenant to pay the mortgage debt at the appointed time and provides that in the event of failure to pay according to the covenant, the mortgagor shall have a right to cause the mortgaged property to be sold. The essence of an usufructuary mortgage, however, is defined to consist in the mortgage being accompanied with transfer of possession and in a covenant therein to the effect that the mortgagor shall retain such possession until payment of the mortgage money, and receive the rents and profits accruing from the property and to appropriate them in lieu of interest or in payment of the mortgage money, or partly in lieu of interest and partly in payment of the mortgage money. A kanam which is the transaction before us combines in it the ingredients of both a simple and an usufructuary mortgage. According to the usage of Malabar, it is a mortgage with possession for twelve years, with a right in the kanomdar to appropriate the usufruct in lieu of interest, or both of principal and interest, and the jenni is also bound, under the contract, to pay the kanam amount on the expiration of twelve years. It is clear from paragraph 34 of the Report of the Law Commissioners of 15th November 1879 that there may be a combination of a simple and an usufructuary mortgage or of an usufructuary mortgage and of mortgage by conditional sale. In such cases, the intention was that the mortgagor and mortgagor should have the rights and liabilities as are created by the Act with reference to each of the forms so combined. Such being the case, the kanom-holder may, as the holder of a simple mortgage, sue for the sale of the kanom property, but he cannot claim foreclosure either as a simple or an usufructuary mortgagee.

Another feature of the Transfer of Property Act is, that in a suit for redemption, as the former suit brought by the respondent was, the decree could only have contained a direction under Section 93 that in default of payment the property shall be sold. The decree passed under that section is only in the nature of a decree nisi and does not of itself extinguish the right of redemption until it is made absolute by an order made under Section 93 that the property be sold. Between the dates of the order for sale and that of the actual sale the position of the plaintiff is that of a judgment-debtor whose property has been ordered to be sold in execution, and he may pay the money as a judgment-debtor and there by obviate the necessity for the sale (see Macpherson on Mortgages, p. 498). Assuming that all the directions contained in Act IV of 1882 are duly complied with, the right of redemption exists until an order for sale is made, and the mortgagor's right of property subsists until there is an actual sale. The English practice of dismissing the suit when the mortgagor fails to pay the mortgage money on the due date so as to make the dismissal operate as a judgment for foreclosure, is superseded in the cases of simple or usufructuary mortgages by Section 92 which substitutes instead an order that the property shall be sold. The result is that in a suit for redemption the mortgagor can never insist on an order for foreclosure when the mortgage is simple or usufructuary, and that the order for sale on which he can insist under Section 93 does not operate to divest the mortgagor of his ownership in the property until the sale has actually taken place.
Such being the scheme of the Transfer of Property Act, the Madras decisions are more consistent with it, while the Bombay decisions introduce in this country a doctrine of constructive foreclosure founded on the plea of res judicata.

Assuming that what Sections 92 and 93 direct have been done, still the ownership would vest in the mortgagor until there is a sale, and the processual law must be construed so as not to defeat the provisions of the substantive law. I am, therefore, of opinion [371] that I must adhere to the Madras decisions until the Full Bench overrules them. I would dismiss this second appeal with costs.

BEST, J.—The question is whether the present suit by the mortgagor's assignee for redemption of the mortgaged property is barred as res judicata by reason of a decree for redemption of the same property having been previously obtained by the present plaintiff's assignor under the same kanom deed, which decree is no longer executable in consequence of a period exceeding three years from its date having been allowed to pass without any step having been taken to execute it.

The former decree, it must be observed, contained no direction that the mortgage should be foreclosed in default of the mortgagor exercising the right of redemption thereby decreed to him.

It has been held by this Court in Sami v. Somasundram (1), Periandi v. Angappa (2) and Karuthasami v. Jaganatha (3), that a decree, such as the above, is no bar to a subsequent suit for redemption; and both the Courts below have held, in accordance with those rulings, that the present suit is not barred, and have given the plaintiff a decree.

Hence this appeal by the defendant who relies on Gan Savant Bal Savant v. Narayan Dhond Savant (4), Molaji v. Sagaji (5) and Anrudh Singh v. Sheo Prasad (6)

These decisions are no doubt in conflict with those of this Court; but having considered them, I see no reason to doubt the correctness of the decisions of this Court.

The latest of the above decisions of this Court, Karuthasami v. Jaganatha (3), was in 1885, i.e., subsequent to the coming into force of the Transfer of Property Act, to which apppellant's vakil referred as a reason for reconsidering the rulings of this Court, and in it both Anrudh Singh v. Sheo Prasad (6), and Gan Savant Bal Savant v. Narayan Dhond Savant (4) were considered. As was then remarked, the relation of mortgagor and mortgagee was intended by the former decree to be terminated only on the redemption of the property, an event which did not occur. Further, under Section 92 of the Transfer of Property Act, there can be no decree for foreclosure in the case of a simple or usufructuary mortgage; and a kanom is in fact a usufructuary mortgage for a [372] period of twelve years, at the end of which it becomes redeemable as a simple mortgage. The only decree that could have been made in the former suit was therefore that in default of payment within a time to be fixed (no such time appears, however, to have been fixed in the former decree) the property be sold. It was admittedly never sold and consequently the relation of mortgagor and mortgagee still subsists. There is no reason why the assignee of the former plaintiff should not be allowed now to redeem.

I agree, therefore, in dismissing this second appeal with costs.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

VIRARAGHAVA AND OTHERS (Petitioners) v. PARASURAMA (Respondent).* [5th and 8th May, 1891.]


A debtor against whom several decrees had been passed, filed his petition in the Insolvent Court at Madras, and the usual vesting order was made. One of the decree-holders had already attached property of the insolvent and had obtained an order for sale in a District Court, and now another decree-holder applied to the same Court in execution of his decrees for the attachment of other property, and for rateable distribution of the proceeds of the sale to be held in execution of the attachment already made. The District Judge held that the vesting order was a bar to both of these applications:

Held, (1) that the order rejecting the application for fresh attachments was right;

(2) that the order rejecting the application for rateable distribution was wrong, and that the High Court had power to set it aside on revision under Civil Procedure Code, Section 622.


Appeals against the orders of J. D. Irvine, District Judge of Coimbatore, made on civil miscellaneous petition No. 29 of 1888, and execution petition No. 27 of 1888, and petitions under Civil Procedure Code, Section 622, praying the High Court to revise his orders made on execution petitions Nos. 28 and 30 of 1888.

The facts of the case appear sufficiently from the following order which was made by Handley and Weir, JJ.

[373] S. Subramanya Ayyar, for appellants and petitioners.

The respondent did not appear in person or by counsel.

ORDER.—These appeals and petitions arise out of the insolvency of one Mahomed Marakayar against whom decrees had been passed in several suits in the District Court of Coimbatore.

The decree-holder, Parasurama Ayyar, in one of these suits (original suit No. 11 of 1886) obtained an order for sale of certain immoveable property of the judgment-debtor. Subsequent to the date of that order, but before sale, Mahomed Marakayar filed his petition in insolvency in the High Court and a vesting order was made.

The Official Assignee opposed the sale, but the District Judge overruled his objections and allowed the sale. Before the sale under that order took place, Seshu Ayyar, the original appellant and petitioner in the present appeals and petitions, made a double application to the District Court in each of two suits in which he had obtained decrees against Mahomed Marakayar (original suits Nos. 18 and 29 of 1887.)

All four applications were filed on the same day. In two of these he applied in the two suits for execution by attachment and sale of the immoveable property of Mahomed Marakayar and in the other two, apparently as an alternative in case the other two applications were refused, he applied in the two suits for a rateable distribution between himself.

* Civil Miscellaneous Petitions Nos. 709 and 710 of 1890.
and Parasurama Ayyar of the proceeds of sale of the immovable property which had been ordered to be sold in Parasurama Ayyar's suit.

The District Judge has rejected the applications for execution by attachment and sale of immovable property of Mahomed Marakayar on the ground that the vesting order "bars any further proceedings in execution when there has been no order for sale," and he has also rejected the two applications for a rateable distribution on the ground that the orders on these applications must follow the orders on the applications for execution by attachment and sale of the immovable property of the judgment-debtor.

Appeals Nos. 138 and 139 of 1888 are against the orders rejecting the applications for execution by attachment and sale of the immovable property of the judgment-debtor. Petitions Nos. 312 and 313 of 1888 are for revision of the orders rejecting the applications for a rateable distribution of the proceeds of sale in Parasurama Ayyar's suit.

[374] As to the orders appealed against, we think the District Judge was right in his conclusion, but not precisely upon the grounds upon which he puts it. It is not strictly correct to say that the vesting order bars all further proceedings in execution. The more correct way of putting it is, we think, that the vesting order divests the judgment-debtor of the property, and, therefore, there is no property of his which can be attached and sold. On this ground the applications for execution by attachment and sale of Mahomed Marakayar's immovable property might rightly have been rejected, and, on this ground, we dismiss the civil miscellaneous appeals Nos. 138 and 139 of 1888.

But we are not satisfied that it follows that the simultaneous applications for a rateable distribution of the proceeds of sale of the property ordered to be sold in Parasurama Ayyar's suit must also be rejected. These are distinct applications for execution of the decree in this way. We are informed that the District Court had already decided against the Official Assignee's right to oppose that sale and had ordered the sale to go on. If this is so, it may be that there is no further question in regard to that sale between the Official Assignee and the judgment-creditors, and the vesting order and other proceedings in insolvency have no effect upon the rights (if any) of the judgment-creditors to a rateable distribution of the proceeds of that sale. Before disposing of these revision petitions, we shall request the District Judge to furnish us with a copy of the order (if any) passed upon the Official Assignee's objections to the sale of the property of Mahomed Marakayar in execution of Parasurama Ayyar's decree, and also to report what further proceedings have been taken in reference to that sale.

After the return called for in the above order had been made the case came on again for disposal.

Bhashyam Ayyangar, for petitioner.

The Court made the following order.

ORDER.—Petitioner Seshu Ayyar having applied to the Court which realized the assets prior to realization for execution of his decree was entitled to a rateable distribution of the assets.

The orders of the District Judge are set aside, and he is directed to give effect to this order by calling on Parasurama Ayyar, plaintiff in original suit No. 11 of 1886, who appears to have received the entire sale-proceeds, to refund the amount he has [375] received and on this being done the District Judge will proceed to make a rateable distribution.
Under the circumstances we make no order as to costs of these petitions.

Parasurama Ayyar preferred petitions for the review of this order.

Weir J., having left the High Court, the petitions came on for disposal before Muttusami Ayyar and Handley, J.J.

Mr. K. Brown and Ramachandra Ayyar, for petitioner.

Bhashyam Ayyangar, for respondent.

JUDGMENT.

These are applications for review of judgment in civil revision petitions Nos. 312 and 313 of 1888. The facts are fully set out in the order of this Court of 9th May 1890. By that order certain information was called for from the District Judge, on receipt of which the final order of this Court was passed, setting aside the orders of the District Judge, which were the subject of these revision petitions, and directing the District Judge to call upon Parasurama Ayyar to refund the amount he had received and upon this being done to proceed to a rateable distribution. Parasurama Ayyar was named in civil revision petitions Nos. 312 and 313 of 1888 as a counter-petitioner, but it appears that owing to some mistake, notice was not served upon him, and the final order was consequently made in his absence. On this ground, a review was admitted, and the case has now been argued on his behalf.

The first point raised by his counsel is that as he was no party to the proceedings in the District Court, out of which these petitions arose, no order can be made against him on these petitions. As to this, it is true that he received no notice of Seshu Ayyar's application for a rateable distribution of the proceeds of sale of the property ordered to be sold, because the District Judge dismissed it on the preliminary point that the vesting order shut out Seshu Ayyar from any claim to a rateable distribution, but he must have been fully aware of the proceedings for he was a joint applicant with Seshu Ayyar in one of the petitions. But, however this may be, the High Court in directing the District Judge to order Parasurama Ayyar to refund the amount he had received was merely putting matters in the same state as they were when what was held to be the erroneous order of the District Judge was passed. After that, strictly speaking, notice would have to be given to him to show cause why the amount should not be rateably distributed. He has had full notice now however and his counsel waives any further notice, and the question whether the rateable distribution asked for by the original petitioner Seshu Ayyar can now be ordered has been fully argued and may now be decided.

It is next argued that this is not a case in which this Court can interfere in revision under Section 623 of the Code of Civil Procedure as there was no question of jurisdiction. The order passed on the two applications for rateable distribution out of which the present petitions arose, was that the order must follow that on the application for execution on which it was based. We must look to the latter order, therefore, to ascertain what was the decision of the Court. The general order made on several applications for execution by attachment and sale of the judgment-debtor's property was:—"The vesting order has been received. It clearly bars any further proceeding in execution when there has been no order for sale. This application must, therefore, be rejected." The District Judge, therefore, declined to entertain the application, and to make the rateable distribution, which he was bound by law to make, because he considered he was precluded from doing so by the proceedings.
in the insolvency and the vesting order. In so declaring, assuming, as we shall show afterwards that he was wrong in his view of the effect of the insolvency proceedings, we think he failed to exercise a jurisdiction vested in him by law, and that this Court has power to interfere under Section 622. In so holding, we consider that we are following the principles laid down as to the construction of that section in the case of Manisha Eradi v. Siylas Koya (1).

Then it is contended for Parasurama Ayyar that the Judge was right, and he was precluded by the proceeding in insolvency and the vesting order from proceeding to a rateable distribution of the proceeds of sale of property attached and sold in execution of a decree against the insolvent judgment-debtor. The fallacy, as it appears to us, of this contention, and of the District Judge's view, is that it assumes that because the Official Assignee may come in and apply for stay of proceedings in execution, the insolvency and the vesting order have of themselves the effect [377] of staying such proceedings. In the present case, the Official Assignee did, subsequently to the order now in question, apply to the District Court to stay the sale of the property, to which these orders refer, and his application was refused, and he did not appeal against that order as appears in the present case, though served with notice. There was, therefore, as pointed out in this Court's order of 9th May 1890, no further question between the Official Assignee and the judgment-creditors as to this property and the pendency of proceedings in insolvency could be no reason for the District Court's refusing to make the rateable distribution ordered by law and allowing one creditor to walk off with the whole proceeds of sale of the attached property.

Lastly, it is argued on the authority of Tiruchittambala Chetti v. Seshayyangar (2), that there could be no rateable distribution in the present case, because there was no application for execution on the file of the Court pending and undisposed of.

The facts are that Seshu Ayyar presented apparently on the same day two applications for execution in the prescribed tabular form. In one the entry in the last column headed "mode in which the assistance of the Court is required" asked for attachment of immoveable property of the judgment-debtor; in the other it asked that the applicant might share in the rateable distribution of the proceeds of sale of the property attached by Parasurama Ayyar when it should be sold.

By the order of this Court of 5th May 1890, it is ruled that the application for attachment of the immoveable property was rightly dismissed by the District Judge, not on the ground on which he put it that the proceedings in insolvency were a bar to execution, but because the vesting order vested the property of the insolvent judgment-debtor in the Official Assignee, and there was therefore no property of the judgment-debtor to be attached. But this ruling did not affect the application for a rateable distribution which was also an application for execution to which the judgment-debtor was a party, as well as an application for rateable distribution, and, therefore, as this Court holds that the latter application was wrongly dismissed by the District Judge, it must be treated as pending within the meaning of Tiruchittambala Chetti v. Seshayyangar (2), for the purpose of supporting Seshu [376] Ayyar's right to share in a rateable distribution of the proceeds of sale of the property attached and sold in execution of Parasurama Ayyar's decree.

(1) 11 M. 220.  (2) 4 M. 383.
We see no reason to doubt the correctness of the orders of this Court of 5th May 1890 and 12th August 1890, and we pass a fresh order accordingly in terms of the latter order.

Petitioner must pay the costs of counter-petitioners of these applications.

15 M. 378.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

Thama (Plaintiff), Appellant v. Kondan and Others (Defendant No. 6 and Defendants Nos. 1—5 and 7—26), Respondents.* [9th March, 1892]

Evidence Act—Act I of 1872, Section 35—Recital in judgment—Admission of jenni’s title.

In a suit by a melkanomdar to redeem a kanom, the kanom document was proved to have been lost; it appeared that a previous suit had been brought by the jenni to redeem the same kanom, and the judgment in that suit, in which it was stated that the defendants admitted their position as kanomdars, was tendered in evidence to prove the jenni’s title:

Held, that the judgment was admissible in evidence.

[R., 18 M. 73 (78); 36 M. 46 (51) = 12 Ind. Cas. 317 = 21 M. L. J. 370 = 10 M. L. T. 232 = (1911) 2 M. W. N. 265]

Second appeal against the decree of A. Thompson, Acting District Judge of South Malabar, in appeal suit No. 263 of 1890, reversing the decree of A. Annasami Ayyar, District Munsif of Ernad, in original suit No. 400 of 1889.

Suit by the holder of a melkanom from the predecessor in title of defendant No. 1 to redeem lands demised on kanom by the predecessor of defendant No. 1 to the tarwad of defendants Nos. 1—25. The kanom document had been lost. The plaintiff, for the purpose of proving his jenni’s title, tendered the judgment in a previous suit, brought by the jenni to redeem the same kanom, of which the District Munsif said:

[379] “Exhibit C, the judgment in original suit No. 304 of 1860, contains a clear admission that defendants Nos. 2, 6, 9 and 21 tarwad karnavers, came in possession of the lands as kanomdars in 1014 (1839); they purchased the prior kanomdar’s kanom in 1014 (1839). Their karnavan, one Raman Kutti Nair, even pleaded that his karnavan attorned to first defendant’s predecessor in stanom and obtained a renewal in 1029 (1854), and paid the porapad (rent) due up to 1032 (1856-57), as defence to that suit. The Munsif gave a decree to first defendant’s predecessor in stanom (the plaintiff in that suit) on the strength of the defendants Nos. 2, 6, 9 and 21 karnaver’s admission.”

The District Munsif held that the plaintiff’s title was proved and passed a decree in his favour. Defendant No. 6 preferred an appeal to the District Judge, who held that the recital of the admissions in the above-mentioned judgment was not legal evidence of them, and reversed the decree.

The plaintiff preferred this second appeal.

* Second Appeal No. 247 of 1891.
JUDGMENT.

We think that the recital of the admission in the judgment C was a relevant fact as evidence of the jenmi’s title under Section 35 of the Evidence Act (see Lekraj Kuwar v. Mahpal Singh (1), Parbutty Dassi v. Purno Chunder Singh (2), Byathamma v. Avulla (3)).

The Judge was therefore wrong in excluding the evidence from consideration. It is for him to consider the binding effect of the admission and also the question raised in the second ground of appeal.

We must reverse the decree and remand the appeal to the Lower Appellate Court for disposal. Costs will follow the result.

15 M. 380 = 2 M. L.J. 42.

[380] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

RAMASAMI (Plaintiff), Appellant v. Muttusami and Another (Defendants), Respondents.

[24th September, 1891.]

Limitation Act—Act XV of 1877, Section 19, Schedule II, Articles 57, 115—Date when money becomes due—Acknowledgment in holograph will unsigned.

In a suit against the legal representative of a deceased debtor to recover the amount of the debt, it appeared that the debt was contracted more than three years, but was payable less than three years before suit. In bar of limitation the plaintiff relied upon an admission of the debt in a draft will, written by the testator, in the first line of which his name appeared:

Held, per Weir, J., that the admission in the will did not constitute an acknowledgment under Limitation Act, Section 19;

per Muttusami Ayyar and Parker, J.J., that the period of limitation should be computed from the date when the debt was due and the suit was not barred.

PETITION under Provincial Small Cause Courts Act, 1887, Section 25, praying the High Court to revise the proceedings of C. W. W. Martin, District Judge of Salem, in small cause suit No. 19 of 1888.

The facts of the case are stated above sufficiently for the purposes of this report.

The District Judge passed a decree for plaintiff quoting the following cases: Andarji Kalyanjit v. Dulabh Jeevan (4), Dara Chand v. Sarfras (5) and Mohesh Lal v. Busuti Kumares (6).

The defendants preferred this petition.

Ramasami Mudaliar, for petitioners.

Parthasaradhi Ayyar, for respondent.

Weir, J.—The decision cannot, I think, be supported. The will, although in the testator’s handwriting, is not signed; and Section 19 of the Limitation Act requires the acknowledgment to be made in writing, signed by the party against whom the right is claimed. The decisions of the Allahabad and Calcutta Courts relied on by the District Judge are


(1) 5 C. 744. (2) 9 C. 586. (3) See 15 M. 19.
(4) 5 B. 88. (5) 1 A. 117. (6) 6 C. 340.
clearly distinguishable in their circumstances from the present case, and the counter-petitioner's pleader admits that they do not apply. He relies, however, on the case of Andurji Kalyanjri v. Dulabha Jeevan (1) referred to by the District Judge. That case proceeded on the special ground that among the community, whose writing was in question, it was the practice not to sign the account, but to head it in a peculiar way, showing that it was written in the writer's own hand. No such practice is alleged, nor can be alleged in regard to the class of documents in question in the present proceeding, viz., a will.

I must hold, therefore, that the District Judge erred in law in holding that there was an acknowledgment of the debt; and reversing the District Judge's decree, I direct that the suit be dismissed, but I shall not allow costs.

The plaintiff preferred an appeal under Letters Patent, Section 15, against this judgment.

The appeal came on for disposal before MUTTUSAMI AYYAR and PARKER, JJ.

Mr. R. F. Grant and Panchapagesa Sastri, for appellant.
Ramasami Mudaliar, for respondents.

JUDGMENT.

The District Judge found the plaintiff's case was established, the averment in the plaint being that the loan was made on 30th September 1885 and was repayable in one month from that date. The plaint was presented on 24th October 1888. There was also evidence to support the finding of the Judge.

Even, therefore, if the admission contained in the will does not amount to an acknowledgment, the suit is not barred. We agree with the decision of the Calcutta High Court in Rameshwar Mandal v. Ram Chand Roy (2) that such a suit will fall under Article 115 of the Limitation Act and not under Article 57.

The decree of the learned Judge must, therefore, be reversed and that of the District Judge restored, but as it is not not taken before we shall make no order as to costs in this Court. The plaintiff is entitled to other costs.

15 M. 382.

[382] APPELLATE CIVIL.

Before Mr. Justice Subramanya Ayyar and Mr. Justice Best.

KRISHNAN (Plaintiff), Appellant v. PERACHAN (Defendant), Respondent.* [15th February, 1892.]

Limitation Act—Act XV of 1877, Schedule II, Articles 62, 120—Money received for plaintiff's use—Suit for which no period prescribed—Transfer of Property Act—Act IV of 1882, Sections 2, 135.

A obtained a money decree against B and attached certain land in execution. C intervened in execution successfully. A then brought a suit to establish that the land was liable to be sold in execution, and obtained a decree. Meanwhile the land was taken up by Government under the Land Acquisition Act, and the compensation money was paid to C. A attached this sum as a debt due to B

* Second Appeal No. 775 of 1891.

(1) 5 B. 88.  (2) 10 C. 1033.

618
and sold it in execution, and it was purchased by the plaintiff. The plaintiff
now sued to recover the amount of the debt:

Hold, that the suit was governed by Limitation Act, Schedule II, Article 120,
and not by Article 62, and that the plaintiff was entitled to recover without
regard to the terms of Transfer of Property Act, Section 135.

[9, 30 M. 459 (460) = 17 M. L. J. 452; 21 M. L. J. 705 (705) = 9 M. L. T. 465 = (1911)
M. W. N. 920.]

SECOND appeal against the decree of A. Thompson, Acting District
Judge of South Malabar, in appeal suit No. 570 of 1890, confirming the
decree of T. V. Anantan Nayar, Principal District Munsif of Calicut, in
original suit No. 708 of 1889.

The plaintiff’s case was that one Ayyan Chetti obtained a money
decree against Kelu in original suit No. 512 of 1885, and attached the
Malgakandi paraamba in satisfaction thereof; the present defendant
Cherukutti Perachan then put in a claim petition and his claim was
allowed on 16th February 1886. Ayyan Chetti brought a suit No 89 of
1887 to declare the liability of the Maligakandi paraamba to sale in
execution of his decree and obtained a decree as prayed. Meanwhile
Government took up the Maligakandi paraamba under the Land Acquisition
Act and paid compensation for it to the defendant Perachan. Ayyan
Chetti then attached this sum as a debt due by Perachan to his (Ayyan
Chetti’s) debtor, Kelu. This debt was sold on 13th April 1889 in Court
auction for Rs. 65 and bought by plaintiff who filed this suit on 9th
October 1889 to recover the amount of the debt.

[383] The District Munsif dismissed the suit and his decree was
affirmed on appeal in the District Court. The District Judge observed that
it was the plaintiff’s case that the defendant received the money on behalf
of Kelu, the original judgment-debtor, and ruled that the case was governed
by Limitation Act, Schedule II, Article 62, and that, since the decree in
original suit No. 89 of 1887 did not constitute a fresh starting point for
limitation, see Hanuman Kamut v. Hanuman Mandur (1), the suit was
barred by limitation.

The plaintiff preferred this second appeal.

Sundara Ayyar, for appellant,
Sankara Menon, for respondent.

JUDGMENT.

We do not think that the money can be considered as having been
received by the defendant for the plaintiff’s use, so as to make Article 62
applicable; nor is the case one coming within any other special article of
Schedule II of the Limitation Act. It is, therefore, one for which no
period of limitation is provided elsewhere, and consequently falls within
Article 120, which gives a period of six years from the date when the right to
sue accrued Nund Lall Bose v. Meer Aboo Mahomed (2) and Gurudas Pyne v.
Ram Narain Sahu (3). This suit having been brought within six years from
date of receipt of the money by defendant is therefore not time-barred.

The Lower Appellate Court has found to be valid the sale at which
plaintiff acquired a right to the money in question. In this finding we
concur. As, by Section 2 of the Transfer of Property Act, Clause (d),
transfers in execution of decrees and unaffected by the provisions of
Section 135 of the same Act, we give plaintiff a decree for Rs. 579-6-1 with
interest at 6 per cent. per annum from date of suit to date of payment.
Each party to pay proportionate costs throughout.

(1) 15 C. 51.
(2) 5 C. 597.
(3) 10 C. 860.
Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

LAKSHMINARASIMHAM (Defendant), Appellant v. SOMASUNDARAM (Plaintiff), Respondent.* [16th February, 1892.]

Civil Procedure Code, Sections 514, 521—Enlargement of time for award.

A suit was referred to an arbitrator, who did not make his award, within the period limited for that purpose. After that period had expired, an application was made for its extension, both parties consenting: the application was granted and the award was made within the time so extended, and a decree was passed in its terms:

Held, that the order extending the time was not illegal, and the party dissatisfied with the decree was not entitled to have the award and the decree made upon it set aside.

PETITION under Civil Procedure Code, Section 622, praying the High Court to revise the proceedings of G. T. Mackenzie, District Judge of Kistna, in original suit No. 3 of 1886, in which he had passed a decree in accordance with the terms of an award. The period fixed for the award had expired, but had subsequently been extended with the consent of both parties, and the award was made within the extended period.

The District Judge said:—"The award bears a date which has been altered from 5th to 6th March. If the award was made on 5th March, it is invalid under the decision in Simson v. Venkatagopalam (1). The High Court held in Kula Nagabushanam v. Kula Seshachalam (2) that when five arbitrators signed a rough draft, that was a final award although a fair copy was made afterwards. In the present case the arbitrator's petition of 6th March shows that the award was then unfinished, and I have no evidence that the award had been completed before that date.

"The application for extension was made after the time had expired, and the question is whether that vitiates the award. If the application had been made within the time, the award would be valid, Suppu v. Govindacharyar (3). I can see nothing in Section 514 that forbids an application to be made after the time had expired. Moreover, both parties consented to the application. They did not then know how the award would be. Plaintiff, finding the award against him, now objects to the extension for which he himself applied."

The plaintiff preferred this petition.

Rama Rau, for petitioner.

Bhashyam Ayyangar, for respondent.

SHEPHARD, J.—I think there is no doubt that the power to extend the time within which an award is directed to be made can only be exercised before the time limited has expired. The language of Section 514 giving power to "enlarge the period" shows that this is the case, and I am further confirmed in this view by the decision in Simson v. Venkatagopalam (1). Consent cannot alter the matter, for the reference derives its force from the order of the Court and not the will of the parties. I

* Letters Patent, Appeal No. 21 of 1891.

(1) 9 M. 475. (2) 1 M.H.C.R. 178. (3) 11 M. 35.
think the District Judge was wrong, and that the decree must be set aside with costs. The District Judge will proceed to try the case.

The defendants preferred an appeal under Letters Patent, Section 15, against the above judgment of Shephard, J.

The appeal came on for disposal before Muttusami Ayyar and Best, JJ.

Bhashyam Ayyangar, for appellant.
Ramachandra Rau Saheb and Venkatarama Sarm, for respondent.

JUDGMENT.

There is nothing in the wording of Section 514 to limit the period within which the time may be extended by the Court to the period mentioned in the previous order, nor would it be reasonable to so limit it. In the case reported as Simson v. Venkatagopaiam (1) no order extending the time had been obtained before the award was given. The award in that case was, therefore, properly held to be invalid under the express terms of Section 521. All that was decided in Suppu v. Govindacharyar (2) was that, as the application for extension of the period had been made within the time originally fixed, the mere fact of the order having been passed after such time did not invalidate the award. It was not then necessary to consider the point now raised. But so far as [386] that decision goes, it supports the contention of the present appellant that the real test is whether the time was in fact extended so as to validate the award which the arbitrators would otherwise have had no jurisdiction to make at the time when they made it. The award in the present case was made after the time had been enlarged and within the time so enlarged.

The dictum in Raja Har Narain Singh v. Chaudhrain Bhagwani Kuar(3) that the Court had the fullest power to enlarge the time under the Section (514), so long as the award was not completed, supports the appellant's contention. The construction put by the Privy Council on Section 549 in Budri Narain v. Mussummat Shea Koer (4) also favours the same view. As there stated the intention must be held to be to confer on the Court a power to enlarge the time "according to any necessity which may arise, when it is just and proper that the Court should do so."

For the above reasons we allow the appeal, and, setting aside the order appealed against, dismiss the civil revision petition No. 32 of 1890 with costs in this appeal and in the revision petition and restore the decree of the District Judge.

15 M. 386 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

REFERENCE UNDER STAMP ACT, SECTION 46.*
[13th October, 1891.]

Stamp Act—Act I of 1879, Section 3, Clause 16, Section 7, Schedule I, Article 50 (e)—Power of attorney—Trust.

Ten mirasidars of a village executed an instrument authorizing the person therein mentioned to recover for them from their former agent the perquisites

* Referred Case No. 21 of 1891.

(1) 9 M. 475. (2) 11 M. 85, (3) 18 I.A. 55, (4) 17 I.A. 1.
and other communal income appertaining to their mirasi rights, to cultivate their maniams, to distribute to them proportionately to their shares the profits of certain common land, &c.: Held, that the instrument was a power-of-attorney and should bear a stamp of Rs. 5.

REFERENCE by the Board of Revenue under Stamp Act, 1879, Section 46. [387] The instrument in question bore Rs. 5 stamp. Its terms were as follows:

"General power-of-attorney executed this 2nd day of July 1890, in favour of O. P. Rangasami Iyengar, Brahmin, Vishnivate, occupation—servant, aged 25, residing in Orathi village, No. 118, attached to the sub-district of Madurantakam, in the district of Chingleput, jointly by ten pangu mirasidars of the same village, viz.:

[here follow names.]

"As Appan Vijayaragavachari, Brahmin, Vishnivate, mirasidar and servant, aged 45, and a resident of the above-mentioned village, who was appointed an agent to collect and distribute among us all swatantrams, and profits of samudayam belonging to pangu mirasi of the village, has not, for the last three years, given us each his share of the profits and swatantrams, as he has not properly accounted to us for these incomes or shown accounts, and, as a notice has now appeared in the District Gazette prohibiting village officers from collecting swatantrams and profits on behalf of pangu mirasidars of the village, we have appointed you our genoral agent for recovering, from the said Appan Vijayaragavachari, by instituting against him suits in civil and revenue Courts all pangu, incomos, and samudayam profits, as well as all incomes of nunja, punja, maniams enjoyed in common, except nunja maniams enjoyed according to shares; for signing on behalf of us vakalats, plaints, statements, &c., and conducting affairs in our behalf in connection with the institution of suits and proceedings in civil, criminal, revenue, &c., Courts re all other rights, incomes, honors, &c., belonging to mirasi; for signing public records and receiving incomes, &c., due to us; for collecting swatantram, &c., due to mirasidars for payment to Government at the rate of 2 annas in the rupee from the mirasidars and payakaris of the village; for putting in objection-petitions and taking proper measures in connection with durkheasts, which may be presented by pangu mirasidars and payakaris for land required for the common benefit of several mirasidars and payakaris: for acting as agent to the devasthanams, and protecting from being misappropriated by others the nunja, punja, maniam, house-site and other property belonging to them, as also the nunja, punja, maniam, house-site and other property of the Parasuram Easawara temple which have [388] been resumed, there being no worship; for continuing without interruption the worship carried on in the temples from time immemorial with the incomes of the devasthanams; for letting out under lease, &c., the different samudayam trees, and collecting and distributing the produce to us according to shares; for getting the samudayam nunja, punja, maniami cultivated or letting them out and collecting and distributing the tirva; for distributing to us each his share of the profits of fishery, vilai, korai, &c., grass, vattam, &c., produce, which we have been enjoying from time immemorial; for protecting our rights to turns of dung, cattle-berd, oil-mill, weaving, katta pai right to water in times of scarcity, irrigation turns; and you are requested to co-operate with us and act up to the opinion of the
majority of the shareholders. If you fail to distribute to us each year
"swatantram, profits of produce, &c., which may be collected by you as stated
above, this general power-of-attorney will be cancelled, and the dues,
together with costs, recovered by proceeding against your person and
"property. Otherwise it will not be cancelled. You are advised to advance
"out of your pocket all sums required for conducting the suits, &c., referred
to above, and, after rendering to us proper accounts, recover them from
the profits and distribute the remainder among us.
"This general power-of-attorney was executed in these terms at our
"own free will and consent."

The question referred for the opinion of the High Court was whether
the stamp was sufficient. It had been impounded by a Sub-Registrar as
being chargeable as an instrument of trust. The Sub-Collector of
Chingleput reported on the instrument as follows:

"The document, which was impounded by the Sub-Registrar of
Madurantakam, is a power-of-attorney executed by ten mirasidars of the
village of Orathi in favour of the petitioners, and authorizes him to recover
for them the swatantrams and other communal income appertaining to
their mirasi rights, to cultivate or lease out their nunja and punja
mamiens, as also the rents of fisheries, &c., and to divide the income
between them in proportion to their shares. The words 'स्वतन्त्रमें उपस्थि
शिर्सा' (according to our shares) which occur in several places in the doc-
ument, clearly show that each of the executants has a distinct and separate
interest. Ten separate powers-of-attorney should, [389] therefore, have
been executed, each bearing a stamp of Rs. 5 (vide Board's Proceedings,
dated 6th November 1877, No. 4430; and Board's Proceedings, dated
29th July 1885, No. 2222; and Article 50 (c) of Schedule I of Act I of
1879). The document is therefore chargeable under Section 7 of the Act
with the aggregate amount of the duties with which separate
instruments are chargeable."

V. C. Desikachariar, for Rangasami Ayyangar.
The Government Pleader (Mr. Ponnell) for the Board of Revenue.

JUDGMENT.

We are of opinion that the document is a power-of-attorney and
must be stamped with a five rupees stamp.

15 M. 389.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Subramanya Ayyar.

SUBBARAYUDU (Defendant No. 1), Appellant v. KOTAYYA AND
OTHERS (Plaintiffs and Defendants Nos. 2 and 3), Respondents. [*
[28th and 29th January, and 4th and 12th February, 1892.]

Civil Procedure Code, Sections, 392. 311—Suit to set aside Court sale—Duty of vakil
purchasing at Court sale—Fraud—Parties—Assignment of religious trusteeship.

A hereditary dharmakarta of a temple, who had assigned his office to a Zamindar
and consented to a decree being passed on the footing of such assignment, is
competent nevertheless to bring a suit to set aside a Court sale of temple lands,
treating such assignment as a nullity.

A mortgagee having obtained a decree on her mortgage brought the mortgage
property to sale; and her vakil bid through an agent at the Court sale and

* Appeal No. 100 of 1891.

623
became the purchaser. It appeared that the vakil had not informed his client that he intended to bid nor obtained the sanction of the Court, but he had been instructed by his client and had obtained the permission of the Court to bid on her account, and he was found to have acted in an unhandy manner towards her. In a suit to set aside the sale, brought by the mortgagor, who had sought unsuccessfully to obtain the same relief by means of a petition under Section 311 in which fraud was not alleged against the purchaser:

Held (on its appearing that the vakil had not discharged the burden which lay on him of proving that the transaction was free from suspicion), that the sale should be set aside.

[R., 28 A. 473 (490); D., 16 Ind. Cas. 225 (232)=23 M.L.J. 131=12 M.L.T. 269.]

[390] Appeal against the decree of G. T. Mackenzie, District Judge of Kistna, in original suit No. 23 of 1890

Suit to set aside a Court sale of certain land attached in execution of a decree on the ground of fraud of the purchaser. The District Judge passed a decree as prayed and the defendant preferred this second appeal.

The facts of the case appear sufficiently for the purposes of the report from the judgment of the High Court.

Mr. Michell and Mr. Ramasami Raju, for appellant.

Pattabhirama Ayyar, for respondents Nos. 1 and 2.

JUDGMENT.

This is an appeal from the decree of the District Judge of Kistna in original suit No. 23 of 1890. The appellant is the first defendant, a First-Grade Pleader, who became the purchaser in Court auction of the village of Devarapalli. The plaintiff, as trustee of the temple of Sriranganayakaswami, sues to set aside the sale alleging fraud on the part of the first defendant. The District Judge found that first defendant's purchase was tainted with fraud, and set aside the sale.

The first question is whether the first plaintiff is the dharmakarta of the temple, and as such entitled to maintain the suit. The village of Devarapalli originally formed part of the zamindari of Vallur, but in July 1847 it was assigned by the then Zamindar in favour of first plaintiff's grandfather Koppula Seetaya Naidu, as an endowment of the temple of Sriranganayakaswami, which had been erected by Seetaya Naidu. The village was sub-divided from the zamindari, and a peishchah of Rs. 541 fixed for it by the Collector and the village was handed over to Seetaya Naidu on his agreeing to pay the peishchah. He was succeeded by his son Pattabhiramaswami Naidu on whose death the village was registered in the name of his widow Subbamma, and his nephew Koppula Kotaya, the first plaintiff. In 1881, the Zamindar of Vallur instituted a suit (original suit No. 52 of 1881) against Subbamma and Koppula Kotaya to establish his right as dharmakarta. In June 1881, there was a razinamah decree in favour of the Zamindar, the defendants relinquishing their rights to the dharmakartashio of the temple and to the village of Devarapalli. It was argued in the Lower Court that the transfer was invalid, but the District Judge without actually deciding that the transfer was invalid, found on the evidence that the transfer was a mere paper transaction nominally executed to save the pride of [391] the Zamindar, that the actual management of the temple and its endowment, the village of Devarapalli, never passed out of the hands of the Koppula family, and he therefore held that the objection taken to plaintiff's right to maintain the suit could not be supported. Here it is argued that as the dharmakarta is the only person who can maintain a suit for the recovery of temple lands, and as by the decree in original suit
No. 52 of 1881, third defendant, the Zamindar of Vallur, was declared to be the damakarta, the plaintiffs cannot sue to set aside the sale and recover the temple lands until they have set aside the razinamah decree. We have been referred to certain documents, road-cess accounts, dowles and jamabundy accounts, as showing that the transfer was not nominal but real, and that the management has since the transfer been with the Zamindar. A great many of these documents have not been proved, and should not have been placed upon the record, and the others do not establish the Zamindar’s management. The plaintiff’s oral evidence goes to show that the Koppula family has always performed the duties of damakarta. The first plaintiff was sued as dharmakarta in the suit in which the sale now in question took place, and was recognised as proprietor of the village of Devarapalli by the Collector in 1890. The plaintiffs being members of the family in which the trusteeship of the temple is hereditary and in virtue of their position trustees, the first plaintiff was incompetent to delegate his office or his duties and the transfer of 1881 was therefore invalid. The Privy Council have held (Rajah Vurnah Valia v. Ravi Varma Kunhi Kutty (1) that a person holding a religious trust is incapable of transferring it and the ruling has been followed in many cases of this nature. The transfer being invalid the Zamindar acquired no title by the razinamah decree of 1881, and the plaintiffs are entitled to treat it as a nullity and to sue as damakartas.

It is then argued that the fraud with which plaintiffs charge first defendant ought to have been set forth in the petition which first plaintiff put in under Section 311 of the Code, that having had his opportunity of setting aside the sale on the ground of fraud, and failed to take advantage of it, the Court is now precluded from dealing with it. In support of this argument reliance is placed on the case of Siva Pershad Maity v. Nundo Lali Kar [392] Mahapatra (2). That case, however, is not in point, for there the question was whether a suit will lie on the ground of fraud notwithstanding the provisions of Section 244. That section has no application to the present case, as the first defendant was neither a party nor the representative of a party to the suit. The legal objection to the charge of fraud cannot therefore be sustained.

The next question is whether the fraud of the first defendant has been made out and whether under the circumstances of the case the sale should be set aside. We concede that fraud and dishonesty are not to be assumed upon conjecture, however probable the conjecture may appear, but that fraud must be affirmatively made out. The facts are as follows:—

In original suit No. 972 of 1881 the present second defendant obtained a decree against the Zamindar of Vallur (third defendant), the first plaintiff, the father of the second plaintiff, and four other members of the Koppula family, on a mortgage executed by first plaintiff as dharmakarta. The decree rendered the property liable. The village was attached and advertised for sale for 11th March 1889. The first defendant who for the last 20 years has appeared as pleader for the family of second defendant represented him in the suit, appeal and execution proceedings. He applied for and obtained (on the 11th March 1889) leave to bid for and purchase the mortgaged property on behalf of the judgment-creditor. On the day of sale the third defendant’s pleader applied for an adjournment.

---

(1) 1 M. 235.
(2) 18 C. 139.
for one week in order that he might discharge the decree debt. Without
giving notice to the other side the Munsif ordered the sale to be stayed
for eight days, and granted third defendant a certificate under Section 395.
Later on in the day the first defendant applied for a reconsideration of
the ex parte order, but consented to an adjournment for seven days.
His petition was rejected. Nothing further was done until June when
a fresh proclamation of sale was issued and the 29th July fixed for the
sale. That the second defendant was not kept informed of what was
going on is apparent from two letters which first defendant received on
his return from Madras about the 27th July. One was from second
defendant’s son-in-law asking the date of sale, and whether third defendant
had paid the money, and urging the vakil to see that some one bid on
behalf of the second defendant [393] so that she might receive the full
amount of her decree. The other was from second defendant herself,
dated 25th July, inquiring whether the sale had taken place, stating that
the money was urgently needed, and telling him to obtain permission
to bid for her. On the day of sale third defendant’s pleader applied
for an adjournment on the ground that terms of compromise were
under consideration, and that the people in the town did not know of
the auction. It is evident and, considering the denial of the first
defendant as to the receipt of a letter on this day from second defendant,
significant, that first defendant also applied for an adjournment, for the
order of the Court runs thus: “At the request of both parties the sale is
ordered to continue for five days.” On the 3rd August third defendant’s
pleader again applied for an adjournment of the sale. His application
was opposed by first defendant and the sale proceeded. First defendant
bid Rs. 1,350 on behalf of the judgment-creditor. The bidding was
then taken up by Sama Sastrulu who had been secretly instructed by first
defendant to bid for him and he bid Rs. 1,275. There were only two other
bidders, neither of whom has been called as a witness and the village was
at 7 P.M. knocked down to Sama Sastrulu for Rs. 5,010. On the 31st
August the third defendant’s pleader and on the 4th September the first
plaintiff’s pleader put in petitions objecting to the sale on various grounds.
On the 31st October first defendant as vakil for Sama Sastrulu put in a
petition maintaining the validity of the sale. Witnesses appear to have
been examined, for on the 4th November second defendant’s son-in-law
gave evidence, and stated that he had instructed first defendant to agree
to the sale being set aside as the defendants offered the decree amount.
On the 10th November the first defendant entered into correspondence
with the third defendant, who expressed great pleasure at receiving a
letter from first defendant, and invited him to come to Bezwada on the
17th and see him. The first defendant went and returned with a letter
from the Zemindar to his vakil directing him to withdraw the objection
petition. This was done, and on the 22nd November orders were passed
confirming the sale. The same day Sama Sastrulu put in a petition
stating that he had purchased on behalf of first defendant, and asking
that sale certificate might issue in first defendant’s name.

The fraud charged against the first defendant consists (1) in his failing
to act according to the instructions of his client on [394] the 3rd August,
and in his pressing on with the sale in order to purchase the village
himself, (2) in his preventing bidders from being present at the sale by
falsely representing to them that the sale had been adjourned, and (3)
in his stifling enquiry by causing the third defendant to withdraw his
petition for cancellation of the sale. The District Judge added another
charge, viz., one of making disparaging remarks to the District Munsif during the course of the sale and appears to consider it proved. It was not set up in the plaint and rests on the evidence of one witness alone. If true it should have been proved by the District Munsif who was not called. We do not consider this charge sustainable.

As to the first charge we think that it is fully made out. We see no reason to doubt that second defendant did write a letter on the 29th July to the first defendant directing him to apply for an adjournment; and we are unable to understand first defendant's absolute denial of the receipt of any such letter. As already remarked his application for an adjournment on that date is only explicable on the assumption that he had second defendant's instructions. The witnesses who prove the despatch and receipt of the letter of the 29th July also speak to the oral message of the 3rd August. They appear to us to be independent and reliable witnesses and we see no reason to suppose that they have entered into a base conspiracy to ruin the first defendant. The names of the second, third, fourth, fifth, sixth, and sixteenth witnesses who now depose as to the letter and the message are to be found in the list of witnesses put in by third defendant in support of his objection petition. It is true that in that petition the blame is not thrown upon the first defendant but upon the judgment-creditor (second defendant) who is accused of having induced the belief that the sale would be postponed, in consequence of which intending bidders stayed away. It is not apparent whether the fact that first defendant was the real purchaser was known on the 31st August by the third defendant and his legal adviser, and there is nothing on the record to throw light upon this part of the case. The tenth witness T. Venkat Reddi who drew up the petition after consulting the third defendant was not questioned as to his instructions and the third defendant has not been examined. All that can be said is that in that petition of the 31st August the judgment-creditor's promise to communicate with her pleader and get the auction stopped is distinctly set forth, and the low price at which the village was knocked down is attributed to the belief that no sale would take place having kept bidders away. To turn to the witnesses who depose on this point. There can be no doubt that the first witness, Vallabha Charu, is a dependent of the second defendant, and that she employs him to take messages, &c., is apparent from Exhibits xxxiii and xxv. The second witness, Narasimha Charu, who was present when the verbal message was delivered to first defendant is an Lcamlvr. No valid reason had been assigned why his evidence should not be relied on. The third witness, Sesha Charu, is the archaka of the temple. He would naturally be anxious that the village which forms the endowment of the temple should not pass out of the hands of the dharmakar'a, and that he at all events visited second defendant on the morning of the 3rd August with the intention of obtaining a postponement of the sale is clear from Exhibit xxiv. This is the document on which first defendant relies in support of his assertion that he was not only not directed to obtain an adjournment but actually directed to push on with the sale. The letter is written by second defendant's uncle (defendant's second witness) and we have no doubt it was concocted for the purpose of being used in this suit. The second defendant denies having given any instructions to Bashikaru in connection with the suit or sale and Exhibits xxxiii and xxxiv render probable her statement that she had ceased to employ him in her affairs. The witness admits that he lives apart from second defendant in consequence of some quarrel and that he had not second defendant's instructions to write the letter.
1892
FEB. 12.

APPEL.

LATE

CIVIL.

15 M. 389.

There is every probability that witnesses Nos. 4 and 5, P. Gopaka-
krishnamma and S. Nagabushnand, did attempt to get the sale postponed
seeing that the father of the fourth witness had spent Rs. 9,000 in erecting
a matam in the temple, and that fifth witness was at that time the
gumastah of the third defendant. It is true that the relatives of the
fourth witness have come forward in support of the second charge, but
if their evidence on that point is not reliable we are unable on that account
to discredit the evidence of the fourth witness corroborated as it is by what
seems to us unimpeachable testimony.

We are unable to agree with the Judge in thinking the second charge
satisfactorily made out. Witnesses Nos. 7, 8, 9 and 11 are related to one
another and to Gopalakrishnana. The only [396] witness whose
name is to be found in the list put in by third defendant on the 31st
August is Tatayya (seventh witness). Now if the evidence of this witness
is to be credited he in the presence of the Acting District Munsif and many
others openly charged the first defendant with having fraudulently sent
bidders away, and this only a few days after the sale. It is impossible to
believe that if this were true, such an allegation would not have found
a place in the petition in support of which seventh witness was cited
to give evidence. Although the name of the twelfth, the only apparently
independent witness, is not to be found in the said list the names of two
persons who he says were with him, but who have not been called, are
entered. The evidence given by these witnesses is evidence, which it is
very difficult to test, or to prove false, but considering it as a whole we do
not think it worthy of credit and must acquit first defendant of the second
charge.

With reference to the third charge there can be no doubt that the
Zemindar withdrew his objection petition immediately after an interview
with the first defendant, and it is difficult, if not impossible to resist the
conclusion that the withdrawal was the consequence of first defendant’s
representations. It would appear from Exhibit ix, the petition of with-
drawal, that it was the prospect of obtaining the large amount which
would remain over after discharging the judgment-debtor’s debt, that
induced the Zemindar to withdraw his opposition. The first defendant
has endeavoured to make out that it was the Zemindar who applied to
him for advice, but from Exhibit XXV it appears that it was in consequence
of a letter written by the first defendant on the 10th November, a letter
which gave great pleasure to the Zemindar, that first defendant was
invited to pay a visit to the Zemindar at Bezwada. As to what took place
at that interview we have only first defendant’s uncorroborated statement.
He returned to Masulipatam with a letter to the Zemindar’s pleader
authorising him to withdraw the petition, and when he delivered it to the
seventh witness first defendant asked the pleader to withdraw the petition
at once. It was not until after the petition had been withdrawn that first
defendant came forward publicly as the purchaser and we cannot but
look upon his conduct in connexion with the withdrawal as dishonest.

On behalf of the appellant it is argued that the decision [397] in
Alagirisami v. Ramanathan (1) covers this case, that appellant purchased
qua vakil, and that he did not occupy any fiduciary position with reference
to his client, his duty being only to see that the village did not sell for less
than the amount of her decree, and that having secured that he was at
liberty to purchase on his own behalf.

(1) 10 M. 111.
All that the Court held in the case of Alagirisami v. Ramanathan (1) was that a vakil was not an officer of Court within the meaning of Section 292 of the Code of the Civil Procedure, and that purchase of property in Court-auction by a vakil of the plaintiff was not illegal as being prohibited by Section 292.

In England the law treats the mortgagee (as to any benefit acquired by him at the expense of the mortgagor, and by taking advantage of his position as mortgagee) as one in a position analogous to that of a person standing in a fiduciary relation. Consequently the solicitor or agent to the mortgagee is under the same restrictions as the principal, so far as any acts done by them on behalf of the principal are concerned. Hence the rule that purchase at a Court-sale by a mortgagee directly or through his agents, without the leave of the Court is liable to be set aside by mortgagor. The law is the same in India (Act II of 1882, Section 90, and Section 294, Civil Procedure Code). But the English law goes further and makes a purchase by the solicitor or agent of the mortgagee for the benefit of the solicitor or agent himself voidable (Martinson v. Clowes (2), Guest v. Smythe (3)). The general rule of Equity is that a man cannot place himself in a situation in which his interest conflicts with his duty. The cases show that that principle is acted upon whenever a person occupying the position of solicitor to a mortgagee acquires a benefit, however honest the transaction may be in itself, on the ground that it is often very difficult, if not impossible, to find out how the advantage was gained (see Greenlaw v. King (4)).

There being no legislative enactment bearing on the present question, and no decided cases having been pointed out, we think that we must decide according to the rules of equity and good conscience. The first defendant had as the agent of the mortgagee or judgment-creditor obtained leave from the Court to purchase on [398] behalf of his client. We are unable to agree with Mr. Michell that he was only authorized, and required to raise the bids so as to secure the amount of the decree. We think that he was bound, if possible, to purchase the village on behalf of his client. That being so he deliberately placed himself in a position in which his interest was in direct conflict with his duty. It was his interest to get the village knocked down to himself at as low a price as possible, and his conduct showed an utter disregard of his client's interest, and of the duty which he as the vakil for the mortgagee bidding for her at the sale owed to the mortgagor. In the case above referred to (Alagirisami v. Ramanathan (1) the vakil purchased in his own name and was not instructed to purchase for his client and in these respects the present case is clearly distinguishable. In the case of Greenlaw v. King (4), the Master of the Rolls said "The question is not whether there was fraud or no fraud, but whether the Court will permit a person standing in the fiduciary and confidential situation in which B was, to make himself an interested party in the very transaction which he as trustee was bound most vigilantly to superintend." The words appear to us to apply most aptly to this case. We do not say that the pleader was under an actual incapacity to purchase, but we think that the rule which the Court should impose upon persons in his position is that the onus lies heavily on them to prove the transaction free from all suspicion, and we do not think that the first defendant has done that. He should have given his

(1) 10 M. 111.  (3) L.R. 21 Ch. D. 857.  (4) 8 Beav. 49.  (3) L.R. 5 Ch. 554.
client information that he intended to bid and have obtained the permission of the Court instead of acting, as he did, in an underhand manner.

For all these reasons we think that the sale must be set aside.

We do not understand the finding of the Judge on the 5th issue. There is evidence to show that the income of the village has been improved recently by the extension of irrigation and that an income of Rs. 1,500—2,000 may now be expected. It lay upon first defendant to prove that the sum of Rs. 5,010 was a fair price and we do not think he has shown that.

The appellant is clearly liable for mesne profits and we shall not interfere with the order of the Lower Court.

The sale amount must be refunded by the second and third defendants who are third and fourth respondents. The third defendant only will pay interest at 6 per cent. on the money drawn by him from the date of receipt to date of repayment. With this modification we confirm the decree of the District Judge and dismiss the appeal with costs.

15 M. 399.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

KRISHNAYYA (Petitioner), Appellant v. UNNISAA BEGAM
(Counter-petitioner), Respondent.* [14th December, 1891.]

Civil Procedure Code, Sections 334, 365—Execution of decree—Death of judgment-debtor after attachment and before sale—Representatives not joined.

A decree-holder attached land of the judgment-debtor in execution of his decree and a sale proclamation was made; the judgment-debtor died and his legal representatives were not brought on to the record, but the execution proceeded to sale:

Held, that the sale should be set aside.

[N.F., 23 C. 696 (639); F., 22 M. 119 (124); Appr., 19 M. 219 (222); R., 19 B. 276 (281); 21 B. 424 (430); 31 M. 611=114 Ind. Cas. 1059=19 M.L.J. 671=M.L.T. 266; 20 P.R. 1898.]

APPEAL under Letters Patent, Section 15, against the judgment of Shephard, J., on civil revision petition No. 92 of 1889.

The above-mentioned petition was preferred under Civil Procedure Code, Section 622, and prayed the High Court to revise the proceedings of G. T. Mackenzie, District Judge of Krishna.

The decree-holder in original suit No. 391 of 1882, on the file of the District Munsif of Bezwa, attached land belonging to the judgment-debtor on 9th September 1887; the sale proclamation was ordered on 27th September 1887; the judgment-debtor died shortly afterwards, but the execution proceeded to sale. The daughter of the judgment-debtor claimed to be entitled to the land in question, and presented a petition to the District Munsif, praying that the sale, which was alleged to have fetched a very low price, be set aside. The District Munsif rejected this petition, but on appeal the District Judge made an order setting aside the sale, which was the order sought to be revised.

The District Judge expressed a doubt whether the provisions in the Civil Procedure Code regarding the death of a party [400] applied

to execution proceedings, as to which he referred to Gulabdas v. Lakshman Narkar (1), Dulari v. Mohan Singh (2), but he considered that the case came within the rule in Ramasami v. Bagirathi (3), on the authority of which he made an order as above.

The auction purchaser preferred the above petition, which came on for disposal before SHEPHERD, J.

Subbayya Chetti, for petitioner.
Respondent was not represented.

SHEPHERD, J.—This is not a mere case of irregularity in the conduct of the sale. Here the judgment-debtor was no longer alive at the date of the sale, and no representative had been placed on the record. The decision in Ramasami v. Bagirathi (3) is binding on me, notwithstanding the judgment in Stowell v. Ajuthia Nath (4). I must dismiss the petition.

The auction-purchaser preferred this appeal against the judgment of SHEPHERD, J.

Subbayya Chetti, for appellant.
Respondent was not represented.

JUDGMENT.

We agree with the learned Judge that the decision in Ramasami v. Bagirathi (3) was right, and see no reason why we should refer this case to the Full Bench because of the decision in Stowell v. Ajuthia Nath (4). In that case the contest was between two mortgagees, the second mortgagee having been the first purchaser. After the sale to him the first mortgagee attached and brought the property to sale, and the mortgagee died prior to the sale. The second mortgagee, however, purchased his interest subject to the first mortgagee’s claim, and the death of the original owner could not affect the proceedings in any way. The remark of Oldfield, J., was not concurred in by Straight, J., and both Judges were agreed that the question whether the sale might be voidable at the instance of the legal representative did not arise for decision.

The property might be liable in the hands of the legal representatives, but the right, title and interest of a deceased person could not be sold. The sale without notice to him of property belonging to a person not a party to the suit was a material irregularity and must necessarily cause him substantial injury.

The appeal is dismissed.

15 M. 401.

[401] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

UKKU (Plaintiff), Appellant v. KUTTI AND ANOTHER (Defendants Nos. 1 and 2), Respondent.* [35th February, 1892.]

Malabar law—Ottidar’s right of pre-emption—Suit to redeem kanom.

In a suit to redeem a kanom of 1871, it was found that the plaintiff’s predecessor-in-title had purchased the jenni title to the land in question at a sale, held in execution of a decree which was binding on the jenni’s tarwad; but it appeared that the defendant (the kanomdar) held an otti on the land, dated 1870, and had not waived his right of pre-emption as ottidar. A decree was

* Second Appeal No. 961 of 1891.
passed providing for payment by the defendant of the purchase money to the
plaintiff and the execution by the latter of a conveyance, and in default for
redemption by the plaintiff on his paying to defendant the amount of the otii:

Held, that the decree was right.

[Apr., 20 M. 306 (310); R., 29 M. 388 (345) = 16 M.L.J. 395 = 1 M.L.T. 153; 30 M.
388 (392) = 17 M.L.J. 329 = 2 M.L.T. 354; Expl., 24 M. 449 (465).]

SECOND Appeal against the decree of J. Fiddian, Acting District
Judge of North Malabar, in appeal suit No. 479 of 1890, reversing the
decree of V. Kela Eradi, District Munsif of Pynad, in original suit
No. 168 of 1890.

Suit to redeem a kanom, dated 1874. It was alleged in the plaint that
the land subject to the kanom was the jenu of one Ramothy Kitau who
demised it on kanom for Rs. 100 to the defendant in 1874, and that the
interest of Ramothy Kitau was sold in execution of a decree passed
against him in 1880 and purchased by the anandranav, (since deceased) of
the plaintiff. The defence was that the land was the jenu of the tarwad
of Ramothy Kitau who demised it to the defendant on otii for Rs. 325
in 1870, a further sum of Rs. 400 being then advanced by the defendant;
that the decree above referred to was not binding on the tarwad of the
judgment-debtor, and that the purchase by the plaintiff's anandranav was
not binding on the defendant who had the right of pre-emption as an
ottidar.

The District Munsif held that the execution sale was binding on the
tarwad of the judgment-debtor, but he found that the defendant held an
otti on the land as alleged by him and held that [402] the plaintiff had
accordingly obtained no valid title against him since he had not waived
his right of pre-emption as ottidar. Upon these findings the District Munsif
dismissed the suit.

On appeal the District Judge who expressed no dissent from the
findings of fact recorded by the District Munsif reversed his decree. He
said—

"I find that defendant is entitled to receive the otii amount,
Rs. 325, and the amount of further charge, viz., Rs. 100.

"The equitable course to pursue under these circumstances seems to
be to allow defendant an opportunity to pay to plaintiff the auction
price and take a conveyance, and on his failing to do so, to allow
plaintiff to redeem the suit land on payment of Rs. 425, and I accordingly
reverse the Lower Court's decision and decree that on defendants paying
of this date Rs. 96, the auction price of item
No. 2 in Exhibit A, plaintiff shall convey his interest to defendant and
that on defendants failing to pay the above amount in the time specified,
plaintiff shall recover the suit land on payment to defendant within
"four months from this date of Rs. 425, with interest at 6 per cent. on
Rs. 100 from 6th March 1869 till date of payment."

The plaintiff preferred this second appeal and the defendant filed a
memorandum of objections to the decree so far as it was against him.

Sankaran Nayar, for appellant.
Naryana Rao, for respondent No. 1.

JUDGMENT.

The Judge finds that the sale is valid, but that the purchaser is under
an obligation to convey the property to defendant on the latter paying the
purchase money in the exercise of his right of pre-emption. This is in
accordance with the principle laid down in Vasudevan v. Keshavan (1)

It is then argued that though the defendant may enforce his right of
pre-emption by instituting a suit, he cannot resist a suit for redemption on
this ground. This is opposed to the decision in Kanharankutty v. Uthotti (2)
and Cheria Krishnan v. Vishnu (3).

Whatever right he can assert as plaintiff is also available to him as a
ground of defence.

The appeal therefore fails and is dismissed with costs.

[403] As regards the memorandum of objections it is argued that the
suit should have been dismissed and that the decree passed by the Judge is
bad in law. But the decree passed appears to us to be just and proper.
It gives effect to the right of pre-emption and in case of this right not
being exercised within a given time allows redemption. In Vasudevan
v. Keshavan (1) this point was raised and considered.

We also disallow the objections with costs.

15 M. 403—1 M.L.J. 538.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

CHATHAPPAN (Counter-petitioner), Appellant v. PYDEL (Petitioner),
Respondent.* [6th April, 1891.]

Civil Procedure Code, Sections 13, 206—Res judicata—Amendment of decree—Subse-
quently execution.

In a suit for money against the karnavan and two anandrvans of a Malabar
tarwad, the judgment decreed a "deed for the plaintiffs as prayed," but the
decree ordered payment by one anandrvan only. Property of the tarwad was
attached and sold. The decree was then amended and brought into conformity
with the judgment. Other members of the tarwad sought to have the sale set
aside, but it was found that the judgment debt had been contracted for proper
tarwad purposes, and that suit was dismissed. Application was now made for
the attachment of other property of the tarwad in further execution of the
amended decree:

Held, that the members of the tarwad were not entitled to contend that the
decree was not binding on them that matter being res judicata.

Query:—Whether the rule in Sundara v. Subbanna (4) as to the amendment
of decrees is correct.

[R., 18 M. 214 (215); 8 O.C. 37 (40).]

APPEAL against the order of J. P. Fiddian, Acting District Judge of
North Malabar, on civil miscellaneous petition No. 536 of 1889, reversing
the order of A. Chattu Nambar, District Muosif of Nadapuram, on
miscellaneous petition No. 1272 of 1889.

The facts of the case are stated above sufficiently for the purposes of
this report.

The petitioner before the District Muosif was the decree-holder and
he applied for the attachment and sale of property of the judgment-
debtors tarwad in execution of his decree. The District Muosif dismissed
the application after referring to Varanakot Narayanan Nambrui

* Appeal against Appellate Order No. 26 of 1890.

(1) 7 M. 309. (2) 19 M 490. (3) 5 M. 198. (4) 9 M. 354.
The District Judge reversed the order of the District Munsif on the authority of Sundara v. Subbanna (5) and granted the application of the decree-holder.

The counter-petitioner preferred this appeal.


Sankaran Nayar for respondent.

JUDGMENT.

The question whether the decree, as amended, is binding on the appellant, was decided in the affirmative as between them and the decree-holder in Pydel v. Chathappan (13). The matter is, therefore, res judicata, as it is the same decree which is now under execution, though the property attached is different. The decision, Parthasaradi v. Chinnakrishna (14), does not apply. It has been further argued that the decree amended was the final decree passed in the original suit No. 162 of 1878, and the decree of the Appellate Court was the one which should have been amended. We are referred to several decided cases in support of this contention, and especially to the decision, Muhammad Sulaiman Khan v. Muhammad Yar Khan (4), in which the decision in Sundara v. Subbanna (5) was dissented from.

[405] Were the question not res judicata for the purposes of the execution of the amended decree we should have been inclined to refer to the Full Bench the question of the correctness of the ruling in Sundara v. Subbanna (5).

We must dismiss the appeal, but under the circumstances we will not make no order as to costs in this Court.

ORIGINAL CIVIL.

Before Mr. Justice Wilkinson.

AZIMULLA SAHER (Plaintiff), v. SECRETARY OF STATE FOR INDIA (Defendant). [16th March, 1892.]

Costs of Government Solicitor—Taxation of, against unsuccessful litigant.

The Government Solicitor, who receives a monthly salary as such, receives no further payment from Government in respect of any costs of litigation to which

* Civil Suit No. 128 of 1891.
Government is a party, except "out fees" or actual payments made by him on behalf of Government, and pays no fees when he instructs the Advocate-General; but, under his arrangement with Government, he is entitled to retain the costs decreed to Government, if recovered, and he then pays to the Advocate-General the fees of counsel allowed by the taxing officer:

Held, that when a suit against Government is dismissed with costs, costs should be taxed in the usual way, and the taxing officer cannot enquire into the arrangement as to remuneration of its law officers by Government.

APPLICATION for review of the taxation of the defendant's costs in reference to certain items which had been allowed by the taxing officer in civil suit No. 128 of 1891. That was a suit brought by the plaintiff against the Secretary of State for India in Council in which a decree had been passed whereby it was dismissed with costs. The items in question related to the fees of the Advocate-General who appeared, and the costs of the Government Solicitor who acted for the Secretary of State.

Mr. Norton, for the plaintiff.

The principle which we contend for is this:—That where Government is represented by the Government Solicitor, Government is entitled to recover no costs in case the other side is unsuccessful, [406] except in respect of such sums as are actually paid by the Government Solicitor.

We admit that, as regards any sums actually paid by the Government Solicitor on behalf of Government and, as regards any liabilities incurred by Government to their solicitor in the matter of the suit, Government would have a right on taxation to recover them from the plaintiff, upon the footing that the Solicitor might sue Government to recover them. But in respect of costs which do not come under either of these heads, there can be no taxation or recovery of costs in any suit where Government is a successful party. There is a contract made between Government and the Government Solicitor to pay the latter so much a month, litigation or no litigation, to keep his services at the disposal of Government and to do all their work. Government further undertaking to pay him any sums actually expended by him as out-fees. The Advocate-General is in a position precisely similar to that of the Government Solicitor. He is bound to undertake and conduct in the City of Madras all civil litigation, in which he may be required to appear on behalf of Government. The fees are not paid to either unless and until the Government succeed, and then they are not paid by Government. It is only after costs are recovered from the unsuccessful party that fees are received by the law officers of Government. The principle involved and which governs the awarding of costs, I submit is this—costs are not given by way of penalty as against an unsuccessful party nor by way of bonus to the successful party. Costs are the actual amount of loss in money computed according to the rules of taxation, to which the successful party has been put by his opponent, and nothing more or less. The test then in this case is—what is the exact sum of money which represents the loss of the defendant? If this is the right view it is illegal that Government should recover from the plaintiff sums of money, practically by way of fine, which they have never paid and are not bound to pay to the Government Solicitor or the Advocate-General.

It must be remembered that the Government law officers are not retained in a case. The salary given them is not a retaining fee, but payment for the work to be done by them. If it were paid merely for the purpose of retaining them, it would be another matter. The Government Solicitor cannot turn round and say to the unsuccessful plaintiff "I
"am going now to charge you, not upon the contract as it really exists as between the Government and myself, but upon some suppositional contract which does not exist, but which puts the Government and me, for the purposes of this suit, upon the footing of client and attorney." What fractional part of the time that he is bound to give to Government, does the Government Solicitor's work in any particular case represent? I contend that the Government Solicitor cannot recover any sum other than that which represents a payment, which Government are bound to recoup. Re Gedye (1), Gambrell v. Earl Falmouth (2), Barnes v. Atwood (3). The test is clearly laid down in Harrold v. Smith (4), viz., that the actual pecuniary disadvantage to which the person who has been successful has been put is that which determines the question of the relationship between solicitor and client. Thus in the case of a contract between a vakil and his client for the payment of a specified amount, a decree for costs would carry no more than such fixed sum, even though the costs allowable exceed it in amount. The Statute 18 and 19 Vic., c. 90, provided for the recovery of its costs by Government, and that the money recovered should be paid into the Exchequer; it was not made a present of to the solicitor, but went into the Consolidated Fund, out of which the Crown officers are paid.

The Advocate-General (Hon. Mr. Spring Branson) contra.

The High Court rules relating to vakils' costs, apply only to pleaders and vakils and not to attorneys. It would be impossible for an attorney to give such a certificate as is required of a vakil. A vakil is not paid for each bit of work done by him, and where he undertakes to accept from his client a smaller sum than would ordinarily be allowed on taxation he can only recover the amount for which he contracted.

In re Gedye (1) there was contract with a solicitor, and as between the attorney and client the remuneration of the former was necessarily governed by that contract.

In Gambrell v. Earl Falmouth (2) again, there was a contract. In that case a contract was entered into with one and the same attorney and in relation to one transaction by two clients, the parties thereto, and the Court held, in reviewing the taxation, that the attorney being but one, there was but one contract and one set of costs.

In Barnes v. Atwood (3) there was a fraud upon the taxing master who was misled thereby. With regard to Harrold v. Smith (4), it is necessary to remember that it was held for some time that where the Crown was a party it neither paid costs nor received them, but this view of the rights and liabilities of the Crown in the matter of costs changed, and the Courts held that costs could be recovered by the Crown in the same way as by private individuals. See also Attorney-General v. Corporation of London (5): It is said that costs are not a penalty. But the giving of costs is entirely in the discretion of the Court. Even where a plaintiff is successful he may be deprived of his costs. What is that but a penalty?

As to the arrangement between Government and their law officers, see Morgan and Wurtzburg, p. 417. In Raymond v. Lakeman (6) the taxing master allowed the company their solicitors' costs, notwithstanding that those solicitors were employed by them on a fixed salary. On review of taxation the Master of the Rolls held that the defendant could not have the benefit of the arrangement between the company and its

---

(1) 29 Beav. 347. (2) 5 Ad. & E. 403. (3) 5 C. B. 164.
(4) 6 Jurist N. S. 254. (5) 19 L.J. N.S. Ch. 314. (6) 34 Beav. 594.
standing solicitors. In the cases cited on behalf of the plaintiff here, the contest was between attorney and client. The client may successfully set up a contract controlling and limiting his liability to pay his solicitor's costs, but it is not open to his opponent to set up such contract when costs are taxed under the decree awarding them. In England the Statute 18 and 19 Vic., c. 90, declares that costs payable to the Crown shall, when recovered, be paid into the Consolidated Fund. Here, in India, Government choose to allow their law officers to receive, in addition to a salary which is in the nature of a retaining fee, the costs ordinarily allowed to solicitor and counsel. When the Accountant-General in 1877 demanded that all costs awarded to Government and recovered should be paid into the Treasury, it was pointed out by the Government Solicitor that that was not the practice, but that, on the other hand, it was a recognised thing, sanctioned by the Supreme Government, that the fees marked by the Government Solicitor on the brief of the Advocate-General and the costs of the Government Solicitor should be retained by those officers.

In proceedings of Government, dated 18th December 1877, No. 2945, paragraph 2, it is stated that "it was not the intention of Government in G.O., dated 20th October 1877, No. 2553, to deny the claim of their law officers to their fees in any suit where costs are awarded to the Government against the opposite parties and are recovered. The contrary practice is distinctly sanctioned in the orders of Government of India quoted in the letter already referred to and is shown by two letters handed in by him to prevail both at Calcutta and Bombay."

Whether the Government have to pay any fees whatever to their law officers or not is a matter which does not concern the other side. The plaintiff has no right to set up or the taxing officer to enquire into any arrangement between Government and their law officers relating to fees. Section 256 of the Civil Procedure Code says "all costs incurred." "Incurred" and "expended" are not synonymous terms. The contention that the costs of the Advocate-General and the Government Solicitor have not been "incurred" by Government is based on the erroneous assumption that the party liable to pay costs can enquire into, and take advantage of the arrangement existing between Government and their law officers.

Mr. Norton.—Section 256 of the Civil Procedure Code lays down the very test for which I contend—namely "all costs incurred." I say that the Government are not liable to their law officers for costs of attorney and counsel, therefore, as to such costs Government has "incurred" no liability, and consequently cannot recover anything. Has the Government Solicitor incurred any professional liability to pay the Advocate-General? If he paid that officer counsel's fees, could he recover them from Government? Could he maintain a suit against Government for the recovery of his own costs if not paid by Government?

JUDGMENT.

Wilkinson, J.—This is an application to review the taxation of the defendant's bill of costs in the above suit, to set aside the allocation of the taxing officer, and to lay down the mode in which and the principle on which the bill should be taxed.
The suit was one by a private individual against the Secretary of State. At the first hearing the Secretary of State was represented by the Advocate-General instructed by the Government Solicitor, and the suit was dismissed, the plaintiff being ordered to pay the costs of the Secretary of State.

The taxing officer’s notes show that before him the plaintiff objected to defendant’s bill of costs on the ground that defendant had incurred no costs, “unless for the time of their officers” (whatever that may mean). The Government Solicitor replied that the taxing officer was not at liberty to go behind the order to tax, that costs were given as a penalty, and that it had for more than thirty years been the invariable practice of the Court to tax Government bills of costs in the same way as other bills of costs. The taxing officer accepted the plea of the Government Solicitor and taxed the costs as between party and party.

Mr. Norton appears for the plaintiff and argues that as Government pay the Government Solicitor a fixed monthly salary to do its legal work, the Secretary of State, the defendant in this case, cannot be said to have incurred any costs that as the Government Solicitor cannot recover from the Government the items mentioned in the bill of costs: Government cannot recover them from the plaintiff, and that the principle upon which the Court ought to proceed in fixing costs is to ascertain what was the actual dammification caused to the successful party and to award to him the sum which he is actually out of pocket. Mr. Norton’s argument proceeds on the assumption that the plaintiff is entitled to the benefit of any arrangement entered into by the Government with the solicitor, whose services the Government see fit to retain by the payment of a monthly salary. I do not think that he is. The principle applicable in cases like the present appears to be that laid down in the case relied on by the Advocate-General—Raymond v. Lakeman (1). In that case the taxing master allowed a company which employed standing solicitors as a fixed salary such costs as the company would be bound to pay to their solicitors. It was argued before the Court that as the standing solicitors were paid a fixed salary, the company had no right to charge the unsuccessful party more than their own standing solicitors could have charged them. The Master of the Rolls maintained the order of the taxing master, holding that the unsuccessful party could not have the benefit of any private arrangement between the solicitor and the company as to costs. The case appears to me all fours with the present case. The unsuccessful party, the plaintiff, has been ordered to pay to the defendant the costs [411] incurred by him. The defendant asserts that costs have been incurred by the employment of a solicitor to receive the summons, to instruct counsel, put in written statement, etc. It is not denied that the costs, which the present defendant claims to recover from the plaintiff, are such as any other defendant must have incurred in defending the suit and would be bound to pay to his solicitor. But it is argued that unless the Government Solicitor proves that he can recover the costs from Government, Government cannot recover them from plaintiff. This is entirely beside the question, which is one between plaintiff and defendant, not one between plaintiff and the Government Solicitor as Mr. Norton suggests. The plaintiff has no right to assume that the defendant has not expended those sums, nor is he entitled to call upon the defendant to prove the nature of the contract between him.
and his solicitor. The case of *Barnes v. Attwood* (1) is not really in point, as there the taxing officer had been induced by false affidavits to allow a larger sum as expenses to commissioners than had actually been paid. It is true that Mr. Norton’s whole argument proceeded on the assumption that the bill of costs put in by the defendant in this case represents absolutely fictitious transactions as between the Government Solicitor and the Government. But it is unnecessary to consider that question. The only question is, has the defendant incurred any, and if so, what costs? The answer is, the defendant has employed a solicitor, who has done certain acts and is entitled to charge for his time and work, and the defendant is liable to remunerate the solicitor. Whether Government chooses to do by a fixed salary and whether the costs it recovered go to the Government Treasury or into the solicitor’s pocket, is not a matter into which the taxing officer is competent to enquire.

The petition must be dismissed with costs.

*Branson & Branson*, attorneys for plaintiff.

*Barclay*, Government solicitor.

---

**[412]** CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.*

**KASTURI (Defendant No. 2), Appellant v. VENKATACHALAPATHI (Plaintiff), Respondent.* 18th and 23rd February, 1892.

**Evidence Act—Act I of 1872, Section 115—Estoppel—Civil Procedure Code—Act XIV of 1892, Section 237—Prior encumbrance—Notice to executing decree-holder.**

A hypothecation bond executed in 1876 by the husband (deceased) of defendant No. 1 to secure a debt due by him to a partner of the plaintiff was assigned to the latter in 1888. In 1892 the plaintiff who was aware of the existence of this instrument, brought the land comprised in it to sale in execution of a money decree obtained by him against the executant, and defendant No. 3 became the purchaser. At the time of the sale the plaintiff gave no notice of the existence of the encumbrance. In a suit to recover the principal and interest due on the hypothecation bond:

*Held,* that the plaintiff was estopped from recovering the secured debt against the land.

[**F.**, 5 C.W N. 497 (502); U.B.R. (1911) 2nd Qr., 92: R., 40 C. 173 (184) = 16 C.L.J. 202 = 17 C.W N. 197 = 16 Ind. Cas. 365; 7 C.P.L.R. 15 (16); 2 N.L.R. 103 (107); 11 O.C. 206 (207).]

SECOND appeal against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 474 of 1890, affirming the decree of A. Kuppusami Ayyangar, District Munsif of Kumbakonam, in original suit No. 449 of 1889.

Suit to recover principal and interest due on a hypothecation bond, dated 20th August 1878, and executed by the husband (deceased) of defendant No. 1 in favour of one Aundi Chakrapani Chetti, who transferred it to the plaintiff by an instrument, dated 23rd June 1888. The plaintiff’s assignor, who was his partner, was not joined in this suit.

It appeared that the plaintiff sued the late husband of defendant No. 1 in original suit No. 556 of 1878 in the Court of the District Munsif

---

* Second Appeal No. 675 of 1891.

(1) 5 C.B. 164.
of Kumbakonam and obtained a personal decree against him, in execution of which he brought the land comprised in the above-mentioned hypothecation bond to sale in 1892, and defendant No. 2 then became the purchaser, and was now in possession of it. The plaintiff at that time was aware of the[413] existence of the hypothecation bond, but he gave no notice of it at the time of sale.

The District Munsif passed a decree for the plaintiff declaring the amount of the decree a charge on the land in the possession of defendant No. 2, and the District Judge on appeal affirmed this decree, referring to the fact that at the time of the sale the High Court had made no rules under Civil Procedure Code, Section 287: and the plaintiff preferred this second appeal.

Parthasaradhi Ayyangar, for appellant.
Ramasami Mudaliar, for respondent.

JUDGMENT.

There can be no doubt that if plaintiff himself had been the holder of the prior encumbrance when he brought the property to sale, he would be subsequently estopped from enforcing the lien of which he had given no notice. See Agarchand Gumanchand v. Rakhma Hanmand (1), followed by this Court in Jaganathav. Gaangi Reddi (2) Nursing Narain Singh v. Roophoobur Singh (3), Tinnappa v. Murugappa (4). The decision in Banwari Das v. Muhammad Mashiat (5) is not in conflict with these decisions, since in that case it was not attempted to be shown that the provisions of Section 287 of the Code of Civil Procedure had not been complied with (vide judgment of Edge, C. J., page 702). All that was urged was that plaintiff as a bidder had not personally announced his encumbrance.

It is urged in this suit that it was not plaintiff but Aundhi Chakrapani Chetti who held the prior mortgage. It is admitted, however, that this man was plaintiff’s partner, and that plaintiff was aware of the existence of the prior mortgage of which he took an assignment some years after the sale.

It appears to us to be immaterial that a suit by Chakrapani Chetti himself might have been successful. The ground of decision is that it was plaintiff himself who led intending purchasers to believe that the property was offered for sale free of encumbrances, and that plaintiff by concealing the existence of a lien, of which he was aware, led the purchaser to pay full value for the property. He is, therefore, estopped from now denying that the sale took place free of encumbrances (Section 115, Indian Evidence Act). Under Section 237 of the Code of Civil Procedure [414] the plaintiff as execution-creditor was bound to specify the judgment-debtor’s interest so far as he had been able to ascertain it. Tinnappa v. Murugappa (4).

On this ground the decrees of the Courts below must be reversed so far as second defendant is concerned and the plaintiff’s suit dismissed with costs throughout.

(1) 12 B. 678.
(2) 15 M. 903.
(3) 10 C. 609.
(4) 7 M. 107.
(5) 9 A. 690.
HAYES v. CHRISTIAN * [24th February and 1st March, 1892.]

Indian Penal Code—Act XLV of 1860. Section 499—Defamation—Privilege of party—
Appeal from the Resident’s Court, Bangalore—Limitation.

A person who was being defended by counsel on a criminal charge interfered
in the examination of a witness and made a defamatory statement with regard
his character. He was now charged with defamation and convicted in the
Resident’s Court at Bangalore.

On an appeal to the High Court, preferred more than sixty days after the
conviction:

Held, (1) that the appeal should be admitted;
(2) that the occasion was not privileged and the words complained of
were uttered maliciously and the conviction was right.

[R., 17 B. 573 (577); 36 M 316 (226) = 14 Ind. Cas. 659 = 11 M. L. T. 416 = 13 Cr. L. J.
275 = 23 M. L. J. 39 = (1912) M. W. N. 476; 3 L. B. R. 555 (272); 1 Weir
559 (591)].

APPEAL against the judgment and sentence of the Assistant to the
Resident at Mysore and Justice of the Peace for the Town of Bangalore in
Criminal Revision Case No. 1 of 1891.

The facts of the case are stated in the judgment of the High Court
sufficiently for the purposes of this report.

The sentence appealed against was pronounced on 10th October 1891
and this appeal was filed on 6th January 1892.

The appeal having come on before a single Judge for admission, it
was referred to a Bench of two Judges with reference to the question as
to whether or not it was barred by limitation.

It then came on before Collins, C. J., and Parker, J.

[S 415] Sundara Ayyar, for appellant, contended that the Criminal
Procedure Code had no application to this appeal, which was preferred
to the High Court under the Extradition Act. He referred to Gazette of
India notifications No. 2252 I, dated 7th August 1883, and No. 178 J,
dated 23rd September 1874, and cited Ward v. The Queen (1).

Their Lordships passed an order admitting the appeal.

Sundara Ayyar, for appellant.
Complainant in person.

JUDGMENT.

The appellant, Mr. J. W. Hayes, a Barrister by profession, appeals
against a conviction for defamation under Section 500 of the Indian Penal
Code.

It appears that on the 2nd September 1891, Mr. Hayes was prosecuted
for defamation, the complainant being Mr. Christian, who is described as
being a Minister of the Gospel. Mr. Hayes was represented by counsel,
and when Mr. Christian was in the witness box Mr. Hayes said to him
"you cheated people at Hyderabad and had to leave the ministry." For
using this expression Mr. Hayes was prosecuted before the Court of the

* Criminal Appeal No. 11 of 1892.

(1) 5 M. 39.
first Assistant to the Resident of Mysore and convicted under Section 500 of the Indian Penal Code. Mr. Hayes through his counsel admitted that he used the defamatory words complained of, but contended that, being an accused person, he was privileged. It is argued before us that an accused person is absolutely privileged as to any statement he makes or any words that he utters during the progress of the case, and that no proceeding can be taken against him either civilly or criminally for any defamatory statement that he makes, and a number of English cases are cited in support of that proposition, Munster v. Lamb (1) being especially relied on. The utmost extent to which the English cases go is that "No action of libel or slander lies whether against Judges, counsel, witnesses, or parties for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognized by law." See Dawkins v. Lord Rokeby (2). Although we are not bound to follow the English cases cited, yet we fully recognize the great importance of allowing the utmost freedom to counsel, parties, and witnesses during the progress of a case, and if the counsel for Mr. Hayes, or Mr. Hayes if he [416] had been defending himself, had asked Mr. Christian in cross-examination whether in consequence of cheating people at Hyderabad he had not been turned out of the ministry, the question could not have been made the subject of a civil action, nor would any criminal proceeding lie for defamation under Section 500 of the Indian Penal Code. It must be borne in mind that in India Act I of 1872 gives the Court power to decide whether the witness shall be compelled to answer questions affecting the credit of such witness by injuring his character, and the Court has also power to prevent any question being put to a witness merely for the purpose of giving him annoyance. See Sections 146 to 152 of Act I of 1872.

In the case before us it is not contended that the words are true, and it appears that Mr. Hayes at the time he uttered the words was not defending himself, neither was he called upon by the presiding Magistrate to answer or explain the charge made against him. Mr. Hayes, therefore, although appearing by counsel, chose to interfere during the examination of a witness, and to make grossly defamatory remarks respecting the character of such witness, it cannot, therefore, be said that Mr. Hayes used the words complained of in the ordinary course of any legal proceeding. We think, therefore, that even under the English cases cited the occasion on which Mr. Hayes used the words were not privileged. Mr. Hayes is, however, charged under Section 500 of the Indian Penal Code, and we hold that the words are clearly defamatory, and, therefore, fall within the section. We hold further that the occasion was not privileged, that the words were not uttered in good faith but maliciously, and that Mr. Hayes is not protected by any of the exceptions to Section 499 of the Indian Penal Code. We therefore dismiss the appeal and confirm the conviction and sentence.

(1) L.R. 11 Q.B.D. 588.
(2) L.R. 8 Q.B. 255.
SAMYATHA v. MUTHAYYA

18 M. 417 = 2 M.L.J. 119.

[417] APPELLATE CIVIL.
Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SAMYATHA (Defendant No. 2), Appellant v. MUTHAYYA (Plaintiff), Respondent. * [29th February, 1892.]

Limitation Act—Act XV of 1877, Section 22—Amendment of plaint.

The creditor of a deceased trustee of a temple sued two persons, as his successors in office, to recover the amount of the debt. One of the defendants died; the other, who was the brother of the deceased, pleaded that other persons were joint trustees with him, and should have been impleaded with him, he also alleged that the debt in question was a private debt, and had not been incurred by the deceased as a trustee. The persons named were joined as defendants, and they repeated the above allegation. The plaintiff, thereupon, amended the plaint and prayed for a personal decree against the original surviving defendant, and the others were removed from the record. The amendment took place more than three years after the date when the debt was payable, but the suit had been instituted within that period:

_Held, that the claim was not barred by limitation._

[F., 7 C.W.N. 575 (578); 7 C.W.N. 817 (821).]

SECOND appeal against the decree of T. Ramasami Avyangar, Subordinate Judge of Nelloreapatam, in appeal suit No. 463 of 1890, confirming the decree of T. Ramasami Ayyar, District Munsif of Tirutturundi, in original suit No. 80 of 1889.

Suit for money payable on 30th May 1886 to the plaintiff by a trustee of a temple now deceased. Defendants Nos. 1 and 2 were impleaded as his successors. Defendant No. 1 died. Defendant No. 2, the brother of the deceased debtor, pleaded that there were other trustees of the temple who should be joined, as defendants. These persons were joined, and they pleaded that the debt had been incurred by the deceased in his individual capacity, and not as a trustee of the temple. The plaintiff then, _viz.,_ on 8th October 1889, amended the plaint and prayed for a personal decree against defendant No. 2, and the other defendants were removed from the record.

The Lower Courts passed decrees in favour of the plaintiff, and the defendant preferred this second appeal.

Mr. Subramanyam, for appellant.
_R. Subramany Ayyar_, for respondent.

JUDGMENT.

[418] The only question is whether the suit is barred by limitation. The plaintiff brought the suit against first and second defendants as representatives of one Kailasanadha (Pandara Samadhi) the adhinastam or trustee of the temple at Vedaranyam, stating that the money was due on account of certain land purchased by Kailasanaadha for the benefit of the temple. First defendant having died, the suit was proceeded with against second defendant alone as trustee of the temple. He pleaded that there were also other trustees who should be included as defendants, alleging, at the same time, that the property was purchased by Kailasanadha for the benefit of his own family. Under orders of the District Munsif, the others named by second defendant were made co-defendants. They also pleaded that the property was bought by Kailasanadha for his own benefit, and not for the temple. Thereupon plaintiff, with the permission of the

* Second Appeal No. 1085 of 1891.
Court, amended the plaint and prayed for defendants Nos. 3 to 8 being removed from the suit, and for a personal decree against second defendant alone.

Second defendant then contended that the suit, as amended, was time barred, and relied on Section 22 of the Limitation Act.

We observe that the second defendant was a party on the record from the very commencement, and the question, whether the amendment ought to have been allowed or not, is not an objection taken.

The effect of the amendment was not to add a new person as defendant, but to alter the ground on which a person, already a defendant, was to be held liable, plaintiff accepting the defendant’s contention that the purchase had been made on behalf of his own family, and not on behalf of the temple.

Having regard to Section 22, we are of opinion that it is not intended to apply to a case in which the ground on which the original defendant is sought to be made liable is merely shifted, without new persons being included as defendants, the intention being not to take away from a person newly brought in as a defendant the benefit which the Act would give him were a suit instituted against him on that date. The decision in Ganpat Pandurang v. Adarji Dadabhau (1) tends to support this view, see page 321 of the Report.

We dismiss this appeal with costs.


[419] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KARUPPASAMI (Plaintiff), Petitioner v. PICHU AND ANOTHER (Defendants), Respondents.* [9th September, 1891 and 1st March, 1899.]

Succession Certificate Act—Act VII of 1889, Sections 4, 6—Suit by assignee of a debt due to a deceased creditor.

One Suprammal lent a sum of money to the defendant and died, leaving an adopted son, who assigned the debt to the plaintiff. Neither the plaintiff nor his assignor obtained a certificate under Act VII of 1889. The plaintiff now sued to recover the amount of the assigned debt:

Held, that the plaintiff was not entitled to recover, no certificate having been obtained under Act VII of 1889.

PETITION under Provincial Small Cause Courts Act of 1887, Section 25, praying the High Court to revise the proceedings of V. P. de Rozario, Subordinate Judge of Palghat, in small cause suit No. 879 of 1889.

The facts of this case appear sufficiently for the purpose of this report from the judgment of the High Court.

The Subordinate Judge dismissed the suit and the plaintiff preferred this petition.

Sankaran Nayar, for petitioner.
Desikachariar, for respondents.

JUDGMENT.

This is a petition presented under Section 25 of Act IX of 1887. As plaintiff in small cause No. 879 of 1889 on the file of the Subordinate

* Civil Revision Petition No. 229 of 1890.

(1) 3 B. 312.
Court at Palghat, petitioner sued to recover from the first counter-petitioner money lent to the latter by one Suppammal since deceased. His case was that, after Suppammal’s death, her adopted son, second counter-petitioner, assigned the debt to him, but it appeared that neither the assignee nor the assignor had obtained a certificate under Act VII of 1889. The Subordinate Judge called upon the petitioner to produce a certificate and granted him two months’ time for doing so. Petitioner, however, failed to produce the certificate, and contended that, as the debtor had agreed to pay the debt to him, he was entitled to recover it without producing a certificate. The Subordinate Judge disallowed the contention and dismissed the suit with costs. It is argued before us that Act VII of 1889 is applicable only to the representatives of deceased persons, and not applicable to their assigns. We think the decision of the Subordinate Judge is correct. It is not inconsistent with the language of Section 4 of Act VII of 1889, for a person claiming a debt under an assignment made by the creditor’s heir certainly claims part of the effects of such creditor. There is nothing in the section to show that the title derived from the heir is not as much within its purview as the right to succeed set up by the heir himself. It would further be unreasonable to hold that the assignee is in a better position than the assignor. If it were so held, the heir might assign the debts due to the deceased person to others and thereby evade the statutory duty imposed upon him by Section 4. The intention was to afford protection to parties paying debts owing to deceased persons, and the construction suggested for the petitioner would frustrate that intention. The heir of a deceased person cannot by his own act deprive the debtors of the protection guaranteed to them by the Act. We may also observe that a certificate may be obtained under the Act in respect of particular debts due to a deceased person as contradistinguished from probate or letters of administration, which create in representatives title to recover all the effects of such person. It is true that the Act is called the Succession Certificate Act, and that it does not refer in terms to assigns of the heirs of deceased persons; but it does not follow that the right of succession is not the primary basis of the claim to recover the debt when it is made by the assignee of the heir, who has to prove not only the assignment, but also the assignor’s right of succession.

The petition is therefore dismissed with costs.

[420] APPELATE CIVIL.


CHINNAMMAL AND ANOTHER (Defendants), Appellants v. VENKATACHALA (Plaintiff), Respondent.* [23rd November and 15th December, 1891.]


Under the Hindu law obtaining in the Madras Presidency, the maternal grandfather of a deceased Hindu succeeds to him in preference to his paternal aunt.


* Second Appeal No. 235 of 1891.
SECOND appeal against the decree of H.H. O’Farrell, Acting District
Judge of Trichinopoly, in appeal suit No. 24 of 1889, modifying the decree
of V. Swaminatha Ayyar, Additional District Munsif of Trichinopoly, in
original suit No. 123 of 1888.

Suit on a hypothecation bond, dated 22nd December 1886, and
executed by one Rangammal (deceased) in favour of the plaintiff.

The last male holder of the land, the subject of the hypothecation,
was Krishnasami Naick, who was the son of Rangammal’s brother. On
Krishnasami Naick’s death, Rangammal entered on the land as his heiress;
the inheritance was then contested by his maternal grandfather and
grandmother, who, having entered on her death, were joined as defendants
in this suit. That contest was not finally determined in the lifetime of
Rangammal, and the same question was now raised by the defendants, who
pleaded that the charge purported to have been created by Rangammal
was invalid, no title to the land having vested in her.

The Lower Courts passed decrees for the plaintiff, against which the
defendants preferred this second appeal.

Krishnasami Ayyar, for appellants.

Ambrose, for respondent.

JUDGMENT.

The only question is, who is the nearest heir to the last male owner—
his father’s sister or his mother’s father? The Lower Courts have decided
in favour of the father’s sister, on the ground that she being related
through a male must be held to be more closely related to Kuppusami than
the defendants, the parents of Kuppusami’s mother, who are related
through a female. It is argued here that, in virtue of the rule excluding
females in favour of male heirs, the maternal grandfather has the preference—
Narasimma v. Mangammal (1). On the other side, it is contended that the
father’s sister comes in under the father’s brother, as the sister is included
in the term brethren. This construction of the text of the Mitakshara
has not been approved by commentators and has been rejected by the Privy
Council—Thakoorain Sahiba v. Mohun Lall (2). A father’s sister cannot
be a gotraja sapinda, because as soon as a female marries, she passes into
a different gotra, but she is a bandhu, and the son of the paternal aunt
ranks higher than any maternal bandhu (Mayne, § 535, fourth edition);
but it does not follow that his mother is a bandhu of the same class.
The son takes by his own independent merit, not through her (Mayne,
§ 492). The maternal uncle has been recognized as a bandhu (Grishhari
Lall Roy v. The Bengal Government (3)), and the maternal grandfather
ranks higher than the maternal uncle. (See Mayne, § 535, and
Krishnayya v. Pichamma (4).) His right therefore as an undoubted male
heir must prevail over that of the paternal aunt. The decrees of the
Lower Courts must be reversed and the suit dismissed with costs
throughout.

RAGHUPATI v. TIRUMALAI

18 M. 422 = 2 M.L.J. 91.
APPELLATE CIVIL.

Before Mr. Justice Muttuswami Ayyar and Mr. Justice Best.

RAGHUPATI (Defendant No. 2), Appellant v. TIRUMALAI (Plaintiff No. 1), Respondent.* [29th February, 1892.]

Hindu law—Suit by reversioner to establish invalidity of a sale by a widow—Daughter of last male holder not joined.

Under the Hindu law obtaining in the Madras Presidency a reversioner is entitled to sue to establish the invalidity of a sale by the widow of the last male holder, notwithstanding the fact that he left a daughter, who was alive at the date of suit, but was not joined as a party.

[R., 32 C. 62 (70) = 9 C.W.N. 25; 33 M 410 (411) = 5 Ind. Cas. 164= 7 M.L.T. 44; 5 O.C. 360 (364).]

[423] SECOND appeal against the decree of W.R. Weld, District Judge of Kurnool, in appeal suit No. 2 of 1891, affirming the decree of D. Venkoba Rau, District Munsif of Markapur, in original suit No. 47 of 1890.

Suit to declare the plaintiffs’ title as reversioners to certain land, the property of the husband (deceased) of defendant No. 1, and to declare a sale-deed executed in respect of it by defendant No. 1 to defendant No. 2 on 15th November 1881 to be void as against the plaintiffs.

The plaintiffs claimed to be the nearest sapinda gnatis of the late husband of defendant No. 1, who died, leaving a daughter, his only child. The daughter was not a party to the suit.

The District Munsif struck the name of the second plaintiff off the record and passed a decree as prayed in favour of plaintiff No. 1, and this decree was affirmed on appeal by the District Judge.

Defendant No. 2 preferred this appeal.

Subramanya Ayyar, for apppellant.
Ranga Rau, for respondent.

JUDGMENT.

The only question argued before us is whether first plaintiff was entitled to maintain the suit notwithstanding the existence of the daughter of Appala Reddi, the last male owner, and our attention has been drawn to Rani Anund Koer v. The Court of Wards (1). That case decided that the party entitled to sue is, as a general rule, the nearest reversionary heir. No question then arose as to whether the existence of a daughter while the property was in possession of the widow would bar a suit by the next male reversioner. The other decisions to which we are referred are Bhikaji Apaji v. Jagannath Vithal (2), Madari v. Malki (3), Balgobind v. Ramkumar (4) and Baghu Nath v. Thakuri (5). The decision in Balgobind v. Ramkumar (4) is a clear authority against the appellant’s contention, and we agree with the conclusion at which the learned Judges arrived therein. An estate taken by a daughter being a qualified heritage like that of a widow, we see no reason why the existence of a daughter should bar a suit by a reversioner any more than would the existence of a co-widow.

* Second Appeal No. 1428 of 1891.

(1) 8 I.A. 14. (2) 10 B.H.C.R. 351. (3) 6 A. 428.
(4) 6 A. 431. (5) 4 A. 15.

647
1892

[424] In the other cases referred to this point did not arise, or was not so fully considered. Such suits are allowed for the purpose of enabling the reversioner to protect his interest against alienations made by persons in possession with a limited interest. We are of opinion that the appeal must fail and we dismiss it with costs.

15 M. 424.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

THE MOST REVEREND JOSEPH COLGAN AND ANOTHER (Defendants Nos. 4 and 5), Appellants v. ADMINISTRATOR-GENERAL OF MADRAS AND OTHERS (Plaintiff and Defendants) Nos. 1—3, Respondents. [4th and 5th January and 2nd March, 1892.]

Perpetuities, rule against—Superstitious uses—Trust for masses—Executor, assent of—Vesting of bequest.

An Armenian died in Madras in 1836, leaving a will whereby she appointed executors and bequeathed a certain sum "that the income thereof be given for perpetual masses for the benefit of my soul and for the souls in purgatory," and she also bequeathed, inter alia, Rs. 42,000 to her grand-daughter for life and provided that in the event of her marrying and having children she could bequeath to them the said Rs. 42,000; but in the event of her dying without issue, Rs. 14,000 out of the said Rs. 42,000, should be subtracted and given to her husband, and the remaining Rs. 28,000 should be added to the first-mentioned bequest and the income thereof be similarly given for masses. The executor with probate gave effect to the first-mentioned legacy. By a settlement made in contemplation of the marriage of the grand-daughter, the subject of the second legacy was settled as provided in the will except as to the Rs. 14,000, as to which it was declared that in the event of there being no issue of the marriage, and of the wife surviving the husband and dying without marrying again, it should be divided between the residuary legatees of the testatrix. The husband was a party to the settlement, as also was the executor of the testatrix who was one of the trustees of the settlement. The marriage having taken place, a suit was brought by the husband and wife against the trustees, and a decree was passed under which the trustees were relieved of their office, and the trust funds paid into Court with the direction that interest accruing thereon be paid to the wife until further order. The husband died without issue and subsequently in 1890 the wife died not having re-married. The Administrator-General of Madras took out letters of administration to administer the estate left [425] unadministered of the testatrix, and the Rs. 42,000 above referred to were paid over to him:

 Held by Shephard, J., that the sum of Rs. 14,000 by reason of the settlement, but not otherwise, fell into the residue of the estate of the testatrix:

 Held by Collins, C.J., and Handley, affirming Shephard, J.

(1) that the sum of Rs. 28,000 formed unadministered assets of the estate of the testatrix;

(2) that the bequest for masses was void as infringing the rule against perpetuities.

[R., 18 M. 201 (213); 31 M. 187 (190) = 18 M.L.J. 158; 10 Bom. L.R. 417 (476).]

APPEAL against the decree of Mr. Justice Shephard sitting on the original side of the High Court, in civil suit No. 325 of 1890.

Suit by the Administrator-General of Madras, to whom had been granted letters of administration of the property and credits, left unadministered by John Arathoon, deceased, of Hosannah Arathoon who died

* Appeal No. 29 of 1891.
on 10th August 1836. There were annexed to the letters of administration
the will of Hosannah Arathoon, dated 5th August 1836, and a postscript
or codicil thereto, dated 7th August 1836, which were as follows:—

"This is my last will and testament.

"Firstly.—I leave eight thousand pagodas or twenty-eight thousand
rupees, that the income thereof be given for perpetual masses for the
benefit of my soul and for the souls in purgatory.

"Secondly.—I leave to my beloved grand-daughter Maria Hosannah
Chambers twelve thousand pagodas or forty-two thousand rupees, that
the same be secured or settled on her, and that she enjoy the income of
the said sum as long as she lives. Should my said grand-daughter
marry and have children, she can will away and bequeath to her children
the said secured or settled twelve thousand pagodas or forty-two thousand
rupees. But should my said grand-daughter die without issue, then four
thousand pagodas or fourteen thousand rupees of this secured or settled
sum is to be subtracted and given to her husband, and the residual eight
thousand pagodas or twenty-eight thousand rupees I will that it go and
be added to the foregoing bequest which is in the first paragraph of my
will, that the income of this eight thousand pagodas added to the income
of that eight thousand pagodas be given for perpetual masses for the
benefit of my soul and for the souls in purgatory.

"Thirdly.—I leave one thousand rupees to my sister's grand-daughter
Jane Maria Marooth, that it be given to her at the time of her
marriage.

"Fourthly.—I leave five hundred rupees to be equally divided
amongst my three old servants, who are Jenny and Podika and
Chorrymathoo.

"Fifthly.—I leave the entire residue of my estate, whatever it may
be, to be equally divided amongst my beloved daughter Hosannah
Chambers and my beloved sons John and Asteel Satur Peter Arathoon,
whom I nominate and appoint my residuary heirs.

"Sixthly.—I, under these presents, appoint and denote my beloved
sons John and Asteel Satur Peter Arathoon to be the sole executors of
this my will. In testimony of the above my writings I have signed
and sealed this at Madras this fifth day of August in the year of The
Lord one thousand eight hundred and thirty-six.

[Here follow signature and attestation.]

"Postscript.—This is a part of my above will. Should it so happen
that my grand-daughter Maria Hosannah Chambers died unmarried,
then the said four thousand pagodas or fourteen thousand rupees which I
have left to be given to her husband, considering the possibility of her
being married and dying without issue, I will that the said four
thousand pagodas or fourteen thousand rupees be equally divided
amongst my three residuary heirs at Madras the 7th of August 1836."

Probate of the above will and codicil was granted on 8th October
1836 to John Arathoon. Leave was reserved to the other executor named
in the will to come in and prove, but he never did so.

The first defendant in this suit was the sole surviving executor of
John Arathoon. The second defendant was the Official Assignee of
Madras, and as such the assignee of the estate and effects of the second
son, A. S. P. Arathoon, who was adjudicated an insolvent in 1851 and
died in 1854, having previously obtained his personal discharge, but was
not shown to have obtained a final discharge. The third defendant was
the Administrator-General of Madras, who was the administrator of the
estate and effects (left unadministered) of the daughter Hosannah Chambers, deceased. The fourth and fifth defendants were, respectively, the Roman Catholic Archbishop and the Vicar-General of Madras.

As to the legacy in the first paragraph of the will, John Arathoon in his lifetime transferred a Government promissory note [427] of the value of Rs. 28,000 (representing the amount thereby bequeathed) to his sons, by whom it was ultimately transferred to the fourth and fifth defendants to hold to the uses therein mentioned. At the settlement of issues it was decided by Handley, J., that this promissory note and the question of the validity of the above-mentioned legacy did not come within the scope of the suit.

As to the legacy in the second paragraph of the will, John Arathoon invested the sum of Rs. 42,000 thereby bequeathed in a Government promissory note, which was subsequently brought into settlement by a deed, dated 25th April 1840, made in contemplation of the marriage of Maria Hosannah Chambers, the grand-daughter, with James Supple, and executed among others by James Supple and by John Arathoon who was one of the trustees thereof. By the terms of that deed, it was provided that the said Government promissory note be held from and after the then intended marriage in trust as to the interest and income thereof for Maria Hosannah Chambers for life to her separate use and upon her death in trust as to the interest and income thereof for her husband, the said James Supple, for his life, and on the death of the survivor of them if there should be children of the marriage, for such children, respectively, as therein mentioned; and it was further provided, if there should be no child of the said marriage and the said James Supple should survive the said Maria Hosannah Chambers, then the said trustees should pay and dispose of the sum of Rs. 14,000, part of the said sum of Rs. 42,000, to the said James Supple for his own use and benefit and that the said trustees should stand and be possessed of the sum of Rs. 28,000, being the balance of the said sum of Rs. 42,000 in trust, that the same should be added to the charitable use and bequest contained in the will of the said Hosannah Arathoon, but that if the said Maria Hosannah Chambers should survive her husband, the said James Supple, and should depart this life without marrying again, then upon the further trust that the said trustees should pay and dispose of the said sum of Rs. 14,000, part of the said sum of Rs. 42,000, into and amongst the several residuary heirs and legatees of the said Hosannah Arathoon named in her said will and codicil and should pay and dispose of the said sum of Rs. 28,000, being the balance of the said sum of Rs. 42,000, so that the same should be added to the said charitable use and bequest therein before mentioned.

[428] James Supple and Maria Hosannah Chambers were married on 27th April 1840. In 1860 they filed a bill of complaint on the equity side of the Supreme Court of Judicature at Madras against the trustees of their marriage settlement. Under the decree passed by that Court the trustees were released from their office as such, and the promissory note in question was brought into Court and it was ordered that the interest thereon be paid to Mrs. Supple until further order. James Supple died without issue on 28th November 1872 and Mrs. Supple died on 17th March 1890 without marrying again.

The Administrator-General applied for letters of administration in pursuance of an order made in the equity suit above referred to.

It was pleaded by defendants Nos. 4 and 5 that John Arathoon had, by reason of his accepting the trusts of the above marriage settlement,
assented to the legacy bequeathed and all the provisions contained in the sixth paragraph of the will and that nothing was left unadministered by him of the estate of the testatrix. With reference to the effect of the marriage settlement, a further question was raised as to whether or not the next of kin of James Supple were entitled to the sum of Rs. 14,000, part of the trust funds. Notice of the suit was given to his next of kin, but they did not desire to be joined as parties and the above question was raised on their behalf by the Administrator-General.

The following issues were framed:—

First.—Is the bequest of Rs. 28,000 by the will of Hosannah Arathoon given on the death of her grand-daughter Maria Hosannah Chambers without issue void as being for superstitious uses on the ground of uncertainty or as being contrary to the rule against perpetuities?

Second.—Has the sum of Rs. 14,000, directed by the will of Hosannah Arathoon to go to the husband of her grand-daughter Maria Hosannah Chambers, lapsed and become part of the residuary estate of the said Hosannah Arathoon?

Third.—If James Supple, the husband of the said Maria Hosannah Chambers, took a vested interest in the said sum of Rs. 14,000, has the said sum by virtue of the Indenture of settlement of 25th April 1840 become part of the residuary estate of the said Hosannah Arathoon?

Fourth.—How are the said two sums of Rs. 28,000 and Rs. 14,000 to be paid and distributed?

Fifth.—Whether the said sum of Rs. 28,000 is part of the estate of the said Hosannah Arathoon to be administered having regard to the said settlement of 25th April 1840?

Sixth.—Was Hosannah Arathoon a Roman Catholic by religion and an Armenian in nationality and domiciled in Madras as alleged by fourth and fifth defendants?

Mr. K. Brown, for the plaintiff.

The Wills Act XXV of 1838 was enacted after the death of the testatrix, accordingly it has no application to this case. The repealing sections in that Act are, however, indirectly of importance because they raise an inference that up to its enactment the statutes there referred to were in force in India, and that others of the same periods including those of the Tudor reigns, which have not been repealed are still in force. The Statute of Edward VI, expressly refers to "Masses satisfactory for the dead" such as are attempted to be made the purposes of a trust by the will now in question; and it is submitted that these trusts are bad under the effect which has been given to that statute and on general grounds of public policy, as being superstitious. That they would fail in England is plain from Cary v. Abbot (1), West v. Shuttleworth (2), In re Blundell's Trusts (3), Heath v. Chapman (4), Morice v. Bishop of Durham (5) and see 1 Jarman on Wills p. 505.

The question next arises is whether or not this was part of the law brought by the English into India: see Mayor of Lyons v. East India Company (6), Gardiner v. Fell (7), Freeman v. Fairlie (8), Ruckmaboye v. Lullockhoy (9), Advocate-General of Bengal v. Ranee Surnomoye Dassee (10). That question has been answered in the negative as far as regards Hindus

---

(1) 7 Ves. 490. (2) 2 My. & K. 684. (3) 30 Rev. 360.
(4) 2 Drewry 417. (5) 10 Ves. 526. (6) 1 M.I.A. 175 (274).
(7) 1 M.I.A. 304. (8) 1 M.I.A. 343. (9) 5 M.I.A. 284.
(10) 9 M.I.A. 397.

651
The last named case was decided by one Judge only, Phear, J., following a decision of Norman, J., also sitting alone. Neither of these decisions can be regarded as settling the question, nor were they so regarded in Judah v. Judah (3), which though it was decided on the ground of uncertainty merely, is sometimes referred to as an authority pointing the same way as the judgment of Phear, J. The earlier cases, it should be observed, were decided without express reference at any rate to the rulings above quoted on the extent to which English Law was introduced into India; and they fail to give effect to the principle of those rulings. Again it is impossible to gather from the judgments what law other than the English was supposed to be applicable in this country to Christians, who have no personal law like those of Hindus, Muhammadans, &c., safeguarded by the charters and regulations. Moreover, the bequests in each of these cases were clearly impeachable on the ground that they violated the rule against perpetuities and for that reason, if for no other, the decisions are wrong.

The trusts in the present case are also bad for the reason that they violate the rule against perpetuities. Since Yeap Cheah Neo v. Ong Cheng Neo (4) it must be taken as settled that that rule as a rule of public policy is applicable in India; and it is violated here, for the performance of the trust for masses would effect and was intended to effect no public benefit so as to bring it into the class of charitable trusts. Compare Rickard v. Robson (5), Hoare v. Osborne (6), Hunter v. Bullock (7), and see Broughton v. Mercer (8), Fatmabibi v. The Advocate-General of Bombay (9), Limji Nowroji Banaji v. Bapuji Ruttonji Limburnwalla(10). The case cannot be put upon the footing of the gift of a Hindu for religious purposes as Armenian Roman Catholics have no personal law.

(SHEPHARD, J., referred to Lopez v. Lopez (11).)

That ruling in that case, which arose upon a question of matrimonial law, cannot be applied here. Moreover, even if it could be applied, there is no evidence what is the customary law of the class to which the testatrix belonged. And if such law when ascertained were found to conflict with the rules of public policy, effect could not be given to it since it has not been safeguarded by the charter or the regulations. A rule against perpetuities is [431] in fact recognised in many cases to which the Hindu law is applicable; it is a different rule from that enforced in other cases, but it has, however, the same object. See Arumugam Mudali v. Ammi Anmal (12), Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb (13), Krishnarmani Dasi v. Ananda Krishna Bose (14), Ganendra Mohan Tagore v. Upendra Mohan Tagore (15). Even if the trust could be regarded as charitable in any sense, it is not a public charitable trust; and also the uncertainty affecting it would suffice to render it invalid.

With reference to the Rs. 14,000 payable to the husband of Maria Hosannah Chambers, I contend that under the terms of the will it was a...
vested interest; in the events which happened it has not been divested and it passed to his next of kin. Phipps v. Ackers (1).

As to the insolvent, there is no evidence that he obtained a discharge in the nature of a certificate nor indeed that he was a trader. See Insolvent Act, Sections 59, 60. His interest accordingly would pass to the Official Assignee.

Mr. R. F. Grant for first defendant argued that the power under the will to appoint among the children of the grand-daughter had been exceeded in the settlement, which accordingly should be treated in the present suit as a nullity and that the sum of Rs. 14,000 bequeathed to the man whom the grand-daughter might marry had fallen into the residue.

Mr. Michell, for second defendant.

As to the question of the bequest for pious uses, the assent of the executor is immaterial. Moreover, it is clear that the Armenians as such have no personal law founded on their religion, and consequently the English law is applicable to them: see Secretary of State v. Administrator-General of Bengal (2), Broughton v. Pogose (3), Barlow v. Orde (4). It is erroneous to consider the rule of perpetuity as an exceptional restraint on a man’s power of disposition of property. On the contrary it is the right of a man to tie up property after his death that should be regarded as a matter of exception—a privilege recognised late in the development of the law. See, as well as the cases already cited, Maclean [432] v. Cristall (5), Cocks v. Manners (6). The argument as to the uncertainty of the trust is fortified by Judah v. Judah (7), Sandial v. Maitland (8), Advocate-General v. Damother (9), Jarman on Wills, p. 213. The argument as to the vesting of Supple’s interest in the sum of Rs. 14,000 is unsound. Phipps v. Ackers (1), Finch v. Lane (10), In re Jackson’s Will (11), Sturgess v. Pearson (12) are distinguishable from the present case; in those cases there was a direct bequest, but in the present case there is none, but only a direction to convey on the happening of an event which must be considered a condition precedent to vesting. But even if it were otherwise, he disposed of his interest by concurring in the marriage settlement; so that in either case this sum forms part of the residuary estate of the testatrix.

Mr. Powell for third defendant argued that the trust for pious uses was bad, if for no other reason, because no beneficiary was named and referred to Lloyd v. Lloyd (13), In re Williams (14), In re Birkett (15).

Mr. E. Norton (Mr Kernan with him) for fourth and fifth defendants.

Our clients claim both under the will and also under the marriage settlement. In fact there were no assets of the testatrix left unadministered, and the assent of the executor to the trusts in the will was evidenced by his payment over of the first sum of Rs. 38,000 and the provisions in the marriage settlement relating to the second sum.

As to the main question, Roman Catholics are as much entitled to settle money for the trusts of their religion as are the Hindus; their religion was established before the English occupation and the statute of Edward VI. was never made applicable to India. See Whitley Stokes’ Codes of Substantive Law, p. 9.

(1) 9 Cl. & F. 863. (2) 1 B.L.R. O.C. 87. (3) 12 B.L.R. 74.
That effect is to be given to the Canon law, as the personal law of Roman Catholics appears from the Full Bench decision of the High Court of Bengal in Lopes v. Lopez (1), and there is nothing in Yap Cheah Neo v. Ong Cheng Neo (2) to prevent effect from being given to it in the present case, for the Judicial Committee [433] was there dealing with a settlement of land by foreigners in a country which was uninhabited at the commencement of the English occupation. See as to the introduction of English law into the English dependencies Advocate-General of Bengal v. Ranee Surnomoye Dossee (3).

The will then must be construed in accordance with the rule of equity and good conscience and that has been held to validate such trusts as those now in question. Das Merces v. Cones (4), Judah v. Judah (5), Advocate-General v. Vishvanath Atmaram (6), Andrews v. Joakim (7) and compare In re Michel’s Trusts (8), Townsend v. Carus (9), Baker v. Sutton (10). Moreover, the present trusts are charitable; there is a spiritual advantage, and also to the priests a material advantage. Compare Kusalchand v. Mahadevgiri (11).

As to the ordinary rule of perpetuity, it is to be observed that even under the Transfer of Property Act the rule is not as restricted as the English rule. See also as to its application in India Goberdhun Byssack v. Sham Chand Byssack (12), Mullick v. Mullick (13), Ananthatiritha Chariar v. Nagamuthu Ambalagaren (14), Maniklal Atmaram v. Manchershi Dinsha Coocman (15), Abdul Cadur Haji Mahomed v. Turner (16), Limji Nouroji Banaji v. Bapujii Ruttonji Limbuwalla (17).

Falle v. Godfray (18), Pickering v. Stamford (19), Attorney-General v. The Iron Monger’s Company (20), Stafford v. Stafford (21) were also referred to.

Mr. K. Brown, in reply.

SHEPPIARD, J.—This is a suit in which the Administrator-General submits to the decision of the Court certain questions which have arisen in the administration of the estate of the late Hosannah Arathoon. Hosannah Arathoon died on the 1st August 1836, having first duly executed a will, whereby, among other bequests, she left Rs. 28,000 directing “that the income thereof be given for perpetual masses for the benefit of my soul and for [434] the souls in purgatory” and bequeathed to her grand-daughter, Maria Hosannah Chambers, Rs. 42,000 to enjoy the income during her life, directing that in the event of her dying without issue (which event happened) Rs. 14,000, part of the said sum, should be subtracted and given to her husband, and the residue, Rs. 28,000, should be added to the first-mentioned bequest, so that the income of the two sums should be given for perpetual masses, for the benefit of her soul and for the souls in purgatory. The will further contained a gift of the entire residue of the estate to her three children Hosannah Chambers, John and Asteal Satur Arathoon, the two last being appointed executors. Probate of the will was granted to John only, and he acted in the administration of the estate until his death on the 17th of March 1875. His brother, the other executor, predeceased him. It is alleged in the plaint that, in the

(1) 12 C. 706. (2) L. R. 6 P. C. 381. (3) 9 M.I.A. 387.
(7) 2 B.L.R. O. C. 148. (8) 28 Beav. 39. (9) 3 Hare 257.
(13) 1 Knapp 246. (14) 4 M. 200. (15) 1 B. 269.
(16) 9 B. 158. (17) 11 B. 441. (18) 14 App. Ca. 70.

654
course of administration, John transferred to his sons Albert John and Samuel, a Government promissory note for Rs. 28,000, representing the first-mentioned legacy, to be held by them on the trusts of a deed, dated in or about August 1872. The execution of this deed is denied by the first defendant, grandson of the testatrix, who, however, admits that the promissory note was transferred by John to Albert John, and further admits that after John’s death, he and Albert John, the other executor of John’s will executed a deed of declaration, dated 9th May 1877. It is recited in that deed that John had handed over the Government promissory note to Albert John, to be held by him upon the trusts of Hosannah’s will and that it had since been transferred into the names of Stephen Fennelly, Joseph Colgan and Alfered Peter (the first defendant) and it is declared that these three persons shall hold the said note upon the trusts created by the will. The promissory note seems to have been in the hands of the first defendant till 1884, but admittedly was held by him as co-trustee with Archbishop Colgan. With a letter of the 26th February 1884, he hands over the note to the Archbishop and retires from the trust. Previously to this, the other trustee, Dr. Stephen Fennelly had died and accordingly, in 1890, a fresh declaration of trust was executed, whereby the note became vested upon the original trusts in the Archbishop and the very Revd. Theophilus Meyer, the fourth and fifth defendants. From the statement of the facts, it appears that John, the executor, appointed under Hosannah’s will and the two executors of John’s will, to [435] whom the entire representation of the testatrix was transmitted, not only consented to the bequest of Rs. 28,000, but did all that was required to give effect to the directions of the testatrix. As far as this sum is concerned, I must hold that it is not part of the estate of Hosannah left unadministered and that, therefore, no question with regard to it has to be decided in this suit. The other bequest stands on a different footing, because the grand-daughter Maria Hosannah, who, under the will, enjoyed the income of the entire sum of Rs. 42,000 during her life, did not die till the 17th March 1890, and the Government promissory note in which that sum was invested is in the hands of the Administrator-General as administrator de bonis non of the estate of the testatrix. Questions arise with regard to Rs. 14,000, part of this sum and a separate question with regard to the remaining Rs. 28,000. After the death of the testatrix the legatees, Maria Hosannah, intermarried with one James Supple and a deed in contemplation of marriage was executed by them and certain other persons on 25th April 1840. There were no children of the marriage and Supple predeceased his wife, dying in 1872. Provision is made for this event in the settlement, for in case of Maria Hosannah surviving her husband and afterwards dying, the trustees are directed to pay Rs. 14,000, part of the sum of Rs. 42,000 brought in the settlement, to the residuary heirs and legatees of Hosannah. In my opinion, the case is within the principle recognised in Phipps v. Ackers (1) and Finch v. Lane (2), and I think that the husband took a vested interest in the Rs. 14,000 and therefore, apart from the settlement, that sum would not form part of the residuary estate of Hosannah. Under the settlement, however, the sum is treated as a part of her residuary estate and, as such, came into the hands of the Administrator-General. By the decree in an equity suit of 1860, the trustees of the settlement were discharged, and it was under an order made in that

(1) 9 Cl. & F. 583. (2) L.R. 10 Eq. 501.
suit that the Administrator-General took out letters of administration and became possessed of the fund, out of which the Rs. 14,000 has to be paid. If I am wrong in holding that Supple took a vested interest in the sum, it is clear that it must fall into the residue and be administered accordingly. In either view I hold that it must be treated by the Administrator-General as part of the residuary estate of Hosanna. [436] No question is expressly raised by the issues as to the persons who now represent the residuary legatees, but it was argued with regard to one of them, Asteal Satur, that any interest to which he or his estate might be entitled was vested in the Official Assignee. I think this contention is sound, for it is shown that he filed his petition in the Insolvent Court in 1851, and it is not shown that he obtained any order of discharge except a personal one. I have now dealt with the second and third issues and all the questions argued with regard to the Rs. 14,000. The remaining question, relating to the sum of Rs. 28,000, is whether the bequest of this sum made in Hosanna's will is a valid one. The validity of the gift has been impugned on the ground of uncertainty and as infringing the rules against perpetuities. This latter point is the more important one and it is one as to which, but for an authoritative ruling of the Privy Council Yap Cheah Neo v. Ong Cheng Neo (1), I should have entertained great doubt, and inclined to the opinion that the gift being made for a religious purpose might be upheld. The will made by a Chinese testatrix, contained a devise of a house for the performance of religious ceremonies to her late husband and himself. "The dedication of the house," the Judicial Committee observes, "bears a close analogy to gifts to Priests for masses for the dead. Such a gift by a Roman Catholic widow of property for masses for the repose of her deceased husband's soul and her own, was held in West v. Shuttleworth (2) not to be a charitable use, and, although not coming within the statute relating to superstitious uses, to be void." The Judicial Committee proceed to say that the Judge below was right in holding that the devise, being in perpetuity, was not protected by its being for a charitable use. This decision not only lays down the principle in which the present case must be decided, but also re-affirms what was held in West v. Shuttleworth (2), viz., that a gift of this particular class now in question cannot be deemed to be a gift for a charitable purpose. The principle in question is that which is expressed in the rule against perpetuities, a rule founded on considerations of public policy from which an exception, also on grounds of public policy, is allowed in favour of gifts for purposes useful and beneficial to the public and which in a wide sense are called charitable uses. [437] I do not think that the principle is the less applicable because in the present case it was money and not, as in the case cited, land which is sought to be dedicated to the performance of masses. That a gift for that purpose is not a charitable gift so as to take the case out of the rule and bring it within the exception is distinctly held by the Judicial Committee, and I think I am bound to follow that ruling and, therefore, to disregard the cases decided in this country to the contrary effect. It, therefore, becomes unnecessary to consider those cases in detail or the other cases cited by Counsel on both sides. I must hold that the bequest now under consideration was void and that the money, therefore, falls into residue and must be distributed accordingly.

Defendants Nos. 4 and 5 preferred this appeal against the judgment of

Shephard, J.

(1) L. R. 6 P. C. 381.
(2) Myla & K. 694.
Mr. Kernan (Mr. E. Norton with him) for appellants.
We contend that the estate is fully administered. Bringing the money into settlement prevented it from being part of the estate.

[COLLINS, C.J.: Why? Some one made a settlement in accordance with the will. No one had power to take it out of the estate or alter the subsequent requisition if it was good.]

The settlement vested the whole in the trustees of it.

[COLLINS, C.J.: It was impossible. No one could do it.]

The contrary would appear from Lewin on Trusts, 8th edition, page 204, where a case is cited in which the executor severed the fund and became a trustee for the trusts of the will.

[COLLINS, C.J.: Assume that was done.]

Here the executor did more for he put it all into settlement, the administration accordingly is over, and the Administrator-General cannot come in.

[COLLINS, C.J.: Who can?]

No one but a cestui que trust.

HANDLEY, J.: The Administrator-General has the money, he has a right to come for directions.

He should pay it into Court and let others come in.

As to the effect to be given to the trusts, the bequest is valid as a charitable bequest. Transfer of Property Act, Section 17, would not exclude it even if the rule against perpetuities applies, for the trust is beneficial for the public in the advancement of religion—[438] compare Succession Act, Sections 104-5. The law of superstition does not apply in India and there is no reason why the rule against perpetuities should, in such a case as the present. For similar cases of bequests for masses, see Des Mercers v. Cones (1) followed by Andrews v. Jonkin (2), Judah v. Judah (3), Kusalchand v. Mahadeviri (4), see also Cary v. Abbot (5).

[COLLINS, C.J.: We are disposed to agree that the rule of superstitious does not apply in India. But you must argue it is a charitable use. If not how can you get over the Privy Council case? Public policy is the same everywhere.]

That case is inapplicable on the ground that Singapore was uninhabited before the English occupation, and the case, I shall show, is otherwise distinguishable. As to the illegality of the rule against perpetuities, see Broughton v. Pogore (6), Advocate-General v. Viskwanath Atmaram (7), Kusalchand v. Mahadeviri (4).

In support of my argument that if the trust is not bad as superstitious it is good as being charitable, I refer to the Southcote case, Thornton v. Home (8), and Whicker v. Home (9). But the rule against perpetuities is clearly capable of application in India, because (1) endowment of temples and idols are permitted; 2) there are decisions of the Privy Council on appeal from India inconsistent to Yew Cegah Neo v. Ong Cheng Neo (10). As to that case it has already been pointed out that Singapore was an uninhabited island, there was accordingly no lex loci; moreover there real estate and not personality was in question.

As to the importance of the distinction of the case in Yew Cegah Neo v. Ong Cheng Neo (10) on the ground that there was no lex loci there, see Mayor of Lyons v. East India Company (11) proceeding on the reasoning in

(1) 2 Ryde 65.
(2) 2 B.L.R. (O.C.) 148.
(3) 5 B.L.R. 438.
(4) 12 H.C.R. 214.
(5) 7 Ves. 495.
(6) 12 B.L.R. 74.
(7) 1 R.H.C.R. App. 9.
(9) 14 Beav. 509.
(10) L.R. 6 P.Q. 931.
(11) 1 M.I.A. 175. (274).
the Grenada case. See also Lopez v. Lopez (1), as to the law applicable to oriental Christians. Yap Cheah Neo v. Ong Cheng Neo (2), is also distinguishable as having merely followed West v. Shuttleworth (3) which is not law in India where the rule of superstitious uses does not obtain.

[439] [Handley, J.: The bequest here is an absolute one: does not that case support the argument as to the rule against perpetuities?

It is not rightly understood.

[Collins, C.J.: How does the trust here differ from a trust for a tomb? I cannot see it tends to advancement of religion.]

[Handley, J.: Is it an advantage to people who are alive?]

It is submitted that it tends to the advancement of religion generally.

See Brooks v. Woolfrey (4) showing the Master of the Rolls went wrong as to prayers of the dead in West v. Shuttleworth (3) which was followed in Heath v. Chapman (5) and in re Blundell's Trusts (6).

As showing that the English rule is not applied by the Privy Council to cases arising in India, see Mutlick v. Mullick (7), Jewala Doss Sahoo v. Shah Kubeer-coo-deen (8), Sonatun Bysack v. Sree mutty Jaggutsoondree Dossee (9), JaggutMohini Dossee v. Mussumat Sokheemoney Dossee (10), Rajender Dutta v. Sham Chand Mitser (11), Aliam v. Konu (12), and compare Kumara Asina Krishna Deb v. Kumara Kumara Krishna Deb (13), Gunenara Mohan Tagore v. Upendra Mohan Tagore (14), Jatindra Mohan Tagore v. Gunenara Mohan Tagore (15).

Mr. K. Brown for first respondent. The Administrator-General took out letters of administration in pursuance of an order of Court and it is submitted that no unauthorized dealing by the executor with this fund which was in Court until it was paid to the Administrator-General under his letters can divest it of its character as assets of the testatrix. The validity of the bequest is questionable on the various grounds mentioned in the third issue. I do not propose to adduce any argument on the rule of superstitious uses, because it is sufficient to show that the bequest not being charitable is bad for uncertainty and as infringing the law against perpetuities. The question of perpetuity is in fact concluded by the authority of Yap Cheah Neo v. Ong Cheng Neo (2), and for the application of the rule in that case it is immaterial that the property now in question is money and not land. The rule of perpetuity is of general applicability [440] and is founded on public policy. 1 Jarman on Wills, pp. 205-6.

The present case cannot be brought within the exception made in favour of charitable trusts, for the present trusts are of benefit to no part of the public. See Jarman, pp. 208-10 and see Indian Succession Act, Section 105, and Whitley Stokes' note to that section.

[Handley, J.—The Privy Council follow West v. Shuttleworth (3) did not that proceed on the law of superstitious uses?]

That law no doubt came in question; but the Court considered whether or not the uses impugned as superstitious were charitable, and so within the exception to the rule against perpetuities which in fact was the foundation of the judgment. Had the uses been held to be charitable and so not within that rule, they would not have failed altogether, but effect would have been given to them ex-presa although they could

(1) 12 C. 706.
(4) 1 Curtiss 380.
(7) 1 Knapp 246.
(10) 14 M. I.A. 289.
(12) Appeals Nos. 80 and 105 of 1886.
(14) 4 B.L.R. O.C. 103.
(2) L.R. 6 P.C. 381.
(5) 2 Drewry 417.
(8) 2 M.I.A. 390.
(11) 6 C. 106.
(13) 2 B.L.R. O.C. 11.
(3) 2 My. & K. 694.
(6) 30 Beav. 360.
(9) 8 M.I.A. 66.
not have been carried out as the settlor desired. *West v. Shuttleworth* (1) is an answer to the contention on the other side that these trusts were in fact charitable as tending to the advancement of religion. My argument is that they are not more so than are trusts for the maintenance of tombs which have frequently been held invalid. See *Hoare v. Osborne* (2), *Limbji Nouraj v. Banaji* (3).

[**Collins, C.J.**—Would a trust for a public service in a church be invalid?]

These masses are understood not to be public services but are read in a private chapel. All the evidence about them is that of Father Moyer who said:

"According to Canon law a gift of money for masses for souls in purgatory is valid—and not void.

"Bequest for masses for a particular person is good. It makes no difference whether it is for souls in general or individual.

"If an individual is concerned, there is no difference except in intention—there is no mention of name. If one soul does not require the mass, it goes for the benefit of others."

[**Collins, C.J.**—There appears to be no further evidence on this part of the case.]

The dangers against which the rule against perpetuities is directed are equally pressing and important here and in England, and even apart from direct authority it would still seem to be part of the English law brought into this country under the rule in *Mayor of Lyons v. East India Company* (4), *Freeman v. Fairlie* (5), *Rucknamoys v. Lalloobhoj Mottichund* (6), *The Advocate-General of Bengal v. Ranee Surnomyoos Dossess* (7), *Varden Seth Sam v. Luckpathy Royyee Lahlah* (8). In fact, however, the rule with the exception in favour of charities has been applied in this country as in England, e.g., in *Broughton v. Mercer* (9), although in some of the early Calcutta cases of pious uses it was overruled.

Of course the applicability of the rule is subject to any special customary law reserved whether by the Charter or the Regulations to, e.g., Hindus. Hindu Law, however, comprises a law against perpetuities of its own which the Courts are careful to protect (see Tagore case (10) and *Sookhmoy Chunder Dass v. Srimati Monohurari Dasi* (11), *Alani v. Komu* (12) subject to exceptions of its own in favour of devadaayam and debutter trusts, see *Soorendronath Roy v. Mussamut Heeramonee Burmoneah* (13), *Advocate-General v. Visvanath Atmaram* (14), *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb* (15), *Rajender Dutt v. Sham Chand Mitler* (16).

Thus there is no inconsistency between the decision of the Judicial Committee in the case I rely on, and the cases cited on the other side, on this part of the argument.

It has not been shown that Roman Catholic Armenians have any personal law, and certainly the legislature has reserved to them no special custom of their own, nor has it been shown what is the law relied on on the other side. *Lopez v. Lopez* (17) does not go as far as is contended.

and there are many cases in which English law as such has been applied to Armenians; see Sarkis v. Prosnonomoues Dossee (1) and the cases therein cited and Naoroji Beramji v. Rogers (2), Lopes v. Lopes (3).

Mr. E. Norton, in reply.

JUDGMENT.

This appeal relates only to the sum of Rs. 28,000, part of the sum of Rs. 42,000 bequeathed by the testatrix Ho-an-nah [442] Arithoon to her granddaughter Maria Ho-an-nah Chambers, afterwards Mrs. Supple, and her children, which sum of Rs. 28,000 in the event, which has happened, of Maria Ho-an-nah Chambers dying without issue, testatrix directed should go and be added to the therein before-mentioned sum of Rs. 28,000, so that the income of the last-mentioned sum of Rs. 23,000 should be added to the income of the former Rs. 28,000 and be given to perpetual masses for the benefit of her (testatrix's) soul and for the souls in purgatory. The first point raised in appeal is that this sum of Rs. 28,000 does not form part of the estate of Ho-an-nah Arithoon and therefore that the Administrator-General has nothing to do with it, because, by the settlement made upon the marriage of Maria Ho-an-nah Chambers with Mr. Supple, the Government promissory note, then representing the sum of Rs. 42,000, of which this Rs. 28,000 is part, became vested in the trustees of that settlement upon the trusts thereby declared. We think there is nothing in this point. The settlement could only deal with the interest which Maria Ho-an-nah Chambers took under the will and could not affect the dispossession of the will which were to take effect in the event of her dying without issue. The disposition of the sum of Rs. 42,000, in the events which have happened, is governed by the will and the Government promissory note representing the sum having through the proceedings in the equity suit gone into the hands of the Administrator-General, he is right in asking the Court for directions as to its proper application under the will of his testatrix.

The other and most important question argued in this appeal is as to the validity of the gift over of this sum of Rs. 23,000 on the death of Maria Ho-an-nah Chambers without issue. The point has been argued very fully by Counsel on both sides and a number of authorities bearing on the question have been cited. On a careful consideration of the arguments and the cases quoted, we must agree with the learned Judge in the Court below that the case is concluded by authority and that the bequest in question is void as violating the rule against perpetuity.

That a bequest for the performance of masses, according to the forms of the Roman Catholic religion, whether the masses be for the testator's own soul or for souls generally, would be void if the case occurred in England, is admitted. The cases of West v. Shut. (4), Heath v. Chipman (5), in re Blandell's Trusts (6) are sufficient authorities for that position. But it is argued for appellants that these and other analogous cases were decided upon the English law of superstition uses which has no application to this country. West v. Shuttleworth (4) certainly was decided on the law of superstition uses. There was no bequest to certain Roman Catholic priests and monasteries for the benefit of their prayers and masses for the repose of her soul and that

of her husband. The Master of the Rolls, after quoting with approval the observation of Sir W. Grant in Curry v. Abbot (1) that there was no statute making void superstitious uses generally and that the statute of Edward VI related only to superstitious uses of a particular description then existing, goes on to say:—"The legacies in question are not therefore within the terms of the statute of Edward VI; but that statute has been considered as establishing the illegality of certain gifts; and, amongst others, the giving legacies to priests to pray for the soul of the donor has in many cases collected in Duke, been decided to be within the superstitious uses intended to be suppressed by that statute. I am therefore of opinion that these legacies to priests and chapels are void."
The other cases following West v. Shuttleworth (2) seem also to have been decided on the law of superstitious uses. This law has, in several cases in the Calcutta High Court, been held to have no application to this country. Das Marces v. Cones (3), Andrews v. Joakim (4), Judah v. Judah (5). As far as we know, the question has never been decided in this Court, but we see no reason for dissenting from the view taken by the Calcutta High Court. But this is not sufficient to establish the validity of bequests such as those in question in this suit. There is another ground on which they may be invalid, viz., that they infringe the rule against perpetuities. On this ground many bequests have been held invalid by the English Courts, e.g., gifts for the keeping in repair monuments or tombs. Richard v. Robson (6), Fowler v. Fowler (7), Fisk v. Attorney-General (8), Dawson v. Small (9).

The general rule is that all gifts, whether of real or personal property, which purport to appropriate property to a certain purpose in perpetuity, are void as contrary to public policy unless the purpose be a charitable one. What is a charitable purpose so as to make the gift a valid gift, although it purports to create a perpetuity, has been the subject of very many decisions of the English Courts, which have taken as their guide the preamble of the Statute 43 Eliz., Cap. 4, which enumerates various charitable purposes, though the Courts have not confined themselves to the charitable purposes there enumerated, but have included as charitable other purposes analogous thereto. The general principle appears to be that a charitable purpose must be one for the benefit of the public or a section of the public, and not for the private benefit of the donor or his family or of certain individuals. It is not necessary, however, in the present case to discuss the question whether on general principles, gifts for masses for the soul of the donor or those of others should be considered to be for charitable purposes so as to exempt them from the rule against perpetuities. The contrary has been decided in many cases by which we consider we are bound. In the case of West v. Shuttleworth (2) before quoted, though the gift was held void on the ground that it was for superstitious uses, it became necessary to decide the question whether the purpose was a charitable one in order to determine what was to become of the void legacies, for if the purpose was a charitable one, the duty of appropriating the amount of the legacies to other charitable purposes devolved upon the Crown, if on the contrary the purpose was not charitable the next of kin took. The Master of the Rolls held that the purpose of the legacies was not charitable and therefore that they went to

---

(1) 7 Ves. 490.
(2) 2 H.L.R.O. 148.
(3) 33 Beav. 616.
(4) 2 My. & K. 384.
(5) 8 H.L.R.O. 433.
(6) 2 Hyde 65.
(7) 33 Beav. 244.
(8) L.R. 4 Eq. 521.
(9) L.R. 18 Eq. 114.
the next of kin. In Heath v. Chapman (1) trusts were declared by a will for certain Roman Catholic chapels for saying masses and requiem for the soul of the donor and for other souls and for the soul of the “pious dead” and for other pious purposes. The gift for masses, &c., was held to be void as being for superstitious uses and as the pious uses could not be separated from the void uses, the whole gift was held bad and the purpose not being a charitable one, the property was decreed to go to the residuary legatees. A similar decision was passed in re Blundell’s Trusts (2). In the case of Yap Cheah Neo v. Ong Cheng Neo (3), a Chinese (4) woman resident in Penang by will directed (inter alia) that a house termed “Sow Chong” for performing religious ceremonies to the testatrix’s deceased husband and herself should be erected. It was held by the Judicial Committee that the devise was void being in perpetuity and not for a charitable purpose. Their Lordships quote with approval the decision of the Chief Justice Sir P. Benson Maxwell in the case of Choah Choon Nioh v. Spottiswoode (4) that whilst the English Statutes relating to superstitious uses and to mortmain ought not to be imported into the law of the Colony, the rule against perpetuities was to be considered a part of it and go on to observe:—“This rule which certainly has been recognised as existing in the law of England independently of any statute, is founded upon considerations of public policy, which seem to be as applicable to the condition of such a place as Penang as to England viz., to prevent the mischief of making property inalienable, unless for objects which are useful or beneficial to the community.” And further on in the judgment they observe, speaking of the ceremonies to be performed in the Sow Chong House:—“Although it certainly appears that the performance of these ceremonies is considered by the Chinese to be a pious duty, it is one which does not seem to fall within any definition of a charitable duty or use. The observance of it can lead to no public advantage and can benefit or solace only the family itself. The dedication of this Sow Chong House bears a close analogy to gifts to priests for masses for the dead. Such a gift by a Roman Catholic widow of property for masses for the repose of her husband’s soul and her own was held in West v. Shuttleworth (5) not to be a charitable use, and, though not coming within the statute relating to superstitious uses, to be void. The learned Judge was therefore right in holding that the devise being in perpetuity was not protected by its being for a charitable purpose. It is to be observed that in this respect a pious Chinese is in precisely the same condition as a Roman Catholic who has devised property for masses for the dead or as the Christian of any Church who may have devised property to maintain the tombs of deceased relatives. All are alike forbidden on grounds of public policy to dedicate “lands in perpetuity to such objects.” It is sought (446) to distinguish this case from the present on two grounds—(1) that the gift there was of immovable property; (2) that the rule against perpetuities does not exist in India, where dedications of property in perpetuity for the performance of religious ceremonies, maintenance of tombs and other purposes not allowed by English law to be charitable, have always been held lawful amongst Hindus and Muhammadans.

As to the first point we observe that the rule against perpetuities has always been held to apply equally to gifts of personal as to those of real

---

(1) 2 Drewry 417.  
(2) 30 Beav. 360.  
(3) L. R. 6 P. C. 381.  
(4) Wood’s Oriental Cases.  
(5) 2 My. & K. 684.
property. The cases as to monuments and tombs quoted above were all of them cases of money bequests.

As to the second point we think it is not a correct statement of the law applicable to India to say that because certain dispositions of property in perpetuity not allowed by English law are allowed to Hindus and Muhammadans, therefore the rule against perpetuities has no application to India. The rule being founded on public policy must be a part of the territorial law of England in all her Colonies and Dependencies. But Hindus and Muhammadans have had their respective personal laws preserved to them by the Charters of the High Courts and by the Regulations. The personal law of the Hindus is intimately connected with their religion, and therefore allows of gifts in perpetuity to religious objects to a much greater extent than the English law. Thus absolute gifts of land or money in perpetuity to an idol and for other religious purposes have been recognized by many decisions. See Mullick v. Mullick (1), Juggut Mohini Dosssee v. Mussunat Sokheemoney Dosssee (2). In his judgment in Alomi v. Komnu (3) Mr. Justice Muttusami Ayyar observes:—"Neither the English law which forbids bequests for "superstitious uses, nor the rule which prohibits the creation of "perpetuities is applicable to gifts to idols in this country;" so the "Muhammadan law of Wakf or appropriation founded on the Muham-
quad"madan religion, allows of the appropriation of property in perpetuity for "the performances of religious services, the maintenance and repair of "tombs and other purposes not held to be charitable by the English law. See the judgment of West, J., in Fatmabibi v. The Advocate-General of Bombay (4). The Armenian or other Roman Catholic has no personal law (447) reserved to him and we fail to see how he is in any different position with regard to his power to dispose of property for charitable purposes from the subject of the decision in Yerp Cheek Neo v. Ong Cheng Neo (5). The principles laid down in that decision have been held by the High Court of Bombay to apply to Parsees—Limji Nowroji Banaji v. Babaji Ruttonji Limbuvalla (6), and, in our opinion, they are equally applicable to the members of the community to which the testatrix whose will is in question in this suit belonged. Were the matter res integra we are inclined to think that either the rule against perpetuities, which is founded on considerations of public policy, should be applied in the same manner to all classes of the community in India, or the relaxation of the rule which has been allowed to Hindus and Muhammadans should be allowed also to those professing other religions. Upon general principles there seems to be no reason why a Hindu or Muhammadan should be allowed to dedicate property in perpetuity for the services of his religion or the maintenance of the tombs of his family, and a Christian should be forbidden to do the same. But we conceive that we are not at liberty to extend the relaxation of the rule against perpetuities conceded to Hindus and Muhammadans by virtue of the reservation of their personal law, to other inhabitants of India to whom no personal law has been reserved. It may be that legislation in the direction of placing all Her Majesty's subjects in India upon a more equal footing in this respect is desirable. The decisions of the High Court of Calcutta before quoted—Das Marcel v. Cones (7), Andrews v. Joakim (8) are no doubt express authorities in favour of the validity of gifts such as that

in question in this suit, but the question of the rule against perpetuities was not raised in them; they were decided solely on the ground that the law against gifts for superstitious uses was not applicable to India. So far as they are authorities for the validity of gifts for the performance of masses they must be taken to be overruled by Yeap Cheah Neo v. Ong Cheng Neo (1). We must agree with the learned Judge in the Court below in holding that the bequest in question was void and that the legacy falls into the residue. We think, however, that the fourth and fifth defendants the Roman Catholic Archbishop and Vicar-General of Madras are entitled [448] to their costs out of the fund throughout. The litigation was caused by the will of the testatrix, and they could not well have done otherwise than come forward and support the legacy given for purposes recognized as lawful and beneficial by their religion. We shall modify the decree of the Lower Court by directing that the costs of fourth and fifth defendants of this suit be paid by the Administrator-General out of the estate of Hosannah Arathoon. In other respects, we confirm the decree of the Lower Court and dismiss this appeal. We also direct that the costs of all parties to this appeal be paid out of the estate.

Laing, Solicitor for appellants.
Harvian Morgan & Orr, Solicitors for respondents.

15 M. 448.

ORIGINAL CIVIL.

Before Mr. Justice Handley.

ADMINISTRATOR-GENERAL OF MADRAS v. MONEY AND OTHERS.” [17th March, 1892.]

Will. construction of—Trust fund to be called after testator’s name—Perpetuities, rule against—Creation of fund, and dispositions except directions for making it a perpetuity, held valid—Persons designated, bequest to persons as vesting of legacy, time of—Income of fund, gift of, carries corpus—Tenancy in common created, not joint tenancy—Advancement out of minor legatee’s share for his benefit, power of—Vested interest, liable to be divested by condition subsequent—Receivers, trust expression of wish held not to create—Patent deficiency as to objects of bequest—Failure of legacy—Charitable use, void bequest to—Succession Act, Sections 68, 84, 99, 101, 105, 106, 125, 159.

Whereby by his will a testator directed the establishment in the Bank of Madras by the executor and trustee of the will of a fund, to be called, after the testator’s name, the “Garratt Trust Fund,” and directed “that such trust fund shall never be removed from deposit in the said Bank of Madras at Madras so long as that bank shall exist,” and “that ‘The Garratt Trust Fund’ shall be a continuing fund to all time,” and that the interest therefrom should be enjoyed by certain legatees and “the same shall be inherited by any child or children of them in equal shares from time to time and from one generation to another in accordance with all legal rights.”

Held, that there was nothing illegal about the creation of this fund, except the direction that the securities representing it shall never be received from deposit in the Bank of Madras, which, as an attempt to create a fund in perpetuity, was invalid; but that this did not prevent the intention of the testator to create and endow the fund from being carried out, and that the legatees took an absolute interest.

The testator bequeathed “to my grandchildren by my said late daughter F. W., and to my grandson F. W. M. and to his step-brother G. W. M.” in equal shares a certain fund:

* Civil Suit No. 73 of 1891.
(1) L.R. 6 P.C. 381.
Held, that this was a bequest to the testator’s grandchildren by his late daughter E. W. not as a class, but to them individually as persona designate.

Held also, that, under the terms of the will, the testator’s said grandchildren by the late E. W., and F. W. M. and G. W. M. took vested interests in their respective shares in the said fund from the death of the testator; that the gift to them of “the benefit, interest and profit” of the fund was a gift of the corpus of the fund by virtue of Section 159 of the Indian Succession Act; that they took as tenants in common, not as joint tenants; and that under a power given to the executor to make disbursements from the said fund for certain purposes for the benefit of F. W. M. in connection with his going to and returning from England the executor was not authorized to apply, towards those purposes, more than F. W. M.’s one-ninth share in the said fund, as it was not the intention of the testator to give F. W. M. a benefit out of that fund over and above that share, and that the executor, in making disbursements for the purposes specified, was only empowered to trench upon the principal of that share if the income, as applied under the power of disbursement for F. W. M.’s support and maintenance in England, were not sufficient.

Held also, that under the terms of the devise in the third and fourth clauses of the will of a certain house and premises to F. W. M., the devisee took on the testator’s death a vested interest in that property, liable to be devised in the event of his dying under the age of twenty-one years.

Held also, that under the terms of the devise in the fifth and sixth clauses of the will of a certain house and premises and furniture to the children of the testator’s late daughter E. W. (who was dead at the date of the will), there was an absolute gift to the children of E. W. of the testator’s whole interest in that property, and that such gift was not controlled by the directions in the latter part of the fifth clause that the house should not be sold until the youngest grandchild attained the age of eighteen years, which must be regarded merely as an expression of the wish of the testator and not as a precatory trust, and was of no legal effect; and that the children of E. W., who were living at the testator’s death, did not take as joint tenants, but took as persona designate, each an equal share in the property which vested in them on the death of the testator and therefore the share of one of them, E. G. W., who had survived the testator, but died subsequently, having vested in E. G. W., passed to E. G. W.’s representative, the ninth defendant.

In the sixteenth clause of the will the testator directed his executor and trustee out of a certain sum of Rs. 500 to “disburse various petty pensions to some poor people who have been mentioned to him” (the executor and trustee) “by me.”

Held, that there was a deficiency on the face of the will as to the objects of this bequest, and by Section 68 of the Indian Succession Act no extrinsic evidence could be admitted as to the intention of the testator, and that this legacy therefore failed and fell into the undisposed of residue.

Held also, that the bequest in the seventeenth clause of the will of Rs. 10,000 to the support of the testator’s Temperance and Reading rooms for European pensioners and the Poor Widows’ Quarters attached thereto, being a bequest to charitable uses, was void under Section 105 of the Indian Succession Act, as the testator had nearer relatives than nephews, and the will was executed less than twelve months before his death.

SUIT by the Administrator-General of Madras for the directions of the Court as to the construction of the following will:

"I, William Garrant, of Cleveland Town in the Civil and Military Station of Bangalore hereby revoke all wills, codicils and testamentary dispositions hereetofore made by me and declare this to be my last will.

"First.—I hereby direct that all my just debts and funeral and testamentary expenses be paid and discharged by my executor hereinafter named.

"Second.—I hereby nominate and appoint as executor to this my last will and testament M. W. Walker, Esquire, Agent of the Bangalore Bank (Limited), residing in the Civil and Military Station of Bangalore.

"Third.—I hereby give, devise and bequeath to my grandson Frank William Money, now a minor, absolutely my house and premises known
as the 'Eastern Castlet,' in the Mount Road, Madras, and I direct that
the title-deeds thereof shall from the period of my demise be lodged in
the Bank of Madras at Madras for safe keeping until the said Frank
William Money, if living, shall attain the age of twenty-one years, after
which period they shall be made over to his personal custody and control
to do with as he may see fit.

"Fourth.—I hereby direct that in the event of the death of the said
Frank William Money prior to his completing twenty-one years of age,
the said 'Eastern Castlet' shall be sold by my executor and trustee and
the sale-proceeds thereof shall be deposited in the Bank of Madras at
Madras to the credit of 'The Garratt Trust Fund' hereinafter mentioned
to be invested in Government of India securities and for the purposes of
the said trust.

"Fifth.—I hereby give, devise and bequeath absolutely my house and
premises called 'Beresford Lodge' at the junction of Lal Bagh Road and
Fort Road, Bangalore, together with all the household furniture supplied
by me therein and thereto belonging to the children of my late daughter
Elizabeth Wilkins, now deceased, jointly share and share alike, and which
I wish [451] should be a house for them or any of them in Bangalore, not
to be disposed of until the youngest of my said late daughter's children
surviving shall attain the age of eighteen years, when the said house and
premises 'Beresford Lodge' may be sold by them, or the survivor of
them, through the medium of my executor and the sale-proceeds there-
of shall be divided between them in equal shares share and share
alike.

"Sixth.—I hereby direct that the title-deeds of the said 'Beresford
Lodge' shall be deposited for safe keeping in the Bank of Madras at Madras
until such time as the property may be sold as stated in the fifth paragraph
herein, and I hereby further direct that if the said children be at any
time all removed from the said house, that my executor and trustee shall
at once take charge of the house, premises and all the furniture therein
supplied by me and belonging thereto, and shall let the property,
furnished, to any tenants, collect and receive the rents thereof, and pay
the same, less expenses for repairs and assessment according to his
discretion, towards the benefit, support and education of my said late
daughter's surviving children.

"Seventh.—I hereby direct that if my grandson Frank William
Money desires to go to England to qualify for any profession, that my
executor and trustee shall have full power to disburse from and out of the
principal of the 'Garratt Trust Fund' hereinafter mentioned sufficient
money for his passage to and from England and for his suitable outfit
and other incidental expenses as my executor and trustee shall deem
just and proper for such purpose.

"Eighth.—I hereby direct that all other house properties and lands
belonging to me in Bangalore, together with all my household furniture
in 'Hope Lodge' or other houses in 'Cleveland Town,' shall, within the
period of one year from the date of my death, be all sold by my executor
and trustee, and the sale-proceeds thereof shall be deposited in the Bank
of Madras at Madras to the credit of the 'Garratt Trust Fund' for invest-
ment in Government of India securities for the purpose of the trust.

"Ninth.—I hereby give, divide and bequeath to my grandson Frank
William Money absolutely my gold watch and chain, which may be made
over to him for immediate use at the time of my death.
"Tenth. — I hereby direct that all other moveable property of
value that may be found in 'Hope Lodge,' consisting of silver or plated
ware, gold or silver jewels, precious stones, also horses, ponies, cows,
cattle and other live stock whatsoever, together with carriages, coaches
or other conveyances, and all or any other sundry articles of any
description, be all sold by my executor and trustee within one year from
the date of my death, and the sale-proceeds thereof shall be deposited
in the Bank of Madras at Madras to the credit of the 'Garratt Trust
Fund' for investment in Government of India securities for the purposes
of the said trust.

"Eleventh.—I hereby give, devise and bequeath to my grand-children
by my said late daughter Elizabeth Wilkins, also to my grandson Frank
William Money, and to his step-brother George William Money (the
latter now in England) in equal shares, the benefit, interest and profit
that shall arise and accrue from and out of the 'Garratt Trust Fund,'
which my executor and trustee shall draw and disburse quarterly. The
share in such for my grandson Frank William Money shall be disbursed
by my executor and trustee as he shall think proper, and, if necessary,
for the support and education of the said Frank William Money in
England.

"Twelfth.—I hereby direct that the shares from and out of the
interest or profit of the 'Garratt Trust Fund' for the children of my
said late daughter Elizabeth Wilkins shall be paid quarterly by my
executor and trustee to their father E. S. Wilkins, Esquire, Barrister-at-
Law, for their support and education on obtaining from him on each
occasion his receipt for the amount expressing the purpose for which the
payment is received, and subject at all times to the condition which I
hereby direct that my executor and trustee shall always be fully satisfied
that the monies so paid away to him are made proper use of exclusively
for the benefit, support and education of the said children, and I hereby
direct that my said executor and trustee shall at all times see to their
continued welfare until they attain majority, after which period my
executor and trustee shall make direct payments to each of such children
who attains majority and obtain receipt of such child for each payment
so made.

"Thirteenth.—I hereby direct that all bank shares in the Bangalore
Bank (Limited) or any other bank that I may be possessed of at
the time of my death shall be all sold by my executor and trustee with-
in one year from the date of my death, and the sale-proceeds shall be
deposited in the Bank of Madras at Madras to the credit of the 'Garratt
Trust Fund' for investment in Government of India securities for the
purposes of the said trust.

"Fourteenth.—I hereby direct that all monies outstanding and due to
my estate at the time of my demise shall, when recovered by my
executor and trustee, be deposited in the said Bank of Madras to the
credit of the 'Garratt Trust Fund' to be invested in Government of
India securities for the purposes of the said trust.

"Fifteenth.—I hereby direct that all or any gold mining shares
and all other interest in gold mining lands at Shemoga District in
the province of Mysore or others that I may possess at the time of
my death shall come under the control of my executor and trustee in
view to recovering the value thereof at his discretion, and he shall
deposit whatever value he may obtain in the Bank of Madras at Madras
to the credit of the 'Garratt Trust Fund' for the purposes of the said trust.

Sixteenth.—I hereby direct that my executor and trustee shall, from and out of my monies that he may receive, retain in his hands and control a sum of rupees five hundred, out of which he will disburse various petty pensions to some poor people who have been mentioned to him by me.

Seventeenth.—I hereby give, devise and bequeath in support of my Temperance and Reading rooms for European pensioners, and also the 'Poor Widows' Quarters attached thereto, the sum of rupees ten thousand, which amount shall be invested as my executor may deem most profitable, and the interest or profit arising therefrom shall be paid monthly by my executor to the Chairman for the time being of the Wesleyan Mission at Bangalore, who shall be considered the trustee for the said premises, and will see to the management and up-keep of the same and the repairs thereof and any assessment payable thereon.

Eighteenth.—I hereby give, devise and bequeath absolutely to P. Cole rupees eight hundred, to Pauline Cole rupees eight hundred, and to Bossy Cole rupees five hundred respectively.

Nineteenth.—I hereby give, devise and bequeath absolutely to each of my domestic servants a payment of three months' salary at the rate of their wages per mensem.

Twentieth.—I hereby give, devise and bequeath absolutely to my executor and trustee M. W. Walker, Esquire, the sum of rupees one thousand, provided he undertakes the office and duties of my executor and trustee under the directions set forth in this my last will.

Twenty-first.—I hereby direct that my executor and trustee shall, from and out of my estate, furnish himself with ready money in a sum of not less than five thousand rupees to be placed to his own credit in the said Madras Bank, and I hereby empower him to draw against such amount from time to time as may be necessary for any urgent expenses, including taking out probate hereof and otherwise administering to my estate, all remaining portion (if any) of such sum shall be ultimately paid over to the credit of the 'Garratt Trust Fund' for the purposes of the trust.

Twenty-second.—I hereby direct that my executor and trustee shall, as soon as may be practicable, having regard to payment of bequests, &c., cause a certain Trust Fund to be commenced and established in the said Bank of Madras at Madras, to be called the 'Garratt Trust Fund,' and all monies that shall be paid to the credit of that fund shall be invested in Government of India securities and be kept in the said bank for safe custody for the purposes of the trust to be so created. I direct that such trust fund shall never be received from deposit in the said Bank of Madras at Madras so long as that bank shall exist.

Twenty-third.—I hereby direct that the 'Garratt Trust Fund' shall be a continuing fund to all time, and that the interest and profit derived therefrom shall be received and enjoyed as expressed in this will, not only to the legatees to whom such has herein been bequeathed by me, but the same shall be inherited by any child or children of them hereafter from time to time and from one generation to another in accordance with all legal rights.

Twenty-fourth.—I hereby nominate and appoint as my trustee for the purposes of the 'Garratt Trust Fund' M. W. Walker, Esquire, whom I have nominated and appointed my executor to this my last
will, and I hereby declare that the power of appointing any new trustee or trustees of this my will[456] and of and in respect of the Garratt Trust Fund shall be exercisable by the said M. W. Walker, Esquire, and hereafter be exercisable by the surviving or continuing trustee for the time being, or the acting executor or executors, administrator or administrators of the last surviving or continuing trustee or by the last retiring trustee, and upon such appointment the number of trustees may be increased, and upon every such appointment the trust premises shall be transferred that the same may become vested in the new trustee or trustees jointly with the surviving or continuing trustee or trustees, and every such new trustee shall, as well before or after the said trust premises shall have become vested as herein directed, have the same powers, authorities and directions as if he had been hereby originally appointed a trustee, and that the said trustees for the time being may respectively reimburse themselves out of the trust premises all expenses incurred in or about the execution of the aforesaid trusts and powers.

"In witness whereof," &c.

The issues in the suit were as follows:—

(1) What interest does the first defendant take in the house mentioned in paragraphs 3 and 4 of the will?

(2) What interest do the children of Elizabeth Wilkinson take under paragraphs 5 and 6 of the will?

(3) Is the creation of the "Garratt Trust Fund" valid to any, and to what extent?

(4) How are the various directions of the will, with reference to the said trust fund, to be interpreted?

(5) Are the bequests of pensions in Clause 16 of the will valid to any, and to what extent? If void, what becomes of the money directed to be paid in such pensions?

(6) Is the charitable bequest in Clause 17 of the will void? If so, does it become undisposed if residue or does it form part of the "Garratt Trust Fund"?

Mr. Subramanyan, for the plaintiff, opened the case pointing out the several difficulties with reference to which the issues were framed, and argued that the bequest in Clause 16 was necessarily invalid under the Succession Act, Section 68, as evidence would be inadmissible for purpose of supplying the names of the persons therein referred to.

[456] Mr. E. Norton (Mr. Kernan with him) for the eighth defendant, George William Money.

Our client is the step-son of Mrs. Money, the late daughter of the testator. He claims under the will alone, and would not take under an intestacy. Our contention is that the charitable bequests fail, and the funds go into the "Garratt Fund." This fund is created by Clauses 22 and 23, and it is fed contingently by Clauses 4, 8 and 10, and also by Clauses 13, 14, 15 and 21. In the corpus of this fund, my client has a vested interest under Clause 11 of the will and Succession Act, Section 159. I concede that effect cannot be given to Clauses 22 and 23 as they stand, but the will, as a whole, indicates two main intentions. First to perpetuate the name of the testator and the fund which he has created; and, secondly, to place the eighth defendant on the same footing with the testator's grandchildren. The first intention cannot be carried out, but the ordinary result of an intestacy does not ensue by reason of the expression of the second of these intentions. Where a testator desires to effect two objects of which the law invalidates one only, the Court should eliminate what
is illegal and give effect to the rest. See Agnew v. Matthews (1); see also
Kally Prosmono v. Gopee Nath (2) which shows that provisions bad for
perpetuity do not operate to vitiate the whole will. Again, Atkinson v.
Hutchinson (3) is an authority for the proposition that even in a deed
where the words employed are susceptible of a twofold construction, the
Court must adopt that which maintains the general intention of the
instrument. Similarly the Lord Chancellor in Martelli v. Holloway (4)
observed that a clause in a will obnoxious as tending to create a
perpetuity according to one construction should, if possible, be construed
otherwise in order to maintain the general intention of the testator.
Succession Act, Section 71, contains a rule in the same sense.

[HANDLEY, J.—Are there two possible constructions in the case of
clause 23?]

Yes, the last words referring to all legal rights mean "my intention is
to be carried out as far as possible." Compare Christie v. Gosling (5).

In this view the clauses in the will now in question might have two
possible effects, first that the beneficiaries should take [467] the corpus
absolutely, or, secondly, that they should take a life interest with re-
mainder to their children. The second effect seems to be precluded by
Succession Act, Section 100. My client, therefore, claims to be entitled
with the grandchildren to an absolute interest in the whole fund.

[HANDLEY, J.—Do you contend that there would be no intestacy
on the expiration of the life interest if there were no gift over?]

The answer to that question is to be found in Succession Act,
Section 159. Here there appears no contrary intention to exclude the
rule. Compare also Manner v. Greener (6), where it was held that the
bequest of the income of the estate passed the fee. In re Johnson’s
Trusts (7) and see Succession Act, Sections 74 and 84 with the illus-
trations. In further illustration of the rule in Section 84, see Garth v.
Baldwin (8), and Butterfield v. Butterfield (9), Re Andrew’s Will (10).

[HANDLEY, J.—With reference to the illustration to Section 74, is
this not a gift for life only?]

That would be better than nothing, but I contend that the Court
must look to the general intention of the testator, and that Clause 11 is
sufficient to carry the corpus. See per Page Wood, V. C., In re Johnson’s
Trusts (7). As to the last words in Clause 23 “in accordance with all
legal rights,” I refer in support of the construction already contended
for to Carver v. Boulws (11), where the words in question were “so far as
I lawfully or equitably, legally can.” Church v. Kemble (12), in which the
words in question were “in case they have power to do so under the will;”
see also Harrington v. Harrington (13). The subsequent words will not cut
down the prior gift which so becomes absolute; see Carver v. Boulws (11),
Blacket v. Lamb (14), Kampf v. Jones (15), Stephens v. Gadsden (16), Gerrard
v. Butler (17), Courttier v. Oram (18). Effect may sometimes be given to
the general intention of the testator at the expense of a particular
intention: Monypenny v. Dering (19), in which the cy-jpres doctrine was

(1) 1 M. H. C. R. 17.
(2) 7 C. L. R. 241.
(3) 3 P. Wms. 259.
(4) L. R. 5 H. L. 532.
(5) L. R. 1 H. L. 290.
(6) L. R. 14 Eq. 456.
(7) L. R. 2 Eq. 716.
(8) 2 Ves. 645.
(9) 1 Ves. 133.
(10) 27 Beav. 608.
(11) 2 Russ. & Mylne 306.
(12) 5 Sim. 545.
(13) L. R. 3 Ch. App. 564, affmd. in L. R. 6 H. L. 87.
(14) 14 Beav. 482, 488.
(15) 5 Keen 756.
(16) 20 Beav. 468.
(17) 20 Beav. 541.
(18) 21 Beav. 91.
(19) 2 De G, M. & G. 145.
applied; and compare [458] Hampton v Holman (1), and see notes to Caddell v. Palmer, Tudor's Real Property Cases, page 489.

Mr. R. Grant (Mr. W. Grant with him), for first defendant, Frank William Money.

Our contention is that the first defendant’s interest in the fund referred to under the fourth and fifth clauses of the will is an absolute interest. Under Clause 21 it would appear to be divested on his death, but, on the true construction of Clause 23, it becomes absolute in the full sense of the word, for the provision for divesting is had. As to my contention that the interest is vested, see Succession Act, Section 106; compare also Section 118, and illustration (a) as to bequests conditional on the happening of an uncertain event. The original bequest is not affected by the invalidity of the second, see Section 120 and illustration (c). The first defendant’s interest accordingly is a vested interest, and is free from the condition precedent, so that if he dies a minor his representatives will take. See Whatter v. Brewood (2) and Ring v. Hardwick (3). The second issue does not affect my client. As to the third issue there may, perhaps, be an intestacy if the provisions of Clause 23 are bad for perpetuity under Succession Act, Section 101. The present case does not come exactly under the terms of that section, but it does come under the rule of remoteness as stated in Jarman on Wills. If the creation of the “Garratt Trust Fund” fails, all the paragraphs relating to the Trust Fund become invalid, a result which can only be obviated by an application of the doctrine of cy-près, and this would have the result of obviating an intestacy. See Succession Act, Sections 69, 74, 84 and Monypenny v. Dering (4). The intention of the testator, as expressed in the will, indicates that the descendants of the first beneficiaries are distinct objects of the testator’s bounty, as to which see Succession Act, Section 84, illustration. The ultimate beneficiaries are there said to take at once on the death of the first takers, so the first takers cannot take an absolute interest. The argument of the eighth defendant depends greatly on the construction that has been placed on Succession Act, Section 159. That section, however, has no applicability here, for, as has already been shown, there is a clearly expressed intention of the testator to exclude the rule. As to [459] Agnew v. Matthews (5), the decision of the learned Judges is open to question: it is not in accord with the judgment of Wilson, J., in Kally Prosonno v. Gopee Nath (6) and see Ex-parte Wynch (7). The Madras decision is, however, distinguishable from the present case, for the words there employed are technical words and the rules of real property were so rendered applicable, although the property was in fact personality. Here there is no technical phraseology to prevent the Court from determining what was really meant by the terms employed. As to the expression in Clause 23 “according to all legal rights” it may mean if the whole of my will cannot be carried out, let my estate be administered according to law, i.e., according to the law of intestacy; see Clause 7, which indicates that the provision for the first defendant is to be a first charge on the corpus. Clauses 16 and 17 both fail, accordingly an intestacy results in respect of the property there dealt with.

Mr. R. B. Michell (Mr. K. Brown with him) for defendants Nos. 2 to 7, the children to the testator’s daughter, Mrs. Wilkins.

1892
March 17.

Original
Civil.

13 M. 448.

(1) L. R. 5 Ch. D 184.
(2) L. R. 2 Eq. 736.
(3) 2 Beav. 359.
(4) 16 M. & W. 428.
(5) 1 M.H.C.R. 17.
(6) 7 C.L.R. 241.
(7) 5 De G.M. & G. 280.
On the third issue.—In so far as the testator directs (in Clause 22 of the will) that the "Garratt Trust Fund" shall never be removed from deposit in the Bank of Madras so long as that bank shall exist, and (in Clause 23) that that fund shall be a continuing fund to all time, the will transgresses the rule against perpetuities; but the whole of the directions in the will for the creation and disposal of this fund are not on that account invalid. The creation of such fund is perfectly valid, and so are the directions as to its disposal, so far as they do not overstep the law against perpetuities. If the legatees mentioned in the eleventh clause of the will taken an absolute interest in that fund by the terms of the will, as it is submitted they do, the directions as to the disposal of the fund will so far be valid, and even if it should be held that those legatees only take an interest for life, those directions will hold good at least to the extent of such life-interests.

On the fourth issue.—I contend that the gifts to the legatees mentioned in Clause 11 of the will is absolute. That clause must be read with Clause 23. The direction in the latter clause that the interest and profit of the fund shall be "inherited" by any child [460] or children of the legatees is inconsistent with the view that there is a distinct gift to them, and is consistent with the view that the child or children were only intended to take by inheritance according to law from those legatees, to whom an absolute estate of inheritance was given; and the words "from generation to generation" and "in accordance with all legal right" also confirm this latter view. In other words, the words in Clause 23 referring to the issue of the legatees are to be construed as words of limitation, not of purchase (Succession Act, Section 84). There is no provision in Clause 23 (nor elsewhere in the will) as to how the children or remoter descendants of those legatees are to take, whether per stirpes or per capita, or whether equally or otherwise, as presumably there would have been if there was a gift in remainder to them. Compare Appleton v. Rowley (1), Alger v. Parrott (2), Avern v. Lloyd (3). It is to be collected from the whole of the will that it was the testator's intention to create estates tail in the "Garratt Trust Fund," or that the legatees mentioned in Clause 11 and their descendants from generation to generation in perpetual succession should enjoy life interests in that fund, the result will be the same, for in the first place an estate tail in personalty cannot be created and words which in the case of realty would confer such an estate would in the case of personality confer an absolute interest [Elton v. Eason (4)], and in the second place a gift of a life-interest in a fund to A, and after his death successive life-interests to his children and remoter issue, or to his heirs in succession, will be construed as a gift of an absolute interest to A [Britton v. Twinning (5), Agnew v. Matthews (6)].

In the present case the fund is given to the legatees mentioned in Clause 11 not for life, but absolutely, and an absolute interest so given is not cut down to an interest for life by a gift over, unless the gift over can itself take effect [Green v. Harvey (7), Winckworth v. Winckworth (8), Ring v. Hardwick (9)]. The bequest in that clause of "the beneficent interest and profit that shall arise and accrue from and out of the "Garratt Trust Fund" is a bequest of the fund itself (Succession Act, Section 19, and illustration (b) there to). Nor is the absoluteness of the gift affected [461] by the directions in Clause 12 as to the application of the

1. L. R. 8 Eq. 139
2. L. R. 3 Eq. 338.
3. L. R. 5 Eq. 389.
4. L. R. 9 Eq. 73.
5. 3 M. & S. 176.
6. 6 M. & R. 576.
7. 1 Hare 428.
8. 6 Beav. 576.
9. 2 Beav. 359.
interest or profit of the fund during the minorities of the testator's grandchildren, nor by the directions in Clause 7 as to advancement out of the principal of the fund for the benefit of the first defendant for the purposes therein mentioned, which advances, it is submitted, can only be made out of his share of the principal.

The legatees mentioned in Clause 11 of the will take the fund as joint tenants, not as tenants in common: that this was the intention of the testator is shown by the direction in Clause 12 to make direct payments "to each of such children who attains majority" [Agnew v. Matthews (1) was referred to].

On the first issue.—Inasmuch as the creation of the "Garratt Trust Fund" is not invalid, the condition subsequent in the fourth clause of the will whereby the first defendant's interest in the "Eastern Castle" is liable to be divested if he should die before attaining twenty-one years of age is valid.

On the second issue.—The devise of "Beresford Lodge" is a devise of it absolutely under the terms of the first portion of Clause 5 of the will, and the expression of the testator's wish as to the property being sold, in the latter portion of the clause, does not create a precatory trust, and is inoperative legally: In re Diques: Gregory v. Edmondson (2), In re Adams and The Kensington Vestry (3) (especially judgment of Cotton, L.J., at page 410), Lamb v. Eames (4), Mussoorie Bank v. Raynor (5), Kumarasami v. Subbaraya (6), Jarman on Wills, 360

The gift of the rent of the property in Clause 5 carries the property itself [Mannox v. Greener (7)].

The devisees of "Beresford Lodge" take as joint tenants, not as tenants in common; this is shown by the word "jointly," by the words "not to be disposed of until the youngest of my said late daughter's children surviving," &c., and by the words "when the said house and premises Beresford Lodge, may be sold by them" in Clause 5 of the will: "them" evidently refers to the surviving children. The intention to create a joint tenancy is also shown by the wording of Clause 6; and especially by the direction therein [462] to pay the rents of the premises, if let, "towards the benefit support and education of my said daughter's surviving children." Throughout the testator speaks of his daughter's children only, and evidently did not contemplate or intend the issue of a deceased child of his daughter taking anything. But even if the daughter's children took as tenants in common, they so took with benefit of survivorship: Doe & Browell v. Abey (8); 2 Jarman on Wills, 700.

On the fifth issue.—The bequest in Clause 16 of the will of Rs. 500 for the payment of "various petty pensions to some poor people, who have been mentioned to him by me," is void for uncertainty, and also for a patent deficiency (Indian Succession Act, Sections 76, 68).

On the sixth issue.—The bequest in Clause 17 of the will of Rs. 10,000 in support of my Temperance and Reading rooms for European pensioners, and also the poor widows' quarters attached thereto," is void, as the testator had grand-children living at his death, and the will was executed less than twelve months before his death (Indian Succession Act, Sections 105, 21-24).

Mr. Smith for the ninth defendant, the administrator to the estate of a child of Mrs. Wilkins, who died since the death of the testator.

The provisions for constituting the "Garratt Trust Fund" are invalid as transgressing the rule against perpetuities, and, therefore, the fund itself failing, all the provisions relating to the disposal and application of that fund, or the income arising therefrom, must fail also. The testator's only object in creating that fund clearly was to perpetuate his name [Ibbetson v. Ibbetson (1)]. There is accordingly an intestacy as to the properties from which the will directs that fund to be formed.

The gift of "Beresford Lodge" in Clause 5 is a gift to a described class, of whom the testator's granddaughter, of whose estate the ninth defendant is administrator, and who survived the testator, was one, and her share in the property therefore vested in her at the testator's death (Indian Succession Act, Section 98, and Illustration (b) thereto). It is only the payment of the sale proceeds that is postponed (by directions contained in Clauses 5 and 6, supposing those directions to be binding) not the vesting of the property. [In re Edmondson's Estate (3); 1 Jarman on [463] Wills, 842]. The donees of "Beresford Lodge" take as tenants in common, not as joint tenants, under the terms of Clause 5: Jolle v. East (3); Heath v. Heath (4); Perry v. Woods (5); 2 Jarman on Wills, 259. Agnew v. Matthews (6) differs materially from the present case, because in the former case the interest of the grandchildren did not vest till they attained their majority. I adopt Mr. Michell's argument as to their being no precatory trust, and also as to the gift being of an absolute interest and not an interest for life only. The principle of Section 159, Succession Act, applies as well in the case of the bequest of the "Garratt Trust Fund" as in the case of the gift of "Beresford Lodge."

Mr. Kearnan for the eighth defendant in reply.

The "Garratt Trust Fund" is the residuary fund. It does not matter what the testator chooses to call it. If any of the dispositions of it are valid, as not transgressing the rule against perpetuities, there is no reason why they should not be carried into effect. Even if the words "shall be inherited by any child or children," &c., in Clause 21 are words of purchase and not of limitation, at all events the life interests to the primary legatees are valid. Those words are to be construed as words of limitation; if the testator had intended them to be words of purchase, he would have expressly made the estates of the primary legatees' estates for life only, but he has nowhere done so, but merely directed periodical payments of interest and profits.

JUDGMENT.

HANDELY, J.—This is a suit by the Administrator-General to obtain the decision of the Court upon certain questions arising upon the construction of the will of William Garratt, who died at Bangalore in August 1888. Testator appointed Michael William Walker his executor and trustee, but Mr. Walker, after partly administering the estate by paying the debts and some of the legacies, transferred the remaining assets of the testator to the Administrator-General under the provisions of Section 31 of the Administrator-General's Act, Act II of 1874.

The first defendant, F. W. Money, a minor, is the son of a daughter of the testator, who predeceased him. Defendants 2 to 7, also minors, are children of another daughter of testator, Mrs. Wilkins, who also predeceased him. The eighth defendant, G. W. [464] Money is a half-brother of first defendant, that is, a son of first defendant's father by

(1) 10 Sim. 495. (2) L.R. 5, Eq. 389. (3) 3 Br. C.C. 26.
(4) 2 Atk. 123. (5) 3 Ves. 204. (6) 1 M. H.C.R. 17.
another wife than the testator's daughter. Ninth defendant is the Administrator-General as the administrator of the estate of Elizabeth Gertrude Wilkins, a daughter of testator's daughter, Mrs. Wilkins, who has died since the death of testator.

First defendant, defendants 1 to 7, eighth defendant and ninth defendant, respectively, are separately represented by counsel, their interests being conflicting.

It is to eighth defendant's interest to uphold all the provisions of the will so far as they relate to him, for he would take nothing under an intestacy, not being one of testator's next-of-kin. First defendant would gain by an intestacy as to part of the will, for he would take an equal share in the undisposed of estate with the children of Mrs. Wilkins as a class, and they are therefore interested in maintaining that there is no intestacy. And both first defendant and defendants 1 to 7 are interested in shutting out eighth and ninth defendants from any benefit under the will. The case has been very fully argued, and my attention has been drawn to all the authorities bearing upon the various questions that arise, which, however, have mainly to be decided under the provisions of the Indian Succession Act, which, it is admitted governs the case. The most important and difficult questions to be decided are those raised by the third and fourth issues as to what the testator calls the "Garratt Trust Fund," and, as some of the other questions depend, to some extent, upon these, I shall consider them first. Paragraph 22 of the will is as follows: "I hereby direct that my executor and trustee shall, as soon as conveniently may be practicable, having regard to payments of bequests, &c., cause a certain trust fund to be commenced and established in the said Bank of "Madras at Madras to be called 'The Garratt Trust Fund,' and all monies that shall be paid to the credit of that fund shall be invested in Government of India securities and be kept in the said bank for safe custody for the purposes of the trust to be so created. I direct that such trust fund shall never be received from deposit in the said Bank of Madras as long as that bank shall exist."

By paragraphs 8, 10, 13, 14, 15 and 21, testator endows this trust fund by directing that the proceeds of sale of certain immovable and moveable properties and the outstandings to be recovered for the estate, and the balance of a sum of Rs. 5,000, which the executor is empowered to retain to meet probate and other expenses, shall be credited to it. These directions, together with the preceding legacies, practically exhaust the testator's assets, though there is no specific residuary bequest. Paragraph 4 provides that, if first defendant dies under twenty-one years of age, a house devised to him shall be sold and the proceeds be carried to this fund. So far there is nothing unusual or illegal about the creation of this fund, except the direction that the securities representing it shall never be received from deposit in the Bank of Madras, which, as an attempt to create a fund in perpetuity, is invalid and cannot be carried out. But this does not, I think, prevent the intention of the testator to create and endow this fund being carried out. I regard it merely as an attempt to fetter the power of the executor to deal with the fund which cannot be enforced, and, disregarding this, there remains only what amounts to no more than the usual direction for sale and conversion into money of the estate and investment thereof for the purpose of carrying out certain trusts. It is when we come to the trusts, which the testator declares of this fund, that the real difficulty begins. These are contained in paragraphs 7, 11, 13 and 23. Paragraph 7 makes a provision for th
payment of the passage to England, outfit and other incidental expenses of first defendant, if he wishes to go to England for the purpose of being educated there. I shall consider this later on, when dealing with first defendant's interest in this fund.

Paragraphs 11, 12 and 23 are as follows:

"Para. 11. I hereby give, devise and bequeath to my grand-children by my said late daughter, Elizabeth Wilkins, also to my grandson, Frank William Money, and to his stepbrother, George William Money (the latter now in England), in equal shares, the benefit, interest and profit that shall arise and accrue from and out of 'The Garratt Trust Fund' which my executor and trustee shall draw and disburse quarterly. The share in such for my grandson, Frank William Money, shall be disbursed by my executor and trustee as he shall think proper, and, if necessary, for the support and education of the said Frank William Money in England.

"Para. 12. I hereby direct that the shares from and out of the interest or profit of 'The Garratt Trust Fund' for the [466] children of my said late daughter, Elizabeth Wilkins, shall be paid quarterly by my executor and trustee to their father, E. S. Wilkins, Esquire, Barrister-at-Law, for their support and education on obtaining from him, on each occasion, his receipt for the amount, expressing the purpose for which the payment is received and subject at all times to the condition, which I hereby direct, that my executor and trustee shall always be fully satisfied that the monies so paid away to him are made proper use of exclusively for the benefit, support and education of the said children, and I hereby direct that my said executor and trustee shall, at all times, see to their continued welfare until they attain majority, after which period my executor and trustee shall make direct payment to each of such children who attains majority and obtain receipt of such child for each payment so made.

"Para. 23. I hereby direct that 'The Garratt Trust Fund' shall be a continuing fund, to all time, and that the interest and profit derived therefrom shall be received and enjoyed as expressed in this will, not only to the legatees to whom such has herein been bequeathed by me, but the same shall be inherited by any child or children of them hereafter from time to time and from one generation to another, and in accordance with all legal rights."

The first thing to be noted in paragraph 11 is that, as to the bequest to the children of Mrs. Wilkins, it is a bequest not to a class but to them individually. This, I think, is clear from the fact that the testator names the other two objects of the bequest, F. W. Money and his stepbrother, G. W. Money, and, though he does not name the children of Mrs. Wilkins, he speaks of them "as my grandchildren" and must be taken to have had, in his mind's eye, such grand-children as were then living. The children of Mrs. Wilkins, therefore, who survived testator, would take as persona designatae a vested interest on the death of the testator in what is bequeathed to them by paragraph 11.

What is bequeathed to them, in equal shares with F. W. Money and G. W. Money is "the benefit, interest and profit that shall arise and accrue from and out of the 'Garratt Trust Fund,' which my executor and trustee shall draw and disburse quarterly."

[467] Assuming the word "benefit" to be no wider than "interest and profit," as would appear from the words "which my executor and trustee shall draw and disburse quarterly," this bequest of the interest
would, by Section 159 of the Indian Succession Act, carry the corpus as well as the interest, unless the will affords an indication of an intention that the enjoyment of the bequest should be of limited duration. Such indication, if it exists at all, must be found in paragraph 12 or 23. Paragraphs 11 and 23 must, I think, be read together, for they contain the whole of the directions as to the devolution of the "Garratt Trust Fund." It is argued by those who contend for an intestacy that the effect of the two paragraphs is to direct payment of the income to the legatees during their lives, and, after their death, to their children and descendants "from generation to generation" as the testator express it, and that the whole bequest is, therefore, void as an attempt to create a succession of life interests in perpetuity. On the other hand it is argued, by those who support the will, that the words in paragraph 23, referring to the children of the legatees, are words of inheritance and not of purchase, and that their effect is to give an absolute interest in the fund to the legatees. In my opinion the latter is the correct construction, having regard to the intentions of the testator to be gathered from the whole will. It is to be observed, that there is no direct bequest in paragraph 23 to the children of the legatees, on the contrary the testator speaks of the legatees "to whom such (the interest and profit of the fund) has been bequeathed by me," and he goes on to say that "the same shall be inherited by any child or children of them hereafter from time to time and from one generation to another and in accordance with all legal rights." This, coupled with paragraph 11, is in effect a gift to the legatees and their children as their heirs. The word inherited must mean inherited from the legatees. I think, therefore, that the disposition contained in paragraphs 11 and 23, read together, comes within the meaning of Section 84 of the Indian Succession Act as a bequest to a person, with the addition of words which describe a class of persons, but do not denote them as direct objects of a distinct and independent gift, in which case by that section the object of the bequest is entitled to the whole interest of the testator therein. No doubt the testator did intend that the fund should be enjoyed by the legatees and their descendants for all time. This is shown [468] by the words in paragraph 22 making the fund a perpetual fund, and by the words "The Garratt Trust Fund shall be a continuing fund to all time" and the words "from generation to generation" in paragraph 23. In fact he wished to create an estate tail in the fund. This he could not do, and so far his intention must fail; but that does not, I think, affect the validity of the gift to the legatees and their children, which has by law the effect of giving the legatees an absolute interest. It is merely an attempt to cut down, by a direction in the will, the absolute interest which the words used have given to the legatees. Such an attempt must fail and the legatees take an absolute interest—see the case of Carver v. Bowles(1), Blacket v. Lamb(2), Kampf v. Jones (3), Stephens v. Gadsden(4), Gerrard v. Butler (5), the principle of which is embodied in Section 125 of the Indian Succession Act.

To sum up. The construction, which I would put upon paragraphs 11 and 23 of the will read together, is this. The gift to the children of Mrs. Wilkins and to F. W. Money and G. W. Money is a gift to them as persons designate, and they took a vested interest in their shares from the death of the testator. The gift to them of the "benefit interest and profit"

(1) 2 Russ. & Mylns 301.  (2) 14 Beav. 422.  (3) 2 Keen 756.
(4) 20 Beav. 469.  (5) 20 Beav. 541.

677
of the fund is a gift of the whole fund by virtue of Section 159 of the Indian Succession Act, because the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration; but, on the contrary, paragraph 23 contains words of inheritance which have the effect, by Section 84 of the Indian Succession Act, of giving to the legatees the whole interest of the testator in the fund. The attempt to limit this absolute interest by directions that the fund shall continue to all time and shall be enjoyed by the legatees’ children, from generation to generation, is void and there remains an absolute gift of the fund to the legatees in equal shares. And the directions in paragraph 12 as to the manner in which the interest in the shares of the children of Mrs. Wilkins shall be paid during their minority and after it ceases does not, I think, prevent their taking a vested interest in their shares on the testator’s death. See explanation to Section 106 of the Indian Succession Act. The above construction is, I think, a possible and not unreasonable one to put upon the words of the will and, if so, it is to be preferred [469] to any other, as it avoids an intestacy and carries out the obvious intention of the testator to provide equally for his grand-children and for G. W. Money, the half-brother of one of them.

With regard to ninth defendant, who represents the estate of a daughter of Mrs. Wilkins, who died since testator, it is argued by those who would exclude that daughter from a share in the "Garratt Trust Fund" that the gift to the legatees was a gift to them as joint tenants and not as tenants in common, and various authorities are quoted on either side of this question.

The general result of the authorities seems to be that the tendency of the Court is to lean against joint tenancy, especially in the construction of a will. As I have said above, in my view, the gift to the legatees by paragraph 11 was a gift to F. W. Money, G. W. Money and the children of Mrs. Wilkins as "personae designatae," and the words "in equal shares" would, I think, make them tenants in common. And this construction is also in accordance with the intention of the testator evidenced by paragraph 23 that the children of the legatees should take after them, which intention, though it cannot be carried out as testator meant it to be carried out, yet may be used as a guide to his wishes in construing other parts of the will. In my opinion, therefore, the deceased daughter of Mrs. Wilkins took upon testator’s death a vested interest in one-ninth part of the "Garratt Trust Fund" which has passed to her representative, ninth defendant, the Administrator-General. A case, Agnew v. Matthews(1), was cited in argument, where it was held, upon a somewhat similar bequest to the children of certain persons with an invalid gift over to their heirs, that the children only took a contingent interest on their attaining twenty-one. But that case is clearly distinguishable from the present, for there was no direct gift to the children as here, but only a direction to the executors to pay them a share of the interest of the fund on their respectively attaining twenty-one.

One other question arises as to this "Garratt Trust Fund," and that is with regard to the provisions of paragraphs 7 and 11 of the will as to sending F. W. Money to England for education. Paragraph 7 is as follows: "I hereby direct that if my grandson, Frank William Money, desires to go to England to qualify for any profession, that my executor and trustee shall have full power to [470] disburse from and out of the

(1) M.H.C.R. 17.
principal of 'The Garratt Trust Fund' hereinafter mentioned sufficient money for his passage to and from England and for his suitable outfit and other incidental expenses as my executor and trustee shall deem just and proper for such purpose.' And the last clause of paragraph 11 is as follows: 'The share in such for my grandson, Frank William Money, shall be disbursed by my executor and trustee as he shall think proper, and, if necessary, for the support and education of the said Frank William Money in England.' Reading these two clauses together, and bearing in mind that testator did intend, to tie up the share of each legatee so that it might descend to his or her children, I think the meaning of paragraph 7 must be taken to be to allow the executor in the case of this legatee only to trench upon the principal of his share for the purpose indicated, if the income, as applied under the last clause of paragraph 11, were not sufficient. Having regard to the intention of the testator to benefit the legatees equally by this fund, it cannot, I think, have been his meaning in paragraph 7 to give F. W. Money a benefit out of the fund over and above his share. In the view that I have taken of the combined effect of paragraphs 11 and 23, that F. W. Money took a vested interest at testator's death in one-ninth of the fund, the effect of paragraph 7 is only to authorize the executor to apply his share towards the expense of his journey to England and other expenses connected with his residence and education there.

I find therefore upon the third and fourth issues that the creation of the 'Garratt Trust Fund' is valid as far as it provides a fund for distribution between testator's grandson, F. W. Money, his half-brother, G. W. Money, and the children of testator's daughter, Mrs. Wilkins, but is invalid so far as it seeks to make the fund a perpetual fund. That F. W. Money, G. W. Money, and the children of Mrs. Wilkins, who survived the testator, took an absolute vested interest each in one-ninth of the fund, and that ninth defendant, as the administrator of the estate of testator's deceased grand daughter, Elizabeth Gertrude Wilkins, is entitled to receive her one-ninth share.

I have next to consider the question raised by the first issue as to paragraphs 3 and 4 of the will. They are as follows:

Para. 3. "I hereby give, devise and bequeath to my grandson, Frank William Money, now a minor, absolutely my house and premises, known as the 'Eastern Castlet' on the Mount Road, Madras, and I direct that the title-deeds thereof shall from the period of my demise be lodged in the Bank of Madras at Madras for safe keeping until the said Frank William Money if living, shall attain the age of twenty-one years, after which period they shall be made over to his personal custody and control to do with as he may see fit."

Para. 4. "I hereby direct that in the event of the death of the said Frank William Money prior to his completing twenty-one years of age, the said 'Eastern Castlet' shall be sold by my executor and trustee and the sale proceeds thereof shall be deposited in the Bank of Madras at Madras to the credit of the 'Garratt Trust Fund' hereinafter mentioned to be invested in Government of India securities and for the purpose of the said trust."

There can be no doubt that under this bequest first defendant took on the death of the testator a vested interest in the property subject to be divested by his dying under twenty-one years of age. But it is contended for him that the creation of the Garratt Trust Fund being invalid as an attempt to create a perpetuity, the gift over fails and he takes an absolute interest in the property to which paragraphs 3 and 4 relate. I have already
held that the creation of the Garratt Trust Fund is only invalid so far as it is attempted to make it a fund in perpetuity. As a fund to provide for the legatees under paragraphs 11 and 23 it is well created, and is, in fact, nothing more than the usual fund directed by a testator to be created by sale of his property. There is, therefore, nothing illegal in the direction in paragraph 4 that in the event of F. W. Money dying under twenty-one years the property bequeathed to him by paragraph 3 shall be sold and the proceeds go to the Garratt Trust Fund. I must hold upon the first issue that under paragraphs 3 and 4 of the will first defendant, F. W. Money, took upon the death of the testator a vested interest in the property mentioned in these paragraphs liable to be divested in the event of his dying under the age of twenty-one years, in which event the property is to be sold and the proceeds carried to the Garratt Trust Fund.

The second issue relates to the bequest by paragraphs 5 and 6 of the will of testator’s house at Bangalore called ‘Beresford Lodge’ and the furniture in it to the children of Mrs. Wilkins. Paragraphs 5 and 6 are as follows:—Para. 5. “I hereby give, devise and bequeath “absolutely my house and premises called ‘Beresford Lodge’ at the junction of Lul Bath Road and Fort Road, Bangalore, together with all the household furniture supplied by me therein and thereto belonging to the children of my late daughter Elizabeth Wilkins, now deceased, jointly “share and share alike, and which I wish should be a home for them or “any of them in Bangalore, not to be disposed of until the youngest of my “said late daughter’s children surviving shall attain the age of eighteen “years, when the said house and premises ‘Beresford Lodge’ may be sold “by them or the survivors of them, through the medium of my executor, “and the sale-proceeds thereof shall be divided between them in equal “shares share and share alike.”

Para. 6. “I hereby direct that the title-deeds of the said ‘Beresford “Lodge’ shall be deposited for safe keeping in the Bank of Madras at “Madras, until such time as the property may be sold as stated in the “fifth paragraph herein, and I hereby further direct that if the said child- ren be at any time all removed from the said house, that my executor “and trustee shall at once take charge of the house, premises and all the “furniture therein supplied by me and belonging thereto, and shall let the “property furnished to any tenants, collect and receive the rents thereof “and pay the same less expenses for repairs and assessment according to “his discretion towards the benefit, support and education of my said late “daughter’s surviving children.” This is, I think, an absolute gift to the children of Mrs. Wilkins of testator’s whole interest in the property, and is not controlled by the directions in the latter part of paragraph 5 that the house shall not be sold until the youngest granddaughter attains eighteen years of age, which must be regarded merely as an expression of the wish of the testator and not as a precautory trust. See Section 125 of the Indian Succession Act and the cases before quoted. Here also it is contended on behalf of defendants 2 to 7 that the gift is to the daughters of Mrs. Wilkins as joint tenants, and therefore that the ninth defendant as representing the deceased daughter Elizabeth Gertrude Wilkins takes nothing, but her share passes to defendants 2 to 7 by survivorship. In my opinion, this being an absolute gift to the children of Mrs. Wilkins share and share alike, and the subsequent direction that the property shall not be sold until the youngest attains eighteen years of age being of no legal effect, the children who survived the testator took each an equal share.
in the property which vested in them on the death of the testator. The
daughter Elizabeth Gertrude Wilkins who died since the death of the
testator took a vested interest on his death in one-seventh share in the
property bequeathed by paragraph 5 and her share is to be received by
her representative ninth defendant. The postponement of the power of
disposition over the property being of no legal effect there remains only
the absolute gift to the children of Mrs. Wilkins 'jointly share and share
alike.' Here again as in the gift of the Garratt Trust Fund, I think the
children of Mrs. Wilkins take as *persona designate* and as they all survived
the testator they took a vested interest in their shares, and the share of
the daughter, who died after testator, passed to her representative. I find
on the second issue that the children of Mrs. Wilkins, who survived the
testator, each took a vested interest in one-seventh share of the property
mentioned in paragraphs 5 and 6 of the will, and that the share of the
daughter Elizabeth Gertrude Wilkins passed to her representative, ninth
defendant.

An additional issue was raised at the hearing as to the legacies given
by paragraphs 16 and 17 of the will.

Paragraph 16 is as follows: — "I hereby direct that my executor
and trustee shall from and out of any of my monies that he may receive,
retain in his hands and control a sum of rupees five hundred, out of
which he will disburse various petty pensions to some poor people, who
have been mentioned to him by me." There is here a deficiency on the
face of the will as to the objects of this bequest, and by Section 68 of the
Indian Succession Act no extrinsic evidence can be admitted as to the
intention of the testator. This legacy must, therefore, fail and fall into
the undisposed of residue.

Paragraph 17 is as follows: — "I hereby give, devise and bequeath in
support of my temperance and reading rooms for European pensioners,
also the poor widows' quarters attached thereto, the sum of rupees
ten thousand which amount shall be invested as my executor may deem
most profitable and the interest or profit arising therefrom shall be
paid monthly by my executor to the Chairman for the time being of the
Wesleyan Mission at Bangalore, who shall be considered the trustee for
the said premises, and will see to the management and upkeep of [474]
the same and the repairs thereof, and any assessment payable thereon."

This is a bequest to charitable uses, and the will was executed less
than twelve months before testator's death. The legacy is therefore void
by Section 105 of the Indian Succession Act and falls into the undisposed
of residue.

There will be a decree declaring the right of the parties in accordance
with the above findings. All parties will have their costs out of the
estate. Costs to be taxed as between attorney and client and to be paid
in the first place out of the undisposed of residue.

Wilson and King, attorneys, for plaintiff.
D. Grant, attorney for defendant No. 1.
Branson and Branson, attorneys for defendants Nos. 2 to 7.
Lasing, attorney for defendant No. 8.
Barclay, Morgan and Orr, attorneys for defendant No. 9.
APPPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and
Mr. Justice Wilkinson.

Narasayya (Defendant No. 1), Appellant v. Ramabandra
and Others (Plaintiff and Defendants Nos. 2 and 3), Respondents.*

[25th March, 1892.]

Civil Procedure Code, Section 525—Suit on an award—Alternative claim on original
consideration—Withdrawal of claim on award.

The plaintiff lent money to two of the defendants, who were partners with the
third defendant, for the purposes of the partnership and obtained promissory
notes from them. Disputes which arose between them, were referred to arbitrators,
who made an award. An application by the plaintiff to have the award
made a rule of Court was opposed by defendant No. 1, and the plaintiff was
referred to a regular suit. He now brought his suit in the alternative on the
award and on the promissory notes. The award was found to be unenforceable.
The plaintiff then declared himself satisfied to withdraw his suit as far as the
award was concerned, and the Court passed a decree for plaintiff on the merits.
Defendant No. 3 alone having appealed, the Court of first appeal held that the
plaintiff must succeed or [472] fail on the award, and that the withdrawal of
the prayer for a decree on the award altered the nature of the suit, and finding
that there was no evidence of misconduct on the part of the arbitrators, he passed
a decree in the terms of the award. On a second appeal preferred by defendant
No. 1:

Beld, that this procedure was right.

[R., 19 P.R. 1907 = 40 P.L.R. 1907 = 134 P.W.R. 1907.]

SECOND appeal against the decree of G. T. MacKenzie, District
Judge of Kistna, in appeal suit No. 132 of 1889, modifying the decree of
M. B. Sundara Rau, Acting Subordinate Judge of Ellore, in original suit
No. 30 of 1887.

Suit to recover principal and interest due by the defendants to the
plaintiff. The plaint was summarized by the Subordinate Judge as
follows:

"The plaint set forth that the defendants Nos. 1, 2, and 3 were joint
contractors in certain contracts with the Public Works Department and
other public bodies; fourth defendant (Gangayya), was undivided father,
and the fifth undivided brother of the first; that the plaintiff lent to
the firm, consisting of first, second and third defendants for its common
purposes, Rs. 2,000, once on a promissory note marked A, dated 11th
December 1885, executed by the first defendant and another
Rs. 2,000, on three promissory notes marked B, C and D, executed by
the second on the 5th and 21st October and 2nd December 1885,
respectively, at an interest of 12 per cent. per annum; that defendants
had not paid the amount due to him, notwithstanding several demands
made by plaintiff; that the joint contracts carried on by the first defend-
ant were for the benefit of the joint family of defendants Nos. 1, 4 and
5; that the cause of action for the promissory notes arose on the dates
of the notes; that the said disputes between the plaintiff and the defend-
ants Nos. 1, 2 and 3 were referred to an arbitration, and the arbitrators
by the award found the defendants severally liable in sums mentioned
in the award filed with the plaint, and that plaintiff’s application for
"filing the award under Section 525 of the Civil Procedure Code was rejected by this Court on the first defendant's objection."

The further facts of the case are stated above sufficiently for the purposes of this report.

Defendant No. 1 preferred this second appeal.

Pattabhirama Ayyar and P. Subramanya Ayyar, for appellant.

Subramanya Ayyar and Sundara Ayyar, for respondent No. 1.

Srirangachariar, for respondents Nos. 2 and 3.

JUDGMENT.

[476] We think that the preliminary objection raised by the plaintiff (respondent) must prevail and that first defendant, who did not appeal against the decree of the Court of First Instance, is not entitled to argue that the suit ought to have been dismissed. It is then contended for the first defendant (appellant) that the procedure adopted by the District Judge was irregular and illegal. The facts are as follows:—Plaintiff lent money on promissory notes to defendants Nos. 1 and 2. They, with third defendant, were partners or joint contractors, and the money was advanced for their work. Disputes having arisen, the matters in dispute were referred to arbitrators who made an award. Plaintiff applied to the Court under Section 525 of the Code. First defendant objected and the then Subordinate Judge referred the plaintiff to a regular suit. Plaintiff then instituted the present suit and prayed in the alternative either for a decree on the award or on the promissory notes. The first defendant pleaded that, as there was an award, no suit would lie on the merits and contended that the award was bad for misconduct of the arbitrators. Defendants Nos. 2 and 3 pleaded that the award was binding.

An issue was accordingly framed as to the validity of the award. At the hearing, the Subordinate Judge appears to have been of opinion that the award "could not be held a valid decision for enforcement," and the plaintiff thereupon was content to withdraw his suit, so far as the award was concerned. First defendant then maintained that plaintiff could only succeed upon the award. The Subordinate Judge, however, decided the case on the merits and gave the plaintiff a decree against all three defendants. From that decree, third defendant alone appealed on the ground that the withdrawal of the prayer for a decree on the award altered the nature of the suit, and that he had always maintained that the plaintiff must succeed or fail on the award. The District Judge took this view, and the first defendant having adduced no evidence as to the misconduct of the arbitrators, amended the decree of the Court of First Instance by giving plaintiff a decree in the terms of the award. We think that the procedure of the Judge was perfectly regular. The plaintiff could not be allowed to withdraw that portion of his prayer which related to the award, so long as any of the defendants objected to his doing so. The decision of the Judge was correct. As to costs, we think that the Judge was right in [477] making first defendant liable for all the costs hitherto incurred, as it was entirely due to his conduct that the suit was instituted and remanded. The second appeal fails and is dismissed with costs, two sets.
A claim in execution to a house which had been attached was dismissed, and the claimant now sued the decree-holder to establish her title to it. It appeared that the house had been previously attached in execution of another decree obtained against the same judgment debtor and his father (since deceased); that the present plaintiff had then preferred a claim, which was allowed; that the judgment-debtor had taken no steps to have the order allowing the claim set aside; and that a suit filed by the decree-holder with that object had been dismissed:

Heard, that the plaintiff’s claim was not res judicata, and the defendant was not estopped from contesting it.

SECOND appeal against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 577 of 1890, reversing the decree of A Kuppusami Ayyangar, District Munsif of Kumbakonam, in original suit No. 447 of 1889.

Suit for a declaration that a certain house was the property of the plaintiff, and that it was not liable to be sold in execution of the decree in original suit No. 325 of 1888 in the Court of the District Munsif of Kumbakonam obtained by Gnanambal Ammal, the present defendant, against Rangasami Ayyan. The plaintiff had preferred a claim in execution without success. It appeared that Rangasami Ayyan was the plaintiff’s husband, and that his father Subbayyan (deceased) was her maternal grandfather. The above decree was obtained on a bond executed by Subbayyan.

In original suit No. 31 of 1884 in the Court of the District Munsif of Kumbakonam, one Naranappa obtained a decree against [478] Subbayyan and Rangasami Ayyan, and, in execution, attached the house in question in the present suit. The present plaintiff then preferred a claim, which was allowed by an order, dated 25th October 1884 and filed in this suit as Exhibit F. Subbayyan had notice of the plaintiff’s claim, and he was named as one of the parties in the heading to that order, and he took no steps to contest it. The decree-holder then filed a suit (original suit No. 331 of 1885) to have that order set aside, but it was dismissed.

The District Munsif held that the order (Exhibit F) created no estoppel and dismissed the suit on the merits. His decree was reversed, on appeal, by the District Judge, who held that the “defendant is estopped from setting up Subbayyan’s right, because it is res judicata by the order (F), dated 25th October 1884.”

The defendant preferred this second appeal.

Ramachandra Ayyar, for appellant.

R. Subramanya Ayyar, for respondent.
JUDGMENT.

BEGUM, J.—The question for decision in this appeal is whether the District Judge is right in holding the suit to be barred as res judicata by the Order (F), dated 25th October 1884.

This order (F) allowed a claim preferred by the present respondents to this same house on its being attached in execution of a decree obtained by one Naranappa (in original suit No. 31 of 1884) against Subbayyan and Rangasami Ayyan; the former of whom is this respondent’s maternal grand-father and also father-in-law, being the adoptive father of the latter (Rangasami Ayyan), who is respondent’s husband. It appears that, on respondent’s claim to the house being allowed as above, the then plaintiff brought a suit under Section 283 of the Code of Civil Procedure (original suit No. 331 of 1885) which was dismissed (see Exhibit G.)

The present appellant does not claim through the former plaintiff (Naranappa). She obtained her decree in original suit No. 325 of 1888 against Subbayyan’s son (Rangasami Ayyan respondent’s husband) for a debt on a bond executed by Subbayyan. On appellant’s attaching the house in execution of this decree, respondent again put in a claim to the house under Section 378 which was dismissed, and she thereupon brought the present suit under Section 283.

The District Munsif dismissed the suit, but, on appeal by the present respondent, the District Judge, without going into the merits, set aside the District Munsif’s decree and passed a decree in the respondent’s favour on the simple ground that the defendant (now appellant) is estopped from setting up Subbayyan’s right, because it is res judicata by the Order (F).

He explains, it was then decided that Subbayyan had no claim to the property and the suit brought by the then claimant against that order was dismissed. Subbayyan himself did not contest the order, and it is now too late for him to do so, more than a year having elapsed since it was made, and, that being the case, the defendant can have no right to attach the property as Subbayyan’s, while Subbayyan himself has lost his right to it.

Even assuming that the fact of Subbayyan having had notice of his daughter-in-law’s claim in 1884 is sufficient to make him a party, against whom that order was passed, and to debar him or his legal representatives from now denying the respondent’s right to the house, I am unable to agree with the District Judge in holding that the appellant is equally bound by that order, to which she was no party; and the mere fact of her being the creditor of Subbayyan is not sufficient to constitute her his legal representative. Her suit is, therefore, not affected by Section 283 of the Code of Civil Procedure or by the limitation of one year prescribed for such suits.

Without considering, therefore, whether Subbayyan or his son would or would not be barred by the Order (F) from disputing the respondent’s right to the house in question, I am clearly of opinion that the appellant is not barred by that order.

I would therefore allow this appeal, and, setting aside the Lower Court’s decree, remand the case to the Lower Appellate Court for replacement on the file of appeals and disposal according to law.

I would further direct respondent to pay appellant’s costs of this second appeal.
1892

MUTTUSAMI AYYAR, J.—I am also of opinion that the claim is not res judicata either by reason of the Order (F) or of decree in Suit No. 331 of 1885. To neither the present defendant Gnanambal was a party, and, though the plaintiff was a party, that circumstance is not sufficient to create the identity of parties necessary to sustain the plea of res judicata, as there is no mutuality, and, as without mutuality, there can be no estoppel. Assuming that both Subbayan and his son were parties to the Order (F) and that neither could now sue to set it aside, the present defendant is not under the same disability. Though she attached it as the property of Subbayan or his son, she did so, not as their privy or representative, but by virtue of a right inherent in her to attach what was really their property at the date of attachment. It would be open to her to show that Subbayan and his son were in collusion with the plaintiff. There is nothing on the record to indicate that the notice of claim was served on Subbayan's son. However this may be, the defendant is not their representative. This circumstance distinguishes this case from the cases cited by the District Judge.

I therefore concur in the order proposed by my learned colleague.

15 M. 480 = 2 M.L.J. 231.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

AMMOTTI HAJI (Plaintiff), Appellant v. KUNHAVEN KUTTI (Defendant), Respondent.* [11th and 12th April, 1892.]

Malabar law—Ottidar, right of pre-emption of — Waiver—Election not to purchase.

An ottidar in Malabar loses his right of pre-emption if he refuses to bid at a Court-sale of the land comprised in his otti, held in execution of a decree against the karnavan and senior anandravan of the tarwad, in which the jenn right is vested, after having been specially invited to attend and exercise that right, and makes no offer to take the property for a long time after the Court-sale.


SECOND appeal against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 432 of 1891, affirming the decree of V. Kelu Eradi, District Munsif of Pynad in original suit No. 163 of 1891.

Suit by an ottidar, alleging that the lands comprised in his otti had been purchased by the defendant for a sum of Rs. 161 at a sale held in execution of a decree against the jenni, and praying for a declaration that the jenn right should vest in him on payment by him to the defendant of the sum of Rs. 161. It appeared that a notice had been sent to the plaintiff at the date of the sale, calling on him to exercise his right of pre-emption, and [481] that the plaintiff attended the sale but did not make any bid. The lower Courts passed decrees dismissing the suit.

The plaintiff preferred this second appeal.

Sankaran Nayar, for appellant.

Sankara Menon, for respondent.

* Second Appeal No. 1772 of 1891.
JUDGMENT.

MUTTUSAMI AYYAR, J.—The question for decision in this appeal is whether an otti-holder in Malabar loses his right of pre-emption in consequence of his refusal to bid at a Court-sale on the invitation of the purchaser at such sale. The contention for the appellant is that he abstained from bidding, because he was under the apprehension that the junior members of the judgment-debtor's tarward might contest the validity of the Court-sale on behalf of their tarward. The decision must, I think, depend on the further question how far an invitation to bid at a Court-sale is equivalent to an offer to sell from the jenni or the real owner. There is no reason to doubt that, if the decree is binding on the tarward, the otti-holder is bound to elect either to bid at the Court-sale, or to relinquish his right of pre-emption. In the present case, the decree was one against the karnavan and the senior anandavan of the tarward, and, as such, it was prima facie binding on the tarward and no valid ground of objection is shown by the appellant to have existed to the validity of the sale in its execution as against the tarward. It is then said that appellant abstained from bidding, because he feared that some members of the judgment-debtor's tarward might contend that the decree was not binding on it. The decree-holder had a right to bring the property to sale, and the otti-holder had a right of pre-emption. All that the former was bound to do was to give the latter an opportunity to elect either to exercise his right or not, and, if the latter did not choose to do so, he must be taken to have relinquished his right. The facts found do not indicate that he made any inquiry, or had a reasonable objection to the decree being treated as one binding on the tarward. The case is one of election, and the Court-sale created a necessity for appellant's electing either to buy or not to buy, and, after once electing not to buy, he cannot again be permitted to change his mind and assert his right for pre-emption. I am of opinion that this second appeal must fail and be dismissed with costs.

BEET, J.—The question is whether the Lower Courts are wrong in holding that plaintiff has forfeited the right of pre-emption which he possessed as ottidar of the property which was purchased by the respondent on its being sold by Court in execution of a decree for money obtained by a third party against the jenni.

The findings of the Lower Courts are (1) that notice was sent by the decree-holder to the appellant of the date of the sale, calling upon him to exercise his right of pre-emption if so minded, and (2) that appellant was himself present at the sale, but would not bid, saying that the otti to himself was given by nine persons of the tarward, whereas the decree, under which the sale was being held, was against two only, and that he was afraid there might be a suit by the others to set aside the sale.

It was no doubt held in Cheria Krishnan v. Vishnu (1) that the mere fact that the public notice was given of the intended sale, at which therefore the ottidar might have come and bid was not sufficient to deprive him of his right of pre-emption. That does not appear, however, to be a case in point, for here there was something more than the public notice. There was a special notice sent to the ottidar himself, and it is found, as a fact, that he was present at the sale and declined to bid for fear his doing so might involve him in litigation.

It appears that the validity of the sale is in fact disputed, but without success, and it is only after this that appellant comes into Court,

(1) 5 M. 199.
offering to purchase the property in the exercise of his right of pre-emption.

It was held by the Calcutta High Court in Abdul Jaban v. Khelat Chandra Ghose (1) that, when property is sold by public auction at a sale in execution of a decree and the person having a right of pre-emption has the same opportunity to bid for the property as other parties present in Court, the law of pre-emption does not apply. This is certainly not quite in accordance with the dictum in Oheria Krishnan v. Vishnu (2) "that the pre-emptor is entitled to be fully informed what price he is to pay before he makes up his mind to pay and should not be driven to give any fancy auction price at an auction." But even taking this dictum to be authority for holding that appellant did not forfeit his right of pre-emption by not bidding at the auction, as soon as the auction sale ended, the price for which the property had been knocked down was a "sum ascertained" for which he could have offered to take the property, instead of waiting for nearly a year without even making the offer.

No doubt the Limitation Act gives a period of one year for the purpose of instituting a suit to enforce a right of pre-emption, but the question before us is not whether the suit is in time, but whether, by his conduct, the appellant waived his right. Both the Lower Courts have found that he did, and I agree with them.

I therefore agree in dismissing this second appeal with costs.

15 M. 483.

APPELLATE CIVIL.

Before Mr. Justice Subramanya Ayyar and Mr. Justice Best.

UKKANDAN (Plaintiff), Appellant, v. KUNHUNNI AND OTHERS (Defendants), Respondents.* [12th February, 1892.]

Malabar law—Karnar or, disqualification for office of—Blindness.

A blind man sued, as the karnan of Malabar tarwad, to recover certain land. One of the defendants, who claimed but was not admitted to be a member of the tarwad, and who asserted a right as kanomdar to the land in question, pleaded that the plaintiff was not competent to act as karnan, or consequently to maintain the suit by reason of his blindness:

Held, that the defendant was not entitled to raise this plea.

SECOND appeal against the decree of J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 303 of 1890, affirming the decree of V. Kelu Eradi, District Munsif of Pynad, in original suit No. 82 of 1890.

The facts of the case are stated above sufficiently for the purposes of this report. The Lower Courts dismissed the suit, holding that the plea of the defendant, above referred to, should prevail.

The plaintiff preferred this second appeal.

Ryru Nambiar, for appellant.

Sankara Menon, for respondents.

JUDGMENT.

The decision in Kanaran v. Kunjan (3) goes no further than that a blind man is not a fit person to be karnan of a tarwad against...

---

* Second Appeal No. 644 of 1891.

(1) 1 B. L. R. A. C. 105. (2) 5 M. 198. (3) 12 M. 307.
the wishes of the other members of the tarwad. The reason given is that the ruin of the tarwad would be the likely result. It is therefore for the members of the tarwad to object to such a man being their karvan and not for strangers. Defendant No. 2, who has raised the objection in the present case, no doubt, claims to be a member of the tarwad, but this claim of his is denied by the plaintiff; and other members of the tarwad have put in a petition, recognising plaintiff as their karvan, and asking that the suit may be proceeded with in his name. If defendants desire, these petitioners might also be included as plaintiffs in this suit. The mere fact of plaintiff’s blindness does not appear to be a valid ground for dismissal of the suit. The decrees of both the Lower Courts are, therefore, set aside and the suit remanded for replacement on the file of the District Munsif and disposal according to law.

Plaintiff’s costs in the Lower Appellate Court, and in this Court, must be paid by second and third defendants. The rest of the costs incurred hitherto will follow and abide the result.


APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

AYYAPPA (Defendant’s Representative), Appellant v. VENKATAKRISHNAMARAZU (Plaintiff), Respondent.*

[25th April, and 4th May, 1892.]

Rent Recovery Act (Madras)—Act VIII of 1865, Section 3—Registered zamindar—Zamindari held in coparcenary.

A registered holder of a zamindari sued under the Rent Recovery Act to enforce the acceptance of a patta and execution of a muchalika by the defendant, a tenant on the estate. It was pleaded, in defence, that the zamindari was the undivided property of the plaintiff and his coparceners in whose name a patta and muchalika had already been exchanged:

Held, that the plaintiff, as being the registered zamindar, was entitled to maintain the suit alone.

[N.F., 26 M. 589; F., 17 M. 140 = 4 M.L.J. 26; 23 M. 221 (222); R., 19 M. 308 (310); D., 7 M.L.J. 243 (245).]

SECOND appeal against the decree of H. T. Ross, District Judge of Godavari, in appeal suit No. 429 of 1880, reversing the decision [485] of J. Walker, Acting Head Assistant Collector of Godavari, in summary suit No. 18 of 1890.

Suit under the Rent Recovery Act to enforce the acceptance of a patta and execution of muchalika by the defendant. The plaintiff was the registered zamindar of Gundepalli. The defendant admitted that he was a tenant of the zamindari, but stated that the plaintiff was a member of an undivided family, together with three other persons, and that the defendant had already accepted patta and executed a muchalika made out in the names of the plaintiff and his two coparceners. It appeared that the patta in question in the present suit had been duly tendered by the defendant. The Head Assistant Collector dismissed the suit, and his decision was reversed by the District Judge, who found that the

* Second Appeal No. 1079 of 1891.
relation of landlord and tenant was subsisting between the parties to the suit.

The defendant having died, his legal representative preferred this second appeal.

Sankaran Nayar, for appellant.
Bhashyam Ayyangar and Venkataramayya Chetti, for respondent.

JUDGMENT.

We think that the Acting District Judge was right in holding that the plaintiff, as the registered zamindar, had a right under Act VIII of 1865 to compel defendant to accept a patta. The decision in Valamarama v. Virappa (1) is an authority for the proposition that in a zamindari the only zamindar is the registered zamindar, and we do not think that, upon this point, the authority of that decision has been shaken by the decision in Subbu v. Varathappan (2). In a zamindari the only landholder entitled to proceed under Act VIII of 1865 against the tenants of the zamindari must be the zamindar, and the only zamindar for the time being is the registered zamindar.

We dismiss this second appeal with costs.

[586] APPELLATE CIVIL.


KANNAMMAL (Plaintiff), Appellant v. VIRASAMI AND ANOTHER (Defendants), Respondents.* [10th and 11th March, 1892.]

Evidence Act—Act I of 1872, Section 115—Estoppel by conduct—Hindu Law—Adoption.

A Hindu widow, professing to have authority from her husband to do so, took the second defendant in adoption, brought him up as her adopted son, and permitted him to perform the funeral ceremonies of her husband. Land to which she otherwise would have been entitled, was attached in execution of a decree against defendant No. 2. She sued to release the attachment, alleging the adoption was bad, as having been unauthorized:

Held, that the plaintiff was estopped from raising this contention.

[£. 30 A. 549 (559) = A.L.J. 569 = A.W.N. (1908) 231 ; 4 M.L.T. 385 ; R., 18 M. 145 (147) ; 150 P.R. 1908.]

SECOND appeal against the decree of J. A. Davies, District Judge of Tanjore, confirming the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in original suit No. 95 of 1888.

Suit to release from attachment property which had been attached by defendant No. 1 in execution of a decree obtained by him against defendant No. 2. Defendant No. 2 claimed to be the adoptive son of the plaintiff, and it was admitted that if he had been validly adopted by her, which she denied in this suit, alleging that she had no authority from her husband to make the adoption, her claim must fail.

The further facts of the case appear sufficiently for the purposes of this report from the judgment of the High Court.

* Second Appeal No. 260 of 1891.

(1) 5 M. 145.  (2) 8 M. 351.
Plaintiff preferred this second appeal.

_Bhashyam Ayyangar and Desikachariar, for appellant._

_Krishnasami Ayyar, for respondent No. 1._

_Subramanya Ayyar, for respondent No. 2._

**JUDGMENT.**

The only question which had to be decided in this suit was that of estoppel. It is not denied that the plaintiff did represent to the parents of the second defendant in 1876 that she had the authority of her husband to adopt; that [487] acting upon the belief that such representation was true, they gave the second defendant in adoption; and that the plaintiff then brought up the second defendant as her adopted son, and, as such, married him to the girl of her choice, and as her adopted son be, for years, performed funeral ceremony of her husband. Having so acted, she cannot now be heard to deny that the adoption was valid. We have been referred to the decisions in _Chitko v. Janki_ (1) and _Ravi Vinayakrav Jaggannath Shankarsett v. Lakshmibai_ (2), in both of which it was held that the conduct of the person who actively participated in the adoption estopped him from disputing the validity of the adoption. It seems to us that this is just such a case as Section 115 of the Evidence Act was framed to meet, and we are unable to assent to the argument of the appellant's pleader that estoppel only refers to cases of contract.

This second appeal fails and is dismissed with costs.

---

**15 M. 487.**

**APPELLATE CIVIL.**

_Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker._

**SUBBAN (Defendant No. 1), Appellant v. ARUNACHALAM (Plaintiff), Respondent.** [13th April, 1892.]

_Transfer of Property Act—Act IV of 1891, Section 35—Parties to a mortgage suit—Objection to written statement as to non-jointer._

In a suit by a mortgagee against two of his three mortgagors, the defendants objected to the written statement that the suit was for non-jointer of the third mortgagor, and also alleged that subsequent encumbrances on the mortgage premises had been created with the concurrence of the plaintiff. It appeared that the third mortgagor, as a witness, recognized interest in the greater part of the mortgage premises. On second appeal:

- Held, that the suit should be remanded to the Court of First Instance for disposal after joinder of the third mortgagor and the subsequent encumbrancers.

**[R., 31 M. 323 (336); 1 O.C. 53 (60).]**

SECOND appeal against the decree of C. Venkobachiar, Subordinate Judge of Madura (West), in appeal suit No. 661 of 1890, [488] confirming the decree of K. Rangamannar Ayyangar, District Munsif of Dindigul, in original suit No. 336 of 1890.

Suit to recover principal and interest due upon a mortgage, dated 17th October 1885 and executed to the plaintiff by the defendants, Nos. 1 and 2, and their brother, Lakshumanan Chetti. The plaintiff alleged that Lakshumanan Chetti had paid a sum of money on account of his

---

(1) 11 B.H.C.R. 199.

(2) 11 B. 381.
share for the secured debt and prayed for a personal decree against both defendants, Nos. 1 and 2, and, in default, for the sale of the property comprised in the mortgage.

The defendants, among other pleas, objected that the suit was bad for the non-joinder of Lakshuman Chetti, and alleged that they had created further charges on the property with the assent of the plaintiff subsequent in date to the mortgage sued on.

The District Muñif passed a personal decree against the defendants and provided for its realization by the sale of their interest in the mortgage premises. His decree was affirmed on appeal by the Subordinate Judge, who said, with reference to the plea of non-joinder,—

"Under Section 85, Transfer of Property Act, plaintiff should have made Lakshuman Chetti a defendant, since he had an interest in the mortgaged property. This Act is to be read as part of the Contract Act, and, therefore, he should have been made a defendant strictly speaking.

"I find, however, from the record, that he was examined as defendants' third witness, and, he says, that he has no interest in the items of property mortgaged, save item 4. Plaintiff might have been refused the right to sell this property, but I see no warrant for absolutely dismissing the suit in the circumstances disclosed. At best, the decree for sale of item 4 may not bind Lakshuman Chetti.

"It is said in appeal that the subsequent encumbrancers should have been made parties to the suit. It appears from the evidence of plaintiff and other witnesses that some properties were sold or mortgaged with plaintiff's consent to others and the sums realized were received by plaintiff. He would and could not, therefore, proceed against such portions of the property as were mortgaged or sold with his concurrence."

Defendant No. 1 preferred this second appeal.

Bhashyam Ayyangar and Thiruvvenkatachariar, for appellant.
Krishnamachariar, for respondent.

JUDGMENT.

We think that, under Section 85 of the Transfer of Property Act, it is necessary to make Lakshuman Chetti a party, as he has an interest in the property comprised in the mortgage, even though the plaintiff may not ask for a personal decree against him. He is, at any rate, interested in item 4.

The subsequent encumbrancers must also be made parties unless the items of property sold or mortgaged to them have been excluded from the properties against which plaintiff seeks a decree. It may be that sales or mortgages made with plaintiff's concurrence have excluded such items from liability, but, if so, they must be excluded from the suit. It is not clear that such is the case. The decrees of the Courts below must be reversed and the suit remanded to the Court of First Instance for disposal.

We will give the appellant the costs of this appeal and the other costs will abide and follow the result.
SAMBAYYA AND ANOTHER (Defendants), Appellants v.
GOPALAKRISHNAMMA (Plaintiff), Respondent.* [23rd March, 1892.]

Practice—Variance between pleadings and proof—Relief not asked for.

The plaintiff, alleging that a certain lane was his property and that he had been obstructed by the defendants from building a door upon it, sued for an injunction and for damages. The Court held that the plaintiff's title to the land was not established, but passed a decree declaring that both the plaintiff and the defendants were entitled to use the lane by right of easement:

Held, that this declaration, which had not been asked for, should not have been made, and that the suit should have been dismissed for want of proof of the title alleged by the plaintiff.

SECOND appeal against the decree of M. B. Sundara Rau, Subordinate Judge of Ellore, in appeal suit No. 468 of 1890, reversing the decree of Y. Janakiramyya, District Munsif, Ellore, in original suit No. 17 of 1890.

[490] The plaintiff stated that a certain lane was the property of the plaintiff, who had erected the frame of a door across it, and that the defendants wrongfully removed the door frame, and prayed for an injunction and for damages. The District Munsif dismissed the suit, on the ground that the lane was not the property of the plaintiff. On appeal, the Subordinate Judge upheld this finding, but passed a decree, declaring that the plaintiff and defendants had both a right of easement over the lane, and decreed "that they should use it only as a passage, in such a way as they may not interrupt each other from using it."

The defendants preferred this second appeal.
Gopalasami Ayyangar, for appellants.
Venkatarama Sarma, for respondent.

JUDGMENT.

The suit brought by respondent was for restraining the appellants from obstructing him in raising a door across the lane in dispute, on the ground that the lane was his exclusive property.

The Subordinate Judge has found that the lane does not belong to the respondent.

Instead of dismissing the suit on that finding, he has declared that both plaintiff and defendants have rights of easement by long use over the lane, and has decreed that neither party should interfere with the other in the exercise of this right.

In a suit brought to establish a right of ownership of property, it is not competent to the Court to enter into, and decide the question of right to an easement over the same.

Though, as observed in Viraasvami Gramini v. Ayyasvami Gramini(1), the Courts are bound to take into consideration all the rights of the parties to a suit, both legal and equitable, and give effect thereto by their decrees, as far as possible, they are not at liberty to grant a relief either not prayed for in the plaint, or that does not naturally flow from the ground of claim as stated in the plaint.

* Second Appeal No. 1026 of 1891.

(1) 1 M.H.C.B. 471 (477).
Neither the pleadings nor the issues in the present case suggest a
right of easement and the parties cannot be fairly presumed to have
proceeded to trial with reference to such right.

We therefore set aside the decree of the Subordinate Judge and
restore that of the District Munsif, without prejudice, how-[391] ever, to
plaintiff's right to establish his claim of easement, if any, by fresh suit.

Respondent will pay appellants' costs of this appeal, and also in the
Lower Appellate Court.

15 M. 491.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

CHATRU (Defendant No. 3), Appellant v. VIRARAYAN (Plaintiff),
Respondent.* [11th April, 1892.]

Limitation Act—Act XV of 1877, Section 19—Acknowledgment in writing—Evidence

Limitation Act, Section 19, must be read with Evidence Act, Sections 65 and
91, and does not exclude secondary evidence in cases where such would be
admissible under Section 65.

SECOND appeal against the decree of E. K. Krishnan, Subordinate
Judge of South Malabar, in appeal suit No. 911 of 1889, reversing the
decree of T. V. Anantan Nayar, District Munsif of Calicut, in original suit
No. 531 of 1888.

Suit to recover possession of certain lands with arrears of rent.
The District Munsif held that the claim was barred by limitation and
dismissed the suit. His decree was reversed, on appeal, by the Subordi-
nate Judge, who passed a decree as prayed, holding that the suit was not
barred by reason of an acknowledgment in writing, which had been filed
as Exhibit VIII in a previous suit. This document was not filed in the
present case, and it appeared to be in the possession of defendant No. 3.
Secondary evidence of its contents, however, was given upon which the
Judge relied.

Defendant No. 3 preferred this second appeal.
Mr. D'Rosario, for appellant.
Sankara Nayar, for respondent.

JUDGMENT.

It is conceded that, if secondary evidence of the contents of the
document filed as Exhibit VIII in original suit No. 747 of 1878 on the file
of the District Munsif of Calicut is [492] admissible under Section 19 of the
Limitation Act, the present claim will not be barred, but it is contended
that, on the true construction of paragraph 2 of Section 19, such evidence
is not admissible, even though the document may be lost, destroyed or
even withheld by the opposite party. We are unable to accept this conten-
tion. We agree with the Calcutta High Court for the reasons mentioned
in Shambhu Nath Nath v. Ram Chandra Shaha (1), that Section 19 of the
Limitation Act must be read with Sections 65 and 91 of the Evidence Act
and that it does not exclude secondary evidence of contents of documents
in cases in which such would be admissible under Section 65.

This second appeal fails therefore and is dismissed with costs.

* Second, Appeal No. 1121 of 1891.

(1) 12 C. 267.
ANANDA RAZU v. VIYYANNA

15 M. 492 = 2 M.L.J. 253.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

ANANDA RAZU (Plaintiff), Appellant v. VIYYANNA AND ANOTHER (Defendants), Respondents.* [6th and 30th March, 1892.]

Limitation Act—Act XV of 1877, Schedule II, Article 120—Suit for the apportionment of assessment on land.

In a suit by the holder of one share against the holders of other shares in inam land, included in a single patta and assessed in an entire sum, for apportionment of the assessment, it appeared that the plaintiff had asked for the apportionment to be made more than six years before suit:

Held, that the suit was not barred by limitation.

[695]

SECOND appeal against the decree of M. B. Sundara Rau, Subordinate Judge of Ellore, in appeal suit No. 436 of 1890, confirming the decree of V. Krishnamurthi, District Munisif of Tanuku, in original suit No. 114 of 1890.

The plaintiff and the defendants were the holders of various shares of land comprised in a single patta, on which an entire sum was assessed by way of kattubadi. The plaintiff now sued for an apportionment of this assessment. It appeared that more than six years before suit, the plaintiff had asked for such apportionment, [493] and, on this ground, both the Lower Courts held that the suit was barred.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar, for appellant.
Venkataramayya, for respondents.

JUDGMENT.

The question for decision in this appeal is whether the Lower Courts are wrong in dismissing the suit as barred by Article 120 of Schedule II of the Limitation Act. The suit was brought for the apportionment of kattubadi and quit-rent payable on the land in possession of the plaintiff.

Plaintiff's case is that of an entire area of 164 acres charged with Rs. 516-6-6 as kattubadi and quit-rent. He is in possession of 128'92 acres as purchaser from, and of 7'32 acres as tenant under eighth defendant, that defendants Nos. 2 to 7 are in possession of the remainder in several portions as purchasers, that the average amount payable for each acre is Rs. 3-2-4½ but that defendants Nos. 1 to 5 have been paying less than the amount so calculated on the acres 1822 in their possession, which has, in consequence, been levied from plaintiff since 1882. Hence this suit to have the kattubadi and quit-rent apportioned in the several shares and for the recovery of the excess amount of Rs. 55-5-3 (at Rs. 18-7-1 per annum) levied from plaintiff during the three fasalis immediately preceding the suit, and interest thereon.

First defendant disclaimed all interest in the property in question and defendants Nos. 6, 7 and 8 supported the plaintiff's claim, while defendants Nos. 2 to 5 pleaded that the apportionment was rightly made by the Head Assistant Collector in August 1881 on the taram rent or sists of the lands, and that they have been paying accordingly ever since, and

* Second Appeal No. 965 of 1891.
no fresh apportionment is necessary. They further pleaded that the suit is time-barred, as the Lower Courts have found. Hence this appeal.

We do not agree with the Courts below that the claim for apportionment is barred by limitation. The parties to the suit hold distinct portions of the inam, subject to payment of the kattubadi under one and the same inam patta. Their position is therefore analogous to that of joint pattadars, who have to bear a common burden as between themselves and Government. So long as the joint liability lasts, each is entitled to claim an apportionment and such claim can no more be time-barred than can a claim for rent so long as the title to the land is not extinct. If the order of the [494] Head Assistant Collector, referred to by the defendants, was made under any legal authority, and could as such, be held to be binding, it might bar the suit, but we are not referred to any legal enactment which would justify our treating the order as being conclusive. The mere fact that such an order was made can have no greater force than the expression of an opinion by a revenue officer.

The decision in Durga Pershad v. Ghosita Goria[1] is only authority for the proposition that Article 120 of Schedule II of the Limitation Act is applicable to a suit by a tenant against his landlord for apportionment of the rent payable to such landlord for the portion of land obtained by him on partition, out of what had theretofore been held by the tenant under all the co-shares jointly.

The present is not a suit between tenant and landlord, but by a proprietor against other proprietors for apportionment of the assessment on lands included in a single patta. The decision in Durga Pershad v. Ghosita Goria[1] is therefore not in point.

In allowance of this appeal, we set aside the decrees of both the Courts below and remand the suit to the District Munsif for replacement on his file and disposal according to law.

The costs of this appeal and in the Lower Appellate Court will be paid to the plaintiff by defendants Nos. 2 to 5.

15 M. 492 = 2 M. L. J. 282.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Wilkinson.

KUNJI AMMA AND OTHERS (Plaintiffs Nos. 2 to 5, 7 to 15, 17 to
19, 22 to 47), Appellants v. RAMAN MENON AND OTHERS
(Defendants Nos. 5, 7, 8 to 60), Respondents.*
[10th and 11th December, 1891 and 24th February, 1892.]

Civil Procedure Code, Section 13—"Res judicata"—Court of competent jurisdiction—Act X of 1877, Section 433—Suit against a Sovereign Prince.

A suit for a declaration of the title of the plaintiffs' tarwad to certain land was filed in a District Court against the Maharajah of Cochin and others, including the [495] trustees of a devasom. It appeared that the same land was the subject of suit instituted in a Subordinate Court on the 6th August 1877, to which the representatives of both the plaintiffs' tarwad and the devasom were parties, and that the land was then found to be the property of the devasom and a decree was passed accordingly. It was contended that the present claim was not res judicata by reason of that decree, because, under the provision of Act X of 1877,

* Appeal No. 156 of 1890.
(1) 11 O. 284.

696
Section 448, which came into operation during the pendency of that suit, no Sovereign Prince could be sued in any Court subordinate to a District Court, and the Court which passed that decree was not therefore "a Court of jurisdiction competent to try" the present suit within the meaning of Civil Procedure Code, Section 13:

Held, that, although these words must be taken to refer to the jurisdiction of the Court at the time the suit was heard and determined, yet the present claim was res judicata since the title to the land was a matter in issue within the cognizance of the Subordinate Judge, and was adjudicated on by him.

[R., 24 A. 112 (117); P.L.R. (1900) 425.]

APPEAL against the decree of L. Moore, District Judge of South Malabar, in original suit No. 2 of 1883.

Suit against the Maharaja of Cochin and others for a declaration that certain land was the property of the plaintiffs' tarwad and for other reliefs.

In 1874, the then karnavan of the plaintiffs' tarwad, executed a kyacht to the Vadakunathan devasom, whereby he acknowledged property now in suit to be the jennm of the devasom. The plaintiffs now alleged that this kyacht was executed in fraud of their tarwad and was not binding on it. In original suit No. 28 of 1877, on the file of the Subordinate Court, Calicut, a suit was brought against the then karnavan of the plaintiffs' tarwad on the footing of this document and a decree obtained on behalf of the devasom. Act X of 1877 came into operation during the pendency of that suit. Defendants Nos. 1, 2 and 3 in this suit were the successors in office of plaintiffs Nos. 1 and 2, in the suit of 1877, and the plea was now raised that the present claim was res judicata by reason of that decree. This contention was upheld by the District Judge who dismissed the suit.

The plaintiffs preferred this appeal.

Ramachandra Ayyar, for appellants.

Sadagopacharier and Sankaran Nayar, for respondents.

JUDGMENT.

The only question we are called upon to determine in this appeal is whether the Court, which tried original suit No. 28 of 1877, was competent to try the present suit within the meaning of Section 13 of the Civil Procedure Code.

Original suit No. 28 of 1877 was a suit instituted in the Court of the Subordinate Judge on behalf of the Vadakunathan devasom to recover certain property from the family of the plaintiffs in the present suit. The main question for decision in that suit, as it is in the present suit, was whether the land in suit was the jennm of the devasom or of the tarwad to which the plaintiffs belong. That was a suit on behalf of the devasom, this is a suit against the devasom. It is argued that, inasmuch as the Raja of Cochin is a party-defendant in the present suit, the Subordinate Court, which tried original suit No. 28 of 1877, was not "a Court of jurisdiction competent to try" the present suit, and that therefore Section 13 has no application.

Original suit No. 28 of 1877 was instituted in the Subordinate Court on the 6th August 1877, but it was not heard and determined until January 1878. Act X of 1877 came into force on the 1st October 1877, and, by Section 433, it was enacted that a Sovereign Prince or ruling chief could not be sued in any Court subordinate to a District Court. It is in
consequence of this provision of law that the present suit was instituted in the District Court.

It has been argued that, as at the time when original suit No. 28 of 1877 was instituted, there was no provision of law which prohibited the entertaining of a suit against a Sovereign Prince by the Subordinate Court, the present suit was one which might have been instituted in the Court of the Subordinate Judge. The words of Section 13 are "Court of jurisdiction competent to try such subsequent suit," and we are of opinion that the only reasonable construction, which can be placed upon these words, is that they must be held to refer to the jurisdiction of the Court at the time when the suit was heard and determined. This is also the view of the Calcutta High Court in Gopi Nath Chobey v. Bhugwat Pershad (1) and Raghunath Panjah v. Issur Chunder Chowdhry (2).

Are we then to hold that, because the Subordinate Court was not competent to entertain the present suit by reason of the Raja at Cochin being a party-defendant, it is not a Court of jurisdiction competent to try such within the meaning of Section 13? We think not. Those words have been interpreted by their Lordships of the Privy Council to mean a Court having concurrent jurisdiction with the Court trying the subsequent suit, whether as regards the subject-matter of the suit or the pecuniary limits of its jurisdiction. Misir Raghobardial v. Sheo Baksh Singh (3).

It is not and cannot be contended that the Court of the Subordinate Judge has not concurrent jurisdiction with the District Court, both as regards the subject-matter of the present suit and the pecuniary limit of its jurisdiction, for the jurisdiction both of the District Judge and of the Subordinate Judge extend to all original suits and proceedings of a civil nature (Section 12, Act III of 1873).

It is the "matter in issue" in the suit that forms the essential test of res judicata (Pahlwan Singh v. Risal Singh (4)). The matter in issue in the present suit, viz., the title of the tarwad or of the devasam was one within the cognizance of the Subordinate Court, and, it having been decided in the former suit, we do not think that the plaintiffs are entitled, by merely adding the Raja of Cochin as a party-defendant, to call upon the District Court to decide an issue which has already been decided by a Court of concurrent jurisdiction.

We are fortified in this opinion by the ruling of the Privy Council, in the case of Soorjomonee Dayee v. Suddanund Mohapatter (5).

That was a judgment with reference to the second clause of Act VIII of 1859 which corresponded with Section 13 of the present Act. Their Lordships were of opinion that the term cause of action in that section was to be construed with reference rather to the substance than to the form of action.

This appeal therefore fails and must be dismissed with costs.

(1) 10 C. 697. (2) 11 C. 153. (3) 9 C. 439.
(4) 4 A. 55. (5) 12 B.L.R. 304.
VENKATARAGHAVA v. RANGAMMA

15 M. 498.

[498] APPELLATE CIVIL.

Before Mr. Justice Mutthusami Aygar and Mr. Justice Parker.

VENKATARAGHAVA (Plaintiff), Appellant v. RANGAMMA (Defendant), Respondent. * [29th October, 1891, and 2nd March, 1892.]

Civil Procedure Code, Section 13—"Res judicata"—Court of competent jurisdiction—Hindu law—Power of guardian to alienate land—Compromise of litigation.

In 1882, the daughter of a deceased Hindu brought a suit in the Court of a District Munsif for a declaration that the defendant was not the adopted son of her father (deceased) as he claimed to be. It was found that the alleged adoption was valid and the suit was dismissed.

The then defendant now brought, in 1889, a suit in the same Court to recover possession of land from the then plaintiff, alleging that it had been wrongfully transferred to her by way of gift by his adoptive mother. The defendant denied the adoption and asserted that the transfer was valid as having taken place in accordance with an arrangement made by her father in his lifetime. It was admitted that the value of the whole property, to which the plaintiff was entitled by virtue of his adoption, if it was a valid adoption, exceeded Rs. 2,500.

The Court of First Appeal held that the question of the adoption was not res judicata, and observed that the transfer to the defendant was apparently made to induce her to abandon her litigation as to the adoption:

Held, (1) that the defendant was not at liberty to question the plaintiff’s adoption;

(2) that the Court should try whether the transfer was made bona fide by the plaintiff’s mother as his guardian for his benefit.

APPEAL against the order of M. B. Sundara Rau, Subordinate Judge of Ellore, in appeal suit No. 208 of 1890, remanding for re-trial original suit No. 184 of 1889 in the Court of the District Munsif of Ellore.

Suit to recover possession of certain land. The plaintiff alleged that, during his minority and after the death of his adoptive father, his adoptive mother, in fraud of his rights, conveyed the land by way of gift to the defendant, who was her daughter. The defendant pleaded, inter alia, that the plaintiff had not been validly adopted, and that the property had been delivered to her in accordance with an arrangement made by her father.

[499] The District Munsif held that the question of the plaintiff’s adoption was res judicata by reason of the decree of his Court passed in a suit (original suit No. 315 of 1882) brought by the present defendant against the present plaintiff to declare the adoption invalid, in which the issue relating to the validity of the adoption was determined in favour of the present plaintiff. It was conceded that the whole property, to which the plaintiff would be entitled by right of his adoption, exceeded Rs. 2,500; and the District Munsif rested his decision partly on the ground that the then plaintiff was estopped from denying the competency of the Court to adjudicate on the matter. He further held that the alienation of the land to the defendant was invalid; and, on these findings, he passed a decree as prayed.

The Subordinate Judge, on appeal, held that the question of the adoption was not res judicata; and, as to the second point, he directed the District Munsif to try the following issue:

"What are the circumstances which led plaintiff’s adoptive mother to execute the deed of gift to defendant, and whether or not, she did so, in her capacity as a guardian for minor plaintiff?"

* Appeal against order No. 131 of 1890.
The plaintiff preferred this appeal.
Subramanya Ayyar, for appellant.
Bhashyam Ayyangar, for respondent.

JUDGMENT.

This is an appeal from the order of remand made by the Subordinate Court of Ellore in appeal suit No. 208 of 1890. It is first urged that the Subordinate Judge erred in holding that respondent was at liberty to question the appellant's adoption, though it was upheld as between them in original suit No. 315 of 1882 on the file of the District Munsif of Ellore. We think that this objection must prevail.

In support of his opinion, the Subordinate Judge observes that, prior to the decision in Ganapati v. Chathu (1), there was an erroneous notion, even among District Munsifs, that a declaratory suit might be instituted, whatever was the value of the property to which it related, in the Court of a District Munsif, and that the respondent's ignorance of law on the subject was excusable, and relies further on the decision of the Privy Council, referred to in Ganapati v. Chathu (1), and on Section 44 of the Indian Evidence Act.

[500] But we are unable to agree with the Subordinate Judge that ignorance of law is a valid excuse. Nor do we consider that the decision of the Privy Council has application in a case in which both the prior and the present suits were instituted in the Court of the District Munsif. As for Section 44 of the Evidence Act, it does not exclude the operation of the doctrine of equitable estoppel. As plaintiff, the present respondent instituted original suit No. 315 of 1882 in the District Munsif's Court to set aside appellant's adoption and thereby put the Court into motion and the decision pronounced therein is conclusive as to the factum and validity of the adoption. The decision of the Subordinate Judge to the effect that the respondent is at liberty to re-open the question in the present suit must be set aside.

Another objection taken in this appeal is that the Subordinate Judge was wrong in deciding that the present suit is not governed by the twelve years' rule. It was brought by the appellant to recover certain land from the respondent on the ground that, during his minority, his adoptive mother bestowed it in gift upon the latter, her daughter, without any necessity for so doing, and in view to benefit her at his expense. The right to sue having thus accrued during his minority, the statutory period is twelve years from the date of the gift, under Section 7 of the Act of Limitation, unless it expires within three years from the date on which he attained his majority. In this point also the decision of the Subordinate Judge must be set aside and that of the District Munsif restored.

The next question considered by the Subordinate Judge is as to the validity of the gift made to the respondent. If, as observed by him, the transaction was substantially not a mere voluntary act, but one concluded bona fide by the appellant's mother, as his guardian, in view to adjust the litigation then pending about his adoption, it might be valid. It was, therefore, open to the Subordinate Judge to have stated an issue and remitted it for trial. The issue, however, referred by him must be amended by inserting the words "bona fide" after the words "did so," and the words "the benefit of" between the words "for" and "the minor plaintiff."

(1) 12 M. 228.
We set aside the order of remand and direct the Subordinate Judge to restore the appeal to his file and to remit for trial an issue amended as indicated above and to dispose of the appeal [501] with reference to the result of the finding thereon and on the eighth issue.

The respondent will pay the appellant the costs of this appeal.

15 M. 501=2 M.L.J. 255.
APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

IBRAYAN KUNHI (Plaintiff), Appellant v. KOMAMUTTI KOYA AND OTHERS (Defendants), Respondents.*
[2nd September, 1891, and 7th April, 1892.]

Civil Courts Act (Madras)—Act III of 1873, Section 12—Declaration of membership of a tarwad—Valuation for the purposes of jurisdiction.

The plaintiff, alleging that he was karravan of the defendant’s tarwad, sued in a Subordinate Court for a declaration that he was a member of it, adding no prayer for consequential relief. It appeared that the tarwad property exceeded Rs. 26,000, in value, but that the proportionate share of each member, computed as on an equal division, was less than Rs. 300. The Subordinate Judge held that the suit was within the jurisdiction of a District Munsif and rejected the plaint:

Held, that the order was wrong and should be set aside.

[R., 10 Ind. Cas. 365 (966) =14 C.L.J. 47 =15 C.W.N. 823.]

APPEAL against the order of C. Gopala Menon, Subordinate Judge of North Malabar, refusing to admit a plaint presented for a declaration that the plaintiff was a member of the defendant’s tarwad, and a petition under Civil Procedure Code, Section 622, praying the High Court to revise his order.

It appeared that the tarwad possessed property worth Rs. 26,605 and that it comprised 30 members and it was alleged in the plaint that the plaintiff was the karaavan of the tarwad. The Subordinate Judge held the suit was within the pecuniary jurisdiction of a District Munsif, and, on this ground, refused to admit the plaint and returned it for presentation in a proper Court, on the view that the suit should be valued for the purposes of jurisdiction as if it were for a share of the aliquot portion of the tarwad property, which would be allotted to the plaintiff if a partition were made by common consent.

Plaintiff preferred this appeal.

[502] Sankaran Nayar, for appellant.
Desikachariar, for respondent.

JUDGMENT.

The question, which we have to decide in these cases, is how is a suit brought by one of the members of a Malabar tarwad to obtain a declaration of his status as a member of that tarwad to be valued for purposes of jurisdiction. The tarwad concerned in this litigation consists of 30 members, including the plaintiff and the value of its property is Rs. 26,605. According to the Marumakkattayam usage, no member of a tarwad can enforce a partition of tarwad property at his pleasure, though such...
partition can be made with the consent of all its members. In the case before us, the Subordinate Judge held that the value of the share, which would ordinarily be allotted to the plaintiff if a partition were effected by common consent, viz., Rs. 886-13-4, was the value of the present suit and that he had no jurisdiction to entertain it, and, in support of his opinion, he relied on the decisions of the High Court in Komappan v. Chathu (1) and Krishnan v. Chathu (2). It is contended before us that tarwad property, not being partible, its aggregate value is the proper value of the suit and that the District Munsif was right in holding that he had no jurisdiction. Our attention is drawn to the case in Ganapati v. Chathu (3) in which it was decided that a suit brought to obtain a declaration of title to specific property should be instituted in that Court in which a suit to recover its possession ought to be tried on the ground of title. The point for consideration is what is the subject-matter of the present suit, and what is its value within the meaning of Section 12 of Act III of 1873. The status of a member of a Malabar tarwad carries with it four distinct rights, viz., (1) a right to be maintained in the tarwad house, (2) a right to see that tarwad property is not alienated otherwise than in accordance with law, (3) a right to become the tarwad karnavan, when he becomes the senior male member, and (4) a right to a share if a partition were made and the tarwad broken up by common consent. In the case before us the plaintiff sued as karnavan and the declaration he desires to obtain carries with it a recognition of his right to present possession of the tarwad property. It is therefore governed by the principle laid down in Ganapati v. Chathu (3). The plaintiffs in the cases on which the Subordinate Judge relies sued as mere anandavans, the first defendant in each case being the karnavan.

The order of the Subordinate Judge must be set aside and he must be directed to entertain the plaint and deal with it in accordance with law. The respondents will pay appellant’s costs. No order as to costs in civil revision petition No. 193 of 1890.

---


PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Morris, Sir Richard Couch, and Lord Shand.

[On appeal from the High Court at Madras.]

GAJAPATHI RADHIIKA (Plaintiff), v. VASUDEV SANTA SINGARO (Defendant). [12th, 13th and 31st May, 1892.]

Appellant not allowed to raise in appeal a contention inconsistent with the case relied upon in the Courts below.

An appeal cannot be maintained upon a ground inconsistent with the case insisted on in the Courts below, notwithstanding that the new ground may be one that might have been brought forward, in the first instance, as an alternative.

In a suit between the widows of two brothers deceased, the plaintiff’s title rested on this, that her and the defendant’s late husbands, respectively, having

(1) Second Appeal No. 442 of 1883 unreported.
(2) Appeals Nos. 135 of 1885 and 131 of 1886 unreported.
(3) 12 M. 223.
been the sons of the same father, had, therefore, been sapindas to each other; so that the plaintiff, as the widow of the one would be the heir of the other, expectant on the death of his widow. In this character she sued to have set aside an adoption made by the defendant. The Courts, however, found that the plaintiff’s husband was an illegitimate son, and not a sapinda, and the suit was dismissed. The plaintiff, now appellant, on findings of fact that both the sons were illegitimate, urged that, though they could not inherit from their father, they yet could succeed to the estate of one another:

 Held, that this contention was so inconsistent with the case made below that it was now inadmissible.

Sreeumitty Dossee v. Ranee Lalmanunes (1) referred to and followed.

Also, the opinion had been expressed by the Court below that, by the law prevailing in Madras, a widow is not in the line of succession to her husband’s male collateral relations.

Appeal from a decree (16th April 1888) of the High Court affirming a decree (16th August 1886) of the District Judge of Ganjam.

The subject of this appeal was the inheritance of one half of the Tekkali taluk in the Ganjam district, formerly held by Padmanabha Deo as zemindar, the common ancestor of all the parties to the suit. He was of the Kshatriya caste. He died in 1832, leaving two illegitimate sons, Krishna Chandra deceased in 1854, and Gopinadha, deceased in 1856. The right to the estate was adjudicated on by this Committee in 1870 in Sri Gajapathi Radhika Patta Maha Devi Garu v. Sri Gajapathi Nilamani Patta Maha Devi Garu (2). Each of the above sons left an illegitimate son. Gopinadha’s son was Hari Krishna, whose claim to share in the estate was disallowed in the above appeal. Krishna Chandra’s son was Brindavana, who was plaintiff in a suit against the same defendants that were sued in this, and the suits were heard together in the Courts below (Brindavana v. Radhamani (3)); but he had no concern in the present appeal.

S. G. Radhika, plaintiff in this suit, and now appellant, was the wife of Gopinadha. The defendants were S. G. Radhamani, wife of the late Krishna Chandra, and Vasudeva Santa Singaro, now respondent, whose adoption the plaintiff sought to set aside. Radhamani died in January 1890 pending this appeal. The suit was brought as that of the widow of one brother suing to have set aside the adoption made by the widow of another brother, and was based on her presumptive title to succeed as reversionary heiress, as soon as the death of the widow, to whose husband the plaintiff’s husband had been a sapinda, should occur.

The state of things at the institution of the appellant’s suit, on the 13th October 1885, appears in the judgment of the High Court given below, in which also the suit of Brindavana, brought on the 22nd September 1885, (claiming as reversionary heir to Krishna Chandra’s estate) is referred to as appeal No. 148 of 1886 (3). In that suit it was found that Krishna Chandra was of illegitimate birth and an ugra by caste, and in the present suit that Gopinadha was also illegitimate, the evidence filed in the one having been received in the other.

Proceedings in the Courts below are stated in their Lordships’ judgment.

That part of the judgment of the High Court, COLLINS, C.J., and MUTTUSAMI AYYAR, J., which does not relate only to the inquiry as to the facts, was as follows:

(1) 12 M.I.A. 470.
(2) 13 M.I.A. 497. This was heard on an appeal from Krishna Devi Garu v. Maha Devi Garu (2 M.H.C.R. 369).
(3) 12 M. 72.
"That Padmanabha Deo was a Kshatriya is a fact admitted on both sides. Upon his death each of his sons alleged that the other was illegitimate, and a disagreement arose between them. This difference continued for several years, until it was terminated by a compromise, whereby each agreed to take a moiety of his father's estate. On that footing, an agreement was made in 1838 between Gopinadha Deo on the one part and Nila Patta Maha Devi on the other, the guardian of Krishna Chandra, who was then a minor under her protection. Krishna Chandra, since attaining his majority and the agreement was ratified and supplemented in 1844 by the two brothers. The appellant and the first respondent are both Kshatriyas by birth, and they married respectively Gopinadha and Krishna Chandra. The latter died in 1854, and the former did not long survive him. The widows of neither of the brothers had legitimate sons: but both brothers left illegitimate sons by their concubines. After the death of the brothers, there was a dispute in the family as to the right of succession, and the present appellant was placed in possession of the whole estate by the Revenue authorities as the widow of the survivor of the two brothers. This led to litigation in the family, which commenced in 1861 and ended finally in 1877. The result was that the rights of the brothers were adjusted in accordance with the agreements between them of 1838 and 1844: and that the first respondent and her co-widow got Krishna Chandra's moiety, and the appellant was left in possession of her husband's moiety. In the course of that litigation, the High Court came to the conclusion that Gopinadha was illegitimate, but its decision rested upon the terms of the compromise evidenced by the agreements of 1838 and 1844. The Privy Council, in deciding the case observed, in advertence to the compromise, that it proceeded on the basis of legitimacy and that it effected a division of the estate in two equal shares between the brothers. The history of this family, and of the various stages of the dispute between [506] the brothers is fully set forth in the decision reported in 13 Moore's Indian Appeals, 497.

"Soon after 1877, the first respondent succeeded to the entire moiety of the estate, which belonged to her husband, owing to the death of her co-widow. In September 1879 she adopted the second respondent, her brother's son, with the consent of five of Padmanabha's sapindas. The suit which has given rise to this appeal was instituted by the appellant to set aside the adoption and to establish her right as reversoner. She alleged that her husband and Krishna Chandra were the legitimate sons of Padmanabha and that she was entitled to succeed to the first respondent as her nearest grani. The respondents denied that Gopinadha was legitimate, and contended that the adoption of the second respondent was valid. The parties proceeded to trial on three issues, viz., (i) Was Gopinadha a sapinda of Krishna Chandra? (ii) If so, is Radhika, as sapinda, entitled to succeed to Krishna Chandra? (iii) Is the adoption valid? The District Judge decided the first and second issues against the appellant and dismissed the suit with costs. It is urged in appeal (i) that the respondents are estopped from denying the legitimacy of Gopinadha; (ii) that it is established by satisfactory evidence; (iii) that the appellant is entitled to bring this suit to set aside the adoption.

"The principal question of fact which we have to determine in appeal is whether Gopinadha and Krishna Chandra were the legitimate sons of Padmanabha. In appeal suit No. 148 of 1886 we have come to
the conclusion that, although a Gandharva marriage was alleged in 1834
to have taken place between Padma Mala and Padmanabh, and some
doubt was then entertained by the Revenue authorities as to Krishna
Chandra's illegitimacy, yet, it was not shown that any marriage took
place, and that even if a Gandharva marriage took place, it was not a valid
marriage. As regards Gopinadh, the antecedent facts of the case show
that from 1834 he was regarded by Padmanabh's family and the
Revenue authorities as illegitimate."

The Judges then went through the evidence, and stated that the
appellant's pleader desired in the Court below that the evidence taken in
No. 148 should be taken in this case. And they added: "The conclu-
sion to which we come is that [507] Gopinadh was the illegitimate
son of Padmanabh. It is then said by the appellant's pleader that
after the decision of the Privy Council in 13 Moore's Indian Appeals,
497, the respondents are estopped from denying Gopinadh's legitimacy,
and he relies on the observation made in that case that the compromise
evidenced by the agreements of 1838 and 1844 proceeded on the basis
of legitimacy. But the Judicial Committee observed that 'Whether
both sons were legitimate, or only one was legitimate, and to whichever
of the two that status might really attach, was a question no longer
material to the consideration in the rights devolving to persons taking
under that compromise or family settlement by which the status assumed
was to be taken as the real status of the family.' It is clear that the
observation was made with reference to persons claiming under the
compromise and rights founded upon it, while the present claim is based
on Hindu Law and depends on the actual relationship between Gopinadh
and Krishna Chandra as sapindas. The assumed status was the real
status only for the purpose of carrying out the provisions of the compro-
mise, and no further, and the contention as to estoppel cannot be
supported. Even on the view that both Gopinadh and Krishna Chandra
were legitimate, the appellant must fail. According to the Mitakshara Law
as administered in this presidency, a brother's widow is not in the line of
heirs, and as to the contention that the appellant is a Gotraja sapinda
and therefore Krishna Chandra's reversionary heir, it was already decided
by the Full Bench of this Court in Mari v. Chinammal (1), that the wives
of collateral male relations who are Gotraja sapindas are not in the line of
heirs under the Mitakshara. It is also in evidence in the cognate case
that five persons authorized the adoption of the second by the first
respondent as the sapindas of Padmanabh, and though some witnesses
in this case say that they are so remote that no pollution is observed
with reference to them, their evidence is by no means satisfactory. If
there are, then, sapindas of Padmanabh, the appellant cannot claim as
bandhu or a remote relation.

"We are, therefore, of opinion that this appeal cannot be supported,
and dismiss it with costs."

On this appeal Mr. J. D. Mayne, for the appellant, accepting [508] the
facts as found by the Courts below, relied upon them as supporting the
argument that the brothers Gopinadh and Krishna Chandra being pro-
cluded by their illegitimacy from inheriting by descent, could, nevertheless,
succeed to one another's estate. It was a just inference that they
were on an equality, and it had been found in the case of their cousin
Brindavana that a son born as they had been belonged to an intermediate

(1) 8 M. 107 (126).
The caste assigned to the son of a Kshatriya by a Sudra woman was termed ugra as stated in the judgment in Brindavana v. Radhamani(1). The general principle of the law on this subject was that the illegitimate sons of the man of high caste took by succession collaterally to one another as brothers, though not inheriting from their father. The High Court had, by finding the facts, supplied the appellant with a title to succeed, as the only reversionary heir, through her late husband, to the deceased Krishna Chandra, although the High Court had not applied the law appropriate to the case. It was submitted that this should be done now. It could hardly be said that the question involved a contradiction of what had been raised below, for the contention had been that the plaintiff was in the line of heirs as the wife of a Gotraja sapinda, or at least as a bandhu of Krishna Chandra. It certainly would be nothing now that, although consistency with what had been raised by the pleadings and proceedings below must be observed, this Committee should act upon a view of the law not presented to the Courts in India. As to adherence to the facts put forward and the questions raised by the pleadings, and what was open in appeal, reference was made to Bank of New South Wales v. O’Connor(2), Eshen Chunder Singh v. Shamachurn Bhutto(3), and Collector of Trichinopoly v. Lekkamani(4).

Mr. R. V. Doyne, for the respondent, was not called upon.

Afterwards, on May 31st, their Lordships’ judgment was delivered by LORD HOBHOUSE.

JUDGMENT.

The only question on which their Lordships have heard any argument is whether the appellant, who is the plaintiff in the suit, shall be permitted to open a case which she did not bring before either the Court of First Instance or the Court of Appeal below. The material facts are as follows:

Padmanabha, talukdar of Tekkali, had two sons by different women. The plaintiff is the widow of one of them named Gopinadha. The first defendant, Radhamani, is the widow of Krishna the other son, and the second defendant is a boy whom Radhamani has purported to adopt. The plaintiff alleges that the adoption is invalid, and that, as the widow of Gopinadha, she is the heir of Krishna, subject to his widow’s interest. She has brought this suit to set aside the adoption. It is plain therefore that she cannot obtain a decree unless, setting aside the adoption, she would stand next to Radhamani in the line of succession to Krishna.

For the defence it is alleged that Krishna and Gopinadha were not sapindas to one another. Krishna, as the defendant has pleaded, was the son of a Kshatriya woman married to Padmanabha, who was himself a Kshatriya, whereas Gopinadha was born to Padmanabha by a woman of some inferior caste.

On these pleadings issues were settled, the first being whether Gopinadha was a sapinda of Krishna. The District Judge found that Gopinadha was of illegitimate birth, and therefore was not a sapinda, and on that ground he dismissed the suit. He did not come to any finding on the other issues in the suit; but he intimated an opinion adverse to the

---

(1) 12 M. 72.
(3) 11 M.I.A. 7
(4) 1 I.A. 289.
plaintiff on the question whether she could claim to succeed to the collaterals of her husband.

The plaintiff appealed to the High Court, insisting on the legitimacy of her husband, but the High Court agreed with the District Judge on this point. They also expressed an opinion that, by the law prevalent in Madras, a widow is not in the line of succession to her husband's male collaterals. The appeal therefore was dismissed.

Connected with this suit, both in the original Court and in the High Court, was another suit to set aside the adoption, brought by one Brindavana, an illegitimate son of Krishna, claiming to be his heir according to the law applicable to the Sudra caste. The plaintiff was no party to this suit, but the defendants were the same as in her suit. The two were tried simultaneously, and the evidence in one was admitted in the other.

In Brindavana's suit the District Judge found that Krishna [510] was not a Sudra, and that an illegitimate son could not succeed to him, and on appeal the High Court took the same view. That view, of course, was fatal to the suit, which was dismissed. The High Court also expressed an opinion that Krishna was an illegitimate son of Padmanabha, a point which does not appear to have been put directly in issue, but which was discussed as incidental to the question of caste, and was treated by the District Judge as of no moment and not requiring a decision. They further held that the adoption was lawful and valid.

As the plaintiff's case has been opened on this appeal, she now takes the ground that, if, as has been conclusively decided, her husband was illegitimate, so also it has been held by the High Court that Krishna was illegitimate, and her Counsel contend that the two illegitimate sons, neither of whom could inherit from their father, can yet inherit from one another.

Their Lordships will assume for the present purpose that the plaintiff is entitled to avail herself of the finding of the High Court in Brindavana's suit to establish the illegitimacy of Krishna. And of the legal inference which is put forward, as they have not heard the argument for it, they will only say that it does not command assent at first sight. But they do not further examine it, because they think that the appeal cannot be maintained on a ground so inconsistent with all the previous proceedings in the case.

In both the Courts below, and indeed up to the moment when her case was lodged in this appeal, the plaintiff has been insisting on the legitimacy of her husband and his brother. It may be conceded that she might originally have framed her case in the alternative, so as to claim heirship if the disputed issue of legitimacy was decided against her. Then the case would have been tried with reference to that contention, and all facts ascertained, and researches into the law conducted accordingly. Possibly she might, on application to the High Court, have obtained some indulgence enabling her to amend the record and try the question. Mr. Mayne has urged that the question he submits is one of pure law, which he says this Committee may decide upon the facts found by the Courts below. No doubt there are cases in which the Court of Appeal will entertain questions of law not argued below, but which are raised by the facts stated in the pleadings. It is impossible to lay down any precise rule for [611] such cases. But Mr. Mayne could not, after time for search, find any case in which this Committee had allowed a plaintiff to rest his appeal upon a legal theory never presented to the Courts below, and rested on a state of facts inconsistent with the facts on which he
1892
MAY 31.

PRIVY COUNCIL.

15 M. 503
(P.C.)=
19 I.A. 179—
6 Sar. P.C.J.
218.

had previously rested his case. In the judgment of this Committee in
Sreemutty Dossee v. Ranee Lalunmonoe (1) it is said:—"Their Lordships
"cannot but feel that it would be most mischievous to permit parties,
"who had had their case upon one view of it fairly tried, to come before
"this Board, and to seek to have the appeal determined upon grounds
"which have never been considered, or taken, or tried in the Court below.
"It is obvious that if they wished to make the case which they now make
"they would, by their answer, have put the case in the alternative."

Indeed in cases of this kind, which may involve subtle and difficult
questions of personal status, it is not easy to say what matters of fact
would have to be ascertained for the proper decision of each proposition
of law. One may be specified. There is no issue and no finding by either
Court as to Gopinadha's caste. And yet it is impossible to suppose that
the question whether two brothers can inherit from one another, because
they are equal in point of illegitimacy, could be properly tried without
knowing how they stand relatively in point of caste. It is indeed clear
that to lay down a rule of inheritance between rival claimants without
a trial of the case in view of that rule may involve serious risk of
miscarriage.

But even viewing the question as one of abstract law, the rule now
propounded is of a very peculiar kind, so unfamiliar as not to have occurred
to the plaintiff's advisers in India, though they must have been quite
awake to the possibility that both brothers might be found illegitimate.
It is part of a law of inheritance confined to Hindus; perhaps, if we may
judge by the utterances of the Courts below, confined to Madras, and
certainly varying with the caste of the persons concerned. It is not right
that Her Majesty in Council should be asked to decide such a point
without any assistance from the Courts in India.

It is clear to their Lordships that this new contention cannot properly
be heard by them on this appeal: and, considering the [512] length of
this litigation, and the fact that another appeal is awaiting the result of
this one, it would be wrong to give the plaintiff any indulgence by way of
amending the record.

They will humbly advise Her Majesty to dismiss the appeal, and the
appellant must pay the costs.

Appeal dismissed.

Solicitor for the appellant—Mr. R. T. Tasker.
Solicitors for the respondent—Messrs. Pemberton & Garth.
I.L.R. 16 MADRAS.


PRIVY COUNCIL.

PRESENT.


On the delivery of the judgment in 1892: Lords Watson, Hobhouse and Morris, Sir Richard Couch and Lord Shand.

[On appeal from the High Court at Madras.]

SRI GAJAPATI RADHAMANI GARU (Appellant), v. MAHARANI SRI PUSAPATI ALAKAJESWARI (Respondent), AND ON REVIVOR.

VASUDEVA SANTA SINGARO (Appellant), v. THE SAME RESPONDENT.

[29th, 30th and 31st January, 1890, and 23rd July, 1892.]

Mortgage by one of two co-widows invalid without the consent of the other—Their joint interests and title by survivorship—Construction of mortgage-deeds.

One of two co-widows mortgaged, without the consent of the other, part of the estate to which they were jointly entitled by inheritance from their deceased husband:

Held, upon the construction of the deeds of mortgage executed by her that they were not so framed as to bind the estate in the possession of the surviving widow after the death of the mortgagor. But assuming that the deeds had been so framed, and that there had been what would have been a justifying necessity for the widow, or co-widows jointly, to have mortgaged an estate which had belonged to the deceased husband (a state of things not decided to have existed here), such a necessity could not render a mortgage attempted by one co-widow binding upon the estate, had descended upon the widow for their joint lives with survivorship between them, so as to affect the interest of the surviving widow. Bhugwandesen Doobey v. Myna Basu (1) referred to and followed.

(Appr., 22 M. 522 ; R., 31 B. 560 = 9 Bom. L.R. 1049 ; D., 33 C. 1079 (1084) ; 26 M. 354 ; 30 M. 3 (4) ; 14 M.L.J. 139.)

[2] APPEAL from a decree (2nd December 1884) of the High Court, reversing a decree (5th November 1883) of the District Court of Ganjam.

This appeal was preferred by the defendant, Sri Gajapati Radhamani Garu, who, having died after the hearing and before the judgment, was represented by the appellant, Vasudeva Santa Singaro. The plaintiff, Nilayamma, also deceased since the commencement of the suit, was now represented by the respondent. The suit was brought to recover Rs. 77,706, the balance of the principal and interest remaining due upon two registered mortgages, executed by Nilamani, who died on the 1st October 1882. Whether this sum was a charge upon the mortgaged property, in the possession of the defendant Radhamani, was the question raised. With the latter, Nilamani was co-widow, and joint heirress of the estate of their deceased husband, Krishna Chandra Deva, who died on the 18th April 1854. The mortgaged property was the Talagam khandam in the Tekkali estate, inherited by Krishna Chandara jointly with his brother

(1) 11 M.I.A. 497.

709
Gopinatha, who died in 1856, from their father Padmanabha. Gopinatha's widow, Radhika, took possession of the whole of Tekkali, and prolonged litigation ensued between her and Nilamani. In 1870, in *Sri Gajapathi Radhika Patta v. Sri Gajapathi Nilamani Patta* (1), the Judicial Committee decided that, in pursuance of a family compromise, the Tekkali taluk should be equally divided between Radhikha and Nilamani. The latter was put into possession of half the entire taluk, but the rights of Radhamani had not been stated in the decree. By an order of Her Majesty in Council, made in March 1873, Nilamani was declared to hold for herself and any other widow of her late husband, Krishna Chandra. It was not, however, till 1877, in *Sri Gajapathi Nilamani v. Sri Gajapathi Radhamani* (2), that the relative rights of the two widows in their husband's estate were settled. That resulted in one-fourth of the profits of the Tekkali taluk going to each widow during their joint lives; their respective rights by survivorship, and their other rights as widows remaining unaffected by the division.

The facts material to a report of the present appeal, and the proceedings below, are all stated in their Lordships' judgment.

[3] Mr. R. V. Doyne, for the appellant, argued that the decree of the High Court should be reversed and the suit dismissed. The co-widow Nilamani was not manager on behalf of the appellant co-widow, nor acting for her, with any authority to bind her, or the estate that had devolved upon both the widows, by the mortgages of 1874. Also Nilayamma, the plaintiff in this suit, either had, or might have had, if she had made the inquiries which, as mortgagee advancing money to a widow, she was bound to make notice of the defect in Nilamani's title. There was an absolute defect of title to transfer; and no title passed by the mortgages because the rule of inheritance was that two or more lawfully married wives took a joint estate for their lives in the property of their deceased husband and equal interests with rights of survivorship. This had been affirmed by this committee and was expressed by saying that the estate of two or more co-widows, taking by inheritance from their husband, was one estate. They were co-parceners, and there could be no alienation by one without the consent of the other, or others. Even although separate possession might be arranged, they remained jointly entitled, with a subsisting right of survivorship. 1 W. H. Macnaghten, H.L., 36, and Vol. 2, chap. I, case XV, and Bhugwandeen Dobey v. Myrna Batee (3). At the time when the mortgages were made in 1874, the estate dealt with by Nilamani was vested in the two widows jointly, and the survivor would, on the death of either, become entitled to the whole. The widow had no power to dispose of any part of the corpus of the property that came to her as widow to the prejudice of the next heir, or heirs. *Cossinath Baisakh v. Hurrosoudry Dabee* (4), cited in the case last referred to, and reported in Clark's Rules of the Supreme Court; also in Sir F. Macnaghten, page 79; and 2 Morley's Digest, 198.

The interests of the next heir were not held to be injured where the widow mortgaged in consequence of a justifying necessity. To have borrowed for the purpose of paying the revenue of the estate, not otherwise forthcoming, would be a necessity, and might justify a mortgage by both of two co-widows, the one being bound to protect the estate as much as the other. But here it had not been shown that mortgaging

---

(1) 13 M.I.A. 497.  
(2) 4 I.A. 212.  
(3) 11 M.I.A. 497.  
(4) 2 Morley's Dig. 198.
the estate was the only available mode of raising the money, and the amount required for the revenue was only a part of the sum raised. Also it had not been shown that the plaintiff had made inquiries as to the circumstances under which the debt was contracted, and she had neglected to take during the life of Nilamani such steps as the terms of the mortgages authorized for recovering the interest. Reference was made to Hanumanpersaud Panday v. Babooee Munraj Kooweree (1), Jioyiamba Bayi Saiba v. Kamakshi Bayi Saiba (the Tanjore case) (2), Sri Gajapathi Nilamani v. Sri Gajapathi Radhamani (3). Lastly, the mortgage deeds, on their true construction, did not show that the mortgaging widow had affected to deal with more than her own interest which had terminated with her life on the 1st October 1882.

Mr. J. D. Moyne, for the respondent, argued in support of the decree below, that the mortgages could be held to be a valid charge on the estate in the hands of the appellant Radhamani, principally on the following grounds: First, referring to the construction of the mortgages, the contention that the mortgages tendered to and accepted by the mortgagee were only hypothecations of the mortgaging widow's life interest, had never been raised in the previous proceedings. There was nothing of it in the written statement. The mortgage was of all that the widow could properly charge. Secondly, in order to give due effect to the special circumstances of this case, which, it was contended, enabled Nilamani in 1874 to make a valid charge upon the property that had devolved upon her at the time, the facts connected with the relative position of the two widows must be considered. On these the question turned, for, although Nilamani had been successful in her litigation, she had been put to inordinate expense in attaining her final position, and she had incurred all the cost, while half of the benefit accrued to Radhamani. On part of the khandams made over to Nilamani, arrears of revenue were already due, and in June 1873 commenced difficulties. The Collector issued process of attachment. Between October and December 1873, payments amounting to Rs. 18,619 were received for revenue, of which more than Rs. 9,000 were borrowed from Suraya. On the 20th November 1873, Nilamani executed to him a mortgage on part of Talagam, as security for Rs. 9,500, said to have been borrowed for the purpose of paying arrears of Government peshцаsh, accrued due on her khandams. Execution for arrears of revenue was stayed, on part payments, until March 1874, when orders were issued by the officials to sell part of them. On the 30th of that month, Nilamani executed to Nilayamma, the plaintiff, the first of the two mortgages in question, pledging her khandam of Talagam, as security for a loan of Rs. 35,000 stated to have been received on that day, for the purpose of paying the arrears of peshцаsh for that estate, with Nandigam and Nowgam, two other khandams; and for the purpose of discharging the debts due already to Suraya on the mortgage of Talagam. Rs. 20,925 was paid into the Government treasury on the 18th April 1874, and out of the balance, bonds given for money previously borrowed to pay revenue, were discharged. On the 4th May, the Collector ordered Nilamani's property to be again attached. On the 3rd July 1874, she executed the second of the mortgages now in question, for Rs. 10,000, on the khandam of Talagam; the debt being said to be for money raised to pay peshцаsh for 1873-74 on Nandigam, and for law expenses in the suits between Nilamani and Radhamani. It was not disputed that, out of the

(1) 6 M.I.A. 395. (2) 3 M. H. C. B. 424. (3) 4 I.A. 213.
money so raised, Rs. 5,000 were paid into the treasury on the 8th July 1874. The general theory relating to joint family necessity was that a member, managing, and in possession, could act for the benefit of all entitled; Mitakshara chapter I, Section 1, paras. 27, 28 and 29. The widow was a full heir with a restricted power of alienation. She represented the estate, and where there were two co-widows, the argument that the consent of both was required was founded on their both together composing but one heir. Here the widow who had mortgaged, was the manager in 1874; and, though she knew that the extent of her share was disputed, she was under the necessity of acting, as the elder widow, to save the estate; she was the only person then capable of managing it; she had been put into possession by a Court of law and remained in possession till she had made the mortgag; it having been in 1873 that the High Court, for the first time, held that the co-widow Radhamani was entitled. If not de jure manager for the latter of her share, at all events, Nilamani was so de facto; and de jure of her own; and where authority was necessary, for securing the estate, it might be inferred. Reference was made to Strange, H.L., vol. II, 339, 340, 348; and with the reservation [6] that the case of a father was somewhat different on account of the son's pious duty to pay his debt, the following cases showed how the manager's authority had been supported.


Mr. R. V. Doyne was not called upon to reply.

By order of revivor after the death of the appellant, after the hearing of the appeal, but before the delivery of judgment the name of Vasudeva Santa Singar was entered in the record. Their Lordships' judgment on the 23rd July 1892 was delivered by

JUDGMENT.

SIR R. COUCH:—This is an appeal from a judgment and decree of the High Court of Judicature at Madras, in a suit in which the deceased predecessor in estate of the respondent was the plaintiff, and Radhamani, who is now dead, was the defendant.

The suit was brought in the District Court of Ganjam to recover Rs. 77,706-4-0, interest and principal, due upon two mortgage bonds, one dated the 30th March 1874, for Rs. 35,000, repayable on the 23rd April 1880, the other dated the 3rd July 1874, repayable on the 6th July 1881.

Both these mortgage deeds were executed by Nilamani Patta Maba Devi, and both contain a possessory mortgage of the Talagam khandam, in the Tekkali estate.


712
Nilamani died on the 1st October 1882, and the plaintiff sought to recover the debts from the mortgaged property in the hands of her surviving co-widow, Radhamani, and from her other property.

[7] Radhamani answered that the alienation, having been made without her consent, was invalid, and that there was no necessity for the loans so as to bind the estate beyond the life-time of Nilamani.

The following issues were laid down:

(i) Could Nilamani (deceased), under any circumstances, create a valid charge on the property binding on the estate in the hands of the survivor, a co-widow?

(ii) If so, was there any necessity in the present case to contract the loan so as to bind the estate?

The first mortgage was as follows:

"Deed of mortgage with possession, dated Monday, the 18th day of Chaitra, 1873, executed and given by Sri Sri Sri Gajapathi Nilamani Patta Mahdevi, widow of Sri Gajapathi Krishna Chandra Devu Raja Garu, of Kashtiya caste, Zemindar, residing in Raghunathpuram, in Tehkali taluk, in Ganjam district, to Sri Kakarlapudi Nilayamma Garu, widow of Sri Kakarlapudi Bungaru Raza Garu, mokhasadar, of Kashtiya caste, residing in Pandrangi, within the jurisdiction of the Registrar of Bimlipatam, in Vizagapatam district.

"The amount received from you this day as a loan for the purpose of paying up the arrears of peshushd due to me by Government for the khandams of Talagam, Nandigam, and Nowgam comprised in my zemindari, and for the purpose of discharging the debts contracted by me from Abburu Surya Narayana Pashupati Garu, on the mortgage of Talagam khandam for the aforesaid purpose, is Rs. 35,000.

"It is agreed as follows:

"As I have received thirty-five thousand rupees, I will pay interest hereon at 10 annas per cent. per mensem. I have mortgaged to you and put in your possession Talagam and other villages specified in the schedule hereunto annexed, situated in the khandam of Talagam in the taluk of Tekkali, within the jurisdiction of the Sub-Registrar of Tekkali, in the Registration District of Ganjam, included in my half share of Tekkali taluk, yielding an income of Rs. 16,154 per annum by Zeraiti, Shratri, &c., assessed with peshushd of Rs. 9,817, being my husband's share of the taluk which came into my possession according to the judgment of the Privy Council, and which has been in my possession and enjoyment. You shall grant leases from fasli 1284 till this bond is discharged, to renters arranged by me either for the amount mentioned in the schedule or for a higher amount, and you shall receive muchalkas (counterparts of lease deeds) from them. The money collected by your officer from them (renters) at the several instalments of each year shall be placed in a box in my切成行政办公区域, room, under lock and key of your officer and my officer; and I myself will provide for the safety of the same. I myself will be answerable for any harm that may befall by act of State or act of God. Out of the money realized, I will receive Rs. 150 a month for my expenses and grant receipts therefor to your officer. You yourself shall pay, on my behalf, at the several instalments, the peshushd due to Government each year on the said khandam of Talagam, take receipts in my name, and hand them over to me. Out of the balance you shall take Rs. 2,625, the annual interest due to you from this date to the 13th..."
"Chaitra Suddha (April) of each year, and Rs. (360) three hundred and sixty a year for expenses of your establishment, in all Rs. 2,955, and pay over the surplus to me, and take receipts. The public expenses incurred for civil and summary suits which you may conduct for the recovery of money not paid by renters according to the several instalments shall be met from the balance on hand. The money again collected shall be added to the balance on hand. If the property mortgaged is not sufficient to meet the aforesaid peshesh and other expenses, the same shall be made good out of my other property. As you do not grant leases to those whom you like, but only to those who are appointed by me, I myself will be answerable for any profit or loss that may result.

"If the principal of Rs. 35,000, and the interest accrued up to date, is paid in a lump on the 13th Chaitra Suddha of the year Pramadi (April 1879), the date fixed for the repayment hereof, or in default of payment on that date, at some time between that date and the thirteenth Chaitra Suddha of the year Vikrama (23rd April 1880), the said mortgaged villages shall at once be put in my possession and this document returned to me. In default of payment in the said manner, I will pay the principal with interest at a higher rate to wit, at 12 annas per cent. per monseem from the date of the bond. If any disputes arise with regard to any lands in the villages, &c., under mortgage, in connection with boundaries or other rights, I myself will look after them, but you shall have nothing to do with the same. This is the deed of mortgage with possession executed and given with my consent."

The second mortgage was similar to the first in all points essential to the decision of the case. The District Judge dismissed the suit with costs.

As to the first issue, he held that Nilamani had no power to bind the interest of Radhamani without her consent, and that the mortgage did not in law bind the estate beyond the life of Nilamani, and further he thought that the parties to the mortgage did not believe that Nilamani was charging or intended to charge any interest of Radhamani.

He stated that his finding on the first issue was sufficient to dispose of the case, and that he based his judgment upon it. He, however, proceeded to try the second issue, and with reference to his finding upon that issue it may be as well to call attention to the fact that the Rs. 35,000 secured by the first mortgage was not merely for the payment of revenue, but also for the payment of debts contracted by Nilamani.

The District Judge held that Radhamani was not liable for those debts, and that there was no necessity therefore, so far as she was concerned, to charge her interest in the estate for the amount borrowed to pay the debts. He said "there was a real necessity, and the estate benefited to the extent of the money paid in discharge of the peshesh, but the transaction viewed as a whole was not, in my opinion, bona fide. Better terms might have been made for extinguishing the debt, and the sum advanced was excessive. The most that could be charged to the estate would be the principal sums paid for peshesh, and even then some deduction should be made on account of the profits which ought properly to have gone towards the extinction of the principal, and this I should have some difficulty in determining without taking an account of the actual profits of the khandam for the six years."

The High Court upon appeal reversed the judgment and decree of the District Judge, and gave a decree against the defendant for the amount.
found due upon the mortgages. As to Radhamani’s consent not having been obtained, they said it would [10] have been impossible for Nilamani to have obtained Radhamani’s assent to any arrangement which she might have proposed at a time when they were in litigation, and that the moneys borrowed were for Radhamani’s benefit, and that she was bound by the mortgages.

It by no means follows that if it had been necessary to borrow money to save the estate of the two widows from sale for arrears of revenue, Radhamani would have refused to consent to mortgage the joint interest of the widows for a sum sufficient to discharge those arrears, notwithstanding the widows were at enmity, and actually engaged in litigation with each other respecting the estate.

At any rate an application was not made to Radhamani for her consent, and without such an application it is impossible to hold, even if that would be sufficient, that Nilamani was under such a necessity of borrowing money without Radhamani’s consent for the preservation of the estate that a mortgage by Nilamani alone would be binding upon Radhamani’s interest in the event of her survival.

But there was a very good reason why Nilamani did not apply to Radhamani for her consent. The mortgages were in 1874, whereas it appears that down to the year 1877 Nilamani was contending that Radhamani as junior widow took no interest in the estate, but was merely entitled to maintenance. Sri Gajapathi Nilamani v. Sri Gajapathi Radhamani (1). It was not determined until 1877 that Radhamani had a joint interest in the estate. If Nilamani had applied to Radhamani to join in the mortgages she would have impliedly admitted that Radhamani had a joint interest.

It may be assumed for the present judgment, without deciding the point, that there was a sufficient necessity for borrowing money to pay the Government revenue, or even for the payment of Nilamani’s debt, but that necessity did not render a mortgage by one widow binding upon the joint estate which had descended from their deceased husband, so as to affect the interest of the surviving widow. (Bhugwandeen Doobey v. Myna Baas) (2). But, irrespectively of these considerations, it appears clear to their Lordships that the mortgages were not so framed as to bind the [11] estate in the hands of Radhamani, as the surviving widow after the death of Nilamani. Many of the stipulations in the mortgages were personal to Nilamani, and they cannot be held to have been binding or intended to be binding upon Radhamani or her interest in the event of her surviving.

Their Lordships are, therefore, of opinion that the mortgages were not binding upon Radhamani, and that the decree of the High Court ought to be reversed, with costs in that Court, and the decree of the District Judge affirmed.

They will humbly advise Her Majesty accordingly.

The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant—Messrs. Pemberton & Garth.
Solicitor for the respondent—Mr. R. T. Tasker.

(1) 4 I.A. 212.
(2) 11 M.I.A. 487 (515, 516.)
In a suit to recover possession of the immoveable zamindari of Shivagunga, it appeared that the Istinarar zamindar died in 1829, and that after an interval of wrongful possession by his brother and his descendants, his daughter established her title to succeed him and was placed in possession in 1861. She died in 1877 leaving the present plaintiff (her son), and three daughters her surviving. A suit was then brought by the father of the present defendant, who was the son of her elder sister (deceased), against the present plaintiff and the daughters of the late range for possession of the zamindari to which he claimed to be entitled by right of inheritance. A decree was passed for the plaintiff in that suit, under which he obtained possession of the zamindari and retained it until his death in 1883, when he was succeeded by the present defendant. The plaintiff now sued as above, claiming that the right to the zamindari had devolved on him and not on the defendant on the death of the plaintiff in the former suit:

Held, (1) that the defendant’s father had not succeeded to a qualified heritage nor to a mere right of management of joint family property in which the plaintiff [12] had a right of survivorship, but that he had succeeded to the estate as full owner and had therefore become a fresh stock of descent;

(2) that accordingly, nearness or remoteness of relationship to the Istinarar zamindar was immaterial, and the defendant’s right of succession was not affected by the fact that the whole class of the Istinarar zamindar’s daughters’ sons had not been exhausted;

Held also, that the plaintiff was not precluded from raising the contentions to which the above rulings relate by reason of their not having been raised by way of defence to the suit brought against him by the defendant’s father.

[R, 30 M. 349 = 17 M.L.J. 275.]

Appeal against the decree of S. Gopalachari, Subordinate Judge of Madura, East, in original suit No. 87 of 1889.

Suit to recover possession of the immoveable zamindari of Shivagunga. The facts upon which the plaintiff’s title was based were undisputed and were as follows:—The Istinarar zamindar died in 1829. On his death his brother entered on the estate, and he and his descendants retained possession until 1864, when Kattama Natehiyar, who was the daughter of the Istinarar zamindar, obtained possession under a decree of the Privy Council, see Kattama Natchiar v. The Rajah of Shivagunga (1), and held the estate until she died in 1877, leaving the present plaintiff (her son), her three daughters, and Dora Singha Tevar, the son of her elder sister (deceased), her surviving. The defendant in the present case was the son of Dora Singha Tevar.

On the death of Kattama Natehiyar, Dora Singha Tevar filed original suit No. 1 of 1877 on the file of the District Court at Madura against the present plaintiff and the daughters of the late range and obtained a decree, see Mutti Vaduganathia Tevar v. Dora Singha Tevar (2), under which he entered into possession of the zamindari and held it until his death in 1883, when he was succeeded by the present defendant.

(1) 9 M.I.A. 539.  (2) 3 M. 290.
MUTTUVADUGANATHA TEVAR v. PERIASAMI 16 Mad. 14

The issues framed in the suit, so far as they are material for the purposes of this report, were as follows:

(i) Whether on the death of Dora Singha Tevar, succession should be traced from the maternal grandfather as alleged by plaintiff, or from Dora Singha Tevar himself as contended by defendant?

(ii) Whether the plaintiff is not estopped by the decree in original suit No. 1 of 1877 from tracing succession [13] from the Istimar zemindar on the death of Dora Singha Tevar?

(iii) Whether, as contended by the plaintiff, on the death of Kattama Natchiyar, the estate devolved upon defendant's father and the plaintiff as joint family property, and after the death of Dora Singha Tevar, the property devolved upon the plaintiff as survivor of the two grandsons?

(iv) Whether, as contended by the plaintiff, Dora Singha Tevar's possession was such as not to constitute him a fresh stock of descent, but he took the property only as manager by reason of the impurity of the estate, subject to the right of the plaintiff to succeed to the enjoyment of the estate upon the death of Dora Singha Tevar?

(v) Whether, on the death of Dora Singha Tevar, the plaintiff is entitled to succeed to the zemindari in preference to the defendant by virtue of the plaintiff being the surviving grandson of the Istimar zemindar and the defendant being only his great grandson?

(vi) Whether, as contended by the plaintiff, the rule of succession to the zemindari is that the eldest of a class succeeds, and that on his death the survivor of the class succeeds in preference to the male issue of such eldest member of the class?

(vii) Whether the plaintiff is estopped by the decree in original suit No. 1 of 1877 from claiming the zemindari from the defendant who is the legal representative of Dora Singha Tevar, the senior of the grandsons of the Istimar zemindar?

As to the subject of the second issue, the defendant's contention was that it was virtually established in the former suit, that the succession should be traced from the last male holder, and that the plaintiff was accordingly estopped from setting up any other mode of devolution. The Subordinate Judge held that this plea was not maintainable on the ground that the issues in the two suits were not identical, since in the former the question was from whom succession was to be traced after the interposition of a female, and in the present from whom succession should be traced after the death of a daughter's son. As to the seventh issue the defendant's contention was that, inasmuch as the plaintiff did not set up in the former suit that he had a joint right to the zemindari along with the defendant's father, or a right of survivorship or succession on his death, the plaintiff was now estopped from setting up such a case. The Subordinate Judge similarly overruled this plea on the ground that the averments now made by the plaintiff were not material to his defence in the former suit.

The Subordinate Judge held on the remaining issues that the plaintiff had not established his title to the zemindari and dismissed the suit.

The plaintiff preferred this appeal.

Parthasaradhi Ayyangar and Rangachariar, for appellant.
Subramanya Ayyar, Bhashyam Ayyangar and Desikachariar, for respondent.
MUTTUSAMI AYYAR, J.—The contest in this appeal is as to the right of succession to the zamindari of Shivagunga. Dora Singha Tevar was the last male holder, respondent is his son and appellant is the son of Kattama Natchiyar, Dora Singha’s predecessor. Appellant is related to the Istimrār zamindar as daughter’s son and respondent as the son of a senior daughter’s son. The question for determination is whether, under the Mitakshara law, succession is to be traced from the last male holder or the Istimrār zamindar. The first and third to sixth issues recorded in this case relate rather to the different grounds on which appellant presses his claim than to independent questions.

As regards the first issue, viz., whether succession is to be traced from the last male holder or his maternal grandfather, appellant’s contention is that when a person succeeds to an obstructed heritage, that person is not, whether a male or female, a full owner. There is, however, no warrant for it in the Mitakshara. The general rule of Hindu law is that when a male heir succeeds a male owner, the former is as much full owner as the latter, the principle being, as stated by Manu in Chapter IX, verse 187, that to the nearest sapinda the inheritance belongs. The only recognized exception to it is that when a female, such as a widow or daughter, succeeds a male owner, her succession is a case of interposition between him and his next sapinda, on the authority of Catyayana, who directs that, upon the death of such female, the last male owner’s (and not her own) heirs shall take the heritage. This text is referred to, and the history of the introduction in the [15] Mitakshara of widow and daughter among heirs is explained in the decision of this Court in Muttu Vaduganadha Tevar v. Dora Singha Tevar (1). As for obstructed and unobstructed heritage (sapratibanda, and apratibanda), the distinction is material only to the extent that, in the one case, the nearer male heir excludes the more remote, whilst in the other, the doctrine of representation excludes this rule of preference. It is founded upon the theory that the spiritual benefit derived from three lineal male descendants, such as son, grandson and great grandson, is the same, though among collateral male heirs, the quantum of such benefit varies in proportion to the remoteness of the male heir from the deceased male owner. Hence it is that the text of Yajnavalkya, cited in Mitakshara, Chapter II, Section 1, verses 2 and 3, premises the death of a male owner without male issue, and enumerates his heirs in the order in which they are entitled to succeed, adding that on failure of the first in the order in which they are enumerated, the next in order is the proper heir. Thus the rule that to the nearest sapinda the inheritance belongs applies alike whether the heritage is obstructed or unobstructed with this difference, viz., that when the last full owner leaves sons, grandsons and great grandsons, their sapinda relationship confers equal spiritual benefit on him, though their blood relationship is not the same, that they are all co-heirs within the meaning of the rule. The decision of the Subordinate Judge on the first issue is, therefore, correct.

The third issue is whether, upon the death of Kattama Natchiyar, the zamindari devolved upon Dora Singha Tevar and appellant as joint family property, and whether, upon the death of the former, it devolves upon the latter by right of survivorship. It is suggested for appellant, first, that it is joint family property; and, secondly, that his right of survivorship excludes respondent from succession. The right of survivorship, as

(1) 3 M. 290. (330 331.)
recognized by the Mitakshara, presupposes two things, viz., a subsisting co-parcenary in respect of the property in litigation, and the death of the last male owner without male issue. In the case before us, respondent is Dora Singh Tavar’s son, and even assuming that the estate was common both to appellant and Dora Singh Tavar, no right of survivorship can arise in appellant’s favour. Again co-parcenary presupposes a common descent from the same paternal ancestor and [16] community of interest in the property in dispute, and as daughters are transferred by marriage to the gotras or the families of their husbands, neither can they nor their sons be said to be co-parcenors so as to constitute a joint Hindu family in the true sense of the expression. Further, to what extent an impartible estate can be treated as joint family property, though it vests in one of its members by the custom of primogeniture, and to what extent a right of survivorship can be deduced from impartibility was considered by this Court in Naragauti Achammagu v. Venkataghalapati Nayanivar(1), and the decision in that case rests on the view that, before succession can pass from one line of descent to another, the former must be extinct, and that the proper heir is not necessarily the co-parcenor nearest in blood to the original owner, but the nearest co-parcenor of the senior line. Again, how far it is joint family property as between father and son for the purpose of invalidating a mining lease granted by the former was considered in Beresford v. Ramasubba(2), and it was held in that case, on the authority of the decision of the Privy Council in Sarla J Kuri v. Deoraj J Kuri(3), that, even as between real co-parcenors an impartible estate devolving in accordance with the custom of primogeniture is not joint family property for all purposes. The right of survivorship on which appellant insists was properly held by the Subordinate Judge not to subsist.

The fourth issue was raised with reference to the contention that Dora Singh Tavar’s interest in the zamindari was only a qualified interest, and that it consisted only in the right of management subject to appellant’s right to succeed to him on his death, and the Subordinate Judge was right in disallowing it also. In the first place, Dora Singh was owner and not a mere manager, and his ownership was that of a male sapinda and not a qualified heritage as in the case of a widow or daughter. The Smritis from which his right of succession is deduced by the Mitakshara in Chapter II, Section III, verse 6, are those of Vishnu and Manu. The former says:—"In regard to the obsequies of ancestors, daughter’s sons are considered son’s sons" and the latter observes:—By that male child whom a daughter, whether formally "appointed or not, shall produce from a husband of an equal class, "[17] the maternal grandfather becomes the grand-sire of a son’s son; "let that son give the funeral oblation." The Smriti on which the Mitakshara rests the daughter’s succession is that of Vrihaspati, who says, "as a son, so does the daughter of a man proceed from his several limbs." It is then clear that in the case of daughter, the ground of succession is that she is her father’s sapinda, because she proceeds from his limbs like a son; but in the case of daughter’s son it consists in the union of blood relationship through the mother with that of sapinda relationship in its spiritual sense, as in that of a son’s son or the son of an appointed daughter under ancient Hindu law. Here I may also draw attention to the Vedic texts cited in Smriti Chandrika and to their effect as discussed

(1) 4 M. 250, (252-267).                      (2) 13 M. 197.                      (3) 10 A. 272 (283).
1892

APRIL 25.

APPEL-
LATE
CIVIL.

16 M. 11=
2 M.L.J. 265.

in Chapter IV, verses 4-8. Those texts show that there is a passage in the Taittiriya Veda to the effect that females and persons wanting in an organ or sense or member are incompetent to inherit, that accordingly Baudhaya-
yana says that females are incompetent to inherit, and that the author of the Smriti Chandrika considers that what they take is not dayam or pure heritage, but only an "amsom," or an allotment, in the nature of a provision or a qualified heritage. Reading the foregoing passages together, it follows that, when the daughter succeeds, she takes the heritage as an amsom or as a provision for life with power of alienation on exceptional grounds, or, as it is usually put, as a qualified heritage; and that, as she succeeds solely by reason of blood relationship, her succession is con-
istituted into a case of interposition between two consecutive male heirs who are both blood relations and sapindas in a spiritual sense. It is also clear, on the other hand, that, when the daughter’s son succeeds, he succeeds as a regular sapinda in the same way in which a son’s son or the son of an appointed daughter succeeds, that the Vedic text and the disability consequent upon it do apply to him, that he inherits from his mother’s father, though after her death, and not from her, that he is a full owner like a son’s son or an appointed daughter’s son, and that, like every regular or male sapinda, he also becomes a fresh stock of descent when the right to inherit once vests in him. The appellant’s contention, which ignores this distinction between the daughter and the daughter’s son as heirs-at-law, cannot be supported.

As regards the fifth issue, it is sufficient to state that nearness or remoteness of relationship to the Istimdar zemindar is per-[18]fectly immaterial. As observed by the Privy Council in Neelkisto Deb Bur-
Bhunyo v. Beochunder Thakoor (1) and by this Court in Naragandhi Achamna Garu v. Venkatachalamapati Nayanivarvu (2) "it is the nearest in "blood to the last male holder, that is the proper heir, and not the senior "member of the whole group of agnates."

In connection with the sixth issue, it is argued for appellant that like daughters daughters’ sons inherit as a class, and that as all the heirs in each class must be exhausted before the estate devolves on another class, appellant is a preferable heir by right of survivorship. This contention is again, as observed by the Subordinate Judge, clearly not tenable. It ignores the principle that, when by the custom of primogeniture, the senior male in a class of heirs excludes the others, the exclusion continues not only during his life, but so long as he leaves lineal heirs competent to succeed to him. If an impartible estate devolves on the eldest of three sons by the custom of primogeniture to the exclusion of the rest, the preference due to seniority of birth is not a mere personal privilege, but a heritable interest which descends to his lineal heirs as his representatives. The doctrine of representation as between the father and his three lineal descendants, consequent on the notion that he is reborn in them, obtains on each occasion the succession opens up and the eldest son’s right to exclude his brother is continued to his lineal male heirs. It is then said that when an impartible estate devolves on the eldest of several daughters, the other daughters take by right of survivorship. Each daughter’s succession is only a case of interposition, and as she dies, the next in seniority is her father’s heir and thus inherits the estate as her, and not by right of survivorship as recognized by the Mitakshara.

(1) 12 M.I.A. 523.
(2) 4 M. 250 (327).
As regards the second and seventh issues, I agree in the opinion of the Subordinate Judge that there is no estoppel in either case for the reasons assigned by him. As the appeal fails on the merits, it is not necessary to consider the eighth, ninth and tenth issues.

I would dismiss this appeal with costs.

Best, J.—This is an appeal by the plaintiff against the Subordinate Judge’s decree dismissing his suit for possession of the Zemindari of Shivaganga to which plaintiff claims to be entitled to succeed on the death of the late Zemindar Dora Singha Tevar, [19] in preference to the defendant, who is the son of the said Dora Singha Tevar.

The Istimar zemindar was Gouri Vallabha Tevar, who died in 1829. Thereupon, his brother Mutta Veduga Tevar took possession, and he and his descendants retained the same till 1864, when Kattama Natchiyar, daughter of the Istimar zemindar, recovered the same under the decree of the Privy Council, following on the judgment of their Lordships in Kattama Natchiyar v. The Rajah of Shivaganga (1). Kattama Natchiyar died in 1877, when a contest arose as to the right of succession between her son, the present plaintiff, and Dora Singha Tevar, the son of her elder sister (deceased) Vellai Natchiyar, which resulted in favour of the latter, on the ground that the estate taken by Kattama Natchiyar as a daughter was a limited estate, and that on her death it devolved not on her own heir, but on her father’s heir, and that Dora Singha Tevar, as senior grandson, was her heir—Mutte Vaduganadha Tevar v. Dora Singha Tevar (2). Dora Singha Tevar succeeded, therefore, and held the zemindari till 1883, when he died.

Hence this suit, in which the plaintiff (appellant) seeks to get possession as grandson of the Istimar zemindar and, therefore, more closely related to him than defendant, who is a great grandson.

The question, therefore, is whether, on the death of Dora Singha Tevar, the succession is to be traced from the Istimar zemindar as contended by the plaintiff, or from Dora Singha Tevar himself as urged on behalf of the defendant. The Subordinate Judge has upheld the defendant’s contention, and I am of opinion that he is right in so doing.

It is urged on behalf of the plaintiff that Dora Singha Tevar’s possession was as manager of the estate by reason of its impartibility, and that the estate having been the joint family property of himself and plaintiff, the latter is entitled to the same by right of survivorship.

As was observed in the Naraganti case (3) at page 267 of the report:—"The impartibility of the subject does not necessitate the denial of the right of survivorship, and there are not wanting in the admitted rules which govern the enjoyment of such property and the succession to it, indicia of co-ownership and consequent survivorship." But can the plaintiff be held to have been a co-owner of the zemindari with Dora Singha Tevar? For it is only in case of co-ownership that there can be a right of survivorship. As pointed out by the Subordinate Judge, plaintiff and Dora Singha Tevar are the sons of different fathers and consequently members of different Hindu families, and therefore not coparceners within the meaning of the Hindu law. The claim by right of survivorship has, therefore, been rightly rejected; and as the last male owner from whom the right of succession is to be traced is Dora Singha.

APPEL-
LATE CIVIL.
16 M. 11 = 2 M.L.J. 265.

(1) 9 M.I.A. 539.  (2) 8 I. A. 99.  (3) 4 M. 250.

721
Tevar, the Subordinate Judge is right in holding that the son, the defendant, and not the plaintiff, is the person entitled to succeed to the zamindari.

This appeal fails, therefore, and is dismissed with costs.

16 M. 20.

APPELLATE CIVIL.

Before Mr. Justice Mutthusami Ayyar and Mr. Justice Best.

SAH MAN MULL and another (Plaintiffs), Appellants v. KANAGASABAPATHI (Defendant), Respondent.*

[18th February and 13th April, 1892.]

Civil Procedure Code, Sections 241, 294, 303, 622—Sale in execution—Purchase-money and judgment-debt set off against each other—Representatives of decree-holder—Appeal—Revision.

One who had attached a decree and obtained leave to bid at the sale of land ordered to be sold in execution, and to have the purchase-money and the amount due under the decree set off against each other, became the purchaser for a sum less than the amount due under the decree. The Court made an order under Civil Procedure Code, Section 309, cancelling the sale and ordering a re-sale on the ground the purchaser had not paid the full amount due on his purchase within the time limited. The purchaser preferred a revision petition under Civil Procedure Code, Section 622:

Held, (1) that the petitioner was the representative of the decree-holder within the meaning of Civil Procedure Code, Section 241, and might have preferred an appeal against the order sought to be revised;

(2) that the petition for revision was accordingly not maintainable, although, under the circumstances above stated, the Court had no jurisdiction to make an order under Civil Procedure Code, Section 309.

[F., 39 M. 318; D., 6 C.L.J. 437 (441) = 11 C.W.N.433.]

[21] PETITION under Civil Procedure Code, Section 622, praying the High Court to revise the order of S. T. McCarthy, District Judge of Chingleput, dated 21st February 1890, cancelling the sale to the petitioner of certain land which had been brought to sale in execution of the decree in original suit No. 1884 and ordering a re-sale.

The above order was made on the ground of non-payment of the purchase-money in full within the period fixed for its payment.

The petitioner had attached the decree in question and had obtained, under Civil Procedure Code, Section 294, leave to bid at the execution sale, and to have the purchase-money and the amount due under the decree set off against each other.

The petition came on for hearing before PARKER, J., who made an order dismissing it.

The petitioner preferred this appeal under Section 15 of the Lett Patent.

The appeal came on for hearing before MUTTUSAMI AYYAR and BEST, JJ.

Mr. R. F. Grant, for appellants.

Bashyam Ayyangar and Sadgopachariar, for respondent.

ORDER.

"It has been urged before us that the amount actually due under the decree on the date of sale, and which the decree holder was permitted

under Section 294 of the Code of Civil Procedure to set off, exceeded the purchase-money and that the Judge, therefore, had no jurisdiction to set aside the sale under Section 303 and to order a re-sale.

"Reading the above two sections together, we are of opinion that this contention is well-founded.

"Before, therefore, disposing of this appeal, we must ask the Judge to ascertain what was the amount due under the decree at the date of the sale, including interest to that date and costs of the execution proceedings. The finding to be submitted within three weeks from the date of the receipt of this order, and seven days after posting the finding in this Court will be allowed for filing objections."

The District Judge, in compliance with the above order, returned his finding, which was to the effect that the amount due under the decree was Rs. 26,596, and the purchase-money was Rs. 24,409.

[22] This appeal having come on for final hearing, the parties being represented as before, the Court delivered judgment as follows:

JUDGMENT.

It is contended that, as an appeal lies from the order made by the District Judge, the appellant's petition under Section 622 was not maintainable, and that, therefore, it was properly rejected. It must be conceded that the order is appealable under Section 244 of the Code of Civil Procedure—Vallabhan v. Pangunu (1) and Mutthan v. Appasami (2).

It is urged on behalf of respondent that as he is not an assignee of the decree, but one who attached it under Section 273, the above rulings are not applicable. This, however, makes no difference in principle, as one who attaches a decree is the decree-holder's representative within the meaning of Section 244, as was also held by the Calcutta High Court in Peary Mohun Chowdhury v. Romesh Chunder Nundy (3).

It is further contended that the objection that the District Judge's order is appealable was not urged before the learned Judge or before us when we made our former order. This is true; but the objection is one that goes to the jurisdiction of the Court to interfere at all under Section 622. We must, therefore, entertain the objection.

The learned Judge's order dismissing the petition was, therefore, correct; but it should have proceeded on the ground that the application under Section 622 could not be entertained, the order objected to being appealable.

We dismiss this appeal, but, under the circumstances, without costs.

(1) 12 M. 454. (2) 13 M. 504. (3) 15 C. 371.
INDIAN DECISIONS, NEW SERIES

1892
MAY 5.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

MUTTUSAMI AND OTHERS (Plaintiffs), Appellants v. MUTTUKUMARASAMI (Defendant), Respondent."

[20th, 21st, 22nd April and 5th May, 1892.]

Hindu law—Inheritance—Baukhri—Maternal uncle of the half blood—Father's paternal
aunt’s son—Kindred of half blood.

Under the Hindu law of inheritance prevailing in the Madras Presidency a
maternal uncle of the half blood is entitled to succeed in preference to the son
of the father’s paternal aunt. The former is an *atma bandhu*, the latter is a
*pitru bandhu*.

[Affirmed. 19 M. 405 = 23 I.A. 83 (P.C) = 6 M.L.J. 113 = 7 Sar. P.C.J. 45 ; Diss., 24
M.L.J. 301 (307) = 13 M.L.T. 213 = 1913 M.W.N. 202 (205) ; R., 20 M. 342 ; 29
M. 439 (445) = 5 Ind. Cas. 280 = 30 M.L.J. 275 = 7 M.L.T. 203 ; 35 M. 152 (161)
= 11 Ind. Cas. 886 = 21 M.L.J. 856 (869) = 10 M.L.T. 226 ; D., 18 M. 193.]

APPEAL against the decree of J. W. Best, District Judge of Chingleput, in original suit No. 25 of 1889.

The plaintiffs sued to establish and enforce their right to certain
property as the reversionary heirs of one Muttusami Mudali deceased. Muttusami Mudali died in 1879 without male issue, leaving him surviving his widow, who died in April 1888, and his daughter, who died in 1883 without issue. The plaintiffs were the three sons of one Parvathammal, who was admittedly the sister of the paternal grandfather of Muttusami Mudali. But a question was raised as to whether or not she was his
uterine sister. The defendant claims title from Vadapathi Nagappa Mudali, the maternal uncle of the half-blood of Muttusami Mudali, whose sons had released their interest in the estate to him by an instrument
dated the 27th November 1888. It is admitted that Vadapathi Nagappa Mudali was only the half-brother of Muttusami Mudali’s mother. On
these facts the District Judge held that the defendant had a higher title
to the estate than the plaintiffs, and accordingly dismissed the suit.

The plaintiffs preferred this appeal.

Anandacharu an’ Masilamony Pillai, for appellants.

Bhashyam Ayyangar, Ramachandra Ayyar and Desikachariar, for respondent.

JUDGMENT.

The contest in this appeal is as to the right of succession to the
property of one Muttusami Mudali deceased. He died without issue in 1879, leaving him surviving a widow, [24] Swarnathammal, who died in the year 1888. Appellants Nos. 1 and 2 are the sons and appellant No. 3 is the son’s
son of Parvathammal, sister of Arumugatta Mudali, who was Muttusami
Mudali’s paternal grandfather. The respondent claims under one Nagappa Mudali and his sons, the former being the step-brother of Muniyammad,
Muttusami’s mother. The main question for decision in this appeal is
whether, as held by the Judge, a maternal uncle of the half-blood is entitled
to succeed in preference to the son of the father’s paternal aunt. It was
alleged for the respondent that Parvathammal was only the step-sister of Arumugatta Mudali, but the Judge did not consider it necessary to
determine this question, as he was of opinion that the distinction between

* Appeal No. 132 of 1891.
the whole blood and the half blood was not material for the purposes of the present suit. Another question, therefore, arising for determination in this appeal is whether a maternal uncle of the half-blood is one's own cognate kindred as much as a maternal uncle of the whole blood. As regards the difference in blood, the appellant contends that mother's step-brother is not at all one's bandhu or cognate kindred. It is argued for him that the term used in the text cited in Mitakshara, Chapter II, Section 6, verse 1 is "matula, and that as it is derived from the word mother, it cannot refer to any other than her uterine brother. We observe, however, that in ordinary parlance the term "matula" includes also mother's step-brother. In Amarakosa Manushiya Varga, verse 31, mother's brother is said to be known by the name of "matula," and in the Sanskrit Dictionary of Taranatha Tarka Vachaspati the term "brother" is said to denote one born of the same father. (See Appendix Extracts Nos. 1 and 2.)

Turning to the etymology, it is true that the word "matula" (maternal uncle) is derived from the term "matri" (mother) and formed by adding to it the terminational particle "dulach," but there in no authority for the contention that the word so formed means only mother's uterine brother. In the Vartika, under Panini Sutra, adhiyaya IV, pada 2, rule No. 36, the following passage is found, which appears to be conclusive: "When the brother is to be indicated after the words pitru and matri (father and mother) the terminations "vyan and dulach" are prescribed. The word "pitrivya" is the father's brother and the word "matula" is the mother's 'brother." (Appendix Extract No. 3).

[25] Passing on to the sense in which the term brothers (bhrtarau) is used by commentators, the conclusion that it is a generic term and includes brothers of the half as well as of the whole blood is irresistible. In Mitakshara, Chapter II, Section 4, verses 5 and 6, the commentator treats the word "brothers" used in the text of Yajnavalkya cited in Mitakshara, Chapter II, Section 1, paragraph 2, verse cxxxi, as indicating brothers both of the whole and half-blood. The only rule of preference indicated by him as resting on the difference in propinquity, consequent on the difference of the mothers, is that the uterine brother excludes the half-brother in cases in which there is a competition between them. Even to this rule, the author of the Mitakshara mentions an exception in Chapter II, Section 9, verse 7, viz., that when the half-brother is reunited and the uterine brother is not re-united, both take together and divide the estate. Again, he explains that the rule of preference is applicable only as between brothers, and that the nephews are not entitled to inherit when there are brothers even of the half-blood since their right of succession arises only on failure of brothers. Moreover, the author of the Smriti Chandrika follows the Mitakshara and says in Chapter xi, Section 4, verse 5 (Krishnasawmy Aiyar's Translation, page 198) that the use of the general term "brothers" in the text of Yajnavalkya is intended to denote both the uterine brother and a brother by a different mother. It is clear that than the leading commentators use the term brother as generic, and that the difference of the mothers is only material when there is competition between heirs of parallel grades. The fallacy in the contention of the appellant lies in the assumption that a brother is one born of the same mother instead of the same father. As regards the several passages relating to pollution or impurity cited from the Mitakshara by the appellant's pleader (Appendix No. 4), they do not show that the term "matula" does not include the mother's half-brother. On the
contrary they prescribe pollution alike on the death of maternal uncles both of the whole and the half blood, though its duration varies according as the deceased is of the whole or half-blood. There is only one passage on which much stress is laid for the appellants as deserving special notice. The author of the Mitakshara cites a text of Manu regarding impurity consequent on death, and it runs in these terms:—

"Impurity lasts for three days if a Srotriva dies; but pakshini [26] pollution, that is to say, pollution for ninety Indian hours, is to be observed in the case of matula, pupil, guru and bandhava." The Mitakshara explains, however, that the term "matula" here indicates also mother’s sister and others, whilst the term "bandhava" denotes atma bandhus, pitru bandhus, and matru bandhus (one’s own cognate, one’s father’s cognate, and one’s mother’s cognate), and the suggestion, therefore, that the term "matula" is used here in addition to the word bandhava, because a maternal uncle of the half-blood is not a bandhu is not entitled to weight. Moreover, it would be unsafe to draw from the use of the word matula, in additional to the word bandhava in an isolated text, the inference suggested for the appellants when the author of the Mitakshara gives a special reason for it. Again, Vyadinadha Dikshtatar, a recent commentator of authority in Southern India, observes that the word "matula" in the above text refers to a maternal uncle of the whole blood who is absent from the place where death occurs, and to maternal uncle of the half-blood (Appendix No. 5). As it is conceded that a maternal uncle of the full blood is a bandhu, and as it has been so held by the Privy Council in Gridhari Lal Roy v. The Bengal Government (1), the contention for the appellants is not tenable. Further, mother’s step-brother is a bhinna gotra-sapinda whether the term "sapinda" is taken in the sense of consanguinity by virtue of the presence of particles of one body or of capacity to offer funeral oblations. Through the maternal grandfather the maternal uncle is related to his sister’s son as sapinda in the sense of consanguinity, and to that grandfather both the maternal uncle and his step-sister’s son offer funeral oblations. We think the decision of the Judge that maternal uncle of the half-blood is one’s own cognate, kindred or atma bandhu is correct.

The next and the most important question is whether under the Mitakshara law, the maternal uncle excludes the father’s paternal aunt’s son. The Judge, who determines it in the affirmative, rests his decision on the ground that the former is one’s own cognate kindred, whilst the latter is only the father’s cognate, and that as being the nearer in affinity, the former excludes the latter. It is not denied for the appellants that bandhus are of three classes—one’s own cognate kindred, one’s father’s kindred, and [27] one’s mother’s kindred, and that each class succeeds in the order in which it is named by reason of affinity. It is also not disputed that the text cited in Mitakshara, Chapter II, Section 6, verse 1, mentions the maternal uncle’s son as one’s own bandhu, whilst it mentions the father’s paternal aunt’s son only as the father’s cognate kindred, and that if the text is accepted as binding so far as it illustrates the order of affinity, it is conclusive. But it is argued that the illustrations given in the text are not intended to denote the classes of bandhus in which maternal uncle’s son and father’s paternal aunt’s son are to be placed for the purposes of inheritance, that the text itself has reference to relatives for whom pakshini or ninety Indian hours’ pollution is intended to be prescribed

(1) 12 M.I.A. 448.
that hence it is first cousins, or cousin-brothers, are alone mentioned, and
the more important bandhus are not named, and that though the author
of the Mitakshara cites the text, he does not mean that the illustrations
ought to be accepted as denoting that the several relatives named are to
be treated for purposes of inheritance as belonging to the several classes
in which they are placed. After thus endeavouring to put out of consi-
deration the text cited by the Mitakshara, it is suggested that one’s own
sister, the father’s sister, the grandfather’s sister, are all daughters
born in the family, and that, as such, their sons should be placed in the
class of one’s own cognate kindred so as to exclude the maternal uncle,
who is only a maternal relative. In support of this contention, our
attention is also drawn to a recent publication on Hindu Law by one
Siromani. The text in question is in these terms:—” The sons of his own
father’s sister, the sons of his own mother’s sister, and sons of his own
maternal uncle must be considered as his own kindred or atma bandhus.
The sons of his father’s paternal aunt, the sons of his father’s maternal
aunt, and the sons of his father’s maternal uncle must be considered as
his father’s cognate kindred or pitru bandhus. The sons of his mother’s
paternal aunt, the sons of his mother’s maternal aunt, and the sons of
his mother’s maternal uncle must be reckoned as his matri bandhus or
his mother’s cognate kindred.”

The text is clear that the maternal uncle’s son and, therefore, the
maternal uncle are atma bandhus, whilst the father’s paternal aunt’s son
is only a pitru bandhu. There is no foundation for the suggestion that
the Mitakshara did not intend to adopt the text so far as it
illustrates the nearness or remoteness of affinity. The commentator
expresses no dissent from the text, nor does he say that the illustrations
are not correct; on the other hand, he founds upon it a rule of preference,
and adopts it as a test of nearness or remoteness of affinity. It is also
remarkable that all the commentators of the Benares school follow the
Mitakshara and cite the same text as illustrating the order of affinity. See
Smriti Chandrika, Kristnaswamy Aiyar’s Translation chapter XI, Section 5,
verses 14 and 15; Vvavahara Mayuka, chapter iv, Section 8, verses 22
and 23; Sarasvatii Vilasa, Foulkes’ Translation, 595—8; Madhaviya,
Dr. Burnell’s Translation, Section 41, page 29. It is anything but reason-
able to hold that a commentator like the author of the Mitakshara would
indicate a rule of preference with reference to a text which, according to
appellants’ contention, erroneously places father’s paternal aunt’s sons,
who are atma bandhus, among pitru bandhus. It is true that certain
relatives only are named in the texts as illustrations of each class of bandhus,
but it does not follow that those who are named by way of illustration are
either named incorrectly, or are not named as examples of the order in which
affinity is to be traced. It may be that the author of the Mitakshara having
defined bandhus as bhinna-gotra-sapindas, considered it sufficient to cite a
text which contained illustrations as to the mode in which nearness or re-
moteness of affinity is to be ascertained, and to leave it to be determined in
each case whether any particular relative who is not named and who claims
to be bandhu is really a bhinna-gotra-sapinda, and comes as such within the
definition of bandhu. It was on this view that the Privy Council held in
Girdhari Lall Roy v. The Bengal Government (1) that a maternal uncle is a
bandhu, though not expressly named in the Mitakshara. The circumstance
of the text cited not naming all the bandhus of each class, and even the

(1) 12 M.I.A. 448.
most important of them, is no valid ground for treating the text as of no
authority in regard to those who are expressly named as belonging to a
particular class of bandhus.

Another argument urged for the appellants is that the term bandhava
used in the text means first cousin or cousin-brother. It is not denied that it
signifies also cognates in general as appears from several extracts
contained in the appendix. This [9] variation in the reading is noticed
by Balambhatta, a commentator of the Benares school, who comes to the
conclusion that it produces no essential difference in the interpretation.

It is next alleged that the text was intended only to denote the
relatives who have pakshini or ninety Indian hours’ pollution, and that it
has no connection with inheritance. This objection is not tenable. It
ignores the fact that Vijnaneswara cites the text in the chapter on inheri-
tance in order to indicate a rule of preference in cases of competition
between bandhus of different classes. If it were intended only for describ-
ing those who observe pakshini pollution, there was no apparent necessity for
classifying the bandhus, insomuch as the duration of pollution consists of
one night and two days, or two nights and one day. Again, as to the Smriti of
Yajnavalkya, in the chapter on pollution or impurity, Vijnaneswara states
that by the word matula in the text are indicated one’s own cognate
kindred, the mother’s cognate kindred, and the father’s cognate kindred,
all connected with a common ancestor. They have been defined in the
portion which begins with Yajnavalkya’s text on inheritance, “The wife,
daughter,” &c., (Mitakshara, chapter II, Section 1, paragraph 2, verse
cxxxv.). The question is not whether the relatives named, by way of
illustration, are all first cousins or cousin-brothers having pakshini or
ninety hours’ pollution, but it is whether the text has application to in-
heritance. That it is applicable is clear from the above passage, wherein
Vijnaneswara explains the word matula as being a generic term which
includes the three classes of bandhus and refers to his comments thereon
in the chapter on inheritance.

As to Siromani’s doctrine, it is discussed by him in chapter IX, Section
9 of his book. He admits that the Mitakshara cites the text of Vridha
Satatapa not to enumerate all the cognate heirs, but as an authority for
determining the order of succession among such heirs. He then observes
that the text cannot be taken to classify and give examples of bandhus of
each class, and states that in that case it would be difficult to say under
which class the sister’s son, the brother’s daughter’s son or the uncle’s
daughter’s son should be placed. He then proceeds to suggest his own
order of succession, according to which he places all related through
dughters born in the family among atma bandhus. Though sons born
in the family are all gotrajas, yet the Mitakshara regulates the succes-
sion when there is competition between [30] them with reference to
the nearness or remotness of propinquity, as, for instance, between a
brother and a paternal uncle’s son. It is not clear why this analogy should
be ignored in the case of daughters born in the family, and why the father’s
sister and the grandfather’s sister should be treated as related to the
propositus in the same degree of affinity. Nor is it reasonable to regard
one’s own sister’s son and one’s grandfather’s sister’s son as related in
the same degree. As for the difficulty pointed out by Siromani, it is not
clear why sister’s son, brother’s daughter’s son, and son’s daughter’s son
should not be treated as atma bandhus in the same way in which the
maternal uncle is treated as an atma bandhu.

728
We may refer here to a passage in the Viramitrodaya (Chapter III, part I, Section 2, page 158):— "Since in the chapter on partition of heritage, the conferring of spiritual benefit is by the term, 'therefore,' set out as the reason: hence it is indicated that he alone is entitled to get the estate on whom the estate being devolved conduces to the greatest amount of spiritual benefit of the deceased owner, and that proximity in this way is to be accepted as a general rule and reasonable." This passage indicates that as between bandhus of the same class, a rule of preference may be found in the quantity of spiritual benefit which they confer.

The conclusions we come to are (i) that those who are bhinnagotra-sapindas or related through females born in or belonging to the family of the propositus are bandhus; (ii) that as stated in the text of Vridha Satatapa or Baudhayana they are of three classes, viz., atma bandhus, pitru bandhus, and matru bandhus, and succeed in the order in which they are named; (iii) that the examples given therein are intended to show the mode in which nearness of affinity is to be ascertained; and (iv) that as between bandhus of the same class, the spiritual benefit they confer upon the propositus is as stated in Viramitrodaya, a ground of preference. However this may be, Siromani's theory is in direct conflict with the Mitakshara so far as it places the father's paternal son among atma bandhus, and transfers the latter from among pitru bandhus in which the text of Vridha Satatapa or Baudhayana places him. In the case before us, there was no allegation nor evidence of any local or special custom in support of the order of succession suggested by Siromani in amendment of the Mitakshara and the commentaries that follow it; and in the absence [31] of such custom, we are not prepared to overrule an express text mentioned in them, and to hold that one who is expressly named therein as a pitru bandhu is an atma bhandu. Another contention is that the maternal uncle and his sons must be considered, though alive, as civilly dead, inasmuch as they alienated their interest. This is manifestly untenable. The decision of the Judge is right, and we dismiss this appeal with costs.

1892
MAY 5.

APPELLATE
CIVIL.

16 M. 23=
2 M.L.J. 295.

16 M. 31 = 2 M.L.J. 139.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Parker.

STRINIVASA AYYANGAR AND OTHERS (Plaintiffs), Appellants v.
STRINIVASA SWAMI (Defendant), Respondent. 5

[9th and 14th March and 6th April, 1892.]

Civil Procedure Code, Section 539—Suit to eject one claiming to be the jheer of a mutt—Specific Relief Act—Act 1 of 1877, Section 42—Consequential relief.

Three disciples of a mutt brought a suit, with the consent of the Advocate-General, under Section 539 of the Code of Civil Procedure, alleging that the defendant was in possession of the mutt under a false claim of title as the successor to the late jheer, and praying that it be declared that he was not the duly appointed successor to the late jheer, and that an appointment to the vacant office of jheer be made by the Court, but no consequential relief was asked for:

Heid, that Civil Procedure Code, Section 539 was inapplicable to the suit, and that the suit was not maintainable for the reason that relief consequential on

* Appeal No. 85 of 1891.
the declaration sought under Section 42 of the Specific Relief Act was not asked for.

APPEAL against the decrete of J. W. B-st, District Judge of Chingleput, in original suit No. 23 of 1888.

The plaintiffs were three disciples of the Ahobaliam mutt, and alleged in the plaint that on the death of the last head of the mutt in August 1888, the defendant, falsely alleging that he had been appointed the successor in office of the late jeer, trespassed upon the mutt. The prayer of the plaint was that it be declared that the defendant was not the duly appointed successor of the deceased jeer, and that the Court should appoint a duly qualified disciple of the mutt in his place. The suit was filed, with the consent of the Advocate-General, under the provisions of Section 539 of the Civil Procedure Code. The plaint, in which no relief was asked consequential on those above referred to, bore a Court fee stamp of Rs. 20 only, and a question was raised as to whether this stamp was sufficient. This question was decided in the affirmative by the District Judge, who, however, dismissed the suit on the ground that Section 539 of the Code of Civil Procedure was inapplicable. He referred in support of this ruling to Arunachella Chetti v. Mutlu Chett (1).

The plaintiffs preferred this appeal.

Pattabhirama Ayyar, for appellants.

Ramachandra Rau Saheb and Sadagopachariar, for respondent.

JUDGMENT.

The plaint in this suit was filed, with the consent of the Advocate-General, under Section 539 of the Code of Civil Procedure, and asks for two reliefs—(1) for a declaration that defendant is not the duly appointed successor to the late head of the mutt, who died on 10th August 1888, and (2) that the Court will fill up the vacancy by appointing a duly qualified disciple of the late jeer as his successor.

It is admitted that the defendant is in possession of the mutt and its properties. The learned Judge in the Court below has dismissed the suit on the ground that Section 539 of the Code of Civil Procedure does not apply to suits brought against a trespasser. Against this view it is argued that plaintiffs have a right to sue whether the sanction of the Advocate-General is given or not, and that it is necessary the Court should make an appointment of a successor to the late jeer, in order that there may be some person qualified to give religious instruction to the disciples of the mutt, and clothed with the rightful authority to sue to eject the trespasser and to recover the mutt and its properties.

It appears to us that this suit is not of the character to which Section 539 of the Code of Civil Procedure was intended to apply. That section merely enables two or more of the general public having an interest in a trust, and having obtained the consent of the proper officer to sue the trustees to enforce the better administration of the trust. It thus confers a right of suit against trustees which did not previously exist, and is not applicable to a suit brought by the disciples of a mutt with the real object of ejecting a trespasser, which right of suit must have existed quite

(1) Second Appeal No. 194 of 1880 unreported.
independently of the enactment of Section 539. In addition to the unrepeated case of Arunachella Chetti v. Mutlu Chetti (1) relied on by the learned Judge, we may refer to Vishwanath Govind Deshmab v. Ramkhat (2) and Gyanep Sambandha Pandarab Sannadhi v. Kandaswamy Tambiran (3) at page 506, from which it is clear that Section 539 does not apply to suits brought against trespassers.

It is then urged that the two plaintiffs have substantial individual interest of their own, and have a right to sue for the relief asked for, even though the consent of the Advocate-General be regarded as an unnecessary formality. It appears to us that it is not necessary to determine in this suit whether the provisions of Section 30 of the Civil Procedure Code apply. Assuming that the two plaintiffs can sue alone without joining other disciples under the provisions of Section 30, the present suit must fail under Section 42 of the Specific Relief Act, inasmuch as the plaintiffs do not seek the consequential relief to which on their plaint they would be entitled. On the facts stated by them they are entitled to ask that some duly qualified person be appointed as the head of the mutt and approved by the Court, and that the mutt and its properties be handed over to the person so appointed, the defendant being ejected therefrom. A similar course was approved by the High Court in Kadami Strinivasa Charla v. Subudhi (4), and is evidently necessary to avoid multiplicity of suits.

We think the fee fixed in the District Court was too low and will allow Rs. 50.

Upon these grounds we confirm the decree of the Court below and dismiss this appeal with costs.

16 M. 34.

[34] APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Handley.

Sobhanadri Appa RAU (Plaintiff's Representative), Appellant v. Gopalkristnamma and Others (Defendants), Respondents. (5)

[18th November and 15th December, 1891, and 14th September, 1893.]

Regulation XXV of 1802 (Madras), Sections 4, 12—Zemindar's sanad, assets mentioned in—Quit-rent on an agraharam village—Inam title-deed, rate mentioned in—Joint liability of agraharamars.

The plaintiff was a zemindar holding his estate under a sanad dated 1802. This sanad followed almost verbatim the language of Regulation XXV of 1802, Section 4, and where it referred to "lands paying a small quit-rent," added "which quit-rent unchangeable by you is included in the assets of your zemindary." The suit was brought to recover arrears of jodi or quit-rent accrued due on an agraharam village in the zemindari. The defendants, who were the agraharamars, had divided the village and held it in separate shares. They pleaded that they were not liable to pay jodi in excess of the rate fixed by the Inam Commissioner and specified in the inam title-deed granted by him for the village in 1869:

 Held, (1) that the decision of the Inam Commissioner did not affect the zemindar's claim, and that the question to be determined was what was the jodi payable in respect of the village at the time of the permanent settlement on which the peishche of the zemindari was fixed;
that the defendants were jointly and severally liable for the amount that should be found due to the zamindar.

On its appearing that Rs. 6 per putti was the recognized rate from 1832 to 1879, and that, there was no evidence to show the agraharmadars had ever paid any other rate, or had paid Rs. 6 under coercion, the Court presumed that that was the rate at the time of the permanent settlement.

[Apr., 16 M. 40 (43).]

APPEAL against the decree of Venkata Ranga Ayyar, Subordinate Judge of Ellore, in original suit No. 25 of 1886.

Suit by a zamindar to recover arrears of jodi accrued due on an agraharam village in the zamindari.

The sanad dated 8th December 1802 under which the zamindari was held after stating the amount of the assessment on the estate thereby permanently settled proceeded in paragraph 4 as follows:—

"This permanent assessment of the land tax on your zamindari is exclusive of the revenue derived from the manufacture [35] and sale of salt, and saltpetre, exclusive of the sayer or duties of every description, whether by sea or land, the entire administration of which the Government reserves to itself; exclusive of the akkari or tax on the sale of spirituous liquors, and intoxicating drugs; exclusive of the excise which is or may be levied on commodities or articles of consumption; exclusive of all taxes, personal and professional, as well as of those from markets, fairs and bazaars; exclusive of lakheraj lands (lands exempt from the payment of public revenue) and all other alienated lands paying a small quit-rent (which quit-rent, unchangeable by you, is included in the assets of your zamindari); and exclusive of all lands and russels heretofore appropriated to the support of public establishments. The Government reserves to itself the entire exercise of its discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included according to the custom and practice of the country under the several heads above stated."

In 1869 the Inam Commissioner granted a title-deed of the village to eight persons, the predecessors in title of the defendants in which it was stated that "the inam is subject to a jodi or quit-rent of Rs. 135 payable to the zamindar." The zamindar's present claim was in excess of this rate, and it was contended that to that extent it was illegal.

The further facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court.

Bhashyam Ayyangar, for appellant.
Subramanya Ayyar, and Anandacharlu, for respondents.

JUDGMENT.

In this suit plaintiff, a zamindar, seeks to recover from defendants, the holders of an agraharam village within the limits of his zamindari, arrears of jodi or quit-rent.

The main question in issue is whether the plaintiff is legally entitled to recover from defendants kattubadi at the rate claimed by him. Plaintiff claims jodi at the rate of Rs. 6 per putti on the grain yielded by the village. Defendants maintain that the jodi was fixed by the Inam Commissioner in 1866 at Rs. 135 per annum, which sum was entered in the inam title-deed (Exhibit I), and that only jodi at this rate can be demanded from them. The Subordinate Judge held that the amount of jodi specified in the [36] inam title-deed is binding on the zamindar and has decreed for him at that rate only. Plaintiff appeals.
It is argued for appellant that the Inam Commissioner had no power to determine the amount of jodi payable to the zamindar; that all that was deputed to him by Government was the power to determine the matters reserved for its determination by Section 1 of Regulation XX of 1802, viz., in the case of lands like this agraharam paying only favourable quit-rent, whether the favourable quit-rent should be continued or whether the full revenue or any less than the full revenue should be assessed on the lands; that the jodi which was payable at the time of the permanent settlement was included in the assets on which the peishcush of the zamindari was fixed, and therefore Government and the Inam Commissioner had no concern with that but only with the quit-rent, or, in other words, the exemption with the agraharamdars enjoyed from full assessment; and therefore that any order passed by the Inam Commissioner fixing the rate of jodi was ultra vires and could not bind the then zamindar or his successors. In our opinion this is the correct view of the respective rights of Government, the zamindar and the agraharamdars.

The sanad of this zamindari (Exhibit V) follows almost verbatim the language of Section 4 of Regulation XXV of 1802, and in speaking of "lands paying a small quit-rent," adds in a parenthesis the words "which quit-rent unchangeable by you is included in the assets of your zamindari." The quit-rent or jodi then being included in the assets of the zamindari, Government had no interest in it, and the Inam Commissioner had no power to alter or deal with it in any way. All he had to deal with was the difference between the quit-rent and the full assessment which was the benefit the inams enjoyed as against the Government. This benefit he could either, according to the rules laid down for his guidance, abolish altogether and fully assess the lands, or commute the surplus revenue over and above the quit-rent into a fixed annual payment to Government. According to the Inam Rules inams of the nature of this agraharam were to be enfranchised on payment of a fixed annual sum to Government bearing a certain proportion to the difference between the quit-rent payable to the zamindar and the full revenue. To calculate the sum thus payable to Government on [37] enfranchisement, it was necessary for the Inam Commissioner to ascertain the amount of the quit-rent payable to the zamindar, but if he took an erroneous amount of quit-rent as the basis of his calculation, the zamindar could not be made to suffer thereby.

It is said that the then zamindar agreed to the rate of jodi fixed by the Inam Commissioner. There is nothing to show this except the statement in the extract from the Inam Register (Exhibit II) that the quit-rent of Rs. 135 was fixed by the zamindar, and two documents (Exhibits III and V) which go to show that, on a reference by the Collector in 1865, the Inam Commissioner informed him that the jodi on inams of this nature in this zamindari had been fixed by the then Inam Commissioner Mr. Taylor with the assent of the zamindar. These same documents also show, however, that if the zamindar did assent when the jodi was fixed, he immediately retracted his consent and proceeded to levy jodi on the produce of the inam lands as before. According to the findings of the Subordinate Judge the jodi fixed by the Inam Commissioner was never collected in this village at least, and the agraharamdars had in some cases paid the jodi claimed by the zamindar at the rate of Rs. 6 per putti of produce. Even if the then zamindar assented to the jodi fixed by the Inam Commissioner, we think such assent would not bind his successors
or give legal effect to the decision of the Commissioner on a matter over
which he had no jurisdiction.

It is argued for respondents that upon the true construction of
Section 4 of Regulation XXV of 1802, lands paying only favourable quit-
rent being excluded from the permanent settlement, the amount of jodi or
quit-rent was reserved for determination by Government as well as the
other matters relating to the favourable assessment of inams. And it is
said that Section 12 of the regulation supports this view. In our opinion
that section does not help respondent's contention but the contrary, for it
shows that agraharams and other inams of that sort paying a favourable
quit-rent are included in the term lakheraj, and that what Government is
concerned with in such inams is the extra assessment over and above the
favourable quit-rent already payable, for it only prohibits the zamindar
from fixing a new assessment on lakheraj lands without the consent of
Government.

The true construction of Section 4 is, as we have said above, in our
opinion that the matters reserved for determination by Government
relate to the terms on which the favourable assessment was to be continued
to the inamdhurs, not to the jodi already payable to the land-owner and in-
cluded in the assets of his zamindari. It would be clearly inconsistent
with the principles of the permanent settlement that one of the sources
of revenue to the zamindar on which his peishcush was fixed should be
liable to be varied at the will of Government of their deputy, the Inam
Commissioner.

It is also urged for respondents that the fact that the jodi was includ-
ed by the sanad in the assets of the zamindari would not oust the power
of Government to deal with the jodi expressly reserved to it by the Regu-
lation, and the case of the Karvetoogar Zamindar reported as Vedanta v.
Kavuniyappa (1) was relied on, as deciding that the matters reserved by
Section 4 of Regulation XXV of 1802 for the decision of Government
could not be included in the permanent settlement. We have already
answered this argument in holding that the quit-rent on inams payable to
the zamindar is not one of the matters reserved for determination by
Government by Section 4 of the regulation. In the case quoted the ques-
tion was as to moturphas, or taxes on arts and trades, which is clearly one
of the sources of revenue excluded from the permanent settlement by
Section 4 of the regulation.

In our opinion the question to be determined in this suit is what was
the jodi at the time of the permanent settlement on which the peishcush
of the zamindari was fixed. This question has not been decided by the
Lower Court and we must send down an issue upon it.

For third defendant a memorandum of objections is filed. The only
point raised in that which was argued before us, besides the points
common to him and the respondents, is that the holders of the agraharam
having divided it, and holding it in separate shares, are each only liable
for a part of the jodi proportionate to his share. We think the Subordi-
nate Judge was right in holding that the defendants are jointly and
severally liable to plaintiff's claim. Any division amongst themselves
to which the zamindar was no party could not affect his right to
look to all the lands of the village for his jodi. We shall ask the
Subordinate Judge to find upon the following issues:

(1) 9 M. 14.
(39) (1) What was the jodi payable to the zamindar in respect of the village in question at the time of the permanent settlement on which the poishush of the zamindar was fixed?

(2) What is the amount due to plaintiff for arrears of jodi?

Fresh evidence may be taken.

Finding is to be returned within two months from the date of the receipt of this order, and seven days after posting of the finding in this Court, will be allowed for filing objections.

[In compliance with the above order the District Judge of Kistna submitted a finding to the effect that the jodi at the permanent settlement of 1802 was Rs. 6 per putti.]

This appeal having come on for final hearing, the Court delivered the following judgment:

JUDGMENT (FINAL.)

The District Judge has found that the jodi at the time of the permanent settlement was Rs. 6 per putti. The defendants have put in a memorandum of objections and it is argued that the finding of the District Judge is unsupported by the evidence on record.

Exhibits E, F and G show that from the year 1864 to 1879 the agraharamdars recognised their obligation to pay kattupadi sist at Rs. 6 per putti. In Exhibit II, the extract from the Inam Register, the jodi is entered at Rs. 6 per putti. This statement which bears date 1859 was prepared from materials supplied by the inamdars themselves. They represented to the Inam Deputy Collector that they were only paying a quit rent of Rs. 135 which had been fixed at the discretion of the zamindar, and the Deputy Collector, finding that the average collections of the zamindar amounted to Rs. 154 per annum, assumed that Rs. 135 was a fair amount and used that to determine the amount of quit-rent payable to Government. But Exhibit III shows that the zamindar at once repudiated the alleged settlement and claimed that jodi was payable to him at the rate of Rs. 6 for every putti raised. Exhibits A, B, C, D and N, which are accounts prepared by the zamindar kurnams in the ordinary course of business, show that in the years 1832, 1834, 1837, 1859 and 1853 quit-rent was collected at Rs. 6 per putti. None of the records carry us nearer to the permanent settlement than Exhibit A of 1832. But we think it may fairly be presumed that the rate at the settlement was Rs. 6 per putti when we find [40] that from 1832-79 that was the recognised rate. There is no evidence to show that the agraharamdars ever paid any other rate, or that they paid Rs. 6 per putti under coercion. With reference to the argument that the Circuit Committee fixed the average beriz of the agraharam at Rs. 33-12-9, and that that sum therefore is to be taken as the amount on which the poishush was fixed, we remark that we have nothing before us to show how the Circuit Committee arrived at these figures. They are taken from an account prepared in the year 1828 by the Collector, and the account shows that in that year the annual beriz had risen to Rs. 228-5-0. It is suggested that as the duty of the Committee was to fix the amount of money payable as poishush, it was necessary for them to ascertain the average collections, and that in some rough way they fixed upon Rs. 33-12-0 as that sum. But that has nothing to do with the present question. If the zamindar at the time of the permanent settlement was entitled to quit-rent at Rs. 6 per putti, he is still so entitled, and we think that the Judge was justified in finding that he was so entitled. The
The objection taken to the amount found due is not pressed.
The memorandum of objections is dismissed with costs.

16 M. 40 = 2 M.L.J. 249.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Wilkinson.

SURYANARAYANA (Plaintiff), Appellant v. APPA RAO (Defendant),
Respondent. [25th February and 15th March, 1892.]

Rent Recovery Act (Madras)—Act VIII of 1865, s. 13—Inamdar—Tenant—Right of
distraint.

A zamindar, holding his estate under a sanad, which included, among the
assets of the zamindari, the jodi payable by an inamdar, proceeded under the
Rent Recovery Act to recover arrears of jodi by distraint.

[41] In a suit by the inamdar to release the distraint, it appeared that the
plaintiff had sublet the land, and that the rate, as which the jodi was claimed,
exceeded that entered in the Inam Commissioner's patta:

Held, (1) that the inamdar was a tenant of the zamindar within the meaning
of the Rent Recovery Act;
(2) that the fact that the inamdar had sublet the land did not confer on
him a higher status than that of a tenant;
(3) that the zamindar accordingly had a right to proceed under the
Rent Recovery Act, and that his claim was not limited to the amount of jodi
entered in the Inam Commissioner's patta.

[R., 21 M. 116 (F.B.).]

SECOND appeal against the decree of G. T. Mackenzie, District Judge
of Kistna, in appeal suit No. 388 of 1839, confirming the decision of L. M.
Wynech, Acting Head Assistant Collector, in summary suit No. 34 of 1885.

The plaintiff was an inamdar in a zamindari of the defendant and, as
such, was liable to the payment of jodi. The sanad of the defendant comprised
the jodi in question among the assets of the zamindari. The
jodi having fallen into arrears, the defendant proceeded under the Rent
Recovery Act, 1865, to restrain the property of the plaintiff for the amount.
The suit was brought to release the property from distraint and for
damages. The contention of the plaintiff was that he was not a cultivating
tenant liable, after tender of a proper patta, to the provisions of the Rent
Recovery Act as to distraint, but that he was a farmer of the revenue
liable to those provisions only if he had taken a written agreement from
the zamindar. The Head Assistant Collector dismissed the suit. The
District Judge, on appeal, held that the plaintiff was a cultivating tenant,
and that the zamindar was not bound by the commutation of the rate of
jodi entered in the inam title-deed, and, on these findings, he affirmed the
decision appealed against. As to the second part of the plaintiff's conten-
tion, as stated above, he said, that, if the plaintiff was not a cultivating
tenant it might be argued that the inam title-deed was such a document as
would render the plaintiff liable nevertheless to the provisions in question.

* Second Appeal No. 792 of 1891.
The plaintiff preferred this second appeal.
Narayana Rau, for appellant.
Bhashyam Ayyangar, for respondent.

JUDGMENT.

The first question argued in this second appeal is whether the plaintiff is a tenant within the meaning of Act VIII of 1865. It is contended that, as the plaintiff is an inamdar and not a cultivator of the land, he cannot be regarded as a tenant of the zamindar. The argument is founded upon a misconception of the decision of the Privy Council in Ramasami v. Bhaskarasami (1). The sole question before the Privy Council is whether a certain document required registration. On behalf of the appellant (defendant in the case), it was argued that the document was a patta and that therefore it was exempted from registration. All that the Privy Council decided, with reference to the construction of Sections 3, 8 and 9 of Act VIII of 1865, was that the provisions were made upon the assumption that there is an existing relation which would warrant the application for a written patta. The case of Ram v. Venkatachalam (2) is distinguishable as, in that case, what the rentor claimed to collect was the kattubali and road-ees payable to Government, a deduction being allowed as a remuneration for his trouble. In the present case the jodi, which the zamindar seeks to collect, was included by the sanad in the assets of the zamindari and is payable direct to the zamindar. The definition of a tenant in Act VIII of 1865 is "a person who is bound to pay rent to a landlord." It is not denied that the zamindar is a landholder and it is conceded that plaintiff is bound to pay to the zamindar jodi or quit-rent upon his inam. We think, therefore, that the Lower Courts were right in holding that the plaintiff was a tenant, and that the zamindar was entitled to proceed against him under Act VIII of 1865. The relation of landlord and tenant undoubtedly has long existed between the zamindar and the plaintiff and his predecessors in title. With reference to the contention that the zamindar can only claim the amount of jodi entered in the patta granted by the Inam Commissioner, it is conceded that, since the decision of this Court in Sobhanadri Appa Rau v. Gopalakrisinanmama (3), the finding of the Lower Appellate Court cannot be questioned.

It is contended by the respondent that the opinion of the District Judge, that the inam title-deed is such a document as is contemplated by Section 13, Act VIII of 1865, cannot be upheld, and we have no doubt that the Judge was in error. The plaintiff does not claim to be an intermediate landlord. He admits that he is an inamdar, an holder of land with a right of occupancy and merely contends that he sublets the land to others. This will not confer on him any higher status than that of a tenant.

It does not appear that the other points raised, in the memorandum of appeal presented to the Lower Appellate Court, were argued or pressed upon the attention of the Judge, and no issue was recorded on these points in the Court of First Instance. We cannot, therefore, allow any weight to them here.

The appeal fails and is dismissed with costs.

(1) 2 M. 67.
(2) 8 M. 576.
(3) See 16 M. 34.
SHARIFA BIBI (Plaintiff), Appellant v. GULAM MAHOMED DASTAGIR KHAN AND OTHERS (Defendants), Respondents.*
[23rd, 24th and 30th August, 1892.]

Muhammadan Law—Death-bed gifts—Consent of heirs—Mushaa—Delivery of possession.

A Muhammadan on 27th February executed two deeds of gift, by one of which (attested by all his sons) he conveyed his one-fourth share in a certain mitta to his daughters; and by the other (attested by all his daughters), he conveyed the rest of his landed property to his sons. The donor died on 6th March, and it was found on the evidence that the above dispositions of his property were death-bed gifts. It appeared that the donor had separate possession of the lands disposed of by him, though part of it was held under joint pattas, in which others were interested; and also that on the date of the gift, the transfer of ownership of the mitta property was proclaimed by beat of tom-tom, and that the tenants were called upon to attorn to the donees, who subsequently collected rent. The widow took no exception to the gifts, but after two years one of the daughters brought this suit to have them set aside as invalid and to recover her share as an heir of her father:

(Held), (1), on the evidence, that the attestation of the heirs was regarded by all the parties concerned as evidence of consent, and that they did consent to the death-bed gifts at the time they were made;

(2) that this consent not having been revoked on the donor's death, and there having been sufficient delivery of possession the gifts were complete;

(3) that the gifts were not impeachable on the ground of mushaa.

Evidence of undue influence considered.

Rel. on., 16 Ind. C. s. 616 (617)= 23 M.L.J. 734 (736)= 12 M.L.T. 305; R., 29 B. 468 = 7 Bom. L.R. 443; 141 P.L.R. 1901.]

[44] APPEAL against the decree of L A. Campbell, District Judge of Salem, in original suit No. 7 of 1888.

The facts of this case appear sufficiently for the purposes of this report from the following judgments of the High Court.

Mr. Wedderburn, for appellant.
Bhashyam Ayyangar and Seshachariar, for respondents.

JUDGMENT.

MUTTUSAMI AYYAR, J.—This appeal relates to the immoveable property left by appellant's father, named Sheriff Mahomed Khan Sahib alias Syed Miyan Sahib, a Mittadar at Dharmapuri in the district of Salem. He died on the 6th March 1886, leaving him surviving a widow, three sons and three daughters including the appellant. Under the Muhammadan Law which governs the parties, her distributive share is $\frac{1}{7}$ part, but on the 27th February 1886, her father prepared two schedules of his immoveable properties valued at Rs. 20,000 and 7,000 respectively, and gave the one to his three sons and the other to his three daughters by documents I and II. Document I, which was executed in favour of the sons, is attested by all the daughters, and document II, executed in favour of the daughters, is attested by all the sons. They purport to have been executed in order to prevent disputes among the sons and daughters.
after the death of the mittadar, who was at the time of their execution between 60 and 70 years of age. The widow to whom no share is given does not appear to have taken exception to the gifts, and the appellant’s two sisters sold what was given them under document II to their brothers for Rs. 4,000 each on the 29th April 1887 and the 29th June 1887 respectively. For several years previous to his death the late mittadar had been suffering from chronic asthma, and about the end of February, pneumonia supervened and proved fatal in the course of a week. The appellant’s case is that the distribution made by her father is illegal and does not bind her. She impugns documents I and II on four grounds, viz., (i) that consent given thereto was procured by undue influence and misrepresentation, (ii) that her consent during her father’s life-time has no legal effect, (iii) that the gifts made by him were made during his last illness, and they could take effect only as death-bed gifts, and (iv) that as such, they are repugnant to the rules of Muhammadan Law. As regards undue influence and fraud the Judge found that they were not proved. He found, however, that the gifts were made during the late mittadar’s death-illness. [45] He was also of opinion that although under the Muhammadan Law consent given by an heir to a death-bed gift was liable to be annulled after the donor’s death, yet appellant did not revoke her consent within a reasonable time. He considered further that objections taken on appellant’s behalf on the ground of mushaa or confusion of the subject of gift and for alleged want of seizin were not tenable and in the result he disallowed appellant’s claim so far as it related to immovable property; hence this appeal.

As observed by the Judge, there is no proof of undue influence or misrepresentation. It is conceded by appellant’s counsel that there is no direct evidence, but it is argued by him that undue influence may be presumed from the following circumstances, viz., (i) that the documents in question were executed on a sudden and in great haste, (ii) that the sons were then living with their father, (iii) that their evidence as to the state of his health on the 27th February is untrue, (iv) that the price paid to appellant’s sisters for their shares is Rs. 4,000 each, whilst the value of the allotment made for the three daughters together is, according to Exhibit II, only Rs. 7,000, (v) that appellant’s eldest brother was the de facto manager of the family under the general power of attorney Exhibit A, and (vi) that appellant is a gosha lady. Our attention is drawn by respondents’ pleader to the special regard which, the late mittadar, had for appellant as the mother of several children, to her having lived with her husband as part of the deceased’s family for several years, to the presence of her husband in the family when she attested the documents, and to her father’s desire to prevent dissensions in the family after his death. After giving my best attention to all the circumstances, I see no sufficient reason to say that either the father or the daughter acted otherwise than bona fide, the former in executing the documents and the latter in attesting document I. The arrangement evidenced by the documents was in the nature of a family arrangement made by the father with the consent of his sons and daughters in view to preserve peace in the family. It is in substance a distribution made in anticipation of death so as to avoid each of the six children having a small share in each village comprised in the father’s mitta and to group the villages into two mittas, one for the benefit of the sons and the other for the benefit of the daughters. It may well be that the inequality between the estimated value of the daughters’ allotment and of [46] their legal share was waived at the time. There is no evidence as
1892
AUG. 30.
APPEL-
LATE
CIVIL.
16 M. 43=
2 M. L. 14.

...to the real value of the villages or that appellant's 3rd share under document II is not likely to fetch Rs. 4,000 as that of her sisters. However this may be, there is no foundation for a presumption of fraud or undue influence, whilst the circumstances point to a distribution made with the consent of all the daughters to preserve peace in the family.

It is also in evidence that there was no cordiality between appellant's husband and her eldest brother. Appellant's position as a gosha lady has no significance in a family arrangement made with the consent of the whole family and with the knowledge of her husband. Nor is it safe to impute mala fides to the father, because the sons made untrue statements in their evidence as to the state of his health when he executed the documents. As regards the contention that mere attestation is not consent, the question whether it is evidence of consent or only a formal mode of authentication must depend upon the special circumstances of each case. In the case before us, there are several reasons for holding that this attestation of the heirs was regarded by all the parties concerned as evidence of consent. In the first place, the appellant refers to her connection with the arrangement in her plaint as a participation therein. Again, there is the fact that all the daughters were invited to attest document I, whilst all the sons attested document II. The appellant did not choose to explain what pressure was brought to bear upon her, what was the nature of the misrepresentation alleged to have been made, and whether she consulted her husband or not. It appears further that the stamp papers on which the documents are engrossed were purchased on the 23rd February, and that their execution was not so unpredicated as is alleged for appellant.

The next contention pressed upon us is that of respondents' pleader, viz., that the documents in question were executed by the late mittadar when there was no apprehension of death, and that the Judge is in error in treating the gifts as death-bed gifts. The respondents' case on this point is that their father was in good health on the 27th February, that he fell into a stream and took a chill on the 28th, and that pneumonia sat in since and ultimately proved fatal. The evidence of their witnesses 1 to 6 and of the Sub-Registrar is relied upon in support of the contention, but there are several circumstances which reduce the weight due to the evidence. Documents Ll and M and N indicate that there was anxiety and alarm regarding the late mittadar's health about the 16th February. Nor is it possible unless there was serious illness to account for the documents being executed and registered on the same day and for intimation of their execution being sent at once to the mitta karmans and raiyats. Though drafts are alleged to have been prepared some time before, yet none are produced in evidence. It was also stated that the late mittadar had desired to make an arrangement for some months prior to his death, but postponed doing so owing to the absence of his third son at Mangalore. But no letters said to have been written to his relatives at Mangalore are produced. Nor was any relative of his examined as a witness. Again, the evidence neither of the Apothecary nor of the Sub-Registrar indicates with precision the day on which pneumonia supervened. Nor was there any necessity for the father procuring the consent of all his sons and daughters if he was in good health. The story of a trip to his village in a cart on the 28th and of his fall into a stream on his way back does not appear to be probable, when it is remembered that he was unable to attend the Sub-Registrar's Office to register the documents on the 27th February. The probabilities of the case point to a belief in the family on the 27th February.
1886 that something serious was impending, and I am not prepared to disturb in appeal the finding of the Judge.

The next question which is raised for our decision is whether the gifts are valid under Muhammadan Law. It is first urged that the consent necessary to validate death-bed gifts is consent given by the heirs after the donor's death, and that the consent given during his life has no legal effect. It is no doubt true that the consent of the heirs is intended to operate as a renunciation and that the right renounced must be a vested right, but it does not follow that the consent given during the donor's life and not annulled after his death and before possession is taken is not equally efficacious. The opinion of the Judge is in accordance with the Hedaya, in which it is stated, "Their (heirs') consent during the life "time of the testator is not regarded, for this is an assent previous to "the establishment of their right; they are, therefore, at liberty to annul "it on the death of the testator. It is otherwise where the consent is given "after the event, for, as this is an assent subsequent to the establishment of their right, [48] they are not at liberty to annul it." The principle seems to be this, that the consent given during the donor's life is imperfect, because the right of the heirs is then inchoate and it becomes perfect when it is not revoked after the inchoate right becomes a vested interest. In Cherachom Vittial Ayisha Kuttii Umah v. Biathu Umah (1), there was no assent to the request after the testator's death, and there was a positive assertion that the assent was refused. In the case before us, it is clear from Exhibit VIII, which is a statement relating to the road cess due on the Nurhulli mitta given to the daughters, that appellant and her sisters signed it on the 15th March. This conduct is inconsistent with an intention on their part to repudiate the gift. Again, the evidence does not disclose any repudiation during the forty days for which the ceremonies of the deceased mittadar appear to have continued. Again, in the letters D to G written between May and November 1886, the appellant applied for pecuniary aid from the first respondent in connection with the marriage of some of her children. She also alluded to promises made to give her Rs. 5,000 in cash, a house and some cattle and to provide funds for the marriages of her children. But there is no evidence in support of such promises: nor is there anything to show that she revoked her assent to the arrangement made by her father and intimated her intention to insist upon her legal share.

The next objection is that the gifts are bad, because there was no transfer of possession. I agree with the learned counsel for appellant that, as observed in Baillie's Muhammadan Law, p. 542, a gift by a sick person is not a legacy for the purpose of regarding it as complete without transfer of possession, but that it is a gift of contract necessarily subject to all the conditions of gift. I may, however, add that when land is occupied by tenants or raiyats as in a zamindari or mitta, a request to them to attorn to the donee is a sufficient delivery to complete the gift and a formal entry on the land is not indispensable, the principle being that the intention to transfer possession and to divest himself of all control over the subject of the gift must be unequivocally manifested by some overt act done towards the execution of such intention. See Shaik Ithram v. Shaik Suleman (2) and Mullick Abdul Gaffoor v. Muleka (3). In the case before us the sons have been in possession [49] of the properties mentioned in document I from the date of its execution. Document VII proves a

---

(1) 2 M.H.C.R. 350.  (2) 9 B. 146.  (3) 10 C. 1112.
direction by the late mittadar to all the raiyats in the mita to accept the
dnces as their landlords and to act thereon forward under their orders.
There is also the evidence of the first respondent that appellant collected
rents from the Nurrallii mita at for about some time, and Exhibit VIII
lends some support to his evidence. The muchalkas executed by several
raiayats to the sons indicate a transfer of possession during the late
mittadar's life-time. I am, therefore, unable to attach weight to the
objection that there was no transfer of possession.

The next objection taken on appeal is that of *mushaa* or confusion
as regards the subject of gift. It is true that there were two joint gifts in
this case, one to the three sons and the other to the three daughters
without discrimination of their shares. It is stated, however, by Baillie
that although *mushaa* in this form renders a gift invalid according to Abbo
Hameeda, yet according to both his disciples the gift is valid, and that the
opinion of the latter prevails against that of the former in temporal
matters. The doctrine of *mushaa* has also been considered by the Privy
Council in *Sheikh Muhammad Munir Ahmad v. Zu baida Jan* (1), and
their Lordships observe that "the doctrine of *mushaa* is wholly unadopted
by a progressive state of society and ought to be confined within the
strictest rules;" see also *Mullick Abdool Gaffoor v. Muleka* (2). The
objection, therefore, that there was a joint gift to three persons must be
disallowed.

Another objection is that the donor held some of his lands under
joint pattas with others, and that there is *mushru* regarding them. But
the evidence shows that the late mittadar had separate possession of those
lands. The next objection is that a house set apart for travellers is
included in the properties given to the sons. But, as observed by the
Judge, there is no evidence of dedication. Nor do I think that the objec-
tion vitiates the gift of the other properties.

I am, therefore, of opinion that the appeal cannot be supported and
must be dismissed with costs. As regards the memorandum of objections,
I also think that costs ought to have been assessed in proportion to so
much of the appellant's claim as was allowed and [80] disallowed. I
would allow the memorandum of objections with costs and modify the
decree as stated above.

WILKINSON, J.—The plaintiff-appellant is the daughter of one Syed
Miyan of the alias Sherif Mamul Khan Sahib, who died on the 6th
March 1886, leaving a widow (sixth defendant), three sons (defendants 1
to 3), and three daughters (the plaintiff and defendants 4 and 5).

On the 27th February 1886, Syed Miyan executed two deeds of gift
(Exhibits I and II), whereby he conveyed to his sons the whole of Reddi-
halli mita with his putest lands and his houses, shops, &c., in the town
of Dharampuri, and to his daughters his 4th share in the mita of Nurhalla.

The plaintiff seeks for a declaration that the said deeds of gift are
null and void on the ground that they were made under the undue in-
fluence of defendants 1 to 3, during the last illness of the donor, that they
are null and void under Muhammadan Law, and that her participation
therein was the result of misrepresentations dishonestly made to her by
defendants 1 to 3.

The District Judge has found that undue influence and fraudulent
misrepresentation have not been made out and that the deeds are not

---

(1) 11 A. 460-36 I. A. 205.
(2) 36 C. 1112.
repugnant to Muhammadan Law, and has therefore dismissed the plaintiff’s suit so far as her claim to a share in the immovable property of her father is concerned.

On appeal it is argued that the gifts are void because of undue influence and as contrary to the rules of Muhammadan Law.

It is admitted that there is no direct evidence in support of the plea of undue influence, but it is contended that it was incumbent upon the defendants to show that the transaction was fair and above board, and that there are indications of undue haste and of absence of consent which are sufficient to raise the presumption that the deeds were executed in consequence of the undue influence of the sons upon their father.

I do not think that the evidence raises any presumption of undue influence. The stamp paper for the deeds of gift was purchased on the 23rd February showing that it was then the intention of the deceased to execute the deeds. The plaintiff’s second witness deposes that Syed Miyan consulted his three daughters before the draft deeds were drawn up, and that they gave their consent, which is also evidenced by their signatures in Exhibit I. The plaintiff herself has not come forward to deny that she gave her consent or to show under what circumstances she was induced to sign Exhibit I. The plaintiff’s husband has deposed that he was not consulted and that when asked to attest he refused, but his statement is that of an interested witness and is entirely uncorroborated. It was not incumbent upon the donor to consult or to obtain the consent of his son-in-law, and the fact that plaintiff’s husband was present when the Sub-Registrar came to the house and raised no objection goes far to negative the present plea of undue influence.

But the main contention is that the deeds are repugnant to Muhammadan Law, and the following objections are taken to their validity.

First, it is argued the gift being a death-bed gift must be viewed in the light of a legacy and cannot take effect for more than a third of the property.

The Judge has found that the donor was laboring under a fatal disease at the time he made the disposition in question and that he made the disposition in apprehension of a fatal issue to his sickness. He therefore held that the disposition was invalid as a gift, but that, as the heirs gave their consent to it, it operated as a will and was valid and binding on plaintiff.

It was contended by the respondents that the finding of the Judge as to the nature of the gift could not be sustained and that the deceased was not, at the time when he executed Exhibits I and II, suffering from the disease of which he died.

There is evidence to show that the deceased who had long suffered from asthma died of pneumonia brought on by a chill caught on the 28th February. The Judge conceded that the cause of the death was pneumonia, but discredited the evidence as to the cause of the attack and I think rightly. If the accident which brought on the chill had really happened on the 28th February, better evidence than that adduced would have been forthcoming. The deceased was an influential mittadar with many friends who could not but have been aware of an accident, if any had happened to him, which caused his death within a week; yet not one has come forward as a witness.

I was at first inclined to doubt whether there was sufficient evidence to make out the requisites of a death-bed gift, in other words, whether at the time when he executed the deeds of gift the donor was under
an immediate apprehension of death. But on [52] further consideration
I think the Judge was right. The documents themselves show that the
executant was under the apprehension of death, and the despatch of the-
taklid and proclamation the same day is evidence that the donor was
anxious that the disposition should be carried out at once. His anxiety
was no doubt prompted by the state of his health which, according to the
evidence, was such that he must have known that it was highly probable
that death would be the result of his illness.

The gift then being a death-bed gift is not valid unless the heirs gave
their assent and possession was taken. I have no doubt that possession
was transferred to the donees. A proclamation (Exhibit VII) announcing
the transfer of ownership was sent on the 27th February to the mitta
kurnam with an order (Exhibit XI) to make the same known to the raiyats
of Reddihalli and Nurhalli, and the kurnam deposes that proclamation was
duly made by beat of tom-tom. On the following day certain raiyats exe-
cuted muchalkas (Exhibit IX) in favour of defendants 1—3, the daughters
collected rent from their tenants, and submitted the road-cess statement
for fasli 1295 to the Tahsildar (Exhibit VIII) on the 15th March.

There is no evidence to show that plaintiff’s consent was the result
of misrepresentation or that it was withdrawn or repudiated until this
suit was instituted in April 1888. It is argued that her letters (Exhibits
B, E and F) and her conduct in leaving the house after the 40 days’
ceremonies were completed show that she withdrew her consent. I fail
to find anything in her conduct or in her letters to show that she in any
way repudiated the disposition made by her father. Her leaving the
house six weeks after her father’s death was in all probability due to
the ill-feeling which has long existed between her husband and her eldest
brother. Her letters show that she was anxious to get her daughters
married, and wanted pecuniary assistance from first defendant, and her
share in her father’s moveable property. Her reference to the “directions
of her deceased father” seems to me to indicate that subsequent to the
execution of Exhibits I and II her father had intimated to the first
defendant that he wished plaintiff, who had a large family, and who had
from the time of her marriage continued to reside in her father’s house, to
receive a liberal share of his moveable property. The first defendant
admits that she asked him for a house and that he promised to [53]
consult with his brothers and give her the house in Dharapuram as a
matter of favour. The evidence given by third witness as to the admis-
sion made by second defendant which supports the above view is more
probable than the evidence of plaintiff’s husband (fifth witness) on this point.
I think, therefore, that the Lower Court was right in holding that plain-
tiff never repudiated her consent. The consent necessary to validate a
legacy may be expressed or implied (Macnaghten, page 245). In this case
the plaintiff gave her express consent prior to the death of the testator,
and her subsequent assent may fairly be implied from her acquiescence
in the arrangement for over two years. There can be very little doubt
that if the first defendant had not delayed the settlement of her claims to
her father’s moveable property, this suit would never have been heard of.

It is then contended that the gift or legacy is void inasmuch as the
particular share of each donee is not specified. This point is concluded by
the decision of the Privy Council in Muhammad Muntaz Ahmad v. Zubaida
Jan (1), that possession taken under an invalid gift of mushaa transfers

(1) 11 A. 460=16 I. A. 205.

744
the property. I have already found that possession was given. The donor
divested himself of all right in the property and the gift was complete.

With reference to the contention that property was included in
Exhibit I, in which the donor's share was not specified, it is only necessary
to refer to Exhibit I itself and to the evidence of the defendants' fourth
witness, the kurnam, who deposes that, though the patta of the land was
joint, Syed Miyan had separate enjoyment of his share.

As to the inclusion of endowed property, I concur with the Judge
that there is no evidence of dedication. The use of the house 17 or more
years ago as a choultry (plaintiff's third witness) does not, if true, show
that Syed Miyan had divested himself of his right to it.

The appeal therefore fails and is dismissed with costs.

The respondents have put in a memorandum of objections claiming
costs. The District Judge disallowed them, because he found that defendants
had not made out their allegation that plaintiff was in possession of
certain moveables. This was a good ground for ordering defendants to pay
costs on the 1/2th share of the moveables decreed, but as, to use
the Judge's own words, plaintiff failed to show that she had any case at
all with regard to the immovable property claimed, she should have
been ordered to pay costs on so much of her claim as was disallowed. I
would modify the decree of the Lower Court accordingly and allow the
memorandum of objections with costs.

16 M. 54.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

LAKSHMIPATHI (Defendant), Appellant v. KANDASAMI (Plaintiff),
Respondent.* [21st and 22nd September and 3rd October 1892.]

Hindu law—Imparible pother—Evidence of impartibility—Pannai lands attached to the
pother—Maintenance and marriage expenses of junior member of the family of
potigar.

The step-brother of the holder of a pother in the Madura district, of which the
gross income was about Rs. 15,000 a year, sued him for a partition of the estate
and in the alternative for maintenance. It appeared that the pother had been
held on military tenure from the sixteenth century, that it had never been
partitioned, and that the custom of impartibility obtained in a large number of
similar pathers in the same district. In 1821 and 1842 enquiries were made
of members of the zamindar's family and other persons connected with the
zemindar as to the nature of the estate, and their recorded answers showed that
they understood the estate to be impartible and that it descended to a single heir:

Held, (1) that the pother was impartible;

(2) that the plaintiff was entitled to a decree for a monthly payment to
him of Rs. 60 for his maintenance.

The plaintiff's claim extended to certain "pannai" lands within the limits of the
zemindar; some of which had been handed down from zemindar to zemindar
since 1831, others having been purchased by the plaintiff's father. The
High Court found that they had been recognised and dealt with as part and
parcel of the zemindari:

Held, that the pannai lands were impartible, and the plaintiff was not entitled
to a share in them or in the cattle, &c., used for cultivating them.

The plaintiff further claimed a sum of Rs. 4,000, the amount of a loan alleged
to have been contracted by him for the purposes of his marriage. It appeared
that the cost of the marriage had been defrayed from the bride's brother;

* Appeal No. 109 of 1891.
Held, that the plaintiff was not entitled to a decree on this account, although if he had incurred debts for the purposes of his marriage the defendant would have been liable.

[Re. 27 A. 203 = 2 A.L.J. 730; 39 C. 711 (730) (P.C.) = 9 A.L.J. 390 = 14 Bom.L.R. 270
W.N. 316 = 168 P.I.R. 1912 = 50 P.W.R. 1912; 17 M. 422.]

[55] Appeal against the decree of C. Venkoba Chariar, Subordinate Judge of Madura (West), in original suit No. 21 of 1890.

Suit against the Poligar of Edayarakottai for the partition of family property including the poliim, and in the alternative for maintenance. The plaintiff also claimed from the defendant the sum of Rs. 4,000, the amount of his marriage expenses.

The Subordinate Judge held that the poliim was immovable, but passed a decree for the partition of certain "pannai" lands situated within the limits of the estate and the cattle used in their cultivation and also of certain jewels. He further decreed that the defendant pay to the plaintiff Rs. 60 a month for his maintenance and Rs. 2,000 on account of his marriage expenses.

The further facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court.

Bhassyam Ayyangar, for appellant.

Rama Rau and Mahadeva Ayyar, for respondent.

JUDGMENT.

The property in litigation is the poliapat or zemindari of Edayarakottai in the Madura district. The zemindar Muthu Venkatadri Naik, who died in 1873, left sons by his two wives, of whom the defendant, the eldest son, succeeded to the zemindari. The plaintiff, who is the step-brother of the defendant, sues for partition of the zemindari, claiming a half share in the zemindari, the pannai lands and the moveables in defendant's possession. In the alternative he asks that he may be awarded maintenance at the rate of Rs. 5,000 per annum. He also claims to recover from defendant Rs. 4,000, the sum borrowed by him and expended on his marriage.

The Subordinate Judge of Madura (West) found that the estate was immovable and descended to a single heir by the rule and custom of primogeniture. With reference to the pannai lands he held that they had not been incorporated with the zemindari, but had all along been distinguished as the private property of the zemindar, and therefore decreed to plaintiff a share in items 2 to 7, 10, 11 and 14. He was of opinion that the chinnna pannai and other lands in the possession of the plaintiff need not be brought into hotchpot, that plaintiff's claim to a share in ready cash and jewels had not been made out, but awarded him a half share in the cattle on the pannai lands. He awarded plaintiff a sum of Rs. 2,000 for the expenses of his marriage, and was of opinion [56] that if plaintiff was not entitled to a share in the pannai lands, he should be allowed a sum of Rs. 60 per mensem as maintenance.

Against this decree the defendant has appealed on the ground that the pannai lands have from ancient times passed as part and parcel of the zemindari to the zemindar for the time being, that on the facts found plaintiff was not entitled to any sum on account of his marriage, and that as plaintiff had been allotted lands for his maintenance, he was not entitled to any allowance in money.
The plaintiff has put in a cross-appeal (memorandum of objections), impeaching the finding of the Subordinate Judge that the estate is impartible.

We will dispose of the cross-appeal first. As remarked by the Privy Council in Mallikarjuna v. Durga (1), the question whether an estate is subject to the ordinary law of Hindu succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it. The question, therefore, we have to decide is one of evidence concerning the custom obtaining in the family.

It is not denied that Edayakottai has existed as a poliem from the middle of the 16th century when Visvanatha Naik, the founder of the Naik dynasty, organised the 72 polioms of Madura as military fields or tenures.

The Subordinate Judge rests his decision as to the impartibility of the poliem on (1) the absence of partition, (2) the belief or consciousness in the family as to the usage in favour of impartibility, and (3) the usage obtaining in a large number of similar Kumbla polioms.

The Dindigul province was conquered by the British in 1790. The poliem in question, which had not been sequestered either by the Muhammadan or Hindu Rulers, was, at the time of the British conquest, in the hands of its then owner Kothanda Ramaswami, who died in 1791. He left two sons, and was succeeded by Chinnama Naik, his eldest son, who died without issue in 1799, and was succeeded by his brother Lakshmipathi. Lakshmipathi died in 1842 leaving two sons, and was succeeded by his eldest son Kothanda Ramaswami, on whose death without issue in 1849, Muthu Venkatadri Naik, the father of the plaintiff and defendant, became zemindar. It appears therefore that in 1791 and again in 1842 the elder brother succeeded, no demand being made by the younger brother for partition.

In 1821 when plaintiff's grandfather was the zemindar, Government instituted certain enquiries as to the nature of the estate. Exhibit I contains the replies submitted by the zemindar. He stated that the poliapet was impartible, that females were entitled to maintenance only, and in answer to the question, "Does the eldest son succeed to the property as the manager of the joint family," replied, "It is the custom for those that succeed to provide food and clothing for the rest of the family." The question and answer are not very definite, but the zemindar had already stated that if the pattakaran had a son he succeeded, and in default of sons, brothers, and we have no doubt that the zemindar intended it to be understood that the estate was impartible and that it descended to a single heir, the eldest son, if there was one.

On the death of plaintiff's grandfather in 1842 an enquiry was held as to his successor, and from the statements taken from the headmen of the zemindari (Exhibit XI), from the neighbouring zemindars (Exhibits II, VII, VIII), from the widow (Exhibit IV), and from plaintiff's father himself (Exhibit IX), only one conclusion can be drawn, viz, that according to custom the eldest son alone was entitled to succeed. Again in 1849 the then poligar stated (Exhibit V) that from before the year 1791 the poliapet had been held by only one member of the family at a time.

Muthu Venkatadri, a few months before his death, addressed the Collector requesting that the defendant, as his eldest son and successor in

(1) 13 M. 406.
the zamindari, should be allowed to sign for him during his illness (Exhibit VI).

In addition to this there is the usage of other Kumbla poliems in the district which is against the plaintiff’s contention. See Collector of Madura v. Kullappa Naik (1) and Chinnammal v. Akkulu Ammal (2). Moreover there is the presumption in favour of impartibility arising from the property having been held on military tenure from the time of Viswanatha Naik. In the Narganti case (Naraguntty Lutchmeaavamah v. Vengama Naidoo (3)) [58] the Privy Council described a poliem as being in the nature of a raj or principality.

Against the foregoing evidence on the subject of impartibility, the respondent refers us to no specific evidence regarding the custom of the family. It is urged by his pleader that since 1791 there were but two cases of succession, in which the elder brother excluded the younger, and that on both occasions the older brother had no son; it was the interest of the younger brother to prefer the right of survivorship to the whole zamindari to that of partition by which he would have only got a part. This argument rests on mere conjecture. There is nothing on the record to show that when he succeeded to the raj, the elder brother had no prospect of male issue. Neither does this explanation account for the evidence of the consciousness in the family, and among those likely to be acquainted therewith, of the custom of impartibility.

The finding of the Subordinate Judge that the estate is impartible must be upheld and the memorandum of objections dismissed with costs.

With reference to the pannai lands it is argued that the Subordinate Judge has stated the law correctly, but has arrived at an erroneous decision on the evidence. The question which has to be decided with reference to these lands is whether they were handed down from zamindar to zamindar as an appurtenant of the zamindari, in other words, whether they have been treated as the zamindar’s private property or as an increment to the zamindari. The lands in question admittedly are situated within the limits of the zamindari. They have not been acquired recently, but have been handed down from zamindar to zamindar, the existence of certain of them in 1831 being evidenced by Exhibit A series. The plaintiff attempted to prove that the pannai lands had been enjoyed in equal moieties by his father and uncle during the time his uncle was zamindar, but the evidence was discredited by the Subordinate Judge and is not relied on by plaintiff’s pleader here. The fact that the defendant has employed separate superintendents to manage these pannai lands is not sufficient to show that the pannai lands were not considered as an appurtenant of the zamindari. The extent or nature of the lands may have rendered the entertainment of a separate superintendent necessary or advisable for more efficient management. [59] The non-production of the accounts by the defendant is no doubt unaccounted for, but it is not enough to rebut the evidence which shows that the lands belong to the zamindar qua zamindar and not as a private individual. The series of documents marked A in no way indicates that the lands had not then been incorporated with the zamindari. It appears that from 1831 to 1833 the zamindari was under the management of the Collector, but that the pannai lands had been left with the zamindar. This

(1) Appeal No. 65 of 1885 unreported.  (2) Appeal No. 103 of 1888 unreported.  (3) 9 M.I.A. 95.
was but natural. It was not the policy of the Government to oust the actual cultivator. The zamindar, therefore, was left in possession of the zamindar's "own pannai lands," but was required to pay to Government the assessment on the lands actually cultivated.

The assignment of a portion of the pannai lands as some provision for the support of the junior members of the family, which lands are known as chinna pannai, also supports the contention that the pannai lands are an appurtenant of the zamindari. These lands as well as other pannai lands (Kathakarumbu), which were purchased by plaintiff's father and made over to plaintiff's brother for his maintenance, are in the possession of the plaintiff. One of the widows of Kothanda Ramaswami has been allowed by the zamindar to enjoy one of the pannai lands for her maintenance. This supports the contention that the pannai lands are part and parcel of the zamindari. Item No. 7 was waste land which was brought under cultivation by plaintiff's father. We think, therefore, it was rightly held not to be an acquisition by plaintiff's father, but to form part of the pannai lands.

For the above reasons we are of opinion that the Subordinate Judge was in error in holding that the pannai lands Nos. 2 to 7, 10, 11 and 14 were the private property of the zamindar. They have all along been recognized and dealt with as part and parcel of the zamindari and are not partible. It follows that the cattle used for cultivating those lands and the other moveable property awarded by the decree to plaintiff are also not partible and that the decree for a moiety thereof cannot be upheld.

We are unable to uphold the decision of the Subordinate Judge as to the expenses of plaintiff's marriage. Plaintiff asserted that he had borrowed and expended Rs. 4,000 on his marriage. He adduced no evidence in support of his statement. The defendant examined the Karbar of the Kadavur zamindar, whose sister the plaintiff married. He stated that the zamindar of Kadavur defrayed the expenses of the marriage. The Subordinate Judge rejected his evidence without assigning any reason for so doing. It is the only evidence on the record. The defendant disapproved of his step-brother's marriage, and the income of the lands in plaintiff's possession being small, it is not improbable that the expenses of the marriage were defrayed by the bride's brother. If the plaintiff had incurred debts on account of his marriage, the defendant would no doubt be liable, but in the absence of any proof, we are unable to support the Subordinate Judge's award of Rs. 2,000 on account of the expenses of plaintiff's marriage.

We are not prepared to say that the sum of Rs. 60 per mensem, which the Subordinate Judge thinks plaintiff should get as his maintenance, is unreasonable. The lands allotted for his maintenance yield an annual income of about Rs. 500. The defendant gets an income of Rs. 15,000 or 16,000. Out of this he has to pay the pesheush and the expenses of management, &c., but can well afford to pay his step-brother Rs. 60 per mensem.

We set aside so much of the decree of the Subordinate Judge as awarded plaintiff a share in the immoveables, items Nos. 2, 3, 4, 5, 6, 7, 10, 11 and 14, and in the moveables specified in Schedule B, as well as the house in Edayasottai, which was not sued for, and Rs. 2,000 for marriage expenses and decree that plaintiff is entitled to recover from defendant.
maintenance at the rate of Rs. 60 per mensem for 3 years prior to the
plaint and future maintenance at Rs. 60 per mensem from the date of the
plaint. In other respects the decree of the Subordinate Judge is confirmed.
Plaintiff must pay defendant's costs in this appeal and in the Lower
Court.

16 M. 61 (F.B.) = 2 M.L.J. 200.

[61] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice
Muttusami Ayyar, Mr. Justice Parker, Mr. Justice Wilkinson
and Mr. Justice Hardley.

ABDUL KADER (Defendant No. 5), Appellant v. AISHAMMA
(Plaintiff), Respondent.* [3rd February, 10th and 12th August
and 26th October, 1892.]

Limitation Act—Act XV of 1877, Schedule II, Articles 123, 144—Distributive share of
a Muhammadan—Suit for possession—Res judicata between defendants.

A Mapilla, alleging that certain "family property" had been enjoyed by her-
self and the defendants (who were her relations on the mother's side) in common
till one year before suit, when she was excluded from possession, sued to
recover the share to which she claimed to be entitled under the Muhammadan
Law of inheritance. It appeared that the property had been acquired in the
lifetime of the plaintiff's maternal grandfather who had died more than 30 years
before suit, and that one of his sons had obtained a decree for his share of it in a
suit to which among others the plaintiff and the father of the present contesting
defendants were parties, and that a plea then raised by the latter to the effect
that the property had been acquired by him was overruled. The present claim
was sought to be resisted on the same ground, which was the subject of the
second issue; but it was held that the defendants were stopped from raising the
plea, and there was no evidence as to whether this matter had been in controversy
between the present plaintiff and her uncle in the former suit, which was decided
ex parte as far as she was concerned. The plaintiff's mother died about 20 years
before the present suit:

Held, by the Full Bench, that the plaintiff's cause of action arose on her exclu-
sion from enjoyment of the property and the suit was not barred by limitation;

by the Division Bench, that in the absence of evidence no finding on the
second issue should be called for.

[R., 34 M. 511 (513) = 6 Ind. Cas. 50 = 20 M.L.J. 288 = 8 M.L.T. 4.]

SECOND appeal against the decree of S. Subbavayar, Subordinate
Judge of South Canara, in appeal suit No. 133 of 1889, affirming the
decree of J. Lobo, District Munsif of Kasaragod, in original suit No. 303
of 1888.

The plaintiff and defendants were members of a Mapilla family
governed by Muhammadan Law. Defendant Nos. 5 to 7, who alone
contested the suit, were the children of one Jainuddin, the son of Moidin
Beari, whose daughter was the mother of the plaintiff. The plaintiff sued
for possession of a one-twelfth share [62] of certain property, of which
she alleged that it was "family property," and averred that she and the
defendants had been in joint possession of it until about one year before
suit. The share claimed was that to which the plaintiff's mother would
have been entitled in the estate of Moidin Beari by the Muhammadan
Law of inheritance, and the property in question was found to consist of

* Second Appeal No. 786 of 1891.
property acquired during the lifetime of Moidin Beari and improved by all his sons.

Defendant Nos. 5 to 7 pleaded that the plaintiff was entitled to no share in the property, which they alleged had been acquired by their father deceased. It appeared that a brother of Jainuddin had brought a suit in 1871 against him and others, including the plaintiff, for his one-sixth share and had obtained a decree, a plea similar to that above stated having been raised and overruled. The District Munsif held that the judgment in that suit estopped the defendants from now raising this plea, and the judgment of the Subordinate Judge proceeded on the same view. Both Courts recorded findings in the negative on the second issue which was as follows:—

"Whether the plaint property is the self-acquisition of Jainuddin."

The contesting defendants further pleaded limitation, and it appeared that Moidin Beari had died in 1856 and the plaintiff’s mother in 1858. This plea was also overruled, and the Courts passed a decree for the plaintiff for a one twenty-fourth share, being one-half of the share of her mother in the property in question.

Defendant No. 5 preferred this second appeal.

This second appeal having come on for hearing before Mr. Justice Shephard and Mr. Justice Subramanya Ayyar, the Court made the following order of reference to the Full Bench.

ORDER.—The question is whether a suit by a Muhammadan against other members of her family for her share in the estate of her mother is governed by Article 123 or Article 144 of the Limitation Act. It has been held in Sithamma v. Narayana (1) that the former article applies only to cases in which the party in possession is either really an executor or an administrator or a legal personal representative of the deceased. On the other hand in [63] two later cases, viz., Patcha v. Mohidin (2) and Kasm v. Ayishamma (3), the contrary view has been taken.

In this conflict of opinion we must refer the above question to a Full Bench.

The case then came on before the Full Bench.

Narayana Rao, for appellant.

Pattabhirama Ayyar, for respondent.

JUDGMENT OF THE FULL BENCH.

It appears to us that the question whether there is any conflict between Sithamma v. Narayana(1) and the other cases referred to in the order of reference and does not really arise in this suit. The plaintiff’s case is that since the deaths of her grandmother and mother, she and the defendants have enjoyed the property in common, but that she has now been excluded from the common possession and enjoyment. Hence her cause of action arises from the date of her exclusion or dispossession, and not from the date when her share became deliverable on the death of the persons to whom the property originally belonged.

In Patcha v. Mohidin(2) it was held that Article 127 of the Limitation Act did not apply, and that plaintiff had never obtained any distribution of her share. In Kasm v. Ayishamma(3) the suit was for partition and participation in the possession and enjoyment of the property was not alleged.

(1) 12 M. 497.  
(2) 15 M. 57.  
(3) 15 M. 60.
In both these cases it was held that Article 123 applied. Sittamma v. Narayana was not referred to, and it does appear that any objection was taken on the ground that the parties sued were not the lawful personal representatives of the deceased.

We would reply to the Division Bench that the case is governed by Article 144, Schedule II of the Limitation Act.

This second appeal come on for disposal before the Division Bench, the Chief Justice and Mr. Justice Parker. The parties were represented as before.

JUDGMENT OF THE DIVISION BENCH.

The Full Bench has held that the suit is governed by Article 144 of the Limitation Act; hence it is not barred.

It is then urged that the Courts below were in error in holding it res judicata that the property was not self-acquired by Jainudin. It is true that plaintiff and fifth defendant's father were co-defendants in the former suit, but it is not shown from Exhibit B [64] whether this matter was in controversy between them or not. The suit was decided ex parte as far as plaintiff was concerned.

It is not necessary, however, to make any enquiry upon this point. No evidence was adduced by the fifth defendant in the suit, and as formal evidence was offered on plaintiff's behalf, it would be of no use to ask for a finding upon the second issue in the absence of evidence.

The second appeal, therefore, fails and we dismiss it with costs.


APPEILLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

AMMANNAN AND OTHERS (Defendants), Appellants v. GURUMURTHI AND OTHERS (Plaintiffs), Respondents. [19th and 20th July, 1892.]


On 28th March 1871, the defendant's father borrowed a sum of money from the plaintiff's father and placed him in possession of certain land under an instrument of mortgage, which provided for the application of the usufruct in liquidation of the interest and then in reduction of the principal; the instrument also contained a covenant for the repayment, in four years, of the balance that might then be due by the mortgagor and a stipulation that, on default, the mortgagor was to surrender the property to the mortgagee as if it had been sold to him.

In 1874, the mortgagor resumed possession without discharging the mortgage debt. The mortgagee having died, his sons, on 14th April 1888, filed the present suit on the mortgage and prayed for a decree for foreclosure or sale. During the pendency of the suit the Succession Certificate Act of 1889 came into operation, but the plaintiffs obtained no certificate under it:

Held, (1) that the suit was not barred by limitation, and the plaintiffs were entitled to a decree for foreclosure with a direction that possession be delivered to them;

(2) that the plaintiffs were not precluded from obtaining a decree by reason of their not having obtained a certificate under the above-mentioned Act.

[R., 16 A. 259; 21 M. 326; 29 M. 77; 5 M.L.J. 294.]

* Second Appeal No. 920 of 1891.

752
SECOND appeal against the decree of S. Manavalayya, Subordinate Judge of Coconada, in appeal suit No. 118 of 1889, reversing [65] the decree of K. Murthi, District Munsiff Paddapore, in original suit No. 158 of 1888.

The facts of the case are stated above sufficiently for the purposes of this report.

The District Munsiff dismissed the suit holding that nothing was due under the mortgage.

The Subordinate Judge, on appeal, held that Rs. 750 was due, and reversed the decree, observing, as to the plea of limitation raised by the defendants:—"The bond sued on is admittedly one of mortgage by conditional sale. As such it entitles plaintiffs to sue for foreclosure at any time within sixty years from the date of the mortgage. Plaintiffs sue for foreclosure. The bond is dated 28th March 1871. The suit was brought on 14th April 1888. Plaintiffs were within time."

The defendants preferred this second appeal.

Ranachandra Rau Saheb, for appellants.
Venkataramayya Chetti, for respondents.

JUDGMENT.

On the 28th March 1871, appellants' father executed a mortgage in favour of respondents' father. The instrument of mortgage, Exhibit A, purported to place the mortgaged property in the mortgagee's possession, and provided for the usurious being applied first in liquidation of the stipulated interest and then in reduction of the principal debt. It contained also a covenant to repay the balance within four years and then proceeded to state that in default of payments on the due date, the mortgagee was to give up the mortgaged property to the mortgagee, as if it was sold to him. The plaint stated that though the mortgagee placed the mortgagee in possession, yet the former unfavourably resumed possession in 1874 without repaying the mortgage debt, and prayed for a decree either for sale or foreclosure. It was contended on appellants' behalf that the mortgage debt was discharged, and that the suit was barred by limitation. On appeal, the Subordinate Judge at Coconada found that the debt was not paid off, and passed a decree for foreclosure, observing that the suit was not barred by limitation. Hence this appeal.

It is first urged that the suit is governed by Article 144 of the second schedule of the Act of Limitations. The land tax evidenced by document A is a mortgage by way of conditional sale as defined in Section 58, Clause (c) of Act IV of 1895, and the plaint prays also for a decree for foreclosure. The suit is therefore governed by Article 147, and not barred by limitation. It is true that the plaint alleges that the mortgagee was dispossessed in 1874, while the suit was instituted in 1888. But it must be remembered that the suit was brought to recover possession, not on the footing of the usufructuary mortgage, but by reason of the foreclosure decree which is claimed under Section 67 of Act IV of 1882. It is not necessary that the plaintiff should be in possession of the mortgaged property when he claims a decree for foreclosure. Though a mortgage by conditional sale is generally accompanied by transfer of possession, yet it is not always the case. It is also clear from Section 87 that a decree for foreclosure may contain a direction, for delivery of possession when necessary. The contention, therefore, that respondents lost their right to claim foreclosure by not recovering back possession on the
footing of the usufructuary mortgage within 12 years from the date of
dispossession cannot be supported.

It is next contended that the respondents are not entitled to obtain
a decree without producing a certificate as required by Act VII of 1889.
We are unable to accede to this contention either, as the suit was instituted
before Act VII of 1889 came into force. The general rule, as stated in
Wright v. Haie (1) and in Kinbray v. Draper (2) is that when an enactment
takes away a vested right, it does not apply to existing rights, but when it
deals with procedure or regulates practice only it applies to all actions
pending as well as future. In C.M.P. 416 of 1889, it was held that the
Act did not apply to an application to execute a decree which was pending
at the date of the passing of the Act (3). In the case before us the plaintiffs
had a vested right to a decision in the suit already instituted by them in
accordance with the law as it existed when the suit was instituted, and
that right would certainly be curtailed if the Act subsequently passed were
applied to it. We may also observe that the decree appealed against is for
foreclosure of the mortgage and not one for the payment of a debt. The
suit would be barred if it were regarded as one to recover the debt, and
the direction to pay in six months contained in the decree is given not to
fix a personal liability for the debt, but to enable the defendants to save
their right of redemption and to prevent its extinction by foreclosure.
This second appeal cannot be supported and we dismiss it with costs.

16 M. 67.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and
Mr. Justice Parker.

Saminatha (Defendant), Appellant v. Purushottama (Plaintiff),
Respondent.* [21st March and 6th April, 1892.]

Religious institution—Debt contracted by one claiming to be in possession as head of the
institution—" De facto " manager, power of—Cost of defending ejection suit.

Suit on a bond in which the obligor was described as the head of a mutt and
the debt therein secured was stated to have been incurred "for the reasonable
expenses of the suit which was being proceeded with, and for the good of the
mutt and for the said mutt's own expenses " The debt had been contracted
by one who was in possession of the mutt under a claim that he was the duly-
constituted head of the institution, for the purposes of defending a suit brought
by the head of another religious institution to eject him and to establish certain
rights over the mutt. A decree for ejection was obtained, but some of the
pretensions of the plaintiff were successfully resisted. The present defendant
was a receiver of the properties of the mutt appointed by the Court in the course
of that litigation.

Held, that the bond was not enforceable against the property of the mutt.

Appeal against the decree of V. Srinivasa Charlu, Subordinate
Judge of Kumbakonam, in original suit No. 44 of 1889.

Suit to recover principal and interest due on a bond, dated 7th
December 1886, and executed by Kandasami Tambiran in favour of the
plaintiff's uncle whom he had since succeeded as managing member of his
family. When the loan secured by this bond was contracted, one

* Appeal No. 108 of 1891.

(1) 6 H. & N. 297.
(2) L.R. 3 Q.B. 160.
(3) See Rama Rau v. Chellayamma, 14 M. 458. [Reporter's note].

754
Kumarsami Tambiran was in possession of the Tirupanandal mutt, of which he claimed to be the head. The money was borrowed by him for the purposes of a suit then pending, in which the Pandara Sannadhi of the Dharmapuram Adhinam, sought to eject him on the ground that he was not the rightful head of the mutt. The High Court on appeal passed a decree for ejectment as prayed, but certain rights which the plaintiff claimed to possess in respect of the mutt were negatived. The defendant in that suit died during the course of that litigation, and Kumarsami Tambiran, the executant of the bond sued on, succeeded him in the mutt and was brought on to the record in his place. The present defendant was a receiver of the properties of the mutt appointed by the Court in that litigation.

The Subordinate Judge held on the authority of Hanoomanpersaud's (1) case and Sammantha Pandara v. Sellappa Chetti (2) that the debt was binding on the mutt and passed a decree as prayed.

The defendant preferred this appeal.

The Advocate-General (Hon'ble Mr. Spring-Branson), Rama Iau and Krishnasami Ayyar, for appellant.

The executant of the bond was a mere trespasser and could in no way pledge the credit of the mutt. The judgment appealed against involves the proposition that one who has usurped authority over a mutt can make the mutt liable for the expenses of putting an end to his usurpation. No authority supports such a proposition. The true rule to be deduced from the cases cited by the Subordinate Judge and the other decisions is that the de facto manager is entitled to be reimbursed only for charges met by him when it is clearly established that the manager de jure would have had to meet them. Nor even if he could have bound the mutt by reason of his being a de facto manager of its properties, has it been shown that the loan was necessary in the sense that funds of the mutt were not available to the required amount.


Subaramanya Ayyar and Bashyan Ayyanar, for respondent.

In the ejectment suit the status of the Tirupanandal mutt as such was at issue by reason of the illegal pretensions of the plaintiff as to which the suit failed (see Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran (8) and, although Kumarasami was ejected because his appointment was defective, the mutt was [69] substantially the successful party. Moreover Kumarasami was not a wrong door in the ordinary sense of the word, although technically he was a trespasser, for he came in under the will of the last Tambiran. Sammantha Pandara v. Sellappa Chetti (9), governs the case; it is also covered by the principles laid down in Prosunno Kumari Debyo v. Golab Chand Baboo (4), Konwur Doorganath Roy v. Ram Chunder Sen (5), Shri Ganesh Dharmidhar Maharajdev v. Keshavraov Govind Kulgaivkar (6), though those cases proceeded on very different circumstances. See also Chidambara Setti v. Katamma Natchiyar (9), where the rightful owner of the Sivaganga

(1) 6 M.I.A. 393. (2) 2 M. 175. (3) 14 W.R. 147.
(7) Appeal No. 53 of 1891 unreported. (8) 10 M. 375 (609).
(9) 3 M.B.C.R. 260.
Zemindari was held bound by the acts of her predecessor who had been de facto manager of the estate though his possession was based on no title, and compare Sulindra v. Budun (1).

JUDGMENT.

The bond on which the present suit is brought was given in consolidation of three previous debts evidenced by Exhibits C, D and E. The genuineness of these documents is not disputed, but it is alleged that the debts were not incurred for the benefit of the mutt. The receipt of the first Rs. 5,000 (Exhibit C) has not been entered in the mutt accounts at all and though it may have been spent for the purposes of the litigation under which Kumaraswami Tambiran was endeavouring to support his title there is nothing to trace the money. The receipt of the other two sums, Rs. 3,000 (Exhibit D) and Rs. 2,000 (Exhibit E) are entered in the mutt accounts (Exhibit IV).

It is pointed out that when the Rs. 3,000 was received there was a cash balance of Rs. 1,496.10.1 and when the Rs. 2,000 was received there was a balance of Rs. 923.15.8. It is not, however, seriously disputed that the income of the mutt was amply sufficient for its ordinary and legitimate expenses, such as paying kists, &c., and the real point argued before us is whether the expenses of the litigation in which Kumaraswami and afterwards Kundaswami were engaged were a legitimate charge upon the resources of the mutt. It is not denied by the Advocate-General that in some cases debts incurred by a de facto but not de jure manager would be binding: but the contention is that this litigation was brought about by a trespasser for his own private ends and was not for the interest of the mutt.

[70] It is argued on the other side that though the defendants were found to be trespassers they resisted the suit in the interest of the adhinam for the maintenance of its independence and the establishment of the right of its head to nominate his successor, in which contentions the claims of the Dharmapuram mutt were successfully resisted. In the result, however, the defendant was ordered to pay his own costs and the High Court refused to make them a charge against the mutt. Though the head of a mutt has large powers (See Sammantha Pandara v. Selappa Chetti (2) there is a wide distinction to be drawn between cases in which debts are incurred bona fide in furtherance of the objects of the institution and cases in which debts are incurred for private and personal purposes. More recitals in deeds are not (sufficient) Chidambara Setti v. Kattamma Natchiyar (3) and it cannot seriously be contended that it is for the advantage of an institution that an unqualified person shall be able to establish himself as its head. It has already been held in Ambalavana v. Saminatha (4) that a similar debt is not binding upon the mutt.

As regards the contention that part of the money may have been used for the payment of kists it is pointed out that Rs. 3,000 out of the second Rs. 5,000 borrowed has been paid back, and it is clear that the lender must have known that the transaction was somewhat of a speculation as he delivered up without demur the Government paper which had been deposited with him as security for the loans.

We must reverse the decree of the Subordinate Court and dismiss the suit with costs throughout.

(1) 9 M. 80.
(2) 2 M. 175.
(3) 3 M. H.C.R. 260.
(4) Appeal No. 53 of 1891 unreported.
16 M. 71.

[71] APPELLATE CIVIL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice and
Mr. Justice Parker.

NARASIMMULU (Plaintiff), Appellant v. GULAM HUSSAIN SAIT AND
ANOTHER (Defendants), Respondents.*
[25th July and 2nd August, 1892.]

Probate and Administration Act—Act V of 1881, Sections 45, 82—Administration deonis non—Will relating to self-acquired property—Suit by testator’s son.

A Hindu by his will bequeathed certain land, his self-acquired property, to
his infant son. On his death, his widow, who was the executrix named in the
will, took out probate, but she died intestate before she had fully administered
the estate. The son now sued by his next friend to recover arrears of rent which
had accrued due on the land, which had been leased to the defendants by the
testator:

 Held that letters of administration de bonis non should have been taken out,
and that since the plaintiff did not represent the estate of the testator, he was
not competent to maintain the suit.

APPEAL against the judgment of Mr. Justice Wilkinson, sitting on
the original side of the High Court in civil suit No. 217 of 1890.
The facts of the case appear sufficiently for purposes of this report
from the following judgment.
The plaintiff preferred this appeal.
Krishnasami Chetti, for appellant.
Mr. Kernan and Mr. R. F. Grant, for respondents.

JUDGMENT.

This is an appeal by the plaintiff against a decree of Mr. Justice
Wilkinson dismissing the suit.
The plaintiff, an infant, by his next friend, brought a suit against the
defendants, alleging that the defendants were tenants of certain premises
under a lease granted by plaintiff’s adoptive father since deceased, that
the rent of the premises is in arrear, and that defendants refuse to pay
the same to the plaintiff. It was alleged in the plaint that, since the
death of testator, defendants held the premises as plaintiff’s tenants, but
that point was not pressed. It appears that the late C. Lutchminarasu
Chetty, plaintiff’s adoptive father, granted a lease of certain premises on
[72] the 18th June 1886. In March 1887, C. Lutchminarasu Chetty died
having made a will appointing his wife, Cheenammal, the executrix, and
leaving the bulk of his property to his adopted son, the plaintiff.
It was not disputed that C. Lutchminarasu Chetty’s property was self-
acquired. Cheenammal, the executrix, took out probate of the will and
proceeded to deal with the property, but before she had fully administered
the property she died. By an instrument dated 14th July 1887, Exhibit
B, she appointed certain persons to be guardians of the minor son, the
plaintiff. It must be taken for the purposes of the present suit that
Cheenammal died intestate and without having fully administered the
estate. The defendants admit that the sum claimed is due from them for
rent and pay the amount claimed, viz., Rs. 3,230, into Court, but they
allege that the plaintiff is not entitled to bring this action on the ground
that he is not the duly constituted representative under the will of

* O.S. Appeal No. 29 of 1891.
C. Lutchminarasu Chetty. We are of opinion that the learned Judge was right in dismissing the suit. The present plaintiff does not represent the estate of C. Lutchminarasu Chetty as, by his will, duly proved, the whole of his estate vested in the executrix Chenchammal, and it is not suggested that the plaintiff sues either as representing the executrix or as administrator de bonis non of the testator. We are of opinion that, as the executrix of the will died intestate and without having fully administered the trusts of the will, an administration of another sort becomes necessary. This is called administration de bonis non, that is, of the goods left unadministered by the former executor. See Section 45. Probate and Administration Act No. V of 1881. We are further of opinion that the word “may” in that section is not to be construed as merely permissive, but as directory as showing the course which the Legislature intends shall be adopted. See De Souza v. Secretary of State (1). As at the present time the estate of the testator is absolutely unrepresented, this suit must fail and we dismiss this appeal with costs.

Branson & Branson, attorneys for respondents.

16 M. 73.

[73] APPELLATE CIVIL.

Before Mr Justice Multusam Ayyar and Mr. Justice Best.

KRISHNAMACHARLU (Defendant), Appellant v. RANGACHARLU (Plaintiff), Respondent. * [3rd and 4th March, 1892.]

Religious trust, assignment of — Delegation of trust—Appointment by trustees of an agent for nine years.

One holding land on trust to supply a temple with rice, &c., out of the income of the land, placed the defendant in possession of it under a lease, and subsequently, in 1888, demised it to the plaintiff for nine years under an instrument which provided that the plaintiff should collect the income, pay part of it to the executant of the instrument, and with the rest perform the trusts above mentioned. In a suit for rent, the defendant denied the plaintiff’s title questioning the validity of the instrument of 1888:

Held, that the instrument was valid, as it merely appointed the plaintiff an agent, and did not amount to an assignment of the trust.

SECOND appeal against the decree of O. Wolfe-Murray Acting District Judge of North Arcot, in appeal suit No. 228 of 1889 affirming the decree of C. Rama Rau, District Munis of Tirupati, in original suit No. 720 of 1888.

Suit for arrears of rent accrued due on certain land which was occupied by the defendant under an ijara lease. The defendant’s lessor was one Venkatachari, in whom the land was vested on a religious trust created by his grandfather. On 21st May 1888, Venkatachari executed in favour of the plaintiff, an instrument comprizing the land now in question which, after describing the land, proceeded as follows:

“In all, three properties of the value of Rs. 2,000 having been purchased by my adoptive grandfather Sri Bhashyam Raghava Charlu for the purpose of offering curd rice daily in the temple of the deity of Sri Venkata Desukalu in Tripat and distribute the same to foreigners, he had been, during his life time, offering curd rice daily from the income

* Second Appeal No. 1069 of 1891.

(1) 12 B.L.R. 423 (428).

758
"of the said estates, and, after his death, I too, in accordance with will the
left by him at the time of his death, continued to do in the same manner.
And as it is not convenient for me to do the said kainkaryam (service)
[75] in future myself in person, and as I requested you to be my
trustee to take possession of the said estates and do the said kainkaryam
(service) yourself from the incomes of the said estates, you agreed to it.
Therefore you shall take possession of the said estates for nine years from
30th May 1888 to 30th May 1897, and from the balance of income left
after deducting kist, &c., out of the incomes derived from the said estates,
you shall daily offer curd rice of half Talia containing two measures in
the temple of Sri Vaidanta Dasikuluvara and out of the cooked rice left
after deducting the swatantras due to the temple people, you shall
give me one-sixth of it and distribute the remainder to foreigners. In
case any proceedings have to be taken in civil, criminal and other Courts
of justice about the said estates, you shall take from the incomes derived
therefrom the expenditure that you may have to incur and continue to
do the said kainkaryam (service) out of the remaining amount as far as
possible. You should continue to do the said kainkaryam (service)
in a low scale if the incomes of the said estates be insufficient to do
kainkaryam (service) in the manner mentioned above, and in a grand
scale if the incomes rise. You shall keep and render accounts of
receipts and disbursements of the same."

The above instrument was filed in the suit as Exhibit A. Another
trust-deed, dated 4th January 1889, executed by S. Vankatashari appointing
plaintiff permanently as trustee was filed as Exhibit D. The will of
the executant’s grandfather was not put in evidence, nor any deed
whereby the trust was created.

The District Mun-if passed a decree for the plaintiff, which was
affirmed on appeal by the District Judge.

The defendant preferred this appeal.

Krishnasami Ayyar, for appellant.
Rama Rau, for respondent.

JUDGMENT.

The only question argued is as to the validity of document A. It is
urged that Vankatashari, being himself a trustee, had not the power to
assign the trust to the plaintiff, and that the Lower Courts are in error in
decreeing plaintiff’s claim.

The general rule as laid down by Lord Langdale in Turner v. Corney
(1) is that trustees who take on themselves the management of property
for others have no right to shift their duty on [75] other persons, and if
they do so they remain subject to responsibility towards their cestuis que
trustent for whom they have undertaken the duty. As observed by Bowen,
L.J. in re Speight(2), the rule that a trustee cannot delegate means simply
this, that a man employed to do a thing himself has not the right to get
somebody else to do it; but when he is empowered to get it done through
others, he may do so. On referring to document A we find that the
plaintiff is authorized merely to take possession of the land for nine years,
and after deducting from the income the kist, &c., to apply the balance in
the mode described therein, and to keep and render accounts of the receipts
and disbursements. Upon its true construction we do not consider that
the document evidences an assignment of the trust, but only empowers

(1) 5 Beav. 517. (2) 22 Ch. D. 727.
plaintiff to hold possession of the land for a period of nine years and to collect the income and apply it for the purposes of the trust in the manner indicated by Venkatachari.

The provision for rendering accounts indicates that Venkatachari did not intend to divest himself of the responsibility to the cestui que trust. Though the document is headed a "trust deed," and plaintiff is therein spoken of as Venkatachari's trustee, the relation created appears to be only that of principal and agent for a limited period without impairing Venkatachari's responsibility to the temple.

Having regard to the object with which Venkatachari's grandfather purchased the land in the name of the temple, it seems to us that Venkatachari was only bound to see that the income was duly collected and applied for the benefit of the temple without himself collecting or applying it.

It might be a question whether, if the transfer were permanent and absolute, it could be upheld, but that is a question that does not arise, as the decision does not rest on Exhibit D, which was executed subsequently to the institution of the suit.

The appeal fails, therefore, and is dismissed with costs.

16 M. 76 = 2 M.L.J. 244.

[76] APPELLATE CIVIL.


SARAPATHI (Plaintiff), Appellant v. SOMASUNDARAM AND OTHERS (Defendants Nos. 1, 5, 6, 7, 8, and 16), Respondents.*

[8th April and 5th May, 1882.]

Hindu Law—Alienation of family property—Right of a son unborn.

Under Hindu law a son conceived is equal to a son born; accordingly, an alienation by a Hindu to a bona fide purchaser for value is liable to be set aside by a son, who was in his mother's womb at the time of the alienation, to the extent of his share.

[F., 14 Ind. Cas. 60 = 173 P.W.R. 1912; R., 22 M. 312; 12 C.P.L.R. 68.]

APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Madura (West), in original suit No. 4 of 1890.

The plaintiff, by his next friend, sued his father and five persons to whom his father had alienated property to have the several alienations set aside: the plaintiff alleged that the alienations had been made under no circumstances of justifying necessity, but for immoral purposes.

The further facts of the case appear sufficiently for the purposes of this report from the following judgment.

Krishnasami Ayyar, for appellant.
Sadagopacharari and Thirugaraja Ayyar, for respondents.

JUDGMENT.

The appellant is the plaintiff, an infant of 4½ years, who sues nominally by his next friend, his maternal uncle, to set aside, so far as his share is concerned, certain alienations made by his father, the first defendant. The appeal relates to items 4, 5, 10 and 12. Items 4 and 5

* Appeal No. 74 of 1891.
were sold to the fifth defendant in July 1887, two months before plaintiff was born. Item 10 was sold to sixth defendant in September 1888, a year after plaintiff's birth, and item 12 in April 1887.

With reference to these transactions the Subordinate Judge found that the sale of items 4 and 5 was bona fide, and supported by consideration, and that the sale is valid and binding on the plaintiff; that the sale of item 10 took place in discharge of antecedent debts which are not shown to have been immoral; and that as the plaintiff was not born at the time when item No. 12 was sold to the eighth defendant, he cannot object to the alienation.

The fifth defendant is the paternal uncle of the first defendant. In August 1886 first defendant wrote to fifth defendant, setting forth the difficulties he was in owing to the pressure of his creditors, and imploring him to raise a loan of Rs. 1,500 or Rs. 2,000 on the security of item No. 4. On the 7th March 1887, first defendant wrote to fifth defendant a still more pressing letter, stating that his creditors were threatening to take further proceedings, and ordering to execute a document in favour of fifth defendant for the lands, item No. 5. On the 9th July 1887, fifth defendant advanced Rs. 3,000 to first defendant and took from him an absolute sale-deed for items 4 and 5, at the same time stipulating to reconvey the property to first defendant after the lapse of 3 years, or even beyond that time on receipt of the consideration. In the sale-deed it was recited that the money was borrowed for the purpose of discharging the debts contracted by the first defendant on account of his family expenses, as well as the hypothecation amount due to Kadambavan Sundaram Pillai on item No. 4. The first defendant admits the receipt of the Rs. 3,000, and there is other evidence in support of it. But it is argued that as the fifth defendant has not shown that he made enquiry as to the necessity for the loan, and as he did not see to the application of it, it is not binding on the minor plaintiff. We think there is ample evidence on the record to show that the fifth defendant satisfied himself as to the pressing necessity which the first defendant was under, and that he bona fide advanced his nephew Rs. 3,000 under very favourable terms, in the hope that he would thus enable him to save this portion of his property. The money was advanced by fifth defendant to enable first defendant to pay off antecedent debts, and as it is not shown that such debts were tainted with immorality, plaintiff cannot set up his right against his father's alienation of items 4 and 5.

Item No. 10 was sold to the sixth defendant, the maternal uncle of the first defendant, in discharge of an antecedent debt which is not shown to have been in any way tainted with immorality. The letters written by first defendant to sixth defendant, in September and November 1886, show how urgent his necessity was, and in the latter month sixth defendant lent him Rs. 550 on two promissory notes. In discharge of a portion of this amount, first defendant, in September 1888, conveyed to his maternal uncle the house-sites and threshing floors, item No. 10. We concur with the Subordinate Judge that, as plaintiff has failed to show that the antecedent debt discharged by the sale of item No. 10 was tainted with immorality, he cannot impeach its validity.

With reference to item No. 12, it is admitted that the sale was not made to discharge antecedent debt, and the only question is whether the plaintiff, who was not born until 4½ months after this transaction, is entitled to dispute it. It is argued that the son's interest in ancestral property exists even before birth. A son cannot object to an alienation validly
made by his father before he was born or begotten, because it is by birth only that he obtains an interest in property then existing in his ancestor—(Mayne's Hindu Law, § 316). The question is whether the right of the son to take objection to the alienation of the father dates from the hour of his birth or from that of his conception. The right of an after-born son to share as a co-ancestor property which has already been divided depends upon his being in the womb of his mother at the time of partition. This indicates that under Hindu law membership with the family is considered as commencing from conception (see Smruti Chandrika, I, 27). In Muthia v. Zaminar of Ramnath (1), it was held by a bench of this Court that a father could not make a gift of ancestral property so as to defeat the right of a son in the womb. Following this decision the Court held in Minakshi v. Virappa (2), that the rights of a son in the womb could not be defeated by a will made by the father. In Mussamut Goura Chowdhrai v. Chummm Chowdry (3), Norman, C.J., and Kemp, J., held that a child in the womb takes no estate, and that a son was not entitled to set aside a deed of compromise executed by his father while he was utero matris. But by a rule now generally adopted in jurisprudence, for certain purposes, existence begins before birth. As Blackstone says "An infant in ventre sa mere is supposed to be born for many purposes. It is capable of having a legacy or a surrender of a copyhold estate made to it. It may have an estate assigned to it, and it is enabled to have an estate limited to its use and to take afterwards by such limitation as if it were then actually born" (1 Comm., 130). As Domat says (Civil Law, Part II, Book II, Section 1, para. 2797) "The children not yet born when their fathers die are reckoned in the number of children who succeed. Although not born when the succession which they are to inherit falls to them by the death of father or mother or other relations, yet they belong to them upon condition that they shall be born alive, and they are considered as heirs already before their birth."

We see therefore no difficulty in holding that the right to inherit ancestral property accrues at the time of conception and not at birth. It is said that this was expressly decided by this Court in Ragular Appeals 43 and 46 of 1874, but on referring to the record we find that no judgment was recorded in those cases.

We concede that, as remarked by the learned Judges who decided Minakshi v. Virappa (2), there are obvious reasons for holding that a purchaser for value is not bound to enquire whether the wife of his vendor is enceinte, but as it appears to us that under Hindu law, as under other systems of law, a son conceived is equal to a son born, we must hold that an alienation to a bona fide purchaser for value is liable to be set aside to the extent of the son's share, by a son who was in his mother's womb at the time of the alienation.

The decree of the Lower Court will therefore be modified by allowing plaintiff to recover on payment his half share in item No. 12. In other respects the decree of the Lower Court is confirmed, and the appellant must pay the respondents' costs.

(1) 2 Ind. Jur. 205.  (2) 8 M. 89.  (3) W.B. (1864) 340.
RAKKEN v. ALAGAPPUDAYAN

16 M. 80.

[80] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RAKKEN AND ANOTHER (Defendants), Nos. 2 and 3, Appellants,
v. ALAGAPPUDAYAN (Plaintiff), Respondent.*

[39th March and 12th April, 1892.]

Evidence Act—Act 1 of 1872, Section 92—Sale-deed—Contemporaneous oral agreement for reconveyance—Mortgage.

In a suit to recover possession of land on the footing of a sale-deed executed by the defendants to the plaintiff's vendor, the defendants set up a contemporaneous oral agreement for the reconveyance of the land to them on the repayment of a sum of money then borrowed by them from the vendor, and alleged that they had retained possession of and held the patta for the land throughout:

Held, that the defendants were entitled to prove by oral evidence that the transaction was a mortgage and not a sale, unless the plaintiff was an innocent purchaser for value without notice of the mortgage.

Lincoln v. Wright (4 De G. & J. 16) followed.
Venkatratnam v. Reddiah (13 M. 494) considered.


SECOND appeal against the decree of L. A. Campbell, District Judge of Salem, in appeal suit No. 102 of 1890, affirming the decree of V. T. Subramania Pillay, District Munsif of Namakkal, in original suit No. 442 of 1889.

The plaintiff claimed certain land as purchaser from one to whom the land had been sold by defendant No. 1, who had bought it from the other defendants under a conveyance, dated 24th January 1876. The defendants alleged that they had borrowed money from defendant No. 1, of which Rs. 50 alone remained due, on the security of the land, that at the time of the execution of the conveyance, it was agreed that the land should be reconveyed to him when the debt was extinguished, and that they had retained possession of the land and held a patta for it throughout. The second issue related to the last-mentioned allegation.

The District Munsif passed a decree for the plaintiff, which was affirmed on appeal by the District Judge, who held that evidence of the alleged agreement contemporaneous with the conveyance was not admissible.

Defendants Nos. 2 and 3 preferred this second appeal.

[31] Parthasaradhi Ayyangar, for appellants.
Subramanya Ayyar, for respondent.

JUDGMENT.

BEST, J.—The District Judge dismissed the appeal on the ground that the document executed by the appellants “must be taken to be what it purports to be—an outright deed of sale,” and that they “cannot be permitted to plead a contemporaneous oral agreement or arrangement under which it was to be treated as a mortgage.”

The question of the admissibility of oral evidence to prove that an apparent sale is, in fact, a mortgage has been considered very fully in Baksu

* Second Appeal No. 1651 of 1891.

763
Lakshman v. Govinda Kanji (1), and the rule "most consonant both to
the statute law and to equity and justice" found to be that though a
party, whether plaintiff or defendant, who sets up a contemporaneous
oral agreement, as showing that an apparent sale was really a mortgage,
shall not be permitted to start his case by offering direct parol evidence
of such oral agreement, yet "if it appears clearly and unmistakeably from
the conduct of the parties that the transaction has been treated by them
as a mortgage, the Court will give effect to it as a mortgage and not as a
sale; and thereupon, if it be necessary to ascertain what were the terms
of the mortgage, the Court will, for that purpose, allow parol evidence
to be given of the original oral agreement."

The Courts will not allow a rule, or even a statute, which was intro-
duced with a view to suppressing fraud, to be used as a weapon or means
of effecting a fraud Lincoln v. Wright (2).

The above decision of the Bombay High Court was approved and
followed by Garth, C.J., and Mitter, J., in Hem Chunder Soor v. Kaly
Churn Das (3), and by this Court in Venkatratnam v. Reddiah (4).

The case of Kashi Nath Dass v. Harirar Mookerjee (5) may also be
referred to in support of the position that Section 93 of the Evidence Act
is not a bar to the admission of evidence of subsequent conduct and
surrounding circumstances for the purpose of showing that what on the face
of it is a conveyance is really a mortgage. As was observed, however, in the
case last referred to, it must be recalled that the rule "turns on the fraud
which is involved in the conduct of the person who is really a mortgagor,
and sets himself up as an absolute purchaser; and the rule of admitting
evidence for the purpose of defeating this fraud would not apply to an
innocent purchaser without notice of the existence of the mortgage,
which merely bought from a person who was in possession of the title-deeds
and was the ostensible owner of the property."

The respondent (plaintiff) in the present case claims possession of the
property as such innocent purchaser, whereas the appellants point out
that he is a near relation of first defendant and contend that the sale of
the land to him by the latter is merely collusive and intended to defraud
them.

The District Judge has not recorded any finding on the second issue,
but simply states that the appellants may "have been in enjoyment
throughout." If so, this and the fact of their being "still the pattadars"
are circumstances favourable to their contention that their property was
merely mortgaged and not sold outright to first defendant.

The Lower Appellate Court's decree must be set aside and the case
remanded for replacement on the file and disposal on merits. The costs
incurred hitherto will abide the result, and be provided for in the decree
to be passed by the Lower Court.

Muttusami Ayyar, J.—I come to the same conclusion. I desire,
however, to rest my decision on the ground stated by Lord Justice Turner
in Lincoln v. Wright (2). His Lordship said in that case "Without reference
"to the question of part performance on which I do not think it necessary
"to give any opinion, I think the parol evidence is admissible and is
"decisive upon the case. The principle of this Court is that the Statute of
"Frauds was not made to cover fraud. If the real agreement in this
case was that, as between the plaintiff and Wright, the transaction

(1) 4 B. 594.  (2) 4 De G. & J. 16.  (3) 9 C. 528.
(4) 13 M. 494.  (5) 9 C. 898.

764
should be a mortgage, it is in the eye of this Court a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud. Assuming the agreement proved, the principle of the old cases as to mortgages seems to me to be directly applicable. Here is an absolute conveyance when it was agreed that there should be a mortgage and the conveyance is insisted on in fraud of the agreement. The question then, as I view it, is whether there was such an agreement as this bill alleges, and, upon the evidence, I am perfectly satisfied that there was. Besides, the agreement for the mortgage was only part of an entire transaction, and the appellant cannot, as I conceive, adopt one part of the transaction and repudiate the other. Thus the ratio decidendi was that the conveyance formed only part of the real agreement, and that the oral agreement which gave a claim to equitable relief formed another part of the same transaction. Again, the ground for departing from the ordinary rule of evidence was subsequent unconscionable conduct in taking advantage of that rule and thereby endeavouring to mislead the Court into the belief that what was only an apparent sale, but a real mortgage was a real sale and not a mortgage. The fraud referred to by the Lord Justice was not fraud practised at the time when the document was executed, but the advancement of a claim in fraud of the true intention or the real agreement of the parties. It seems to me that Section 92 of the Evidence Act, as observed in Venkataratnam v. Reddiah (1), does not render evidence of the oral agreement inadmissible, for, if the real agreement were proved, it would invalidate the document as a deed of absolute sale within the meaning of the 1st proviso to Section 92 of the Evidence Act and constitute a ground for a Court of equity and good conscience giving effect to it only as a mortgage. Nor do I see my way to adopting the rule that a party should not first start his case with proof of a contemporaneous oral agreement and then confirm it by evidence of subsequent acts and conduct of the parties, but that he should prove the latter first and then proceed to prove the former. The subsequent acts and conduct are only indications of the contemporaneous oral agreement, and it is such agreement that is the real ground of equitable relief. Such a rule involves in it the anomaly that, while indirect evidence of the true agreement is admissible, notwithstanding Section 92, direct evidence of the same is not admissible. I do not, however, desire to be understood as saying that it would be safe to rely on the uncorroborated oral evidence of the contemporaneous oral agreement at variance with the terms of a document, but I think the absence of corroborative evidence in the shape of subsequent possession and conduct and other circumstances is an objection that ought to go to the credit due to the parol evidence and not to its admissibility. In the case before us, there was such corroborative evidence though the weight due to it was a matter for the Judge to determine. I concur in the remarks made by my learned colleague about a bona fide purchaser for value without notice or knowledge of the real agreement of the parties and in the necessity for a distinct finding on the 2nd issue and in the order proposed by him.

(1) 13 M. 494.
APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

RAYAKKAL AND OTHERS (Defendants), Appellants v. SUBBANNA (Plaintiff), Respondent. [21st and 27th July, 1892.]

Hindu law — Power of father over ancestral land — Gift to daughters.

A Hindu, during the infancy of his son, conveyed certain immovable ancestral property to his wife and married daughters by way of gift. After his death the son sued by his next friend to have these alienations set aside and to recover the property:

Held, that the alienations should be set aside altogether.

SECOND appeal by the defendants against the decree of D. Irvine, District Judge of Coimbatore, in appeal suit No. 124 of 1890, affirming the decree of V. Malhari Rao, District Munsif of Coimbatore, in original suit No. 604 of 1888.

The facts of the case are stated above sufficiently for the purposes of this report.

Seshagiri Ayyar, for appellants.
Bhashyam Ayyangar, for respondent.

JUDGMENT.

The plea that some of the items of plaint property were the self-acquisition of Palani Gounden does not appear to have been pressed before the District Judge and apparently there is no evidence in support of the contention.

The deeds of stridhanam executed to the two daughters were executed after their marriage, and without the consent of plain,[85]iff, who was a minor, and together with the deed in favour of first defendant, they amount to more than half of the ancestral property. No authority in support of a Hindu father’s power to make such an alienation of ancestral immovable property has been quoted at the bar, and we find that, in a similar case, the Allahabad High Court on the suit of a minor son held that such an alienation must be set aside, not only to the extent of the father’s share, but altogether Ganga Bisheshar v. Pirthi Pal (1).

The second appeal must be dismissed with costs.

* Second Appeal No. 1090 of 1891.
(1) 2 A. 635.

766
A debtor and the firm of which he was a member were adjudicated bankrupts in Mauritius and a receiver was appointed by the Court. Subsequently the creditors met and resolved that if the adjudication was annulled, a composition, payable by instalments, be accepted in full satisfaction of their debts, and that the security of the plaintiff's firm be accepted for payment of such composition, and that the bankrupts' estate be assigned to that firm, and that the plaintiff be appointed trustee to carry out such arrangement.

An instrument was executed to give effect to these resolutions and was conveyed by the receiver and approved by the Court, which annulled the adjudication and ordered that the bankrupts' estate in Mauritius and India vest in the plaintiff, who was appointed trustee to carry out the said composition with full powers of realisation. The plaintiff now sued to recover moveable and immovable property of the bankrupts in India.

 Held (1) that the above instrument was valid as a composition-deed and did not require to be stamped and registered as a conveyance; and that any surplus that might remain after payment to the creditors did not belong to the plaintiff's firm, but was subject to a trust for the bankrupts;

(2) that the plaintiff was entitled to a decree for the amount expended by him in payment of the creditors, together with such costs as were incurred by him in recovering debts due to the estate and could not be recovered from the debtors, and the costs of certain sales and a mortgage incurred in realisation of the estate;

(3) that the plaintiff was entitled to a decree for possession of the immovable property until the sum due is paid to him by the defendants or is satisfied out of the rents and profits of the property.

No order made by the Court at Mauritius can operate to transfer the ownership of immovable property in British India. So held, without deciding that the Court cannot compel the bankrupt when within its jurisdiction to execute in favour of the trustee such a deed as will, in accordance with the formalities of the local law, render the order of the Court effectual.

[Appeal against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in original suit No. 22 of 1888.]

Suit to recover moveable and immovable property.

Defendant No. 1 and the firm of which he was a member were adjudicated bankrupts in Mauritius and a receiver was appointed. Subsequently a composition-deed was entered into by the creditors and the adjudication was annulled, and the plaintiff was appointed trustee under the composition with full powers to realise the assets. The property now sought to be recovered formed part of the assets in India; some of it was in the possession of defendant No. 2.

The further facts of the case appear sufficiently for the purposes of this report from the judgment of the High Court. The fourth and ninth issues, which are particularly referred to therein, were framed as follows:

* Appeal No. 71 of 1890.
What is the value of the properties already entrusted to the plaintiff, and if such value were more than sufficient for the discharge of the debts undertaken by him, whether plaintiff is entitled to bring this suit?

Whether the defendant No. 2 is in possession of Rs. 10,000 outstanding and Rs. 4,000 profits recovered as alleged in the plaint?

The Subordinate Judge dismissed the suit in part and the plaintiff preferred this second appeal.

Mr. Grant and Mr. W. Grant, for appellant.

Mr. Johnstone and Mr. R. F. Grant, for respondents.

JUDGMENT.

On the 25th April 1887 the firm of Coo. Vytilingam and Company and Coo. Vytilingam (first defendant) personally were adjudicated bankrupts by the Bankruptcy Court of [37] Mauritius, and a Mr. Newton was appointed by the Court manager and receiver of the bankrupts’ property.

On the 23rd May 1887 Rungaswamy and three others, members of the firm of Coo. Vytilingam and Company, were adjudicated bankrupts, and Mr. Newton was appointed receiver.

On the 22nd July 1887 a meeting of creditors was called by Mr. Newton under the presidency of the Judge in Bankruptcy, and the creditors, by a majority in number and three-fourths in value, passed the following resolutions: (i) that a composition of 50 cents in the rupee be accepted in full satisfaction of the debts in principal and costs due to the creditors of the bankrupts, exclusive of all privileged costs and preferential claims which are to be paid in full, and on condition that the two orders of adjudication of 25th April and 23rd May last be annulled by the Court; (ii) that such composition be paid in eight equal monthly instalments; (iii) that the security of V. Subbarayan and Company (plaintiff’s firm) be accepted for the payment of the above composition, and that, in consideration of such security, all the joint and separate estate, effects, and property, both real and personal, of the firm of Coo. Vytilingam and Company and of the individual members thereof, situated in Mauritius and in India, be assigned to Subbarayan and Company; and (iv) that N. Subbarayan (plaintiff), the managing member of the firm, be appointed trustee to recover and realise all the estate, effects and property assigned as aforesaid and to carry out the above arrangements.

Mr. Newton, as trustee of the property of the bankrupts, accepted the above composition subject to the approval of the Court.

The same day a deed (Exhibit T) was drawn up and executed by Mr. Newton on the one part, Subbarayan and Company on the other part, and the bankrupts on the third part, giving effect to the above resolutions. This deed of composition was approved by the Court, the orders of adjudication of bankruptcy were annulled, and it was ordered that all the estate and property of the bankrupts, both in Mauritius and in India, be vested in N. Subbarayan, who was appointed a trustee to carry out the said composition with full power to recover and realise all the said estate and property.

The plaintiff has instituted the present suit to obtain possession of (i) nunja and punja lands, houses and gardens; (ii) jewels, cattle, vessels &c.; (iii) Rs. 10,000 outstanding; (iv) value of produce of lands; and (v) debts.
The Subordinate Judge of Kumbakonam gave the plaintiff a decree for the moveables and a declaration of title to items 195 and 200, but dismissed his claim in other respects. Plaintiff appeals.

It is first urged on behalf of the appellant that the Subordinate Judge is in error in holding that plaintiff cannot rest his claim on the order of the Bankruptcy Court of Mauritius set forth above. The respondents support the judgment of the Lower Court on the ground that, after annulling the adjudication, the Bankruptcy Court was functus officio, and had no jurisdiction to pass any further order vesting the property of the bankrupts in plaintiff, as the consequence of the order was to remit the bankrupts to their former status. We observe that the direction was part of the final order passed by the Court of Bankruptcy in the matter of the Bankruptcy of Coo. Vythilingam and Company and the partners of that firm, and that it was competent to the Court to give directions for the due execution of the composition-deed when annulling the adjudication of bankruptcy. Section 23 (2) of the English Bankruptcy Act of 1883 is as follows:—

"If the Court approves the composition, it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as the Court may appoint." We agree, however, with the Subordinate Judge that, for the purpose of deciding this question, the Court of Bankruptcy at Mauritius must be taken to be a foreign Court, and that no order passed by it could operate to transfer the ownership of immovable property in British India. The settled rule of law is that such transfer is governed by the lex loci rei sitae, and until a deed of transfer is effected in accordance with such law, the immovable property remains vested in the bankrupt. We are not, however, to be understood as deciding that the Court of Bankruptcy cannot compel the bankrupt when within its jurisdiction to execute in favour of the trustee such a deed as will, in accordance with the formalities of the local law, render the order of the Court effectual.

As regards the plaintiff's claim so far as it rests on the composition-deed (Exhibit T, which has been admitted in evidence in [89] this Court by our order on C.M.P. 399 of 1890), the question raised for our decision is whether it is a composition-deed or a conveyance in the sense in which the word is used by the Subordinate Judge. If it is a conveyance, the document would require registration, and the suit must fail for want of it. We are, however, unable to agree in the opinion of the Subordinate Judge that the document is a conveyance and not a composition-deed. His remark that the bankrupts were not parties to it is clearly inaccurate, for they signed the deed. The creditors were duly represented not only by Mr. Newton, but also by the plaintiff who guaranteed the payment of 50 per cent. which the creditors had agreed to accept in full liquidation of their claims. Mr. Newton was a necessary party to the deed, as it was executed during the pendency of the bankruptcy proceedings, and without his concurrence and the sanction of the Court the property could not have been transferred by the bankrupts. We consider that in order to decide the above question, we should have regard more to the substance of the transaction than to its form. The transaction substantially amounts to a transfer of their property by the debtors for the benefit of their creditors, and the intervention of Mr. Newton does not in our judgment alter the real nature of the transaction. As a composition-deed the document has been duly stamped as provided by Section 31 of Act I of 1879, and a composition-deed is by Section 17 (e) of
the Registration Act (Act III of 1877) exempted from registration. We are, therefore, of opinion that Exhibit T is valid as a composition-deed.

Another question urged upon us by the respondent's counsel is that the Subordinate Judge should have recorded a finding on the fourth issue, whether the value of the property already entrusted to plaintiff was more than sufficient for the discharge of the debts of the bankrupts. It is contended on the other side that no such finding is necessary, inasmuch as the decision of the Subordinate Judge is supported by that of the Bankruptcy Court in Mauritius, which adopted the principle laid down in *ex parte Wilcocks re Wilcocks* (1). Our attention has been drawn by the other side to the case of *Bolton v. Ferro* (2) and *Cooke v. Smith* (3), and it is argued that the assignment of the estate to plaintiff was not absolute but conditional, that it was made not for the benefit of plaintiff but as security for the payment of the creditors, and that a resulting trust in favour of the debtors must be implied. The case of *Bolton v. Ferro* (2) is not really in point, because that was a case of composition prior to bankruptcy, and the question was whether a creditor who had entered into a contract whereby, in consideration of the present payment of a composition on the rest of his debt, was entitled subsequent to the receipt of the amount of composition to the full benefit of his security. The Court (Bacon, V.C.) decided in the negative, and held that the surplus belonged to the estate of the debtor. In the course of his judgment, however, the Vice-Chancellor remarked: "If this had been a bankruptcy, "the trustee would have been entitled to the full benefit of the pledge." The same learned Judge decided *ex parte Wilcocks re Wilcocks* (1). In that case the debtor, alleging that he had no means of paying his debts, submitted his schedule to his creditors, who accepted a composition of two shillings in the pound. One Davies then took upon himself the burden and liability of paying the composition, and as consideration for that the creditors, who were entitled to the whole of the debtor's property, and the debtor agreed that all the assets of the debtor should be held by him. The Chief Judge held that no resulting trust appeared in the deed, and that it would be inconsistent with the transaction. But this decision was virtually overruled by the decision of the Court of Appeal in *Cooke v. Smith* (3), in which it was held that, although a deed, whereby debtors assigned the business and property of the firm to trustees upon trust, contained no ultimate declaration of trust for the assignors in case the property was more than enough for the payment of the debts, still, the object being the payment of debts, the transaction did not amount to a sale, but there was a resulting trust of any surplus in favour of the assignors. The remarks of Fry, L.J., are expressly applicable to this case. Referring to the deed executed in that case he said: "Is it a deed by which a firm "and their creditors agreed upon a certain mode of settling the debts and "nothing more—in which case there would plainly be a resulting "trust for the benefit of the assignors—or is it a deed by which the "firm sold their business to their creditors, or a deed by which they "agreed to give up their business by way of satisfaction and [91] accord "to their creditors, in either of which two cases it is of course plain that "the creditors, and they alone, are the owners." What was the object of the deed in this case? It was a deed for the benefit of creditors, and the presumption is that it was intended to pay their debts and nothing more. No doubt, a surplus was not contemplated, but it cannot have been intended

(1) 44 L.J. 12. (2) L.R. 14 Ch. D. 171. (3) L.R. 45 Ch. D. 38.
that should the debts be paid in full and a surplus remain that should pass to the guarantors. As soon as the debts are paid in full, the intention of the parties is fulfilled and there is a trust for the assignors. In this view we consider it necessary to ask the Subordinate Judge to return a finding on the fourth issue.

With reference to the claim for jewels, there is no reliable evidence in support of the plaintiff's claim, which was rightly disallowed by the Subordinate Judge.

As to the mortgages, only certified copies of the mortgage deeds were put in and there is no evidence on the record to enable us to come to a definite finding as to the validity or otherwise of the mortgage transactions.

With reference to the Rs. 10,000 which the second defendant is said to have recovered as the agent of the first defendant, second defendant admits the collection of Rs. 6,000 and pleads payment to first defendant. There is no evidence to show whether the money was collected after the vesting order, and in the absence of such evidence, we cannot press against the second defendant his omission to produce his accounts.

An account must be taken of the mesne profits of the land which admittedly came into second defendant's possession, and the case must go back to the Subordinate Judge for a finding on the fourth issue and the latter portion of the ninth issue.

Finding is to be returned within four months from the date of the re-opening of the Court and seven days after the posting of the finding in this Court will be allowed for filing objections.

In compliance with the above order, the Subordinate Judge submitted his findings.

This appeal having come on for final hearing, the Court delivered the following

JUDGMENT.

The Subordinate Judge has submitted a finding on the fourth and ninth issues. He finds that the value of the properties realized by the plaintiff in Mauritius, amounting to Rs. 17,274'24, has not sufficed to meet the expenditure on behalf of [92] the defendants, and that plaintiff has expended Rs. 12,722'82 out of his own pocket.

The plaintiff has put in a memorandum of objections, the Subordinate Judge having struck out of his account the sum of Rs. 24,309'35.

The first item disallowed is Rs. 5,850'21 paid to creditors. The Subordinate Judge appears to have disallowed these items, because they do not appear in the schedule of debts (Exhibit III) put in by the defendants, and because the plaintiff has not explained how the debts were incurred. The schedule was not referred to in the composition-deed, and the plaintiff undertook to pay not only the scheduled creditors, but all the creditors of the defendants' firm. Items 9 and 27 are bills made out in the name of the firm and are prima facie evidence of the firm's liability. The defendant, when in the witness-box, did not repudiate these items. Items 29, 30 and 25 are promissory notes and a cheque issued by the defendants. The holders have been paid and have granted their receipt. We do not understand the remark of the Subordinate Judge that the alleged payments are not true. The defendants have never repudiated their signature, nor called in question the payments made by plaintiff. Item No. 1, Rs. 1,027'07, are protest charges. The defendants failed to take up their bills when due and the bank protested them. The plaintiff had to pay
the protest charges to the bank, but came to terms with the bank and
paid less than was actually due. This accounts for the difference in the
figures referred to by the Subordinate Judge in paragraph 27. The sum
of Rs. 5,850'21 must, therefore, be allowed.

The Subordinate Judge has disallowed a sum of Rs. 125, Attorney's
costs. These costs were incurred in connection with the bill of Subbaraya
Chetty and Company, No. 27 above, and the bill having been allowed, the
Attorney's costs follow. The Subordinate Judge has disallowed an item of
Rs. 30'72, costs incurred by plaintiff in recovering rent due by certain
tenants. Plaintiff obtained a decree, but was unable to recover his costs,
which were allowed and certified by the Court. He is entitled to be
reimbursed.

We think the sum of Rs. 337'02, costs said to have been incurred in
resisting a claim for wages made by servants of defendants' firm, was
rightly disallowed, as the presumption is that [93] costs were recovered
from the unsuccessful party. The order of the Court as to costs is not on
the record.

The plaintiff cannot recover in this suit the costs incurred by him in
defending a suit instituted against him in the Courts at Mauritius by the
defendants. The decree being in his favour, he is at liberty to take out
execution. The item of Rs. 6,251'09 was properly disallowed.

As to the items included under general expenses, the Subordinate
Judge is in error in saying that a great many of them were incurred by
plaintiff after he launched this suit. All these sums were expended in
August, September and November 1887, and appear to be closely
connected with defendants' affairs. In paragraph 20 of his finding the
Subordinate Judge accepts the plaintiff's statement as to the sales of the
"Rabannes." The twelfth item of Rs. 10 are the costs of the auction
sales. Exhibit M shows that the Rs. 110 were paid to Mr. Jolliffe, a
Notary, for preparing a mortgage deed on the property of defendants at
Mauritius. The sum of Rs. 215'31 was wrongly disallowed.

It is not now contended that plaintiff is entitled to more than the
Subordinate Judge has allowed as personal expenses.

The result is that plaintiff is shown to have expended from his
own pocket Rs. 18,944'06. He is entitled, as the Subordinate Judge has
held, to interest on this sum from 1st December 1887 at 6 per cent. till date
of realisation. He is entitled to a decree for possession of the immove-
able property sued for until the sum due to him is paid by the defendants
or until the said amount is made good by the rents and profits of the
property, and, as he succeeds in this suit, he is entitled to his costs.
There will be a decree accordingly in modification of the decree of the
Subordinate Judge.
Certain land was mortgaged in 1876 to A, and on 10th February 1877 to B, and two days afterwards to C; the last-mentioned mortgage was effected to satisfy a decree obtained by A on his mortgage. In February 1882 C obtained a decree on his mortgage: this decree was discharged by the sale of the land to D, who borrowed part of the purchase money from the plaintiff to whom he mortgaged it on the day of the sale. B subsequently obtained against D and the mortgagor's representatives a decree on his mortgage, which comprised a declaration that the sale of 1882 was subject to his lien, and brought the property to sale and became the purchaser in execution.

The plaintiff now sued B and D on his mortgage:

Held, that the plaintiff's mortgage was entitled to priority over the mortgage of 10th February 1877 to the extent to which the loan secured thereby had gone to discharge the mortgage of 1876.

SECOND appeal against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in appeal suit No. 235 of 1888, affirming the decree of P. Dorasami Ayyar, Principal District Munsif of Trichinopoly, in original suit No. 287 of 1887.

Suit to recover principal and interest due on two instruments of mortgage (Exhibits C and D), dated, respectively, 8th February 1882 and 25th October 1883 and executed by defendant No. 1 in favour of the plaintiff. The latter of these mortgages was executed to secure repayment of a sum of money borrowed for the purpose of erecting a house on the mortgage premises. This house was comprised in the mortgage of 1883, but not in the previous mortgages to which the property had been subject.

The site of the house originally belonged to one Subba Royer, and in 1876 was mortgaged by him to Subbayyar. The mort- [95]gagor again mortgaged the same property to the present second defendant on 10th February 1877 and to one Swaminanda Ayyar on the 12th February 1877. The last-mentioned mortgage was effected for the purpose of satisfying a decree which had been obtained by the mortgagee on the instrument of 1876. Swaminanda Ayyar subsequently sued on his mortgage, and in February 1882 obtained a decree which was satisfied by the widow of the mortgagee with money obtained by the sale of the property to defendant No. 1, in whose favour she executed a sale deed on 8th February 1882. On the same day defendant No. 1 mortgaged the land to the plaintiff for Rs. 300, which went to discharge the judgment-debt, and subsequently mortgaged the house by the instrument of 1883 for a further sum of Rs. 300. In 1884 defendant No. 2 obtained a decree on his mortgage of 1877 against the mortgagee's widow and defendant No. 1, which, inter alia, declared that the sale of 1882 was subject to the mortgage sued upon:

*Second Appeal No. 1221 of 1890.
the decree-holder brought the property to sale in execution and himself became the purchaser.

Defendant No. 1 did not defend the present suit, and the plaintiff obtained personal decrees against him in both the Lower Courts, but the suit was dismissed as against defendant No. 2.

The plaintiff preferred this second appeal.

Krishnasami Ayyar, for appellant.
Subramanya Ayyar, for respondents.

This second appeal having come on for hearing before WILKINSON and SHEPHERD, J.J., the Court delivered the following

JUDGMENT.

The Courts below are clearly wrong in dismissing the suit altogether against defendant No. 2. There has been no decision in either Court on the question which properly arises.

The plaintiff claims on the footing of a mortgage of 1882, alleging that on the execution of that mortgage money was advanced to pay off Swaminada Ayyar’s mortgage of 1877, which mortgage was again executed to pay off Subbayan’s mortgage of 1876. The second defendant’s mortgage of the 10th February 1877 was prior to Swaminada Ayyar’s, but subsequent to Subbayan’s mortgage. What the plaintiff claimed was that he, having paid off the mortgage of 1876, was entitled to that extent to priority over defendant No. 2. The cases relied upon are Gokaldas Gopaldas v. Puranmal Premukhadas (1) and Rupabai v. Audimal (2). We must ask the District Judge to decide with reference to the law laid down in those cases and Section 101 of the Transfer of Property Act whether in fact the plaintiff’s money went in discharge of the mortgage of Swaminada Ayyar and whether Swaminada Ayyar’s money went in discharge of Subbayan’s mortgage, and, if so, whether the plaintiff is entitled to priority and to what extent. This has reference only to the house-site. With reference to the superstructure there was no second mortgage and therefore the plaintiff is entitled to a decree.

The finding is to be returned within six weeks from the date of receipt of this order, and seven days after the posting of the finding in this Court will be allowed for filing objections. Fresh evidence may be taken.

[In compliance with the above order the District Judge submitted his finding, which was to the effect that the plaintiff had advanced Rs. 300 under Exhibit C, the mortgage of 1882, for the purpose of discharging the decree which Swaminada Ayyar had obtained under the mortgage of 1877 and that Swaminada Ayyar’s judgment-debt had been partly discharged thereby, and that the plaintiff was entitled to priority to that extent over the second defendant.]

This second appeal having come on before COLLINS, C.J., and WILKINSON, J., for final disposal, the above finding was accepted and the decree modified accordingly.
License to occupy—Landlord and tenant—Notice to quit.

The plaintiffs who were mirasidars of a village permitted the defendants to occupy their land on the condition that they should do blacksmith's work for the plaintiffs. The defendants ceased to do the work after a time.

Held, that the plaintiffs were entitled to evict the defendants without notice to quit.

SECOND appeal by the defendants against the decree of T. Rama-sami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 425 of 1890, reversing the decree of T. Venkatarama Ayyar, District Munsif of Valangiman, in original suit No. 496 of 1889.

The facts of the case are stated above sufficiently for the purposes of this report.

Gopalasami Ayyangar, for appellant.
Desikachariar, for respondents.

JUDGMENT.

The only question raised in second appeal is whether second defendant is entitled to notice. We think not. The defendants were allowed to occupy on condition of doing certain work. It is found that they did work up to five years ago. On ceasing to do work they were liable to eviction without notice. It is not the case of a tenant but the case of a licensee. This case may easily be distinguished from those in Abdulla Rawutan v. Subbarayyar (1) and Subba v. Nagappa (2), as in both those cases there was an agreement to pay rent. Here there was no agreement to pay rent, but the mirasidars permitted the defendants to occupy a certain house site so long as they did work. This second appeal fails and is dismissed with costs.

VENKAYYA (Plaintiff), Appellant v. LAKSHMAYYA (Defendant No. 1), Respondent.† [13th and 15th September, 1892.]

Hindu law—Partition of part of family property—Suit for ejectment.

A Hindu sued for possession of a one-third part of a house, a portion of his family property. Defendant No. 1 claimed title from the purchaser at a court-sale, held in execution of a decree against the plaintiff's father, the other

* Second Appeal No. 393 of 1891.
† Second Appeal No. 1390 of 1891.
(1) 2 M. 846.
(2) 12 M. 359.
defendants were undivided brothers of the plaintiff. The title claimed by
defendant No. 1 was supported by the other defendants, but the plaintiff alleged
that the purchase at the court-sale had been made benami for him:

_Held, that the suit was not maintainable, being a suit for partition of a
specific item of the family property, but that the plaintiff might sue to eject
defendant No. 1 joining his own brothers as defendants.

SECOND Appeal by the plaintiff against the decree of C. Ramachandra
Ayyar, Acting District Judge of Nellore, in appeal suit No. 281 of 1889,
reversing the decree of V. Subramanya Ayyar, District Munsif of Ongole,
in original suit No. 455 of 1886.

The facts of the case are stated above sufficiently for purposes of this
report.
Anandacharlu and Krishnasami Rau, for appellant.
Subramanya Ayyar, for respondent.

JUDGMENT.

The District Judge has reversed the decree of the District Munsif on
the ground that a suit to enforce partition in a specific item of the
immoveable property of the family is not maintainable. We think this
decision is right. The general rule is that a suit will not lie for a partial
partition of family property. In this case the action is really one in
ejectment, and the plaintiff, if he established that first defendant is a
trespasser, can claim to eject him, notwithstanding that his brother
supports a false title which first defendant sets up.

The case is not similar to _Chinna Sanyasi v. Surya_ (1), as here there
has been no alienation by a co-partner to a stranger.

[99] The plaintiff, if he does not choose to sue for partition of the
whole estate, can sue to eject first defendant from the house, making his
brothers, who refuse to join as co-plaintiffs, defendants in the suit.

The second appeal fails, and we dismiss it with costs.

16 M. 99 = 3 M.L.J. 1.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Handley.

NATASAYYAN AND OTHERS (Defendants), Appellants v. PONNUSAMI
(Plaintiff), Respondent.* [2nd September and 7th October, 1892.]

_Hindu law—Son's liability for his father's debt—Immoral origin of debt—Limitation
Act—Act XV of 1877, Schedule II, Article 120—Suit by a decree-holder against the
sons of a deceased judgment-debtor whose property had passed to them.

A decree was passed against a Hindu for money dishonestly retained by him
from the plaintiff's family to which he was accountable in respect of it. The
judgment-debtor having died, the decree-holder sought to attach in execution
property of the family which had passed into the hands of his sons by survivor-
ship. The sons objected that such property was not liable to attachment, and

* Appeal No. 104 of 1891.
(1) 5 M. 198.
the decree-holder was referred to a regular suit. He now brought a suit against the sons:

Held, (1) that the suit was governed by Article 120 of the Limitation Act and that time began to run for the purposes of limitation from the death of the father;

(2) that the sons were not entitled to go behind the decree except for the purpose of showing that the judgment-debt was immoral or illegal in its origin;

(3) that the judgment-debt was not of an illegal or immoral nature so as to exclude the pious obligation of the sons to discharge it.


APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in original suit No. 56 of 1888.

Plaintiffs, Savaramithu Nadan and Susai Nadan were undivided brothers, who owned certain property. Part of this property and certain outstanding debts due to the family were sold in 1877 by Savaramithu Nadan to the father of the present defendants who realised the debts. The plaintiff, alleging that the sale by his brother was not binding on him, brought original suit No. 20 of 1879 on the file of the Subordinate Court of Negapatam against [100] the defendants’ father and obtained a decree, which was substantially confirmed by the High Court in 1883, for his one-third share of the land and of the sum realised on account of the costs and for costs. The then defendants died after decree, viz., in October 1884, and on an application being made for the execution of the decree against the property of the judgment-debtor, the sons objected that the property had passed to them and was not liable in execution. The plaintiff was thereupon referred to a regular suit and now sued in November 1888 to recover the sum decreed together with a certain sum to which he claimed to be entitled on account of mesne profits "from the defendants and on the liability of the family property which is in their hands." The Subordinate Judge dismissed the suit so far as concerned the last-mentioned claim, but otherwise passed a decree as prayed.

The further facts of the case appear sufficiently for the purposes of this report from the following judgment.

The defendants preferred this appeal.

Subramanya Ayyar, Mahadeva Ayyar and Krishnasami Ayyar, for appellants.

Bhashyam Ayyangar, for respondent.

JUDGMENT.

Defendants appeal against so much of the decree as makes them liable to pay to plaintiff out of their family property the sum of Rs. 4,002-15-1, together with further interest and proportionate costs. This sum represents items 1, 2, 3 and 4 in the plaint schedule. Of these items 1, 2 and 3 are sums awarded to plaintiff against defendants’ father Dorasami Ayyar by the decree in original suit No. 20 of 1879 on the file of the Subordinate Court of Negapatam as modified by the decree of the High Court in appeal No. 152 of 1882. Item 4 is the costs awarded to plaintiff against defendants’ father by the same decree. Defendants’
father died after the decree and plaintiff sought to execute the decree against the present defendants, but was referred to a regular suit, on the ground that defendants took the family property on the death of their father by survivorship and not as his representatives, and therefore the decree could not be executed against them as his representatives. Hence this suit, in which plaintiff claimed the items which have been decreed to him, and also certain sums on account of mesne profits of lands and a bungalow belonging to his family which were alleged to [101] have been for some time in possession of defendants' father. This latter part of his claim was disallowed.

The first question to be decided in this appeal is limitation. The Subordinate Judge holds that the suit is governed by Article 120 of Schedule II of the Limitation Act, which prescribes six years as the period of limitation for suits for which no period of limitation is prescribed elsewhere in the schedule. He holds that the cause of action arose on the death of defendants' father, which he finds to have taken place on 29th October 1884, and therefore the suit brought in 1888 is not barred. For appellants it is argued that limitation runs as to items 1, 2 and 3 from the time defendants' father became accountable for these sums, which, according to plaintiff's case, was in 1876, and that the period of limitation is three years under Article 62 of the schedule, and the suit is therefore barred. We think the Subordinate Judge was right in holding that the case was governed by Article 120 of the schedule. Article 62 clearly cannot apply, for the money sued for was not received by defendants, but by defendants' father. We can see no other article of the schedule that applies to the case. The suit is one of a special nature, founded on the pious duty imposed on sons by the Hindu law of discharging the debts of their father, other than those contracted for illegal or immoral purposes, and the necessity for the suit arises from the fact that the decree against the father, which might have been executed in his lifetime against the family property, can no longer be so executed after his death, the property having passed to his sons by survivorship. We hold, therefore, that six years is the period of limitation for this suit under Article 120 of the schedule. But this decision is not enough to settle the question, for if the cause of action arose at the date contended for by defendants' vakil, the suit would be barred as to items 1, 2 and 3 even if six years be the time prescribed. Article 130 gives as the time from which limitation begins to run 'when the right to sue accrues.' It is argued for appellants that the pious duty of sons to pay their father's debt begins as soon as the debt is contracted, or if the sons are born after the debt is contracted, with their birth, and therefore limitation begins to run from the date of the debt or the date of the son's birth according to circumstances. In support of the position that the son's pious obligation to pay the debt of the father arises at the date of the debt or of the birth of the son, [102] the case of Kunhali Bari v. Keshava Shanbaga (1) is relied on, and the point certainly does seem to have been expressly decided in that case in favour of appellants' contention. It is true that a dictum to the contrary at page 335 of the report of Arunachala v. Zemindar of Sivagiri (2) was not noticed in Kunhali Bari v. Keshava Shanbaga (1), but the judgment in this latter case is an exhaustive discussion of all the authorities as to the position of the son by Hindu law with regard to his father's debts, and it expressly negatives the contention there raised that the pious obligation of the

---

(1) 11 M. 64.
(2) 7 M. 328.
son to pay his father's debt arises only on the father's death (see page 67.) The authority of this case has not been questioned in later decisions, and it is conclusive upon the question. But we think it does not follow that, assuming that the pious obligation arises at the date when the debt was contracted or the son was born, limitation in the present case therefore runs from the same dates. The question under Article 120 of the second schedule to the Limitation Act is, when did the right to sue accrue, and in our opinion the right to sue accrued only on the death of the father. It must be remembered that suits like the present are of a peculiar nature, arising out of the fact that the family property, which might be made available for discharge of the father's debts in the father's lifetime by proceedings in execution of a decree against him, can no longer be made so available after his death, because the sons are not the father's representatives qua the family property. It is argued for appellants that plaintiff could have sued in the father's lifetime to have it declared that the shares of the sons were also liable to be taken in execution of a decree against the father and therefore plaintiff's right to sue accrued in the lifetime of the father. No doubt Ramakrishna v. Namasivaya (1) and other cases are authorities that a judgment-creditor who has sought to attach the sons' shares in execution proceedings under a decree against the father and been defeated on a claim by the son, can bring a suit to establish his right to proceed against the sons' shares in execution. But though plaintiff could bring such a suit, he need not do so if he can obtain his remedy against the sons' shares in execution and, moreover, such a suit is a very different one from the present suit. In such a suit the question would be whether, the liability of the father's [103] share being admitted, the sons' shares were also liable. In this suit the father's share having passed to his sons by survivorship, the liability of the whole property has to be established. In short, it is a suit sui generis, and in our opinion the right to bring such a suit accrues only on the death of the father, and limitation under Article 120 of Schedule II of the Limitation Act runs only from that date, and the suit is, therefore, not barred.

The next point taken on behalf of appellants is that they are not bound by the decree against their father, but it is open to them to question it not merely on the ground that the debts which were the subject of it were contracted for immoral or illegal purposes, but generally on every ground on which the father could have contested the suit. It appears to us that this view overlooks the nature and object of suits like the present. It is not a question whether the judgment against the father is a judgment inter partes and therefore not binding on the sons. It is settled law that in the father's lifetime the decree against the father could be enforced in execution against the sons' shares, and that they could only avoid liability to that decree by establishing the immoral or illegal nature of the debt. By the death of the father the creditor can no longer proceed against the sons' shares in execution, but must have recourse to a suit; but the object of that suit is the same as that of the proceedings in execution in the father's lifetime and the defence allowed to the sons can only be the same. Both to the suit and the proceedings in execution the sons might set up the defence of fraud or collusion between the father and the creditor; but apart from that, equally in the suit as in the execution proceedings the sons can only resist the liability of their shares.

(1) 7 M. 295.
to satisfy the decree against their father on the ground of the immoral or illegal nature of the debt. We think the Subordinate Judge was right in holding, as we understand he did hold, that defendants could not go behind the decree in this case except for the purpose of showing that the debt was immoral or illegal in its origin.

It is further contended for appellants that the claims 1, 2 and 3 against defendants’ father, a share of which has been allowed to plaintiff in this suit against defendants, were in their origin immoral and illegal. Our attention is not directed to any particular portion of the evidence upon this part of the case, but it is argued that the Subordinate Judge’s own findings show that the debts were tainted with immorality and illegality. What the Subordinate Judge’s findings came to is this, that the three items, 1, 2 and 3, in the plaint schedule were sums collected by defendants’ father on account of plaintiff’s family, but never paid to, or accounted for to, the family. No doubt this was a dishonest transaction on defendants’ father’s part, but the dishonesty is not of such a nature as absolves defendants from their pious obligation to discharge their father’s debts. Much has been said in the course of the argument as to the peculiar notions of Hindus as to what would amount to immorality or illegality in the origin of a debt, and allusion has been made to the exceptions to the rule of the pious obligation recognized by the commentators in the case of such liabilities as a toll or a fine. Without discussing the origin of these exceptions or the exact meaning that the words ‘immoral’ and ‘illegal’ bear to the minds of commentators on the Hindu law, it seems to us that there can be no question that debts of the nature of those found by the decree against defendants’ father to be justly due by him to plaintiff are not of an immoral or illegal nature, upon any reasonable view of the meaning of those words as used in the rule of Hindu law under consideration. That rule, as we understand it, is that sons are under a pious obligation to discharge the just debts of their father, because otherwise he would be liable to be punished in a future state for non-discharge of these debts. Upon any intelligible principles 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. The son is not bound to do anything to relieve his father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, viz., to restore to those lawfully entitled money he has unlawfully retained. In our opinion the contention of appellants on this point is opposed to all the principles upon which the rule of Hindu law rests, and we agree with the Lower Court that no such immorality or illegality in the nature of the original debts has been shown as would absolve defendants from their obligation to pay them out of the family property. Lastly, it is argued that at least item 4, the costs of the suit, is not binding on defendants. It follows from the view we have taken that defendants’ liability in this suit is the same as it would have been in execution proceedings, viz., to pay the decree amount; that they are also liable for the costs awarded by the decree.

On the whole the appeal fails and is dismissed with costs.

Plaintiff has filed a memorandum of objections in respect of that part of his claim which has been disallowed. It is not pressed except as to a sum of Rs. 304-15-6, the difference between the total claim in the plaint under the heads 1, 2, 3 and 4 and that which the Subordinate Judge...
finds would be the correct total. The Subordinate Judge, though he says plaintiff’s total is founded on a mistake, gives him only what he claims. It is admitted that it is a purely arithmetical mistake. We shall modify the decree by decreeing to plaintiff Rs. 4,307-14-7 and costs proportionate instead of Rs. 4,002-15-1. In other respects, the memorandum of objections is dismissed with costs.

16 M. 105 = 1 Weir 823.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Parker.

QUEEN-EMpress v. VIRAPERUMAL.*

[17th October, 18th November and 5th December, 1892.]

Oaths Act—Act X of 1873, Sections 5, 6, 7, 13—Examination as witness of a child of tender years—Intentional omission to administer affirmation.

A child, aged about six years, was called as a witness in a Sessions Court. The Judge satisfied himself of his intellectual capacity to give evidence, but intentionally omitted to administer an affirmation on the ground that he was of too tender years to render any attempt to bind his conscience expedient or practicably operative. The Judge did not examine the child for the purpose of eliciting whether he knew it was wrong not to tell the truth, or whether he knew the difference between right and wrong, but he told him to tell the truth and permitted him to be examined as a witness:

Held, that the child should have been affirmed.

Quere, whether the omission to affirm the child having been intentional on the part of the Judge, the case came within the provisions of Oaths Act, Section 13.

[R., 11 C.P.L.R. 16 (18) (Cr.) ; 10 O.C. 337 (340).]

[106] CASE referred under Criminal Procedure Code, Section 374,
by T. Weir, Sessions Judge of Madura.
Mr. J. G. Smith, for the prisoner.
Mr. K. Brown, for the Crown.
At the first hearing their Lordships directed the further examination of certain witnesses. This examination having taken place, the case now came on again for disposal.
The further facts of this case and the arguments adduced at the hearing appear sufficiently for the purposes of this report from the judgment.

Oaths Act, 1873, Sections 5, 6, 7 and 13 are as follows:—

Section 5.—"Oaths or affirmations shall be made by the following persons:—

(a) All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having, by law or consent of parties, authority to examine such persons or to receive evidence;

(b) Interpreters of questions put to, and evidence given by, witnesses;

and

(c) Jurors.

Nothing herein contained shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, or

* Referred Trial No. 36 of 1892.
necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Section 6.—Where the witness, interpreter or juror is a Hindu or Muhammadan, or has an objection to making an oath, he shall, instead of making an oath, make an affirmation. In every other case the witness, interpreter or juror shall make an oath.

Section 7.—All oaths and affirmations made under Section 5 shall be administered according to such forms as the High Court may, from time to time, prescribe.

And, until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use.

Explanation.—As regards oaths and affirmations administered in the Court of the Recorder of Rangoon and the Court of Small Causes of Rangoon, the Recorder of Rangoon shall be deemed to be the High Court within the meaning of this section.

[107] Section 13.—No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in, or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

The form of affirmation directed by the High Court under Section 7 to be administered to children is as follows:—

"I affirm that what I shall state shall be the truth, the whole truth and nothing but the truth."

JUDGMENT.

COLLINS, C.J.—The accused Viraperumal Asari has been convicted of the murder of a boy named Vellayan, aged three years, on the 3rd June 1892 and sentenced to death. Viraperumal Asari was on a visit to the boy’s parents and had been living in their house for some weeks.

On the 3rd June the father of Vellayan went to work at a village some miles from his home. His wife brought him his meals at midday, and at three o'clock after sunset he returned to his village. On his way home he was met by his wife, who informed him that the child was missing. He searched for the child that evening, but with no result. Next morning he renewed the search and passing by a well some three-quarters of a mile from his house discovered the body of his son floating in the water. He took the body from the well and discovered that the jewels usually worn by the child were missing, viz., a kapu, silver waist cord and toe ring. The neighbours soon assembled at the place, and the police being sent for arrived about noon. An inquest was held that same afternoon, apparently at some place near the well where the body was found, and the corpse was afterwards sent to the Hospital Assistant at Dindigul, who was examined before the Sessions Judge and who had no doubt that the cause of death was drowning.

At the inquest the police examined a boy named Arumugam, aged about six, a cousin of the deceased and he said that he saw the accused taking Vellayan along the path to the dhobi’s house towards the north, and he pointed out the accused who was standing near. The accused was then arrested and remained in the custody of the police that night. Early
the next morning the police brought the accused to the Village Munisif. The Village Munisif, in the presence of the police, questioned him, and the accused said the jewels were at Tandavan Asari’s stack and he would produce them. The accused accompanied by the Village Munisif, the police and others went to this stack and took out a knot of cloth from the stack. The cloth upon being opened by the Munisif contained a silver bangle, a silver waistcord and a toe-ring. These articles were identified as those worn by the deceased boy.

The fourth and fifth prosecution witnesses say that, on the afternoon the child was missed, they were working at a forge and they saw the accused with the child Vellayan pass by about 4-30 P.M. and going in the direction of the well where the body was found, and the seventh and eighth prosecution witnesses say that they also saw the accused and the child a little further on than the place spoken of by the fourth and fifth prosecution witnesses. The Sessions Judge says that this group of witnesses is of a class not unfrequently open to suspicion and he further says that the object is to complete what is regarded by the police or prosecution as links in a chain of evidence. If this suspicion is correct, viz., that the police obtained the evidence of these witnesses by improper means for the purpose abovementioned, of course their evidence is worthless; but I am inclined to believe the witnesses, more especially as the Sessions Judge is not under the circumstances of the case prepared to reject it as unreliable. The other witness for the prosecution is Arumugam, said to be six years of age, who is described by the Sessions Judge as a “very young child—seems unusually intelligent.” This witness was told to tell the truth, but was not sworn in or examined for the purpose of eliciting whether he knew it was wrong not to tell the truth or whether he knew the difference between right and wrong, and the Sessions Judge says the witness was of too tender years to render any attempt to bind his conscience expedient or practically operative. The printed copy of the evidence of this little child is, if reliable, conclusive of the fact that on the day in question between 4 and 5 P.M. the accused took the deceased boy from his playmates and led him away. It would have been more satisfactory to me, however, if Arumugam’s evidence had been taken down by way of question and answer. This is practically the case on the part of the prosecution. The accused stated before the Committing Magistrate that on the day in question he was working with his aunt’s husband Tandavan Asari at smith’s work until sunset and denied that he took the silver articles named from the stack. The accused called Tandavan Asari before the Sessions Judge. This man was the father of Arumugam and the owner of the stack where the jewels were found, and he denies that the accused was working with him on the day named and in cross-examination he states that the accused did produce the jewels from the stack.

The counsel for the accused in the High Court argued that the evidence of the Village Munisif, ninth prosecution witness, and the police constable, tenth prosecution witness, to the effect that Arumugam stated, at the well that Viraperumal took the deceased child away and pointed out accused as Viraperumal and after that the Mahazar was written, ought not to be believed as the Mahazar states in answer to question 11. “If any persons are suspected who? and why?”—A. “Suspicion not known”; and it was impossible to believe that if Arumugam made the statement alleged and pointed out the accused and in consequence the accused was taken into custody that fact would not appear in the Mahazar; and that the
prosecution witnesses 4, 5, 7 and 8 are not trustworthy and the details of their evidence as to distances are not in accordance with the facts. It was also urged that Arumugam not having been affirmed, his evidence was not admissible. The High Court directed the case to be sent back to the Sessions Judge to re-examine some of the witnesses for the prosecution as to the time the Mahazar was written, the distances spoken to and to enquire whether Arumugam affirmed before he gave his evidence and to give his opinion upon the additional evidence. The re-examination of the witnesses does not throw much more light upon the case, but I think that the Sessions Judge’s opinion is right that the Mahazar was made out before, but not signed until after the witness Arumugam had made his statement. The Mahazar is on the common printed form, and, as the proceedings took place under a tree and a heavy shower of rain came on, the witnesses got away as quickly as possible and are not strictly accurate as to the sequence of events. With regard to the evidence of some of the witnesses as to how far one spot is from another, the Sessions Judge points out that uneducated witnesses in this country, especially in Madura, have little idea of distance or time, usually pointing to an object to determine the one and the heavens to determine the other.

The other point to be considered is whether the evidence of Arumugam is admissible, the Sessions Judge having intentionally declined to affirm the boy on the ground that he was of too tender years to render any attempt to bind his conscience expedient or practically operative. Act X of 1873, commonly called the Oaths Act, is the Act that governs the procedure as to administering oaths and affirmations, and by Section 5 it is enacted that oaths or affirmations shall be made by all witnesses, i.e., all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court...having by law...power to receive evidence, and by Section 7 all oaths or affirmations made under Section 5 shall be administered according to such forms as the High Court shall, from time to time, prescribe. The High Court of Madras has directed certain forms to be used and especially one form of affirmation to be administered to children of tender age. Section 13 enacts that no omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place.

In Queen v. Mussamut Itwarya (1) the question decided on this point was whether the evidence of a witness taken on simple affirmation only was admissible, and Kemp and Birch, JJ., held, inter alia, that the Sessions Judge being of opinion that the witness was not aware of the responsibility of an oath, examined her on simple affirmation and the omission to examine the witness on oath or solemn affirmation was an omission which was knowingly made by the Judge and it cannot be said that because the omission was knowingly made it renders the evidence inadmissible under Section 5, for Section 13 says no omission of any kind shall render the evidence of a witness inadmissible. But the same learned Judges in the case of Queen v. Anunto Chuckerbutty (2) held as appears by the report as follows:—“It does not appear to me that this section (Section 13) would render the evidence of a child nine years old, whose evidence as in this case has been advisedly, and not by omission, recorded without any oath or affirmation,

(1) 14 B.L.R. 54.

(2) 14 B.L.R. 295.
admissible as evidence." In consequence of this decision Queen v. Sewa Bhogta (1) was referred to a Full Bench and Couch, C.J., Kemp, Phear and Markby, J.J., held—the case being decided [111] without argument—that the word "omission" in Section 13 of Act X of 1917 includes any omission and is not limited to accidental or negligent omission. Jackson, J., dissented from the other members of the Bench. The judgment of the Chief Justice is very short and simply says that the word "omission" in Section 13 includes any omission and is not limited to accidental or negligent omissions. Jackson, J., was of opinion that Section 13 was intended to obviate the effect of any evasion on the part of witnesses or mistake on the part of officers of the Court, and not to give a power to Judges or Magistrates to render the whole Act as it were ineffectual by perversely or erroneously ordering that witnesses should not take an oath or affirmation.

In a very recent case Queen-Empress v. Shava (2) at a trial on a charge of murder one of the prosecution witnesses was a girl, ten years old. The Sessions Judge allowed her to be examined without administering any oath or affirmation. Jardine, J., held that although the girl ought not to have been examined as a witness until she had made the proper affirmation, yet that the irregularity was saved by Section 13. Parsons, J., declined to deal with this question at all, but, as there was other evidence, concurred in confirming the conviction for murder.

The Judges of the Allahabad High Court differ from the decision of the Calcutta Full Bench. Mr. Justice Mahmood in Queen-Empress v. Maru (3) in a very able judgment in which the English as well as the Indian cases are reviewed, came to the conclusion that Section 6 of the Oaths Act, 1873, imperatively requires that no person shall testify as a witness, except upon oath or affirmation, and notwithstanding Section 13 of the same Act the evidence of a child, 8 or 9 years of age, is inadmissible if it has been advisedly recorded without any oath or affirmation; and in Queen-Empress v. Lal Sahai (4) Straight and Tyrrell, J.J., agreed with Mahmood, J., that the evidence of a witness is inadmissible if the Court advisedly declines to administer to such witness an oath or affirmation. In Queen-Empress v. Perumal (5) the same [112] point arose, and Sir T. Muttusami Ayyar and Wilkinson, J.J., held that, although the Sessions Judge was in error in not administering an oath or affirmation, the irregularity was cured by Section 13 of the Oaths Act. This judgment was delivered during the time the present case was under the consideration of Parker, J., and myself.

Section 118 of the Indian Evidence Act, 1872, enacts that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions by tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. Every person, with the above exceptions, is therefore competent to give evidence.

(1) 14 B.L.R. 294. (2) 16 B. 359. (3) 10 A. 207. (4) 11 A. 183.

16 M. 111-N = 1 Weir 827-N.

(5) Referred Trial No. 40 of 1895; JUDGMENT.—"The Sessions Judge reports that the omission to administer an affirmation to the second witness Kuliammal was deliberate, as he thought the child was of too tender years to render any attempt to bind her conscience expedient. We have, no doubt, that the Sessions Judge was in error and that the girl Kuliammal ought not to have been examined as a witness until she had made the necessary affirmation. But we agree with the Calcutta and Bombay Courts that Section 13 of the Oaths Act includes any omission and that the irregularity was saved thereby.

M V—99

785
The Oaths Act X of 1873 by Section 5 enacts that oaths or affirmations shall be made by the following persons:—(a) “all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having, by law or consent of parties, authority to examine such persons or to receive evidence.” The law then stands thus. All persons are (with certain exceptions) competent to give evidence: all witnesses who may lawfully be examined shall make an oath or affirmation. But it is said that Section 13 of the Oaths Act absolutely cures any omission or refusal to administer any oath or affirmation, and a Judge may advisedly refuse to administer to any competent witness any oath or affirmation and such evidence although not given upon oath or affirmation is admissible in evidence. I am of opinion that a witness’ evidence taken under such circumstances as in the present case is not admissible. The Sessions Judge refused to administer any oath or affirmation, and it cannot, therefore, be said that he merely omitted to administer such oath or affirmation. That the action of the Sessions Judge in not administering an oath or affirmation was irregular admits of no doubt, but the question is was the irregularity cured by Section 13 of the Oaths Act.

I agree with Jackson, J., that the Judge having been directed by law to examine the witness in question upon affirmation and having determined that he would not administer such affirmation, the witness has been examined contrary to law and the evidence is inadmissible (Queen v. Siva Bhogta (1)). It may be argued that it is the policy of the Indian legislature not to allow any technicality or mere omission to interfere with the decision of a competent Court, e.g., Section 195 of the Code of Criminal Procedure enacts that certain offences shall not be cognizable by a Court unless a previous sanction, as therein defined, is given, yet Section 537 says that no finding or sentence passed by a Court of competent jurisdiction shall be reversed by the want of any sanction required by Section 195 unless a failure of justice is occasioned thereby; but can it be said that a conviction would be legal if a previous sanction had been asked for and refused on the ground that no such sanction was necessary? It is clear that there is a difference between acts of omission and acts of commission, and as Section 13 only mentions acts of omission, I decline to extend the section to acts of commission.

I am, however, of opinion that the evidence in the case, apart from that of the child Arumugam, justifies the conviction of the accused for the murder of Vellayan, and I would, therefore, confirm the conviction, but, taking into consideration the youth of the accused, and that it is possible the murder was not a premeditated one, but was committed on account of a sudden temptation to possess himself of the boy’s jewels, I would alter the sentence to one of transportation for life.

PARKER, J.—The Sessions Judge has re-examined prosecution witnesses 4, 5, 9 and 10 as to the omission of the mention of suspicion against the prisoner in the inquest report, and has also re-examined the seventh witness as to the exact spot where he alleges he saw the accused and the boy. The Mahazur filled up was the usual printed form supplied to Station House Offices, and I am of opinion that the Judge is right in his opinion that this must really have been filled up before the boy Arumugam pointed out the prisoner. Had such not been the case there is no reason whatever why the fact should not have been recorded in the Mahazur.

(1) 14 B.L.R. 294.
The truth seems to be that the boy was questioned after the Mahazur was written and before it was signed,—but just at that moment heavy rain came on, so the Mahazur was hastily signed and the information given by the boy recorded on a separate piece of paper.

Nor do I see sufficient reason to doubt the evidence of the two dhobies. They are uneducated people and their inaccuracy in calculating and expressing distances in English measurements is [114] not a sufficient reason for discrediting the general truth of their testimony.

The third ground of objection taken by the learned counsel was as to the admissibility of the evidence of the boy Arunugum on the ground that he had not been affirmed. In answer to our inquiry the Sessions Judge has explained that he intentionally omitted to administer an affirmation, as it appeared to him that the child was of too tender years to render any attempt to bind his conscience expedient or practically operative. By this I understand the Judge to mean that he believed the child too young to understand the nature of an oath or affirmation and the consequences attaching to a breach thereof. The Judge did enjoin the child to tell the truth and in that manner attempt to impress upon him his obligation as a witness.

The Judge states that he fully satisfied himself of the intellectual capacity of the child to give evidence, and the child was, therefore, a competent witness under Section 118 of the Evidence Act. Under Section 5 of the Indian Oaths Act an affirmation should have been administered, and the question for consideration is whether, with reference to Section 13, Act X of 1873, the omission or irregularity renders the child’s evidence inadmissible. The earliest case on the question is Queen v. Mussammat Itwarya (1). That was a case in which the Sessions Judge examined a little girl on simple affirmation being of opinion from the answers given by her that she was not aware of the responsibility of an oath. It was held by the Court (Kemp and Birch, JJ.) that the evidence was not rendered inadmissible, because the omission was knowingly made, and that the credibility of the evidence had been rightly left to the Jury.

A few months afterwards a similar case occurred and the question was referred to the Full Bench by Couch, C.J., and Ainslie, J., whether the word "omission" in Section 13 included any omission and was not limited to accidental or negligent omissions. It was held by the Full Bench (Couch, C.J., Kemp, T’hear and Markby, JJ.) that the word included any omission, but Mr. Justice Jackson dissented from this opinion (Queen v. Sewa Bhogta (2)).

In 1888 the question was raised at Allahabad before a single Judge (Mr. Justice Mahmood), who held (Queen-Empress v. Maru (3)) that a witness who, by reason of tender age or want of previous instruction, had no conception of the obligations of an oath, whether with respect to a future life or to the punishment for perjury, could not be regarded as competent to give evidence legally admissible. On this ground he held the evidence of the child-witness to be inadmissible, though he also dissented from the view of the Calcutta Full Bench in Queen v. Sewa Bhogta (2).

This opinion of Mr. Justice Mahmood was considered by a Divisional Bench of the Allahabad High Court in Queen-Empress v. Lal Sahai (4) (Straight and Tyrrell, JJ.). It was then held (contrary to the opinion of

---

(1) 14 B.L.R. 54.
(2) 14 B.L.R. 294.
(3) 18 A. 207.
(4) 11 A. 183.
Mahmood, J.) that in determining the question of the competency of a witness under Section 118 of the Evidence Act, it was not necessary to enter into inquiries as to the witness' religious belief or his knowledge as to the consequences of falsehood in this world or in a future state. It was held that if a child was possessed of sufficient intellectual capacity to give a rational and intelligent account of what he had seen or heard or done on a particular occasion, his competency as a witness was established and the question of the credibility to be attached to his statements only arose when he had given his evidence. In that case the child had stated to the Sessions Judge that he knew the difference between truth and falsehood, but did not know the consequences here or hereafter of telling lies—but he promised to tell the truth. The High Court held that the Sessions Judge ought to have solemnly affirmed him, but without expressly deciding the question as to the effect of Section 13 of the Oaths Act sent for the witness and took his evidence afresh.

In Bombay the point came recently before a Division Bench (Jardine and Parsons, JJ.). The former concurred with the view of Chief Justice Couch and his colleagues at Calcutta that the irregularity, though intentional, was covered by Section 13. He pointed out, however, that the irregularity was serious inasmuch as it might lead to the Judge failing to make proper inquiry into the intellectual capacity of the child. Mr. Justice Parsons abstained from expressing any opinion inasmuch as he considered there was sufficient evidence, independently of that of the child, to prove the guilt of the accused.

[116] Finally there is the judgment of this High Court (Queen-Empress v. Perumal (1), in which it was held by Sir T. Muttusami Ayyar and Wilkinson, JJ., that though a girl-witness ought to have been affirmed the irregularity was covered by Section 13.

I do not myself feel any doubt that the evidence is admissible and the weight of judicial authority appears strongly to support this view. Section 13 of the Oaths Act is only one of many instances indicating the settled policy of the Indian legislature to prevent justice being defeated by a technical irregularity. It maintains the legal obligation of a witness to speak the truth, while at the same time it provides against the possible failure of justice through a technical irregularity. Under Section 118 of the Indian Evidence Act no sort of religious belief or knowledge of temporal penalties is required from a witness. All that is necessary is rational understanding and power to answer rationally, and though an oath or solemn affirmation is prescribed, the omission to take it will not relieve the witness of the legal obligation to state the truth. It is obvious that it may be impossible for the witness to know whether the omission to affirm him is intentional or an oversight, and if the mental perversity of the Magistrate (of which the witness may know nothing) does not destroy his legal obligation to state the truth, why should it render his evidence inadmissible and thus defeat the ends of justice? What could have been the object of the legislature in maintaining the obligation to state the truth if the statement when made was not to be used as evidence? In the present case the Judge was careful to satisfy himself as to the competency of the witness under Section 118 of the Evidence Act, and though he, for a mistaken reason, omitted to affirm him, I do not think the evidence is thus rendered inadmissible.

(1) Referred Trial No. 40 of 1892 (16 M. 111, supra).
This evidence is material also,—for though there is other evidence that the deceased boy was in company with the prisoner,—the witness Arumugam is the only one who speaks to the prisoner having led him away. The statement by the boy appears to have been made quite spontaneously and naturally, and it would have been difficult if not impossible to have tutored the child to make such a statement. It was his statement which led to the arrest of the prisoner and to the pointing out of the jewels.

[117] It is the evidence on this latter point which appears to me to fix the guilt upon the prisoner. Had he not been really guilty, the discovery of the jewels by his agency would seem to have been impossible.

As to the sentence the accused is a mere youth and a relative. The murder does not appear to have been premeditated, and I am inclined to think the prisoner may have yielded to sudden impulse and temptation when he found himself alone in the company of his little cousin. Having regard to his youth and the time that has elapsed, I think we may perhaps be justified in commuting the sentence to transportation for life and I would order accordingly.

18 M. 117.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

ATCHAYYA (Plaintiff), Appellant v. BANGARAYYA AND ANOTHER (Defendants), Respondents.*

[29th March and 29th April, 1892.]

Civil Procedure Code, Sections 13, 272—Execution proceedings—Res judicata—Matter which ought to have been raised as a ground of defence

A and B obtained a decree against X and Y, on which about Rs. 9,000 was due. Z obtained a decree against A and B, on which about Rs. 6,400 was due, and in execution attached the first-mentioned decree. A and B alleged in the matter of the execution of their decree for the first time, that the suit against them had been instituted really by X though in the name of his son Z, and consequently contended that the decree amount, which they paid into Court, was the property of X and so liable to satisfy their claim. The above allegation was substantiated and Z’s claim on the money in Court was disallowed on appeal:

Held, (1) that A and B were not precluded from asserting their claim to the money in Court by reason of the above allegation not having been made by way of defence to the suit of Z;

(2) that A and B were entitled to enforce any claim, which X might enforce, for the purpose of satisfying their decree, and accordingly that Z’s claim on the money in Court was rightly disallowed.

[R., 19 A. 517.]

APPEAL against the order of H. R. Farmer, District Judge of Vizagapatam, dated 19th February 1891, and made on civil mis-[118]cellaneous petitions Nos. 16 and 23 of 1891 in execution of the decree passed in original suit No. 10 of 1886 on the file of the District Court of Vizagapatam, and petition under Civil Procedure Code, Section 622, praying the High Court to revise another order made by him on civil miscellaneous petitions Nos. 76 and 100 of 1891, and dated 25th March 1891 in execution of the decree in original suit No. 8 of 1886.

* Civil Revision Petition No. 298 of 1891 and Appeal against Order No. 96 of 1891.
In original suit No. 3 of 1886 on the file of the District Court of Vizagapatam, the present respondents obtained against two persons, one of whom was the father of Achayya, a decree for land with mesne profits and costs, on which about Rs. 9,000 was now due. In original suit No. 10 of 1886, Achayya obtained a money decree against the present respondents, on which Rs. 6392 was now due and in execution attached the decree in the first mentioned suit. The above petitions were presented to the District Court in the matter of the execution of the decrees in both suits.

The present respondents alleged that the second suit had really been brought by Achayya’s father in the name of his son, and they paid into Court the amount due on the decree against them, and prayed that it should be kept in deposit pending the determination of their claim to it as money of their judgment-debtor.

The District Judge held on the authority of Luckmidas Khimji v. Mulji Canji (1) and the cases there cited, distinguishing Ramphal Rai v. Ram Baran Rai (2) and Subramanian Pattar v. Panjamma Kunjamma (3), that it was open to the defendants in the second suit to show that the amount due on the decree was the property of their judgment-debtor, although the question of Achayya’s right to maintain the suit against them had not been raised by way of defence, and he held on the evidence that their allegation was substantiated, and consequently disallowed Achayya’s claim on the money in Court.

Achayya, the decree-holder in original suit No. 10 of 1886, preferred the above-mentioned appeal and petition to the High Court.

Rama Rau, for appellant.
Subramanya Ayyar, for respondents.

JUDGMENT.

BEST, J.—The appellant and petitioner Achayya Gurun obtained, in original suit No. 10 of 1886 on the file of the Vizagapatam District Court, a decree for money against the respondents, while the latter obtained, in original suit No. 3 of 1886 of the same Court, a decree for land, mesne profits and costs against the appellant’s father and another. The amount due to appellant under his decree was Rs. 6392, whereas that due to respondents under their decree against appellant’s father is nearly Rs. 9000. Respondents tried to get the amount due from them to appellant set off in part satisfaction of the amount due to them from appellant’s father; but this was disallowed on the ground that appellant is not a party to the respondent’s decree, and as respondents were unable to execute their decree against appellant’s father in consequence of the appellant having attached the same in execution of his decree, the respondents paid into Court the amount due under the latter decree, and asked that this money might be kept in deposit, pending disposal of their claim to the same, as being money really due to their judgment-debtor, who had obtained in his son’s name the claim on which was obtained the decree in original suit No. 10 of 1886, in which suit, they say, the father was the real plaintiff though it was brought in the name of the son. The District Judge, without deciding the question whether the money was in fact due to appellant or his father, ordered attachment of the same under Section 272 of the Code of Civil Procedure, observing that the “deceaseholder in original suit No. 10 of 1886 will have an opportunity either under

(1) 5 B. 295 (325).
(2) 5 A. 59.
(3) 4 M. 324.
Section 244 or 278 of showing that he is the real, as well as the nominal, owner of the decree amount in that suit."

It is contended on behalf of the appellant that respondents are not at liberty to set up in execution proceedings a claim which they might have set up as a plea in the suit. They certainly might, as defendants in the suit, have pleaded that the suit was not maintainable by the appellant, as his father, and not himself, was the real purchaser of the claim against them upon which the suit was brought. They might have done so, and had they so done the father might have been included as a party to the suit and the complications which have since arisen might have been thus avoided. But I do not think the omission to raise this plea in the suit is fatal to the present claim. It must be remembered that the respondents are minors and consequently can have had no personal knowledge of the facts, and it is quite probable that their guardian ad litem was not sufficiently well informed of the facts to be able to object to the suit on this ground, as the document on which it was brought stood in the name of the then plaintiff. Though this might have formed a ground of defence in the suit, I am unable to say that it is a plea that ought to have been then raised. I would, therefore, disallow the objection that the claim now set up by the respondents is barred by Section 13 of the Code of Civil Procedure.

As the question, whether the money in deposit belongs to appellant or his father, is one between the parties to the appellant's decree (No. 10 of 1886) and relates to the execution of that decree, the Judge should have decided it in these proceedings. Consequently if nothing further had been done in the matter, it would have been necessary to remand the case for a finding as to the ownership of this money. But there has been an enquiry subsequently and the Judge's finding is that the money, in fact, belongs to appellant's father, and that the assignment of the claim on which the suit No. 10 was brought was obtained by the father merely in the son's name. Vide the Judge's finding of 25th March 1891 in proceedings in re the present appellant's petition No. 100 of 1891, to which these respondents were also parties. The Judge has given valid reasons for the finding at which he has arrived.

I would therefore dismiss with costs both the appeal and petition.

MUTTUSAMI AYYAR, J.—I come to the same conclusion. I was at first inclined to think that the decision in original suit No. 10 of 1886 was conclusive in regard to the ownership of the money decree as due by respondents to appellant and petitioner Achayya. It is no doubt so for the purposes of that suit and of the execution of the decree passed therein. The appellant's father was, however, not a party to that suit, and it was open to him to satisfy the decree passed against him in original suit No. 3 of 1886 with the money decreed to his son if it really belonged to him, and if he only caused the son to obtain a decree upon a promissory note taken in his name, but really for the father's benefit and with the father's money. As execution-creditors in original suit No. 3 of 1886, the respondents might enforce any claim which the father, their judgment-debtor, might enforce for the purpose of obtaining satisfaction of their decree. In attaching, therefore, the money standing to the credit of original suit No. 10 of 1886, the respondents only exercised their right as execution-creditors in original suit No. 3 [121] of 1886 to enforce a claim which their judgment-debtor had, and this claim which they derived from their judgment-debtor existed, notwithstanding the decree in original suit No. 10 of 1886, and was not
extinguished by it inasmuch as the father was no party to it. This being so, the only other question for decision is whether the finding of the Judge that the money attached really belonged to the father is correct. I agree with my learned colleague that it is fully supported by the evidence recorded at the subsequent enquiry held in connection with petition No. 100 of 1891.

I would also dismiss the appeal and the petition with costs.

16 M. 121=2 M.L.J. 281.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

PERUMAL (Defendant No. 2), Appellant v. KAVERI AND OTHERS (Plaintiffs and Defendant No. 1), Respondents.*
[16th May and 1st September, 1892.]

Mortgagor and mortgagee—Purchase by first mortgagee—Suit by second mortgagee—Inconsistent cases set up in the alternative—Relief not asked for—Practice.

Defendant No. 1 mortgaged certain premises to defendant No. 2 in 1884 and to the plaintiff in 1885. The mortgage to the plaintiff was a usufructuary mortgage. In 1887 defendant No. 2 obtained a decree on his mortgage, and in execution brought to sale and himself became the purchaser of the mortgage premises. The plaintiff, who was in possession under the mortgage of 1885, prayed in this suit that the prior mortgage be declared fraudulent and void, and the sale in execution be set aside, and in the alternative that she be declared entitled to redeem the prior mortgage. The plaint was stamped as in a redemption suit and the Court of first appeal passed a decree for redemption:

Held, that the suit should be dismissed, since after the sale of the mortgage premises in execution of the decree obtained by defendant No. 2, the only right which remained to the plaintiff mortgagee was the right to retain possession until her mortgage should be redeemed.

Semple per BEST, J.—It is open to a plaintiff who is not a party to the transaction in respect of which allegations are made to come into Court seeking relief in the alternative, dependent upon what may be found by the Court to be the true facts of the case.

Quo Ir: Whether the Court can pass a decree for redemption when the plaint seeks only a declaration of the right to redeem.

[R., 29 B. 153; 11 C.P.L.R. 75 (76); 16 C.P.L.R. 168; 5 Ind. Cas. 745 (746)=6 N.L.R. 33; 21 M.L.J. 213=9 M.L.T. 431=(1911) 1 M.W.N. 165 (176); D., 17 M. 62.]

[122] SECOND appeal against the decree of C. Verkobachariar, Subordinate Judge of Madura, West, in appeal suit No. 348 of 1891, reversing the decree of T. Sadasiva Ayyar, District Munsif of Madura, in original suit No. 222 of 1889.

Plaintiff No. 1 (whose son, plaintiff No. 2, was brought on to the record in the course of the suit) claimed as a usufructuary mortgagee in possession under a mortgage, dated 24th April 1885, and executed in her favour by defendant No. 1. This mortgage was filed as Exhibit E: it provided that the mortgagee should enjoy the mortgage premises in lieu of interest and should “continue to enjoy them as mortgagee until the amount is paid.” Defendant No. 2 claimed title to the premises comprised in the above mortgage on the ground that the mortgagor had executed in his favour a prior mortgage for Rs. 350, which was filed as Exhibit II, and that he had brought a suit on this mortgage in 1887 and obtained a

* Second Appeal No. 1262 of 1891.
deed, in execution of which he had brought to sale and himself became the purchaser of the mortgage premises.

The plaint prayed that the prior mortgage be cancelled as fraudulent and not binding on the plaintiff, and the sale to defendant No. 2 be set aside; and in the alternative prayed the Court if the prior mortgage "is held genuine and valid to declare the plaintiff's right to redeem the property on payment of Rs. 350 with interest." The plaint was stamped as in a suit for redemption.

The District Munsif held that the plaintiff's mortgage was fraudulent and not supported by consideration and that the prior mortgage was valid, and accordingly dismissed the suit.

The Subordinate Judge held that both mortgages were valid and passed a decree for redemption of the prior mortgage by the plaintiff.

Defendant No. 2 preferred this second appeal.

Ramachandra Rau Sahib, for appellant.

Desikachariar, for respondents.

JUDGMENT.

BISHT, J.—The following are the facts of this case:

First defendant mortgaged the plaint house to second defendant in 1884 under Exhibit II for a sum of Rs. 350. Exhibit II was written on the 28th July 1884, but was not signed by first defendant till 5th December of that year after criminal proceedings had been instituted against first defendant by second defendant for cheating (see Exhibit W). On the 5th December 1884 first defendant's vakil put in a statement (Exhibit VI) admitting that first defendant had executed the document for Rs. 350, but pleading that she had only been paid Rs. 304.8.0. The complaint of second defendant was thereupon dismissed on the ground that the dispute between the parties was of a civil nature (Exhibit T). Second defendant then presented the document for registration; but first defendant denied its execution and the District Registrar, after inquiry, declined to register it. This was on the 23rd April 1885. On the following day first defendant executed to the first plaintiff the document E, mortgaging to the latter, with possession, a portion of the same house and several lands for a sum of Rs. 1,000.

In consequence of the District Registrar's refusal to Register II, second defendant instituted a suit (No. 181 of 1885) for a decree, directing its registration (under Section 77 of the Registration Act), and, though he failed in the Court of First Instance, he succeeded in the Appellate Court (see Exhibit XII). The document II was accordingly registered in December 1886: and original suit No. 89 of 1887 was subsequently instituted thereon and resulted in a decree in favour of second defendant, who caused the house in question to be sold in execution of the decree and himself purchased it at that sale on the 21st January 1889. First plaintiff was not made a party to the suit No. 89 of 1887. Hence her suit, out of which this second appeal has arisen, in which, claiming to be in possession as mortgagee under Exhibit E, she prays (i) for cancellation of Exhibit II as fraudulent; (ii) for cancellation of the sale in execution of the decree obtained by second defendant in original suit No. 89 of 1887, as not binding on her "even if it be held that the mortgage deed of 28th July 1884 (Exhibit II) is genuine;" (iii) for a declaration that she is entitled to redeem the said mortgage on paying the said mortgage amount with interest up to date; and (iv) for costs "and such other and further relief as the nature of the case may require."
Second plaintiff, who is son of the first plaintiff, was added as a party in consequence of second defendant's allegation in his written statement that the suit was really brought by this second plaintiff in the name of his mother, but on behalf of his junior aunt, the first defendant. It is further explained in the second defendant's written statement that the reason of his not making first plaintiff a party to his suit No. 89 of 1887 was, because the [124] document E under which she claims was "executed fraudulently and without consideration;" and it is added that her son, the second plaintiff, who contested that suit on behalf of his aunt, the first defendant, "did not ask that plaintiff (i.e., first plaintiff) should be made a party thereto, nor did he say that he would pay the sum due to this defendant."

The following issues were recorded by the District Munsif:—

(i) Is the first plaintiff a bona fide mortgagee for valuable consideration from first defendant?

(ii) Is the mortgage in favour of second defendant, on which decree has been passed in original suit No. 89 of 1887, a true and valid transaction for valuable consideration?

(iii) To what relief, if any, are plaintiffs entitled?

The District Munsif's finding on the first issue was in the negative and on the second in the affirmative. He consequently dismissed the suit with costs.

On appeal the Subordinate Judge has found both Exhibits E and II to be genuine and valid, and, on the ground that first plaintiff not having been made a party to original suit No. 89 of 1887 is not bound by the decree passed in that suit, he has set aside the decree of the original Court and given one in favour of the plaintiffs, "allowing them to redeem the second defendant's mortgage by paying him what is due to him under his decree until his purchase." He has also directed second defendant to pay plaintiffs' cost.

In this second appeal by second defendant it is contended, firstly, that the plaint ought to have been rejected on the ground of inconsistency, seeking, as it did, to avoid the mortgage evidenced by Exhibit II, or to conform the same and declare plaintiffs' right to redeem. It has been held that it is open to "a defendant who is a stranger to the transaction to raise inconsistent pleas as to matters not necessarily or properly within his knowledge"—Narayanasami v. Ramasami (1). Similarly it must, I think, be open to a plaintiff, who is not a party to the transaction in respect of which the allegations are made, to come into Court seeking relief in the alternative, dependent upon what may be found by the Court to be the true facts of the case.

[125] It is next contended that as the suit was brought for a declaration merely, the Appellate Court was not justified in giving a decree for redemption. The Subordinate Judge has referred as authority for his procedure to Sankana Kalana v. Virupakshapra Ganeshapa (2). It is to be observed, however, that the procedure was acceded to even in that case by Pinhey, J., one of the two Judges who took part in it, with an expression of disapproval, and only because "the thing had been allowed so often in the Bombay High Court" that he did "not consider it either necessary or advisable to formally differ" from his brother Judge on the point in that case. In this Court, however, the only authority that I have

(1) 14 M. 172.

(2) 7-B. 146.

794
been able to find is against the indulgence allowed to the plaintiffs by the Subordinate Judge. See Venkatanarsammah v. Ramiah (1).

It has, however, been further contended on behalf of the appellant that as only a portion of the plaint house is included in first plaintiff's mortgage deed E, the Subordinate Judge is in error in giving to plaintiffs a decree for redemption of the whole of the house. Further, stress is laid on the circumstance that second defendant has by reason of his purchase at the Court sale acquired, in addition to the interest possessed by him as mortgagee under II, also the right of redemption, which includes the right to redeem the mortgage to first plaintiff under E.

Although in consequence of first plaintiff not having been made a party to original suit No. 89 of 1887 (as required by Section 85 of the Transfer of Property Act), she is not affected by the decree in that suit, yet second defendant, as purchaser of the right of redemption which belonged to the mortgagor, is entitled to all the equities that belonged to the said mortgagor. If the mortgagor had by private sale transferred his interest in the property to second defendant, first plaintiff could not have maintained a suit for redemption against the latter, and I am of opinion that she is equally unentitled to maintain a suit for redemption against second defendant, the purchaser at the Court sale, who now stands in the shoes of the mortgagor. All that first plaintiff is entitled to is to retain possession of the share of the house mortgaged to her till it is redeemed by second defendant, Raghunath Prasad v. Jurawan Rai (2).

[126] I would, therefore, allow this appeal, and, setting aside the decree of the Lower Appellate Court, restore that of the District Munsif, and direct plaintiffs to pay second defendant's costs throughout.

MUTTUSAMI AYYAR, J.—I am also of opinion that upon the facts found the declaratory decree for redemption cannot be supported. Ordinarily, a second mortgagee has a right to redeem the first mortgage, but this right ceases when the first mortgage ceases. When the right arising from the first mortgage is united with the mortgagor's equity of redemption by purchase at a Court sale, a confusion of the two rights arises by their vesting in one and the same individual. The doctrine that a purchaser who pays off a pre-existing mortgage can use it as a shield only keeps the security alive for his protection. Again the second mortgagee's right to redeem the prior mortgage is in its nature a right to consolidate the two securities into one as against the mortgagor and to hold them together until they are redeemed, and there can be no right to consolidate when the first security ceases to exist by payment or by a Court sale which extinguishes the first mortgage. At the date of the Court sale in original suit No. 89 of 1887, three distinct rights were in existence, those founded on the first and second mortgages and the mortgagor's equity of redemption. The interest which passed by the Court sale was whatever the mortgagor and the first mortgagee could convey together, and the result is that the rights that survived the actual sale are only two, viz., the equity of redemption vested in the original owner against the second mortgagee and the latter's right to be redeemed by him. Otherwise, there would be this anomaly: if the second mortgagee is allowed to redeem the first mortgages and purchaser by paying him the purchase money, there would be no one entitled afterwards to redeem the second mortgage. The original mortgagor cannot redeem, because as between him and the first mortgagee he ceases to be the owner by the sale of his whole interest in the property.

(1) 2 M. 108. (2) 8 A. 105.
If the purchaser can redeem the second mortgage, the latter can have no right to redeem the former. The sale under the order of the Court extinguishes the first mortgage and the only right which survives it in the second mortgage is the right to be redeemed. The case should be treated as if the original mortgagor conveyed his whole interest in the property by a voluntary sale in extinction of the first mortgage. [127] Moreover, the plaintiff is a usufructuary mortgagor in possession of the house and, as such, she is not entitled to redeem after the extinction of the first mortgage. For these reasons I concur in the decree proposed by my learned colleague.

16 M. 127.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

GOPALA AND ANOTHER (Plaintiff and Defendant No. 2), Appellants v. FERNANDES (Defendant), Respondent."

[25th and 28th March, 1892.]

Civil Procedure Code, Sections 261, 328, 331 - Obstruction to execution of decree - Obstruction offered by a tenant - Dismissal of decree-holder's petition - Appeal.

Obstruction was offered to the execution of a decree for partition of certain property, by one claiming to be entitled to occupy part of the land in question as a mulgeni tenant. The decree-holder presented a petition to the Court under Civil Procedure Code, Section 328: this petition was rejected, and the claim was not numbered and registered as a suit.

Held, (1) that an appeal lay against the order rejecting the petition;
(2) that the decree for partition was a decree for possession of property within the meaning of Civil Procedure Code, Section 328;
(3) that that section was not rendered inapplicable by the fact that the obstructor claimed to be a mulgeni tenant.

[Dis. 9 Bom. L.R. 936; F., 7 C.L.J. 93; R., 13 C.W.N. 724.]

APPEAL against the order of S. Subba Ayyar, Subordinate Judge of South Canara, in miscellaneous petition No. 246 of 1890.

The petitioners had obtained a decree in original suit No. 43 of 1885 in the file of the Subordinate Court of South Canara for the partition of certain moveable and immovable property and now sought to execute it. The respondent was in possession of part of the land: he claimed to be entitled to occupy it as a mulgeni tenant and obstructed the execution of the decree. The decree-holders' petition was preferred under Civil Procedure Code, Section 328, but the Subordinate Judge held that that section was not applicable to the case, and he rejected the petition without numbering and registering the claim as a suit.

[128] The petitioners preferred this appeal.
Ramachandra Bai Saheb, for appellants.
Narayana Bai, for respondent.

JUDGMENT.

BEST, J.—The appellants obtained a decree in original suit No. 43 of 1885 on the file of the Subordinate Judge's Court of South Canara for possession of their shares in certain properties, moveable and immovable.

* Appeal against orders Nos. 117 of 1890 and 29 to 34 of 1891.
Execution of the decree was resisted by the respondent who claimed to be in possession of a part of the property under a mulgeni lease.

Appellants thereupon complained to the Court under Section 328 of the Code of Civil Procedure.

The respondent was summoned to answer to the complaint, and both parties were heard, with the result that the Subordinate Judge rejected the petition without even numbering and registering the claim as a suit as required by Section 331 of the Code. Hence this appeal.

A preliminary objection is taken by the respondent, viz., that the claim not having been numbered and registered under Section 331, there was no suit and consequently no decree from which an appeal will lie.

As was observed, however, in Ponindro Deb Raikut v. Rani Juvodishwari Dabi (1), "the law declares that proceedings in a case under Section 331 are to be conducted in the same manner and with the like powers as "if a suit for the property had been instituted by the decree-holder against "the claimant under the provisions of Chapter V of the Code. Chapter V "provides for matters relating to the institution of suits. The refusal of the "Judge to number and register the claim as a suit is therefore of the same "effect as the refusal to register a plaint; or, in other words, it amounts "to rejecting a plaint."

Therefore the order is appealable as coming within the definition of a decree under Section 2 of the Code, and the preliminary objection must be disallowed and this appeal considered.

On reading together the three Sections 329, 330 and 331, I think it is clear that the Subordinate Judge was not justified in disposing of this case without numbering and registering it as a suit and investigating the claim as required by Section 331. Sections 329 and 330 deal with obstruction or resistance by the [129] judgment-debtor himself, or by some other person "at his instigation." In such cases the Court may "pass such order as it thinks fit" as the result of its investigation under Section 328. But "if the resistance has been occasioned by any person other than the judgment-debtor claiming to be in possession of the property on his own account or on account of some person other than the judgment-debtor," Section 331 directs that the claim shall be numbered and registered as a suit between the decree-holder and claimant, and the Court shall proceed to investigate the claim in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of Chapter V. The claimant here is not one of the judgment-debtors, and it is clear from the Subordinate Judge's order that he does not consider that the claim is made at the instigation of the judgment-debtor. The case, therefore, is one falling under Section 331, and must be disposed of in accordance with the procedure therein prescribed.

It has been contended on behalf of the respondent that, as the latter merely claims a right of occupancy, the procedure to be adopted is that laid down in Section 264. I am of opinion, however, that the last-mentioned section is inapplicable to a case like the present where the respondent's right of occupancy is disputed. The object of Section 331 is, I take it, to avoid putting a decree-holder to the expense of instituting further suits for the possession of property for which he had already obtained a decree after paying all the requisite institution fees. It has also been suggested that a tenant—even a permanent tenant, (as the claimant in this case is alleged

---

(1) 14 C. 334.

797
to be), cannot be a person claiming to be in possession of the property on
his own account. I am unable to accede to this contention. But even if
it were otherwise, it is sufficient that the claim is one of possession "on
account of some person other than the judgment-debtor."

Being satisfied that the case is one that should have been disposed of
in the manner directed in Section 331 of the Code of Civil Procedure, and
that the Lower Court has erred in summarily rejecting the appellant's
petition without investigating the same as required by that section, I
would set aside the order appealed against and remand the case for disposal
according to law and direct that the costs incurred hitherto be provided
for in the decree to be passed in the suit.

[130] Muttusami Ayyar, J.—The preliminary objection is taken
that no appeal lies from an order refusing to register an application under
Section 331 as a suit between the decree-holder and the party causing the
obstruction. It is true that the order is not specified in Section 588, but
the language of Section 331 is mandatory. Moreover an application made
under that section is in the nature of a plaint, and the order rejecting a
plaint is appealable. The same view was taken by the High Court at
Calcutta in Foumdeo Deb Raikut v. Rani Jugdishwari Dabi (1). I would
overrule this objection.

Passing on to the merits, the Subordinate Judge is in error in holding
that a decree for partition is not a decree for possession of immovable
property, and, as such, it is not within the purview of Section 331. It is not
denied that in the present case a partition was decreed as well of immove-
able as of moveable property. It may be that the share awarded by the
decree has first to be set out by metes and bounds before it can be placed
in the possession of the decree-holder, but when the share is so set out,
the decree becomes at once a decree for the possession of specific
immovable property to which Section 331 is admittedly applicable.

It is argued by the respondent's pleader that in the case now before
us the party obstructing is a mulgeni tenant and that Section 331 does not
apply to tenants, and reliance is placed on Section 264 of the Code of
Civil Procedure. If the decree-holder is actually placed in possession
under this section, he may not be at liberty to change his mind and to
proceed under Section 331. But when such is not the case, there is
nothing in the language of Section 331 or 264 to render the former
inapplicable to mulgeni tenures.

The object of Section 331 is to secure to the decree-holder the fruits
of his decree without a fresh suit by a special proceeding in continuation
of the first suit. I, therefore, concur in the order proposed by my learned
colleague.
16 M. 131.

[131] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

VARADARAJA (Plaintiff), Appellant, v. DORASAMI AND ANOTHER (Defendants), Respondents.* [2nd and 10th November, 1892.]

Landlord and tenant—Occupancy right—Undisturbed possession—Construction of grant—Conduct of parties.

In a suit for ejectment brought by the trustee of a temple, the defendants set up a right of occupancy as permanent tenants. It appeared that the defendants' ancestor had held the village from the Collector (then in charge of the temple properties) under a lease which expired in 1831, when he offered to hold it for two years more. The Collector made an order that if the tenant would not hold the land at the existing rate permanently he should be required to give security for two years' rent. Two "permanent" muchalkas were subsequently taken from the tenant successively, but they were returned as not being in proper form. No further document was executed, but the tenant and his descendants remained in undisturbed possession at the same rate of payment up to 1868. In that year the plaintiff sent a notice of ejectment to the then tenant, who, however, set the plaintiff at defiance and remained in possession till the present suit was brought in 1890.

Held, that it should be inferred that the defendants were in possession under a permanent right of occupancy.

APPEAL against the decree of C. Venkoba Chaturai, Subordinate Judge of Tanjore, in original suit No. 17 of 1890.

Suit for ejectment. The land in question was the property of the temple of which the plaintiff was trustee. The case for the plaintiff was that in 1826, when the temple property was in the charge of the Collector, Vythilinga Mudali, the defendant's grandfather, was put into possession of the land for five years under an agreement executed in the name of his friend Gopala Ayyangar, and that, since that date, three persons, and afterwards Vythilinga Mudali's descendants, had been in possession. The plaintiff claimed that they were yearly tenants merely, and that he having given them notice to quit was entitled to eject them.

The defendants' case was that the land had been handed over to Vythilinga Mudali by the Collector in fasli 1241 on an irrevocable permanent settlement under a contract to pay the sirka kist for the plaintiff's lands and swamibhogam for the plaintiff mentioned temple, and that the plaintiff had accordingly no right to eject them; they further denied the notice to quit. A question of limitation was also raised.

The second issue raised the question whether the defendants were permanent tenants. The determination of this issue turned on the construction of the following exhibits:––

Exhibit B.

"Muchalka in respect of cash security executed on 26th June 1826 to the Honorable the East India Company, by me, Vythilinga Mudali, Mirasdar of Tirupunthiruthi village in Kandiyyur magnanam, of Tiruvadi taluk, as follows:—Kandiyyur Gopala Ayyangar has undertaken to obtain in proposal lease, nanja lands measuring 6 velis, 15 mabs and 37½ gulties in Yeakabogam Tirupunthiruthi village attached to the Miras of Sri Brahmasira Kandiswaraswami's temple at Kandiyyur of the said taluk for

* Appeal No. 9 of 1892.

799
five years from fasli 1236 to 1240, agreeing to pay as follows:—

Rs. 1,809-12-9½ for five years at Rs. 361-15-4½ per year; and 815 kalam of paddy and cash Rs. 195 for five years at 163 kalam of paddy and cash Rs. 39 per year for swarnibhogam of the temples.

In respect thereof I do hereby bind myself agreeing to pay cash security as follows:

The said Gopala Ayyangar shall be paying regularly according to the instalments that may be fixed by the sircar, the kist money due to sircar as aforesaid for the nunja lands in the said village, with price current, as also the paddy and cash as specified above due to the temple. Should he fail to do so in any instalment without payment, I shall not only agree to pay at once the amount of arrears due by him, but also bind myself to be responsible for the lease amount accepted by him. Besides, if the said Gopala Ayyangar should abscond without putting his appearance, I do hereby bind myself to produce him at once.

Thus I have executed this muchalka in respect of cash security with my free will.

(Signed) Vythilinga Mudali, Mirasidar.

Exhibit G.

As it is due, orders should be issued that it should be sent accordingly.

133It is stated thus:—For the matter in which order No. 24, No. 21, 23rd Valiam and sent up for the amount due according to the list, which is sent along with the order, in respect of thirappu sarvamanyam (rent free) villages belonging cash, so taken away, have been entirely spent away or something more still remains.

To the temples of this taluk, for which the assessment (tharam) has not been settled.

On communicating the aforesaid matter to the (purakkudis) tenants of the villages mentioned in the list, Vythilinga Mudali, the (purakkudi) tenant of the Thirappu villages of Tirupuntiruthi and Ukkudai came and presented himself before me and executed dharkast, stating therein that he would pay for two years from fasli 11 at the rate of 196 kalam and 4 marcas of paddy, and Rs. 39 in ready cash per year to the temple, and in respect of the katee (vacant) nunja of the said village measuring 19 mabs and 19½ kulies, he would pay Rs. 383-2-9 according to the assessment of sircar jamabundhi, and I have herewith sent the same. The amount of the said dharkast (coincides) is exactly correct according to the amount in the list. Up to date no one else has offered dharkast for a higher amount than that. The said Vythilinga Mudali is a purakkudi (tenant), who used to cultivate the said village. Therefore, I shall conduct myself according to the order that may be received in respect of the decision to be made about the lease for the said village in the name of the said person.

The details for the accounts sent to the Huxoor Cutcherry in No. 22, 30th Trivady. Peranjee is as follows:—I have prepared and sent, along with the index, the accounts for two items of kadappu and kar paddy, which have been harvested and realized in the Amani villages of the temple up to the 25th September.
"It is as follows:—For the matter in which order has been received No. 29, 31st Trivady, bearing No. 37 and made on the 3rd instant asking a report to be submitted about the following particulars:—Out of the kaduppu, kar, sambu and pishanum paddy of fasi 40 of the sarvamanyam [134] (rent free) village of Pulimangalam situate in the taluk of Valangeman and belonging to the temple of the God Sri Panthanatheeswarar of Kasba Trivady, the Musharp and others of the said temple have sold 462 kalam, 3 marceals and 4 measures of paddy and have taken away in ready cash 150 pons and 2½ fanams and in the shape of paddy 407 kalam and 3 marceals, and it was so understood (as was said above) from the report of that Taksildar; whether the said Musharp and others have so taken them away out of their own accord or they have taken away under the orders of the late Taksildar and whether the paddy and money in ready. In respect of the aforesaid matter, Musharp Sethu Bau."

Exhibit III.

No. 49.

Takeed sent to Narasappayan, Taksildar, Tiruvadi taluk.

"Your arzi No. 21, dated 23rd October, together with the proposal tendered by purakkudi (ryot) Vythilinga Mudali, of Tirupunthiruthi consenting to pay for the first two instalments of the current fasi sirkar jamabandi at the faisal (final) rate mentioned for Thirappu Tirupunthiruthi Ulkkadai village in the list sent for the settlement of rate temple villages, and also swamibhogam to the temple at the rate of 166 kalam of paddy and Rs. 39 in ready money has been received.

"Regarding the above, if nobody accepts for a higher sum, and, if that Purakkudi Vythilinga Mudali himself does not accept the same amount permanently, then you are to forward from him security muchalka, &c., for two instalments in accordance with the dharkasts."

(Signed)      N. W. KINDERSLEY.
(Signed)       VYTHINADHAIYAN.

CAMP, NEGAPATAM.
16th November 1831.

Exhibit III-A.

No. 61.

Takeed sent to Narasappayan, Taksildar Tiruvadi taluk.

"As the muchalka sent with your arzi No. 28, dated 29th November, stating that you have sent a permanent muchalka [138] from purakkudi (ryot) for the land in Tirupunthiruthi Ulkkadai belonging to Sri Brahmasirakhandiswaraswami of Kandiyur in the above taluk, is not in proper form, the same has been returned. You are, therefore, to get another muchalka, including both ayan (rent proper) and swamibhogam in accordance with the form herewith sent; and to send it together with an account, clearly giving what the amount of ayan and swamibhogam are, to the Huzoor. Besides you are to give him the possession of the village and to make collections properly according to the kist.

"Further, also in respect of the temple villages hereafter to be settled, you are to get muchalkas as per above form and to send them, with detailed accounts, to the Huzoor. In addition to this, you are to take
"and send from the ryots intricate securities binding one another. You are at once to get and send intricate (binding one another) securities for the above Tirupunthiruthi Ulkadai lands."

(Signed) N. W. KINDERSLEY.
(Signed) GULAM MOIDEEN.

CAMP, NEGAPATAM.
14th December 1831.

Exhibit III-B.

No. 80. [17th January.

Takeed sent to Narasappayan, Tahsildar, Tiruvadi Taluk.

"Your arzi No. 48, dated 27th December, stating that you have taken "and sent fresh muchalkas from purakkudis (ryots) in proper form for the "Ulkadai lands in Tirupunthiruthi village belonging to Sri Brahmasira- khandiswaraswami of Kandiyur, in the above taluk has been received."

"Regarding it, on referring to the muchalka, it appears that the total "amount, including ayan and swamibhogam, arrived at by adding the "jamabundi amount for the above land with the amount of money for total "swamibhogam lands, calculated at the price fixed for the Maghanam, to "which the village belongs, is not therein stated, but only the jamabundi "amount and the quantity of swamibhogam paddy separately. As it is "not correct according to the form, the above muchalkas is again returned "herewith. You are, therefore, to take and look into the form [136] "above sent carefully and get and send fresh muchalkas in accordance therewith, mentioning the above particulars. Besides, you "must prepare and send detailed accounts, giving the total jamabundi "with its jamabundi amount and swamibhogam paddy with its amount."

(Signed) N. W. KINDERSLEY.
(Signed) VYTHINADHAIYAN.

CAMP, NEGAPATAM
16th January 1832.

The Subordinate Judge decreed the above issue in favour of the defendants and dismissed the suit.

The plaintiff preferred this second appeal.
Sadagopachariar, for appellant.
Subramanyam Ayyar, for respondents.

JUDGMENT.

The sole question in the appeal is whether the defendants have occupancy right in their holding or whether they hold as tenants of the temple from year to year. It is clear from Exhibit B that in 1826 defendants' ancestor held the village on a five years' lease which expired in 1831. Exhibit G shows that in 1831 the same Vythilinga Mudali made an offer to hold the village for two years longer at a certain rate, and that the Tahsildar reported that no better offer was forthcoming. Exhibit III, dated 16th November 1831, is the Collector's reply to this arzi. In it the Tahsildar is informed that if Vythilinga Mudali does not accept for the same amount permanently, security for the two years' rent is to be demanded. From Exhibit III-A it is clear that a permanent muchalka was obtained from Vythilinga Mudali and was returned, not being in proper form, the Tahsildar being directed to take another, and the same direction was repeated in Exhibit III-B, the second muchalka being also
incorrect in form. The muchalka itself is not produced, and the book said to have contained it is missing from the Collector's office. From the fact, however, that no further muchalkas have been taken since 1832, and that the former system of leases for terms of years has not been reverted to, but the same rent has been uniformly paid since 1832, it is a fair inference that defendants and their ancestors have continued to hold in accordance with the muchalka given in 1832.

[137] Was then that muchalka of a permanent character? It is urged for the plaintiff that the word 'permanent' in Exhibit III series is used with reference to the commutation rate, and not with reference to the duration of the tenancy, and it is argued that the terms would be similar to those in Exhibit J in Krishnasami v. Varadaraja (1) which were held not to denote a lease of a permanent character, but only that the rent should be permanent during the continuance of the lease. In the present case, however, the words 'saswata' and 'saswatami' are used in conjunction with 'muchalka,' and the verb 'oppukollamal,' so that the language used would appear to have reference to the duration of the lease. That the parties understood them in this sense may be gathered from their conduct. Not till 1878 did plaintiff endeavour to disturb defendants in their holding. He then sent a notice (Exhibit E), dated 30th June (the last day of the fasli) stating that he had 'herewith' removed him from the occupation and possession of the lands. That such a notice would be utterly invalid as a legal notice to quit addressed to a tenant who had been 46 years in possession it is needless to state. But the first defendant replied on 21st August 1878 (Exhibit E) asserting his rights of permanent occupancy in the most unqualified and indignant terms, and setting the plaintiff's pretensions altogether at defiance. It does not appear that any reply was sent to this letter, but the plaintiff continued for ten years longer to accept rent on the same terms from the man whom he professed to have ejected and who had defied the plaintiff to eject him. Then, on 29th January 1888, the plaintiff sent another notice to quit at the end of the current fasli (Exhibit F 1), to which first defendant replied on 19th March 1888 (Exhibit E 1) reiterating his former defiance. Not till 30th June 1890—within a few days of the expiry of 12 years from the date of Exhibit E—was the present suit brought.

We are of opinion, therefore, that there is evidence from which it can be legally inferred that the lease of 1832 was a permanent lease, and, that being so, the plaintiff's suit must fail.

The decisions in Krishnasami v. Varadaraja (1), and Thiguraja v. Giyana Sambandha Pandara Sannadhi (2) were referred to in the argument. In the former case, the suit was brought by this very same plaintiff as trustee of another temple at Kandiyur on a similar [138] cause of action. It was held in that case by a majority of the Court that though the defendants had not been able to prove that the engagements of 1833 were of a permanent character, yet by customary law the tenants were entitled to occupancy rights. It was further held that an occupation for upwards of 70 years at the same rent was sufficient, under the circumstances of the case, to throw upon those who sought to disturb it the burden of showing that the tenancy was not accompanied with a right of occupancy. We may point out that Mr. Justice Kindersley, while agreeing with his colleagues upon this point, was further of opinion that the muchalka J did evidence a permanent tenure. The present case is much

(1) 5 M. 345. (2) 11 M. 77.
stronger, for not only are the terms of Exhibit III less ambiguous, but the inference deducible from 60 years' possession at a uniform rate, nearly 12 of which were in open defiance of the landlord's claim to eject, still further strengthens defendants' claim. In Thiagaraja v. Giyana Sambandha Pandara Sannadh (1) [also from Tanjore] the muchalka was produced, and it was held that the terms thereof did not lead to the conclusion that the cultivators were more than tenants from year to year. No subsequent grant of occupancy right was alleged to have been made, nor were there circumstances proved from which such a grant or right of occupancy could be presumed.

The case before us is distinguishable, therefore, from both of those we have considered. We must confirm the decree of the Subordinate Judge and dismiss this appeal with costs.

16 M. 138.

APPELLATE CIVIL.


PURAKEN AND OTHERS (Plaintiffs), Appellants v. PARVATHI AND OTHERS (Defendants), Respondents.* [1st April, 1892.]

Limitation Act—Act XV of 1877, Schedule II, Articles 91, 120—Suit for declaration.

The reversionary heirs to a stanom in Malabar sued in 1889 for a declaration that a kanom executed in 1881 by the first defendant, the present holder of the [139] stanom, in favour of the second defendant, was not binding on them or on the stanom:

Heid, that the suit was barred under Limitation Act, 1877, Schedule II, Article 120.

[1891] 26 M. 410; 56 P.R. 1903 = 93 P.L.R. 1903.]

SECOND appeal against the decree of V. P. deRozario, Subordinate Judge of South Malabar, in appeal suit No. 462 of 1890, confirming the decree of V. Rama Sastri, District Munsif of Palghat, in original suit No. 23 of 1889.

Suit by the plaintiffs as reversionary heirs to the stanom of Kongat Nayar for a declaration that a kanom executed in 1881 by defendant No. 1, the present stanomdar in favour of defendant No. 2 is not binding on the stanom or on the plaintiffs.

The District Munsif dismissed the suit, and his decree was affirmed on appeal by the Subordinate Judge, who held that the rule of limitation applicable to the case was Limitation Act, 1877, Schedule II, Article 120, and not Article 91 as argued on behalf of the plaintiffs.

The plaintiffs preferred this second appeal.

Ramachandra Ayyar, for appellants.
Sundara Ayyar, for respondents.

JUDGMENT.

In our judgment the Subordinate Judge was right in holding that Article 120 and not Article 91 applied to the case, and that the suit, which was instituted more than six years after the date of the cause of action, was barred. We cannot concur with appellants' pleader that in the case

* Second Appeal No. 1396 of 1891.
(1) 11 M. 77.
Pachamuthu v. Chinnappan (1) the decision as to the only article of the
Limitation Act which affected plaintiffs' right was a mere obiter dictum.
The question stated by the learned Judges for decision was whether Article
91 or Article 120 of the Limitation Act applied, and, assuming that plaintiff
had a right to sue, they decided that Article 120 was the only article which
governed the case. Following that decision we hold that plaintiffs' suit
was barred and dismiss this second appeal with costs.

16 M. 140.

[140] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Wilkinson.

KUNHIAMMA (Plaintiff), Appellant v. KUNHUNNI AND OTHERS
(Defendants Nos. 1 to 3), Respondents.* [7th April, 1892.]

Specific Relief Act—Act I of 1877, Section 42—Civil Procedure Code—Act XIV of 1882,
Section 283—Suit for declaration of title by an objector in execution proceedings—
Consequential relief.

In a suit under Civil Procedure Code, Section 283, for a declaration that the
sale to defendant No. 2 of certain land in execution of a decree was invalid, it
appeared that the land had been attached in execution of a decree obtained by
defendant No. 2 against defendant No. 1, who held it as the plaintiff's tenant,
that the plaintiff had intervened unsuccessfully in the execution proceedings,
and had been referred to a regular suit, and that the land had been brought to
sale and purchased by defendant No. 2 who was now in possession:

Held, that the suit was not maintainable for want of a prayer for possession.

[overruled, 29 M. 151; Diss., 14 Ind. Cas. 510 (511) = 10 P.R. 1912 = 74 P.L.R.
1912 = 267 P.W.R. 1912; R., 19 M. 145; 17 C.L.J. 30 (33).]

SECOND appeal against the decree of A. Thompson, District Judge
of North Malabar, reversing the decree of A. Venkataramana Pai, District
Munsif of Tollycerry, in original suit No. 113 of 1889.

Suit under Civil Procedure Code, Section 283, for the declaration that
the sale in execution of certain property was invalid.

The facts of the case are stated above sufficiently for the purposes of
this report.

The decree of the District Judge dismissed the suit.

The plaintiff preferred this appeal.

Sankara Menon, for appellant.

Sankaran Nayar, for respondent No. 2.

JUDGMENT.

This is a suit instituted under Section 283, Civil Procedure Code, for a
decree declaring that the auction sale of certain property sold in execution
of a decree obtained by second defendant against first defendant is invalid,
the property being the property of the plaintiff, and at the time of sale in
the possession of plaintiff's tenant. On the 30th November 1888 such posses-
sion was divested by the delivery order of the Court and as found
by the District Judge the second defendant is now in possession. The
question is whether, under these circumstances, a suit for a declaratory
decree will lie. By Section 15, Act VIII of 1859, the Civil Courts were

* Second Appeal No. 1691 of 1891.
(1) 10 M. 213.
authorized to make binding declarations of right without granting consequential relief. This section was repealed by Act I of 1877, and it was thereby enacted that any person entitled to any property might institute a suit against any person denying his title, and that the Court might in its discretion make a declaration that he was so entitled, provided that no Court should make any such declaration, where the plaintiff being able to seek further relief than a mere declaration of title omits to do so. In the present case, it is clear that the further relief, which plaintiff is entitled to supposing her suit is well founded, is possession of the property. But it is contended that Section 283 of the Code of Civil Procedure authorizes a party against whom an order under Sections 260-282 has been passed to file a suit for a decree declaratory of his right only, and reliance is placed on the remarks of Mr. Justice Muttusami Ayyar in Ambu v. Kettilamma (1). The question for decision in that case was whether the suit, which was one for possession, was barred by the provisions of Section 43. The plaintiff in the suit had obtained a decree setting aside the Court sale, and the learned Judges held that under Section 43 of the Code of Civil Procedure that suit did not bar the entertainment of the subsequent suit for possession. It was found there, as a fact, that plaintiff when instituting the first suit was not aware of the transfer of possession under the Court sale, and this no doubt influenced the Judges in their decision. With great respect for our learned colleague, we are unable to agree with him in holding that Section 283 gives a special right to sue for a declaration of title in direct opposition to the provisions of Section 42, Specific Relief Act. Section 283 gives the party against whom an order under Sections 260-282 has been passed the right to institute a suit to establish the right which he claims to the property in dispute, and he must sue for the whole right which he can claim at the time he institutes the suit. In the present case the right which plaintiff claims is a right to possession, and as undoubtedly one of the principal objects of the proviso to Section 42 was to prevent multiplicity of actions and to prevent a man getting a declaration of right in one suit and then harassing his opponent with another suit for possession, we are unable to hold that plaintiff could sue in this suit for a bare declaration and immediately after instituting a suit for possession. In our judgment Section 42 of the Specific Relief Act is the only provision of the law, and the appellant's pleader can point out no other, under which a suit for a declaratory decree can be brought, and we cannot import into Section 283 any other right than that which is conveyed by the words of the Section.

We agree with the Lower Appellate Court that the suit is not maintainable and we dismiss the second appeal with costs.

(1) 14 M. 23.
APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RAMA and ANOTHER (Defendants), Appellants v. VARADA (Plaintiff), Respondent.6 [2nd May, 1892.]


On an application for execution of a decree, it appeared that the only previous application for execution which had been made within a period of three years had been defective, by reason of its not containing the particulars required by Civil Procedure Code, Section 235 (f), and had been returned for amendment, but had not been amended:

Held, that the present application was not barred by limitation.

[Dis., 23 C. 217; F., 25 C. 594 (597); 31 M. 98 = M.L.T. 254 = 17 M.L.J. 696; R., 14 G.W.N. 491 = 5 Ind. Cas. 579 (590); 5 N.L.R. 8; 116 P.R. 1907 = 143 P.W.R. 1907.]

APPEAL against the order of C. Ramachandra Ayyar, Acting District Judge of Nellore, dated 11th December 1890, reversing the order of M. Visvanatha Ayyar, District Munisif of Kavali, on miscellaneous petition No. 695 of 1890.

The holder of the decree in original suit No. 219 of 1875, on the file of the District Munisif of Kavali, applied for execution by the above-mentioned petition. It appeared that the execution of the decree was not barred on 22nd July 1889, when an application for execution was made, but that application was returned [143] for amendment as being irregular by reason of an omission to state the earlier of two previous applications that had been made and its result, and the amendment was not made. The present petition was preferred within three years from the date of the last-mentioned application, but more than three years from the date of the application next previous to it.

The District Munisif held that the present petition was barred by limitation and made an order dismissing it. The District Judge on appeal reversed this order and remanded the case.

The defendants preferred this appeal.

Mr. DeRozario and Venkataramayya Chetti, for appellants.

Sankaran Nayar, for respondent.

JUDGMENT.

It is argued that the application for execution is barred by reason of the application of 1889 having been returned for amendment with reference to Clause (f) of Section 235 of the Code, and the amendment not having been made within the time allowed for the purpose. The defect in the previous application consisted in omitting to state the earlier of two previous applications and its result. It is admitted that this omission was in no way calculated to prejudice the judgment-debtor or to mislead the Court; such being the case, though the application was formally defective with reference to the provisions of Section 235, it substantially complied with them.

We are, therefore, unable to hold that it was not an application made in accordance with law within the meaning of Article 179 of Schedule

---

* Appeal against Appellate Order No. 19 of 1891.
II of the Limitation Act. This view is in accordance with the decision in Ramanadan v. Periatambi (1).

Our attention has been drawn to the decision of a Full Bench of the Calcutta High Court in Asgar Ali v. Troiokya Nath Ghose (2), but in that case the defect was not merely formal. The property sought to be attached was not fully described nor was a list of such property produced.

We dismiss this appeal with costs.

16 M. 184 = 2 M.L.J. 153.

[144] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

Narasimma (Plaintiff), Appellant v. Surianarayana and Another (Defendants Nos. 1 and 2), Respondents.*

[15th and 20th July, 1892.]

Revenue Recovery Act—Act II of 1866 (Madras), Sections 32, 42—Encumbrance—Permanent lease at a low rent.

One of the villages in a mitta was demised by the mittadar to A on a permanent lease, at a rate below both the faisal assessment and the proportion of revenue payable upon it. The lessee’s interest was brought to sale in execution of a decree and purchased by B, and ultimately was sold in 1884 to the plaintiff who now sued the tenant in possession to enforce an exchange of patta and muchalka. In the interval, viz., in 1883, the village was sold for arrears of revenue under Madras Act II of 1864 to C and the defendant claimed to hold the land from C:

Held, that the permanent lease was an encumbrance under Revenue Recovery Act, 1864, Section 42, and was voidable by the purchaser at the revenue sale, although it had not been declared to be invalid by the Collector.

SECOND appeal against the decree of L. A. Campbell, District Judge of Salem, in appeal suit No. 150 of 1886, reversing the decree of Sultan Mooldin, District Munsif of Krishnagiri, in original suit No. 265 of 1885.

Suit to enforce the acceptance of a patta and execution of a muchalka by the defendant.

It appeared that a permanent lease of a village in a certain mitta had been granted to one Adam Sahib, and that Adam Sahib’s interest had been attached and brought to sale in execution of a decree and purchased by Muniappa Chetti. It was alleged that Muniappa Chetti’s interest had passed by various mesne assignments and lastly by a sale-deed, dated 30th January 1884, to the plaintiff. The defendant was in occupation of the village and the plaintiff now sued as above to enforce an exchange of patta and muchalka.

In 1883 the village was sold under the Revenue Recovery Act for arrears of revenue and purchased by one Ramachandra Ayyar and the defendant now pleaded that he held under this purchaser. [145] The District Munsif passed a decree for the plaintiff. This decree was reversed on appeal and the suit dismissed by the District Judge after a remand of the case. The District Judge observed:

“A lease of this nature cannot under Hindu Law bind the next owner of the property unless it can be shown to be to the advantage of the property. It cannot be to the advantage of the property that it should be permanently leased for a sum so far below both the faisal

(1) 6 M. 250.
(2) 17 O. 691.

* Second Appeal No. 835 of 1891.
assessment and the proportion of the revenue payable on it. This being
so, I consider that plaintiff has failed to show his title to hold on as a
permanent farmer of the entire village after its sale by Government. He
bought after that sale and must be taken to have known of it."

The plaintiff preferred this second appeal.

Ramechandra Ayyar, for appellant.
Subramanya Ayyar, for respondents.

JUDGMENT.

It is first urged on behalf of the appellant that the Judge was in
error in taking into consideration the evidence adduced by second defendant
(whose name had been ordered to be removed from the suit) in proof
of the revenue sale. The evidence was adduced when first and second
defendants were jointly contending that the former's holding was under
second defendant and not under plaintiff; and the finding originally
called for had reference to that joint contention. Such being the case, we
cannot say that the Judge was wrong in using this evidence in determining
the issue as between plaintiff, and first defendant. It is next contended
that the Judge is in error in holding that plaintiff's perpetual lease
is not binding on the purchaser in that it was granted for a sum below
the falsal assessment and the proportional revenue payable on it.

A permanent lease is, in our opinion an encumbrance within the
meaning of Section 42 of Madras Act II of 1864. It creates an under
tenure which diminishes the value of the estate.

As for the contention that the permanent lease in question fell under
Section 32 of the Act, and that, as there was no declaration by the Collector
of its being invalid, it must be upheld, we are of opinion that the absence
of a declaration by the Collector is immaterial and will not preclude the
purchaser from avoiding the lease on the ground of its being an encumbrance
under Section 42.

We are of opinion, therefore, that the decision of the Judge
must be upheld for the reasons stated above.

This second appeal is dismissed with costs.

16 M. 146.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Best.

RANGASAMI (Plaintiff), Appellant v. RANGA AND OTHERS
(Defendants Nos. 1 to 3 and 5 and 6), Respondents.*
[5th and 16th September, 1892.]

Religious office, assignment of—Res extra commercium—Custom as to assignability.

The plaintiff sued for a declaration of his title as purchaser of a mirasi office
in a temple, to which were attached certain duties to be performed as part of a
religious ceremony, and for a sum of money representing the emoluments of the
office. The first defendant was the plaintiff's vendor, the second defendant
claimed title to the office by purchase, the other defendants were the trustees of
the temple, and they did not appear on appeal. The Court of first instance
passed a decree as prayed, which was reversed on an appeal preferred by the
second defendant alone. On second appeal:

Held, that defendant No. 2 was not entitled to a decree on the sole ground
that the office was res extra commercium.
Per Parker, J.—Had the trustees of the temple appeared in the Court of first appeal and raised the question of the inalienability of the office, it would have been necessary for the Court to have determined the question whether by the custom of the particular institution such alienations were valid.

[R., 12 C.W.N. 98.]

SECOND appeal against the decree of H. H. O’Farrol, District Judge of Trichinopoly, in appeal suit No. 52 of 1889, reversing the decree of V. Swaminadha Ayyar, Additional District Munisif of Trichinopoly, in original suit No. 227 of 1888.

The plaintiff prayed for a declaration of his title as holder of a mirasi office called Tiruvalakkunayakam, in the Sri Ranganatha Swami temple at Srirangum, under a sale-deed, dated 2nd July 1888, by which the office and its emoluments were assigned to him, and for certain reliefs consequential on this declaration. The duties of the office are described sufficiently for the purpose of this report in the judgment of best, J. Defendant No. 1 was the previous holder of the office in question and the executant of [147] the instrument of 2nd July 1888. Defendant No. 2 claimed to be entitled to the office and alleged that the above instrument has been executed in fraud of his rights. Defendants Nos. 3 to 5 were the trustees of the temple.

The District Munisif passed a decree as prayed. Defendant No. 2 alone appealed against this decree to the District Judge, who reversed the decree, holding that the office in question was extra commercium and that the plaintiff accordingly had no title to it.

This plaintiff preferred this second appeal.

Parthasaradhi Ayyangar, for appellant.

Ramachandra Rau Sahib, for respondent No. 2.

JUDGMENT.

Best, J.—It is urged on behalf of the appellant that the District Judge is wrong in holding the office, the subject of this suit, to be a religious office and therefore extra commercium.

The duties of the office are, it appears, to hold the poles of the god’s seat when taken in procession, to tie cloths (parivattam) on the heads of the athatahers, and to distribute sacred food to the spectators. It is admitted that (the office) can only be held by a Vaishnava Brahmin; and the duties are performed as part of a religious ceremony. The Judge is therefore right in holding it to be a religious office. As a rule, such offices cannot be the subject of sale. In the present case, however, it has been admitted by the second respondent himself that the office is saleable, and, as a matter of fact, first defendant, by whom it was sold to appellant, acquired his right to it by purchase. Second respondent, who is the adopted son of first defendent, contended originally that the acquisition by first defendant was made with the joint funds of himself and first defendant, but at the trial he changed his ground and said that the acquisition was with his own money and only benami, in the name of first defendant.

Both the Courts have found that the office is the self-acquisition of first defendant alone.

Under these circumstances, I do not think, that second defendant’s objection is sustainable, and I would, in allowance of this appeal, set aside the decree of the Lower Appellate Court and restore that of the District Munisif, and direct second defendant to pay plaintiff’s costs both in the Lower Appellate Court and in this Court.
PARKER, J.—I concur with Mr. Justice Best that the decree [148] of the District Judge may be reversed, and that of the District Munsif restored.

As the second defendant alone appealed, the decree should not have been reversed when it was found that he had no interest in the subject-matter of the suit. Neither first defendant nor defendants 3 to 5 appeared before the District Court to raise the question as to the inalienability of the office in question. Had they done so, it would have been necessary for the District Judge to determine whether, by the custom of the particular institution, such alienations were valid (see the Privy Council case of Rajah Vurnah Valia v. Ravi Vurnah Kunhi Kutty (1)). It was found by the District Munsif that these mirasi offices had usually been the subject of alienation, and that the temple authorities recognized their validity, but the District Judge gave no finding upon this point.

I may further point out that the District Judge was also in error in making a decree against first defendant when he had not been made a party to the appeal.

The second defendant should pay plaintiff's costs in this appeal and in the Lower Appellate Court.

16 M. 148 (F.B.) = 3 M. L.J. 54.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Parker, Mr. Justice Wilkinson and Mr. Justice Handley.

KRISHNAMMA (Defendant No. 3), Appellant v. SURANNA AND OTHERS (Plaintiffs Nos. 1 to 3 and Defendants Nos. 1 and 2), Respondents.*

[26th November, 1891, and 5th February, 10th August, 29th September and 16th December, 1892.]

Registration Act—Act III of 1877, Section 50—Unregistered mortgage with possession—Subsequent registered mortgage—Notice—Priority.

The defendants Nos. 1 and 2, in 1877, placed the plaintiffs' father (since deceased) in possession of certain land as usufructuary mortgagee under an unregistered mortgage deed for Rs. 99, and in 1893 mortgaged the same land to defendant No. 3 by a mortgage deed which was registered. Defendant No. 3 obtained a decree [149] on his mortgage in 1886, and applied that the mortgaged premises should be sold. The plaintiffs, having opposed his application for an order for sale without success, now sued for a declaration of their title as mortgagees. It was found that defendant No. 3 took his mortgage with notice of the mortgage of 1877, but had not otherwise acted fraudulently:

Held, that the plaintiffs were entitled to priority in respect of the mortgage of 1877:

Held by the Full Bench, that when it is proved that a subsequent encumbrancer under a registered conveyance had notice of a valid prior unregistered encumbrance and of possession by such encumbrancer, or of such conveyance without possession, the Courts are not bound to interpret the Registration Act of 1877, Section 50, so as to defeat the title of the prior encumbrancer.

[F., 19 A. 145; 5 L.B.R. 184 (187); 56 P.R. 1900 (F.B.)=29 P.L.R. 1900; R., 25 A. 866; 27 B. 492; 29 M. 22; 8 C.P.L.R. 109; 1 C.W.N. 14 (17); 1 L.B.R. 293; 81 M. 34 (62)=17 M.L.J. 537.]

* Second Appeal No. 80 of 1891.

(1) 1 M. 295.

811.
SECOND appeal against the decree of H. R. Farmer, District Judge of Vizagapatam, in appeal suit No. 211 of 1889, reversing the decree of N. Lakshmana Rau, District Munsif of Bimlipatam, in original suit No. 21 of 1889.

Suit to declare the title of the plaintiffs under an unregistered mortgage deed of 1877 accompanied by possession.

The facts of the case appear sufficiently for the purposes of this report from the following judgments of the High Court.

The District Judge passed a decree in favour of the plaintiffs.

The defendant No. 3, a puisne eumbrancer, preferred this second appeal.

This second appeal came on for hearing before Collins, C.J., and Wilkinson, J., and their Lordships made the following order of reference to Full Bench.

ORDER OF REFERENCE TO FULL BENCH.—On the 3rd November 1877 the first and second defendants, respondents, borrowed Rs. 99 from Adivi Naidu, the father of the plaintiffs, on the security of a usufructuary mortgage bond (Exhibit B) and possession of the property mortgaged was given to the mortgagor.

The mortgage bond was not registered. On the 25th February 1883 the same defendants, respondents, mortgaged the same property to third defendant and the deed of simple mortgage was duly registered. The third defendant brought a suit in 1886 and obtained a decree for sale. The plaintiffs opposed the order for sale but unsuccessfully, and then instituted the present suit to establish their mortgage right, the third defendant having denied the existence of their mortgage, and to recover the mortgage money from defendants 1 and 2.

The District Munsif dismissed the suit, holding, inter alia, that third defendant’s registered deed took effect as against plaintiffs’ [150] unregistered deed, and that plaintiffs were not entitled to succeed. On appeal, the District Judge found that the third defendant’s mortgage was tainted with fraud, and that plaintiffs were entitled to a declaratory decree.

In second appeal it is argued that even if third defendant had notice of the prior mortgage and knowledge of the plaintiffs’ possession as mortgagees, such notice and knowledge will not, according to the current of the decisions in this Court, deprive his registered deed of the priority conferred on it by Section 50 of the Registration Act.

It has been found that the third defendant at the time when he took Exhibit I was informed by second defendant of the existence of the subsisting mortgage. The Judge relies on the case of Narasimulu v. Somanna (1) as an authority for presuming fraud. But the case is not in point, because there it was found that the registered instrument had been executed collusively, and that there were other grounds besides notice and knowledge of possession for holding it to be fraudulent. There do not appear to be any such grounds in the present case, nor was fraud pleaded. The present case is on all fours with that of Nallappa v. Ibram (2), which has been followed in many subsequent cases see Kondayya v. Gurrwappa (3), Madar v. Subbarayalu (4), and Muthanna v. Alibeg (5). In that case it was held that transactions evidenced by unregistered documents which it is optional, as well as those which it is compulsory, to register are rendered of no effect by the subsequent execution and registration.

(1) 8 M. 167.  (2) 5 M. 73.  (3) 5 M. 189.
(4) 6 M. 88.  (4) 6 M. 174.
of a document relating to the same property, that Act XIX of 1843 did away with the doctrine of notice which has never since been expressly revived, and that, therefore, notice did not bar the operation of Section 50 of the Registration Act. It had already been held *Bimaras v. Papaya* (1), that in the case of two documents, the registration of which was optional, the registered sale deed took effect against the unregistered deed though accompanied by possession. But in subsequent cases *Ramaraja v. Arunachala* (2) and *Ramachandra v. Krishna* (3), it was recognised that an unregistered mortgage is not in itself invalid, and that a person who has bought subject [151] to it cannot afterwards take advantage of the Registration Act to avoid it. We are disposed to go further than this, and to hold that where a mortgagee under a registered instrument had notice that his mortgagor had previously mortgaged the property to some third person by an unregistered conveyance, it is contrary to equity and good conscience that his title, though under a registered deed, should be allowed to prevail. As remarked by Garth, C.J., *Nani Bibee v. Hafizullah* (4), "Every man when he buys property, or takes property as security for an advance, is, *prima facie*, supposed to make some inquiries about it, and if he finds that somebody else is in possession under a conveyance from the owner, though the conveyance is unregistered, he is not justifiable in equity and good conscience in buying the property himself," and we would add, if he takes it as security for money advanced by him, he does so subject to any equities arising out of the prior charge created by the owner.

The principles applicable to cases of this sort appear to us to be those laid down in the case of the *Agra Bank (Limited) v. Barry* (5). Lord Cairns there said: "Your Lordships have been referred to the Act of Anne, which established a registry of deeds in Ireland. Any person reading over that Act of Parliament would, perhaps, in the first instance, conclude that it was an Act absolutely decisive of priority under all circumstances, and enacting that, under every circumstance that could be supposed, the deed first registered was to take precedence of a deed which, although it might have been executed before, was not registered till afterwards. But by decisions which have now well established the law, it has been settled that, notwithstanding the apparent stringency of the words contained in the Act, still if a person registers a deed, and if, at the time he registers a deed, either he himself, or an agent whose knowledge is the knowledge of his principal, has notice of an earlier deed which, though executed, is not registered, the registration which he actually effected will not give him priority over that earlier deed. I take the explanation of those decisions to be that, inasmuch as the object of the statute is to take care that, by the fact of deeds being placed upon a register, those who come to register a subsequent deed shall be informed of the [152] earlier title, the end and object of the statute is accomplished if the person coming to register the deed has, *aliaude*, and not by means of the register, notice of a deed affecting the property executed before his own. In that case the notoriosity, which it was the object of the statute to secure, is effected in a different manner, but effected as absolutely in respect to the person who thus comes to register, as if he had found upon the register notice of the earlier deed." In *Wyatt v. Barwell* (6), the Master of the Rolls

---

(1) 8 M. 46. (2) 7 M. 248. (3) 9 M. 495. (4) 10 C. 1073. (5) L.R. 7 E. and Ir. App. 135. (6) 19 Ves. 433.
said: "It has been much doubted whether the Courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance, but the Courts have replied: "We cannot permit fraud to prevail; and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another that we suffer the registered deed to be affected."

It appears to us that where, as in the present case, the holder of the registered document had, at the time of taking the document, notice that another person already had a valid lien on the property, as well as knowledge that possession was in that third person, the Courts are not bound to interpret Section 50 strictly, and so enable the holder of the registered document to perpetrate a fraud against the prior encumbrancer who has a perfectly valid title. But as such a ruling would be contrary to many decided cases in this Court, though in accordance with the decisions of the other High Courts, we refer the matter to a Full Bench, the question for determination being whether when it is proved that a subsequent encumbrancer under a registered conveyance had notice of a valid prior unregistered encumbrance and of possession by such encumbrancer or of such conveyance without possession, the Courts are bound to interpret Section 50 of the Registration Act strictly so as to defeat the title of the prior encumbrancer.

This case then came on for hearing before the Full Bench.

Mahadeva Ayyar, for appellant.

Regulation XVII of 1802, Section 6, paragraph 3, contains express provisions, as to notice. This provision, however, was repealed by [153] Act I of 1843, and that Act, except as to notice, was repealed by Act XIX of 1843, Section 1. The Regulation and both of these Acts were repealed by Act XVI of 1864, which, for the first time, introduced the system of compulsory registration. I refer to Section 68; but the Act is silent as to notice.

[Muttusami Ayyar, J.—What does it say about possession under an oral mortgage?]

Nothing. The present case arises under the Act of 1877. It is unnecessary to consider the intermediate Act XX of 1866. As to Act VIII of 1871, Section 50, contains certain rules of priority and Section 48 provides for cases where possession has been delivered. Section 48 of Act III of 1877 is only a re-enactment. See also Sections 49 and 50. As to the effect of the repeal of the earlier Act, see General Clauses Act I of 1868, Section 3. The Madras decisions consistently proceed on the view that in order to invalidate a subsequent registered document, fraud must be alleged and proved. Thus when a case of competition between a registered and unregistered sale arose under Act I of 1843, the Sudder Court held in Ravapen Nair v. Shakhrah Kooroopoo (1), that the registered conveyance prevailed. This case shows that mere notice is not sufficient in the absence of collusion or the like. Again in Paskoo Poy v. Antonio Naik (2), where it was proved that an earlier vendee had protested against a subsequent sale and brought a suit on the very next day, the Court set aside the registered document evidencing the latter transactions, not on the ground of notice, but on that of fraud in the subsequent transferee. See also Anantaiya v. Krishnacharaiya (3).

(1) Mad. S. D. (1855) 238.
(2) Mad. S. D. (1859) 143.
(3) Mad. S. D. (1860) 70.
[Wilkinson, J.—In that case there was no conflict, because one of the transactions was fictitious.]

In Sreenauth Bhuttacharjee v. Ramcomul Gungopadhy (1) a conflict did arise between two registered deeds. I rely especially on page 228 of the report. I next refer to Nallappa v. Ibrahim (2) and Kondayya v. Guruvappi (3), which are alluded to in the order of reference.

[Wilkinson, J.—If a man sold a piece of land in 1873, what interest has he left to dispose of in 1879?]

[154] He has power to deal with the property in that the law says, that by a subsequent registered instrument he may defeat the first conveyance, if that has not been registered. The suggestion, that the first unregistered sale leaves no power of disposition in the vendor, is contrary to Section 50 of the Act, and all the High Courts agree that in the absence of notice at any rate the subsequently registered sale-deed prevails.

[Muttusami Ayyar, J.—The question appears to be whether the Registration Act upon grounds of public policy introduced a rule abrogating the general rule as to notice.]

As to this see Madar v. Subbarayalu (4), where the competition was between a deed of hypothecation and a deed of sale taken with notice.

[Wilkinson, J.—In that case there was a finding of fraud which the Judges failed to observe.

Muttusami Ayyar, J.—That seems to be improbable even if the counsel failed to observe it. It seems doubtful whether the finding was or was not in fact a finding of fraud as distinguished from notice.]

The next case is Venkayya v. Kotayya (5), where the question of fraud was not raised. See also Muthanna v. Alibey (6). In Ramaraya v. Arunachala (7) it was held on the facts that no question of priority arose—see, however, page 252 of the report—and as to section 50 of the Act compare Kadar v. Ismail (8). I rely upon Narasimulu v. Somanna (9) as showing that it is necessary to prove more than has been found to be proved in this case before the title of the registered holder can be displaced. See also Ramachandra v. Krishna (10). In Narain Chunder Chuckerbutty v. Dataram Roy (11), the question was raised whether the possession of the prior transferee amounted to notice to the subsequent purchaser, and this question was answered in the negative. As to the case of an unregistered document with possession coming into conflict with a subsequent registered deed, see Bimaras v. Panayya (12).

Pattabhiram Ayyar, for respondent.

Kanna v. Krishnan (13) is the last decision of this Court and [158] is to the effect that an agreement to sell together with possession is superior to an unregistered conveyance without possession. This is the result of all the decisions taken together, and the question is can this be right. Turning to the Sudder decisions which have been cited, it will be seen that the first and third do not touch the present point, and that the second does not cover it, since in that case there was a finding of fraud.

The doctrine of notice is as old as any Court of Equity. See Le Neve v. Le Neve (14). The clause which has been alluded to in the Regulation of 1802 was enacted for the purpose of expression only, and it remained in force until 1843, when the legislature considered that it

---

(1) 10 M.I.A. 220. (2) 5 M. 73. (3) 5 M. 139. (4) 6 M. 88.
(9) 8 M. 167. (10) 9 M. 486. (11) 9 C. 597. (12) 3 M. 46.
(13) 18 M. 324. (14) 11 White & Tudor, p. 35.

815
was inconvenient in its results, and provided that if the authenticity (not merely the genuineness) of the registered document was proved, it should have priority. This Act was repealed and succeeded by other Acts comprising no provision as to notice, but the old law of notice which existed before the regulation was enacted stands good; and the assumption that this application of the doctrine of notice was a new thing (an assumption which underlies the decision in Nallappa v. Ibram (1) is clearly erroneous. It may be observed that Act XX of 1866 does not expressly provide that the existence of fraud should invalidate the second conveyance, though the Courts have always considered that it has that effect.

[Collins, C.J.—Do you suppose that the Judges who decided Nallappa v. Ibram (1) did not realize how well established was the doctrine of notice?]

They refer to it, as I submit, inaccurately when they write of its introduction.

[Handley, J.—It is a different matter from the general question of notice. It is a particular question as to the effect of registration. The policy of the Act is to make a registered document conclusive. This policy would be, to a certain extent, defeated if evidence of notice were let in.]

This policy is so far defeated when fraud is admitted to prevail as an objection to the conclusiveness of a registered conveyance, and it is difficult to see why evidence of notice should not be let in equally with evidence of fraud. The questions of fraud and notice are inextricably connected.

[156] [Muttusami Ayyar, J.—It has been held that proof of notice in the subsequent transferee does not establish fraud against him.]

My contention is that as between two equally innocent persons registration is conclusive, but as between them only.

[Muttusami Ayyar, J.—Suppose there were an unregistered mortgage for Rs. 80 and a registered sale deed for Rs. 101, which should prevail?]

The Act does not here distinguish between optional and compulsory registration. As to Kondaya v. Guruvappa (2) I desire only to point out that the argument used as to the necessity of observing the plain terms of the law, in spite of the hardship that they might give rise to, would exclude the well-established rule as to the effect of fraud to which I have already referred.

[Muttusami Ayyar, J.—Do you argue that notice, whether constructive or actual, should be placed on the same footing as fraud?]

Yes, in this respect. In Madar v. Subbarayalu (3) and Muthanna v. Alibeg (4), which are authorities to the contrary, the matter was treated as concluded by previous decisions. Ramaraja v. Arunachala (5), Kadar v. Ismail (6), and Ramachandra v. Krishna (7) do not really touch this matter.

Again with reference to Section 48 of the Registration Act compare Specific Relief Act, Section 27, Clause (b), which contains a proviso as to good faith like the Trusts Act, Section 91, but such a proviso would not be within the ordinary scope of Registration Act.

The other three High Courts are unanimously in favour of the view for which I am contending. See Dimitri Ghose v. Aulek Moni Dabee (8) as to the introduction by the Act of 1871 of the new provision in Section 48.

---

(1) 5 M. 73.  
(2) 5 M. 139.  
(3) 6 M. 88.  
(4) 6 M. 174.  
(5) 7 M. 248.  
(6) 9 M. 119.  
(7) 9 M. 495.  
(8) 7 C. 758.

816
but not Section 50; see also Waman Ramchandra v. Dhoniiba Krishnaji (1) explaining the object of these words after the reference to the English cases, and compare page 150 of the report as to the terms of Henry VIII's Statute of Inrolments of Deeds, of Bargain and Sale, and the Irish Act of Anne.

[Muttusami Ayyar, J.—Apply your reasoning to the case of a contract for sale. Suppose the consideration has been paid, but possession has not been delivered].

[157] The result would be the same; and with reference to such a case it must be remembered that under Transfer of Property Act, Section 54 to complete a sale, there must be possession in the absence of a registered instrument. Before that Act there was a conflict of opinion upon this point. See Shivaram v. Genu (2) and Dundaya v. Chenbasapa (3). In Calcutta the decisions have been consistent. In the Calcutta case last quoted Field, J., discusses the meaning of the words "take effect" as employed in the section.

[Muttusami Ayyar, J.—Even adopting his view, a difficulty remains in cases where a subsequent purchaser has no notice.]

Field, J., considers the case where an unregistered conveyance, not being compulsorily registrable, is followed by possession.

[Muttusami Ayyar, J.—Still you cannot rest your argument upon his reasoning. You concede that the first transaction would be a valid sale as between vendor and vendee, apart from possession.]

The question of possession was discussed with reference to notice by the Full Bench in Narain Chunder Chuckerbutty v. Dataram Roy (4) and that case was explained in Nani Bibee v. Hazizullah (5). See also Bhalu Roy v. Jakhu Roy (6) and Abdool Hoosain v. Raigu Nath Sahu (7). The same view was adopted in Ram Autar v. Dhanauri (8), where the Madras cases are quoted and dissented from and Transfer of Property Act, Section 53, is referred to.

[Collins, C. J.—Do any of these decisions draw a distinction with regard to notice between the cases of optionally and compulsorily registrable documents?]

No.

[Handley, J.—Do any of the Calcutta or Bombay cases refer to Act XIX of 1843?]

I think not.

Mahadeva Ayyar in reply.

The legislature in India thought it necessary to enact the equitable rule of notice, and then for certain reasons set out in the preamble of the Act of 1843 to abrogate it.

This Court, after a consideration of the history of the Acts, has come to the conclusion that the doctrine so abrogated was extinguished, because it has not been expressly revived. The other High Courts in the cases which have been cited have not considered the history of the Acts, and this accounts for the opposite conclusion at which they have arrived. With regard to the reference which has been made to the Specific Relief Act and of Transfer of Property Act, and Trusts Act it must be noted that each of these Acts contains a section saving the operation of the Registration Act.

(1) 4 B. 126.  (2) 6 B. 515.  (3) 9 B. 427.  (4) 8 C. 597.  

817
JUDGMENT OF THE FULL BENCH.

COLLINS, C. J.—The question referred to the Full Bench is whether, when it is proved that a subsequent encumbrancer under a registered conveyance had notice of a valid prior unregistered encumbrance and of possession by such encumbrancer, or of such conveyance without possession, the Courts are bound to interpret Section 50 of the present Registration Act so as to defeat the title of the prior encumbrancer.

The first attempt to compel the registration of deeds, &c., in Madras was by Regulation XVII of 1802, a regulation for establishing a registry for wills and deeds for the transfer or mortgage of real property, and it was enacted by Section 6, Clause 3, that "it being the object, however, of the rules in the two preceding clauses, to prevent persons being defrauded by purchasing, or receiving in gift, or taking in mortgage, real property which may have been before sold, given, or mortgaged, subsequent to the period fixed for the operation of this regulation; and as persons can never suffer such imposition when they are apprized of the previous transfer or mortgage of the property; it is to be understood, that if any person shall purchase, receive in gift, or take in mortgage, any real property, knowing such property to have been previously sold, given, or mortgaged, to any other person subsequent to the above period; and that the deed of sale, gift, or mortgage has not been registered; and shall register his own deed, in such case the deed of sale, gift, or mortgage of such subsequent purchaser, donee, or mortgagee, which may have been registered, shall not, from the registry of it, invalidate, or be discharged, in preference to the unregistered deed of sale, gift, or mortgage, first executed, provided the authenticity of the latter be established to the satisfaction of the Court."

Act I of 1843 repeals all provisions in any regulation touching knowledge or notice of unregistered conveyances, and enacted that unregistered titles shall be void as against any person claiming [159] under a subsequent registered title, notwithstanding notice of a prior unregistered title.

Act XIX of 1843 repeals Act I of 1843 except so far as it repeals provisions touching knowledge or notice of the existence of unregistered instruments, and enacted that deeds of sale or gift of real property, if registered, shall invalidate other deeds of sale or gift which have not been registered, and registered deeds of mortgage, and certificates of discharge of encumbrances shall be satisfied in preference to any other, and that no conveyance, &c., affecting title to land other than such deed or certificate as aforesaid shall be void for want of registration.

Act XVI of 1864 repeals Regulation XVII of 1802 and Acts I and XIX of 1843 and enacts by Section 68 that registered instruments described in Clauses 1 and 2 of Section 16 of the Act shall have priority over unregistered instruments.

Act XX of 1866, a Consolidation Act, recites the expediency of consolidating the law relating to the registration of assurances, and by Section 50 enacts that instruments of the kind mentioned in Clauses 1, 2 and 3 of Section 18 shall, if registered, take effect against every unregistered instrument relating to the same property.

Act VIII of 1871 repeals Act XX of 1866 and is repealed by Act III of 1877, the Registration Act now in force, but Section 50 of Act VIII of 1871 is re-enacted, and is as follows: "Every document of the kinds mentioned in Clauses (1) and (2) of Section 18 shall, if duly registered, take effect as regards the property comprised therein, against
every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

The first reported case under Act III of 1877 (Nallappa v. Ibram (1)) was decided in 1881 by Turner, C.J., and Innes, J., who held that "Section 50 affects alike documents which it is optional, as well as those which it is compulsory, to register, and its effect is not modified by the fact that the subsequent registered purchaser buys with full notice of a prior unregistered encumbrance," that transactions evidenced by documents of either description are rendered of no effect by the subsequent execution [160] and registration of a document relating to the same property, that Act XIX of 1843 'did away' with the doctrine of notice which has never since been expressly revived. There is nothing about notice to be found in the Acts of 1864, 1866, 1871 and 1873. "Have we any right," say the learned Judges, "to import this doctrine? Were we to do so, notice would, it cannot be doubted, be set up in every case and the Act would be rendered to a great extent inoperative. The plain words of the Act are—shall, if duly registered, take effect as regards the property comprised therein against every unregistered document relating to the same property." The words are used without any qualification, and we think we should not be giving effect to the Act if we treated the circumstance of defendants having notice of plaintiffs' unregistered instrument as one which bars the operation of Section 50 of the Registration Act.

This decision appears to have been accepted by the Judges of the High Court of Madras as decisive, for, in Kondayya v. Guruvappa (2), Innes and Muttusami Ayyar, JJ., treated it as conclusive and held that although the plaintiff had entered into possession of land under an unregistered agreement executed by S and N in 1872 and remained in possession from 1872 to 1880, but was ousted in 1880 by one who claimed the land under a subsequent registered sale deed from S and N, yet the plaintiff could not recover the land from the subsequent purchaser.

In Narasimulu v. Somanna (3), Turner, C.J., and Muttusami Ayyar, J., held that fraud in the subsequent registered purchaser would defeat his claim. They also held that, although where the prior instrument is optionally registrable, mere notice may not deprive a person claiming under an instrument subsequently executed and registered of the priority given him by the Act, inasmuch as the prior instrument was effectual to create a title they were at liberty to hold that a participation in fraud by the person claiming under the subsequent instrument will deprive him of the benefit of the provision which was aimed at the prevention of fraud.

The fraud alleged, as appears from the report, was that the vendor of the land having first sold it to the respondent in the appeal afterwards sold it to the appellant, the appellant being aware [161] of the prior sale to the respondent. "They thus," says the report, "colluded." It is not clear what difference this can make if the words used in Section 50 are without any qualification," as was said in Nallappa v. Ibram (1). In every case in which a vendor sells to a person property which both he and the subsequent purchaser know that he has sold previously, I should say that the vendor and second purchaser "colluded" to deprive the prior purchaser of his property.

With the greatest respect to Sir Charles Turner and Mr. Justice Innes, it appears to me that they have placed a wrong construction on Act XIX of

(1) 5 M. 73. (2) 5 M. 139. (3) 8 M. 167.
1843. It is therein enacted that unregistered titles shall be void as against any person claiming under a subsequent registered title "any alleged notice or knowledge of such prior conveyance or instrument notwithstanding." Act XVI of 1864 repealed Act XIX of 1843; but the Judges in Nallappa v. Ibram (1) appear to have thought that, as the Act XIX of 1843 "did away" with the doctrine of notice, it would be required, to be operative, to be expressly revived. The words "did away" are somewhat ambiguous. The learned Judges must have seen the difficulty that existed if the doctrine of notice was held to apply, and, taking the view of Section 50 that they did, they were constrained to hold that the doctrine of notice was abolished by Act XIX of 1843 and not having been expressly revived had, therefore, no operation. It is difficult to imagine that if a statute enacts that, under certain circumstances, "notice" shall not be a defence the equitable doctrine of notice is for ever after extinguished, even after the statute itself is repealed; yet apparently that was the opinion of the learned Judges, and the second reason the same learned Judges give, namely, that, if notice was admitted to be a good defence, the Act would to a great extent be inoperative, as that defence would be set up in every case, does not commend itself to me as any reason at all for refusing to recognize the doctrine of notice. It does not seem to have attracted the attention of the learned Judges who decided Nallappa v. Ibram (1) that, if the legislature desired that the doctrine of notice should not be a defence in cases under Section 50 of Act III of 1877, it would have been easy to incorporate in that section the words relating to notice in Act XIX of 1843.

[162] I have dealt at some length with Nallappa v. Ibram (1) and Narasimulu v. Somonna (2), as those cases are the leading ones on this subject, and have been considered to have declared the effect of Section 50 of Act III of 1877 on the rights of subsequent purchasers who have notice of prior unregistered instruments in this presidency. The High Court of Calcutta differs from Madras on this subject. In Nani Bibee v. Hafizullah (3) decided in 1884 Garth, C.J., says, "that, where a registered purchaser "had notice that his vendor had previously conveyed away the property "to some third person by an unregistered conveyance, it was contrary to "equity and good conscience that his title though under a registered deed "should be allowed to prevail."

The High Court of Bombay also differs from Madras in the construction of Section 50 of the Registration Act of 1877. It was held in Shivaram v. Genu (4) (under Act XX of 1866, Section 50) that a subsequent registered purchaser or mortgagee cannot avail himself of the registration of his deed against a prior unregistered purchase of which he had notice, and in Dundaya v. Chenbasapa (5), Sargent, C.J., and Melvill, J., held that, although Shivaram v. Genu (4) was decided under Act XX of 1866, as the language employed in Section 50 of the Acts of 1871 and 1877 by which preference is given to registered documents is the same as that used in Section 50 of Act XX of 1866, the principle of those decisions is equally applicable and that "if the defendant was in possession when the "mortgage deed was executed to plaintiff or plaintiff had otherwise notice of "defendant's purchase, then the plaintiff could derive no advantage from "the registration of his mortgage."

The Allahabad High Court agrees with the decisions of the Calcutta and Bombay High Courts on this point (see Ram Aular v. Dhanauri (6) and

(1) 5 M. 73. (2) 8 M. 167. (3) 10 C. 1073. (4) 6 B. 515. (5) 9 B. 427. (6) 8 A. 540.
thus the rulings of the High Courts of the other three Presidencies are in conflict with the Madras decisions. The English cases are dealt with very fully in the notes on Le Neve v. Le Neve (1). The judgment of Lord Cairns in the case of the Agra Bank (Limited) v. Barry (2) quoted in this reference is a decision of the House of Lords to the effect that notwithstanding the apparent stringency of the words contained in the Act, still [163] if a person registers a deed and if at the time he registers it he has notice of an earlier deed, which though executed is not registered, the registration which he actually effected will not give him priority over the earlier deed. In Blades v. Blades (3) (decided so long ago as 1727 by Lord Chancellor King), it was held that a person having notice of a prior purchase (though it was not registered) was bound thereby, and that getting his own purchase first registered was a fraud and that the transaction was collusive. It must be borne in mind that I am only considering the cases in which the registration of the instruments is optional, and the case referred and the cases decided by the several High Courts and already cited, relate only to cases in which the value is under Rs. 100.

I will now consider the several Registration Acts passed in this country and give my reasons for differing from Nallappa v. Ibram (4) and thus overruling a series of decisions of this High Court since 1881.

The first Madras Registration Act was the Regulation of 1802, and the reason for passing such a regulation is declared to be to prevent persons being defrauded by purchasing real property which may have been before sold, and I assume that the intention of the other Registration Acts was also to secure subsequent purchasers against prior secret conveyances and fraudulent encumbrances. It is clear that from the passing of Act I of 1843 until it was repealed by Act XVI of 1864, notice of a prior sale unregistered would not affect a subsequent purchaser who had registered his instrument of title, but when that Act I of 1843 was repealed the doctrine of notice affected all subsequent transactions. By Section 17 of Act III of 1877 it is enacted that any document conveying any right, title or interest of the value of Rs. 100 in immoveable property shall be registered, and by Section 18 any document of the same nature as above of a value of less than Rs. 100 may be registered. By Section 49 no document required by Section 17 to be registered shall be received as evidence of any transaction affecting such property if unregistered, but the section is silent as to instruments under Section 18. Section 50 has been already quoted.

[164] The effect therefore of Sections 17, 18, 49 and 50 is that if a man purchases immoveable property of the value of Rs. 100 and does not register his sale-deed, that document shall not be received as evidence of the transaction. If the property purchased is of a less value than Rs. 100, the purchaser may register or not as he thinks fit, but if the former owner sells the same property subsequently to another who registers his sale-deed, the registered sale deed shall have priority over the unregistered, subject, however, to any equitable rights the prior purchaser has. It is impossible to believe that the legislature intended that the doctrine of notice should not apply to the provisions of an Act which is silent on the point.

It appears to me that the case of Nallappa v. Ibram (4) cannot be supported. First, the Judges were wrong when they held that all

(3) 1 Eq. C. Ab. pl. 12, p. 359.  (4) 6 M. 78.
transactions evidenced by documents, the registration of which is optional, are rendered of no effect by the subsequent execution and registration of a document relating to the same property; and, secondly, in holding that the doctrine of notice was done away with and required to be expressly revived, and that the fact that the subsequent registered purchaser bought with full notice of a prior unregistered encumbrance did not modify Section 50 of Act III of 1877. I am of opinion that if the subsequent purchaser had notice of a prior sale, and agreed with the former owner to buy that which he knows to have been already sold, that this is a fraud and dolus major itself. I agree with so much of the decision in Narasimulu v. Somanna (1) as says that fraud may be successfully pleaded against the holder of a subsequent registered instrument by the holder of a prior unregistered instrument, but I go further and hold that if a subsequent purchaser buys after notice of a prior valid sale even if possession has not been taken by the prior purchaser, such subsequent purchase is evidence of fraud and collusion between the former owner and the subsequent purchaser to cheat the prior purchaser, and that the subsequent purchaser's title should not be allowed to prevail. With reference to those observations I would answer the question referred in the negative.

MUTTUSAMI AYYAR, J.—The question referred for the decision of the Full Bench is whether, when it is proved that a subsequent encumbrancer under a registered conveyance had notice of a valid prior unregistered conveyance and of possession by such encumbrancer, or of such conveyance without possession, the Courts are bound to interpret Section 50 of the Registration Act strictly so as to defeat the title of the prior encumbrancer. The facts of the case in which the question arises are stated in the order of reference, and I do not think it is necessary to recapitulate them.

The leading case on the question in this Presidency is that of Nallappa v. Ichram (2), in which it was held that the effect of registration was independent of notice. In all the subsequent decisions, it was either expressly acknowledged or tacitly assumed that such was the general rule. See Kondayya v. Guruvappa (3), Madar v. Subbarayalu (4), Muthanna v. Alibeg (5), Ramaraja v. Arunachala (6), Narasimulu v. Somanna (1), Kadav v. Ismail (7), Ramachandra v. Krishna (8). Three exceptions were, however, recognized by them, viz., (i) that fraud as contradistinguished from mere notice defeats the claim to priority under Section 50, (ii) that notice is material in a suit for specific performance under Section 27 of the Specific Relief Act, and (iii) that when the registered purchase or mortgage is made or taken subject to the prior unregistered mortgage which is optionally registrable, no question of priority arises and there is no real competition between the two transactions.

The question as to the effect of notice upon the claim to priority as based on registration is one of construction. It was never doubted in this Presidency that the competition contemplated by Section 50 is between two valid transactions evidenced by the documents mentioned therein, and not between transactions either of which is invalid either for fraud, coercion, illegality or other good and sufficient cause. The principle that mere registration cannot operate to validate a transaction which is not legally enforceable has been invariably recognized.

(1) 8 M. 167.   (2) 5 M. 73.   (3) 8 M. 139.   (4) 6 M. 88.
(5) 6 M. 174.   (6) 7 M. 248.   (7) 9 M. 119.   (8) 9 M. 495.
Another proposition of law mentioned in the leading case is that though the transaction evidenced by the prior unregistered document is valid in itself, yet the title or interest created by it is [166] liable to be defeated under the rule of priority by a valid later sale or mortgage evidenced by a duly registered document. The reason is that, otherwise, no effect can be given to the rule which implies that a later registered title is intended to prevail against an earlier unregistered title. No weight can, therefore, be attached to the contention that by a valid unregistered sale for less than Rs. 100 the vendor's title is exhausted, he has, afterwards, nothing to sell, and the later registered sale gives nothing to the purchaser. Suppose that the subsequent purchase is made without notice of the prior sale; it cannot then be denied that the former prevails against the latter. The fallacy in the contention lies in ignoring the reason of the rule, viz., that as between registered and unregistered transactions, the registered transaction creates the dominant right or title.

The substantial question then is whether the doctrine of notice ought to have been treated as part of Section 50. It is patent that nothing is said of notice in any of the Registration Acts commencing with the Act of 1864. It is also clear from Acts I and XIX of 1843 that in order to avert the danger arising to registered titles and interests in immoveable property from perjury committed in this country during investigations touching the fact of notice or knowledge, and to give stability to such titles and interests, the legislature declared in 1843 in express terms that notice was immaterial. It was then known that according to the practice of the Court of Chancery under the Registration Acts in England, a registered purchase or mortgage concluded with notice of a prior unregistered title or interest was a species of fraud. It is also obvious that the Acts of 1843 were passed to supersede the Regulation of 1802 which had expressly recognized the doctrine of notice on the ground of fraud, and that this was done with the knowledge, how that doctrine had worked in this country during the previous 40 years. (See Section VI, Clause 3, Regulation XVII of 1802, and compare with the preamble of Act I of 1843). Again, the law that was enacted in 1843 was kept alive till 1863, and this raised a presumption that the mischief contemplated by the Acts of 1843 continued to exist. The course of legislation then in this country up to 1863 was this. It was the Regulation of 1802 that prescribed the rule of equity and good conscience as the law to be administered in matters to which the Hindu or Mahomedan Law was not declared applicable. Regulation XVII of 1802 introduced the doctrine of notice as part of that rule in connection with the registration of documents on the ground of fraud. Acts I and XIX of 1843 declared that the practical application of that doctrine in India resulted in much perjury and seriously impaired the stability of registered titles and interests and enacted on that ground that notice was immaterial. Moreover, it was considered in the leading case that the general policy of the later Registration Acts was more stringent than that of the Acts of 1843 and in furtherance of the policy initiated by the earlier enactments. If the unregistered document was one of which registration was compulsory, notice was immaterial, as it would then amount only to a notice of what was not a legal transaction. The policy consisted in constituting registration into a pre-requisite of a valid sale or mortgage of immoveable property, unless such sale and mortgage were petty transactions for or of less than Rs. 100 in value, and into a ground of priority, even in regard to those transactions. Hence it was considered by the learned Judges, who took part in the leading case, that they

1892
DEC. 16.

FULL
BENCH.

16 M. 148
(F.B.) = 3 M.L.J. 55.
were not at liberty to import into the Registration Act the doctrine of notice and thereby to re-open to any extent the door for perjury closed by the legislature in 1843. Under Act IV of 1882 notice was likewise immaterial, though a document was optionally registrable, if it fell under Section 54 of that Act and if there was no delivery of the property affected by it. When the unregistered document is compulsorily registrable, its registration is of the essence of the transaction and when it falls under Section 54 of Act IV of 1882, a registered sale deed or delivery of the property sold is the only recognized mode of transfer. Again, Sections 59, 107 and 127 of Act IV of 1882 prescribed rules for determining how far registration is a pre-requisite in the case of valid mortgages, leases and gifts, while Section 107 declared in what cases an oral agreement is permitted. These sections were declared by Act IIII of 1885 to form part of the Registration Act.

The policy indicated by them consisted in abolishing optional registration in cases failing under Section 54, and declaring that an oral agreement is no evidence of a valid transaction, except as specified in Section 107. That policy is explained with reference to Section 59 in these terms in the third Report of the Select Committee, dated 11th March 1881. "We agree with the Law Commissioners that the requirement of registration will not [168] "only discourage fraud and facilitate investigations of title, but "that it will also preclude some difficult questions of priority. A majority "of us, however, think that where the principal money secured is less than "Rs. 100, the assurance need not be registered and we have altered the "bill accordingly. Our colleague, Mr. Stokes, dissents from this alteration, "as in his opinion all encumbrances should appear on the Register, those "who mortgage their property for small amounts, as a rule, require protec- "tion from fraud more than those who mortgage for large amounts, and "the changes impeding on the working of the law will deprive the "requirement of registration of all hardship even in the pettiest cases." On the other hand, the equitable doctrine that the taking of a legal estate after notice of a prior right is a species of fraud, rests on the basis that unregistered conveyances are sufficient of themselves to create titles and that they are invalid as secret conveyances only as against those who are not aware of their existence. There is thus this essential difference in the mode in which registration is enforced in this country, viz., that notice is immaterial wherever compulsory registration is prescribed or an un-registered document is declared insufficient to create a valid transfer. Hence it was also presumed in the later cases that the legislature would have expressly revived the doctrine of notice if they had intended to revive it or referred to notice as they have done in the Specific Relief Act and the Indian Trusts Act.

The course of decisions is, however, open to this objection, viz., that transactions resting on documents which are optionally registrable and which are accompanied with or followed by possession are held liable to be superseded by a registered transaction, whilst oral agreements followed by possession are expressly saved by Section 48 of the Registration Act. It is also open to the remark, that, by prescribing compulsory registration and thereby rendering notice immaterial, the legislature denied the class of transactions in which alone the temptation to the commission of forgery and perjury was strong, and it was intended that the effect of registration should be independent of notice. This view receives corroboration from the distinction made by Section 54 and Section 59 of Act IV of 1882 in the case of optionally registrable instruments, and it may well be that as regards small transactions creating limited
interests in immoveable property the temptation to perjury was not considered to be strong, and registration was left to be enforced regarding them in the same way in which it is enforced in England. On reconsideration, it seems to me that the principle laid down in Wyatt v. Barwell (1), and approved by the House of Lords in the case of the Agra Bank (Limited) v. Barry (2), was not intended to be ignored in the case of transactions in which the requirement of compulsory registration was deemed to be a hardship, and it was considered sufficient to permit optional registration subject to the rule of priority. For, it is not correct to say in the absence of express provision to the contrary that an Act of the legislature designed to prevent one species of fraud was designed to let in another. As pointed out in the last-mentioned case, the authoritative canon of interpretation with reference to the rule of priority is that the object of the Registration Act, so far as it relates to priority, is to "take care that, by the fact of deeds being placed upon a Register, those who come to register a subsequent deed shall be informed of the earlier title, and the end and the object of the Act is accomplished if the person coming to register the deed has, aliunde, though not by means of the Register, notice of a deed affecting the property executed before his own." This is consistent with the intention of Section 48 to respect titles completed by transfer of possession, although such titles might rest on mere oral agreements and with the intention to confine the policy of the Acts of 1843 to important transactions by repealing those Acts and substituting therefor a system of compulsory registration. In the light thrown by the decisions of the other High Courts referred to by Mr. Justice Parker and of the English decisions already cited, I think that the sound rule of interpretation is that indicated in the Agra Bank (Limited) v. Barry (2).

I am, therefore, of opinion that the doctrine of notice is applicable in all those cases in which its operation is not excluded by a special provision of the Indian legislature to the effect that an unregistered document shall not generate a right. Here I may observe that all the decisions of the other High Courts, to which our attention has been drawn, are decisions on documents which were optionally registrable and sufficient, when they were executed, to create a title or a right. They were all executed, prior to 1882[170] and before Section 54 of Act IV of 1882 virtually abolished optional registration in the case of sales of immoveable property for less than Rs. 100. See Dinonath Ghose v. Auluck Moni Dabee (3), Naram Chunder Chuckerbutty v. Dataram Roy (4), Nani Bibee v. Hazratullah (5), Bhalu Roy v. Jakhoo Roy (6), Aboul Hossein v. Raghu Nath Sahu (7), Shivarman v. Genu (8), Dundaya v. Chenbasapan (9), Ram Autar v. Dhanauri (10). In most of these cases, the title under the unregistered documents was also completed by transfer of possession. Moreover, the recognition of the doctrine affords a basis for reconciling Section 49 with Section 50, for, in most cases, possession is very cogent evidence of notice, if not notice of itself. The result is that, when the prior unregistered document was sufficient at the date of its execution, to create a title to or interest in immoveable property or when possession was transferred under it, notice would be material as disclosing an intention to defeat a pre-existing right and that when such is not the case, notice would not be material, because there was no prior title nor right to defeat.

(1) 19 Ves. 439. (2) L.R. 7 E & Ir. App. 135. (3) 7 C. 753.
(8) 6 B. 516. (9) 9 B. 427. (10) 8 A. 540.
I would, therefore, answer the first part of the question referred to us in the negative and say that notice saves the prior title or interest.

As regards the second part of the question, it is not clear that it arises from the facts of the case as stated in the order of reference. If it is, however, desirable to answer it, I would answer it also in the negative, provided, as stated in the question, that the prior unregistered document was at the date of its execution valid, that is to say, sufficient to create an interest in immovable property.

Parker, J.—The facts found in the present case are that defendants Nos. 1 and 2 executed to the plaintiffs' father on November 3rd, 1877, an usurious mortgage bond for Rs. 99 and placed him in possession. The bond was not registered. Subsequently on February 25th, 1883, defendants Nos. 1 and 2 executed to third defendant an hypothecation bond upon the same property which deed was registered. In execution of a decree obtained upon this bond, the third defendant brought the property to sale. The plaintiffs sued to establish their rights under the usurious mortgage of 1877, but the District Munsif held that their deed had been defeated by the subsequent registered hypothecation under Section 50 of the Registration Act. The District Judge reversed this decision holding that, as third defendant had notice of the previous mortgage to plaintiffs' father and possession thereunder, his acceptance of the subsequent hypothecation deed was tainted with fraud.

The question now referred for the decision of the Full Bench is whether when it is proved that a subsequent encumbrancer under a registered conveyance had notice of a valid prior unregistered encumbrance and of possession thereunder, or had notice of such conveyance without possession the Courts are bound to interpret Section 50 of the Registration Act so as to defeat the title of the prior encumbrancer. By the expression "valid unregistered encumbrance" I understand the learned referring Judges to mean an encumbrance which by law is optionally registrable.

It is conceded that the course of decisions in the Madras Presidency since 1882 has been adverse to the prior unregistered encumbrancer. It has been held (Nallappa v. Ibram (1), Kondayya v. Guruvappa (2)), that it was the deliberate intention of the legislature to allow a subsequent registered conveyance to defeat a prior unregistered one,—although such prior conveyance was in itself a perfectly valid deed—and that the fact that the subsequent encumbrancer had notice of the earlier unregistered deed was immaterial and did not affect the question of priority. It has further been held that even notice and knowledge of possession under the earlier deed were not sufficient grounds for holding the subsequent deed fraudulent (Narasimulu v. Somanna (3)).

I do not think it necessary to examine in detail the different Madras cases in which the above doctrines have been laid down. They are set out in the order of reference, and there is no dispute as to their general tenor and effect. But those decisions all refer to and follow the leading case of Nallappa v. Ibram (1), and the contention which has led to this reference to the Full Bench is that the ratio decidendi in Nallappa v. Ibram (1) has been based upon a misapprehension. It is, therefore, necessary to examine that decision to see whether this contention can be supported.

The conclusion arrived at in Nallappa v. Ibram (1) was that Section 50 of the Registration Act rendered the effect of registration...
altogether independent of notice. The ground of decision was that whereas the earliest registration law in this Presidency (Regulation XVII of 1802) expressly recognized the doctrine of notice (Section 6, Clause 3) such doctrine had been expressly abolished by legislation in 1843 (see Act I and Act XIX of 1843 and had never since been expressly revived. The doctrine is not referred to in the later Registration Acts XVI of 1864, XX of 1866, VIII of 1871, and the present Act III of 1877; hence it was held that the Courts could not impart a doctrine which the legislature had once prohibited and had never revived, and the effect of which might be to render the policy of the legislature to a great extent inoperative.

Against this it is urged that the doctrine of notice is an equitable doctrine which exists altogether independently of statutory sanction, and will continue to exist so long as it is not expressly prohibited by law. Acts I and XIX of 1843 which contained the prohibition were repealed by Act XVI of 1864; hence the doctrine revived of itself, being no longer held in abeyance by a statutory prohibition.

It appears to me there is considerable force in this contention. It is true, no doubt, that the repeal of the Acts of 1843 will not revive Section 6, Clause 3, of Regulation XVII of 1802 (see Section 3, Madras General clauses Act I of 1867), so that the doctrine of notice will no longer rest upon specific enactment, but the doctrine may well be justified upon grounds of justice, equity and good conscience according to which the Courts are enjoined by the legislature to act.

If Section 50, Registration Act, were to be construed as a categorical direction to give prior effect to a registered document in all cases, it would follow that a registered document obtained by fraud, coercion, or from a minor or insane person would have to be given effect to in preference to a perfectly valid prior deed though unregistered. The Courts can hardly presume that the legislature would have enacted a direction so unreasonable, and I cannot but believe that, in enacting Section 50, it was intended to provide for cases of competition between innocent and bona fide purchasers, of whom the one had taken the precaution to register his conveyance, while the other had neglected that precaution. The whole object of registration is to give security and to enable intending purchasers and mortgagees to ascertain whether property is already encumbered. It is not unfair that a person who, by omission to register, neglects to give warning of his claim shall be liable to find that claim defeated in favour of a subsequent innocent purchaser who has presumably been induced to give valuable consideration through the neglect of the first encumbrancer to give public notice of his claim.

That the legislature does not regard the equitable doctrine of notice as altogether defunct is apparent from the Specific Relief Act I of 1877, Section 27, and the Indian Trusts Act II of 1882, Section 91, the former Act having been passed in the same year as the present Registration Act. The effect of the doctrine in a case arising under Section 50 of the Registration Act was referred to in Kadar v. Ismail (1), in which I took part. The legislature must be credited with consistency and unity of design and we can hardly suppose that an equitable doctrine was deliberately recognized in the Specific Relief Act and Indian Trusts Act,—but treated as defunct in the Registration Act, because not expressly mentioned therein. The effect of holding otherwise would lead to the curious result that as against a

(1) 9 M. 119.
subsequent registered purchaser a person in possession under an oral agreement would, under Section 48 of the Registration Act, be in a better position than a person in possession under an unregistered conveyance. The policy of Sections 48 and 50 of the Registration Act may, however, be reconciled by giving effect to the doctrine of notice, since actual possession—if not itself notice—is at all events cogent evidence of notice. See Narain Chunder Chuckerbutty v. Dataram Roy (1). This view is not inconsistent with Section 4, Clause (c), of the Specific Relief Act, which only deals with the operation of the Registration Act on documents independently of the intention and mind of the person. I am sensible of the gravity of overruling a long course of decisions. But in the present case it not only appears that the leading case which those decisions followed was based upon a misapprehension, but the case is in conflict with the course of decisions in England, in the other High Courts in India, and also (it appears to me) with that justice and equity which the Courts are bound to administer. With the greatest respect, therefore, for the learned Judges who decided Nallappa v. Ibram (2), I am of opinion that that decision [174] should be overruled and that our answer to the questions referred by the Division Bench should be in the negative Agra Bank (Limited) v. Barry (3), Wyatt v. Barwell (4), Dinonath Ghose v. Auluck Moni Dabee (5), Narain Chunder Chuckerbutty v. Dataram Roy (1), Nami Bibee v. Hafizullah (6), Bhalu Roy v. Jakhoo Roy (7), Abool Hossein v. Raghu Nath Sahu (8), Woman Ramchandra v. Dhondiba Krishnaji (9), Shivaram v. Genu (10) Dundaya v. Chenbasapa (11), Ram Antul v. Dhonaiuri (12).

WILKINSON, J. :—The question referred to the Full Bench for determination is whether, when it is proved that a subsequent encumbrancer under a registered conveyance had notice of a valid prior unregistered conveyance, and of possession by such encumbrancer, or of such conveyance without possession, the Courts are bound to interpret Section 50 of the Registration Act strictly so as to defeat the title of the prior encumbrancer.

Section 50 of the Registration Act is as follows: “Every document of the kinds mentioned in clauses (a), (b), (c) and (d) of Section 17, and Clauses (a) and (b) of Section 18, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.”

In the present case the conflict is between two deeds of mortgage, the earlier deed of November 1877, the registration of which was optional, being unregistered and the latter deed of February 1883 being registered. The earlier deed was followed by possession, and the District Judge found that the second mortgagee was, at the time when he took his mortgage, aware of the prior mortgage, and on the authority of Narasimulu v. Somanna (13) he held that such knowledge amounted to fraud which deprived an unregistered deed of priority.

In second appeal it was argued that such knowledge as the second mortgagee had of the prior encumbrance would not, according to the

course of decisions in this Court, deprive the registered [175] deed of the priority conferred upon it by Section 50 of the Registration Act.

The leading case upon the point is that of Nallappa v. Ibrahim (1). In that case it was held that transactions evidenced by unregistered instruments which it is optional, as well as those which it is compulsory to register, are rendered of no effect, by the subsequent execution and registration of a document relating to the same property; that Act XIX of 1843 did away with the doctrine of notice, which has never since been expressly revived and that, therefore, knowledge or notice of a prior encumbrance did not bar the operation of Section 50 of the Registration Act.

The first legislative enactment on the subject of registration in this Presidency was Regulation XVII of 1802, which enacted that registered conveyances and other instruments affecting titles to land should take precedence of unregistered instruments in all cases, except those in which the party registering had knowledge that the property had been previously sold or mortgaged under an unregistered deed. By Act I of 1843, however the Governor-General in Council repealed all the provisions in Regulation XVII of 1802, touching knowledge or notice of previous unregistered conveyances, and it was enacted that unregistered titles should be void as against any person claiming under a subsequent registered title, notwithstanding notice of the prior unregistered title.

This Act was repealed by Act XIX of 1843, except so far as it repealed the provisions in Regulation XVII of 1802 touching knowledge or notice of the existence of unregistered instruments, and the provision that knowledge or notice of a prior unregistered encumbrance by a party to a registered deed should not invalidate the priority of the registered deed was re-enacted.

From that year (1843) down to 1864 the equitable doctrine of notice was not available as a ground of defence. But in the latter year Act XVI was passed, which repealed Regulation XVII of 1802, Act I of 1843 and Act XIX of 1843 without re-enacting the provisions of the two latter Acts as to the ineffectiveness of notice. While, therefore, it is true, as remarked by the learned Judges in Nallappa v. Ibrahim (1) that the doctrine of notice has never been expressly revived, it must not be overlooked that the legislature have not, since Act XIX of 1843 was repealed, expressly [176] enacted that a registered instrument shall take effect against an unregistered instrument, notwithstanding that the party to the registered deed had notice or knowledge of the prior unregistered conveyance. If it had been the intention of the legislature that Section 50 should have the effect of conferring absolute priority on a registered instrument, knowledge or notice of a prior title notwithstanding, it must be presumed that the legislature would have said so; and in the absence of any express enactment I cannot see why we should import into the section words which are not to be found there. Moreover it was held by the Privy Council Sreenath Bhattacharjee v. Ramchun Gungopadhy (2) that even under Act XIX of 1843 a registered deed was liable to be deprived of its priority if tainted with fraud.

Now, as remarked by Story (Equity Jurisprudence), it would be gross injustice to allow a person who takes a transfer of property, with full notice of the legal or equitable title of other persons to the same property to defeat the just rights of others by his own iniquitous bargain. He becomes particeps criminis with the fraudulent grantor, and

(1) 5 M. 73.  (2) 10 M.I.A. 220.
it is a rule of equity as well as of law *Dolus et fraus nemini patrocinari debet.*

This principle was acted on by this Court in the case of *Narasimulu v. Somauna* (1). In that case the conflict was between two documents, the registration of which was optional. The Court (Turner, C.J., and Mutthusami Ayyar, J.) held that the plaintiffs' instrument which was followed by possession conferred a complete title, that the defendant's instrument which was executed conclusively and fraudulently could not prevail over it, and that participation in fraud by the person claiming under the registered instrument will deprive him of the benefit of Section 50. It having been thus admitted that fraud will deprive a person of the benefit of Section 50, I do not see how the decisions that registration protects an encumbrancer who takes with notice or knowledge of a prior title can be maintained; for, as remarked by Lord Hardwicke in the leading case of *Le Neve v. Le Neve* (2) fraud or *mala fides* is the true ground on which the Court is governed in cases of notice. "The design of a Registration "Act is," the learned Judge observed "to give parties notice who might "otherwise without such registry be in danger of being [177] imposed on "by a prior purchase or mortgage which they are in no danger of when "they have notice thereof in any manner, though not by the registry. "The taking of a legal estate after notice of a prior right makes a person "a mala fide purchaser. It is a species of fraud and *dolus malus* itself." The judgment of the House of Lords in the case of the Agra Bank (set out in the order of reference) is to the same effect.

The Courts of this country are required, in cases where no specific rule of law exists, to act according to justice, equity and good conscience (Act III of 1873, Section 16), (c), and so long as the principles of equity are not declared by express legislative enactment (as in the years 1843—1864) to be of no avail as a defence to an action, the Courts are bound not to decide cases on inequitable principles.

The principles of equity which apply to cases like those under consideration were very clearly stated by Wood, V. C., in *Benham v. Keane* (3). He said: "The whole doctrine of notice proceeds on this:—where a man "has created a charge affecting his estate, he is not at liberty to enter into "any new contract in derogation of the interest which he has created. "The Court will not allow him to do the wrong himself, nor will it suffer "any third person to help him to do it. No one will be permitted to enter "knowingly into a contract with a person so situated, which would "redound to his benefit at the expense of the prior encumbrancer... The "conscience of a purchaser is affected through the conscience of the person "through whom he buys; that person is precluded by his previous acts "from honestly entering into a contract to sell; and therefore any one "who purchases with the knowledge that his vendor is precluded from "selling is subject to the same prohibition as the vendor himself."

It cannot be contended that registration can confer validity upon an instrument which is *ultra vires*, or illegal or fraudulent. The law of registration was designed to prevent and not to aid fraud, but if the true construction of Section 50 is that a person by registering his document, whether such document is optionally or compulsorily registrable, shall be entitled to oust the title of a prior encumbrancer, notwithstanding that he took with knowledge or notice of such prior encumbrancer's title and possession, then the law is in my opinion a direct incentive to fraud.

---

(1) *S. M. 167.*  
(2) *II White & Tudor, p. 35.*  
(3) *J. & H. 702.*

---

830
I think Section 50 must be interpreted as having been intended to apply to the case of two innocent purchasers or mortgagees, and as giving the preference to the one who took the precaution to secure his title by registration, but not as intended to apply to the case of a subsequent registered purchaser or mortgagee who, at the date of his purchase or mortgage, had notice of a prior unregistered purchase or mortgage. The words of Lord Redesdale in *Latouche v. Lord Dunsany* (1) are directly in point. He said: "The intention was to make priority of registration the criterion of title to all intents and purposes whatever, but this does not exclude any thing which affects the conscience of the party himself who claims under the registered deed; it never was the intention of the legislature to give priority of right to commit a fraud, but its meaning was that, parties dealing fairly, priority should be given to him who had the registered instrument."

That it was not the intention of the legislature in this country to do away with the doctrine of notice and to encourage fraud is apparent from other legislative enactments subsequent to the Registration Act. Section 27 of the Specific Relief Act, which came into force in the month following Act III of 1877, provides that specific performance of a contract shall not be enforced against a transferee for value, who has paid his money in good faith and without notice of the original contract. In one of the illustrations to that section possession is represented as sufficient to affect the subsequent purchaser with notice of the interest of the person in possession. In Section 91, Act II of 1882, it is enacted that where a person acquires property with notice that another person has entered into an existing contract affecting the property, the former shall hold the property for the benefit of the latter, and finally in Section 53, Act IV of 1882, it is enacted that every transfer of immovable property made with intent to defraud prior transferees is voidable at the option of the person defrauded.

But, before answering the questions (there are really two) referred to us, it is necessary to take into account the provisions of Section 49 of the Registration Act as well as of Section 54 of the Transfer of Property Act. According to the former no document, (179) the registration of which is compulsory, shall affect any immovable property comprised therein, or be received as evidence of any transaction affecting such property unless duly registered. Section 54 of the Transfer of Property Act virtually abolishes optional registration so far as deeds of sale are concerned, for it enacts that no transfer can be made by an instrument of sale in writing unless it is registered; but it also provides that in the case of tangible immovable property of a value less than Rs. 100, a valid transfer by way of sale may be made by delivery of possession. The answer, therefore, seems to me to be this:

(a) In the case of sales of immovable property no conflict can arise under Section 50 of the Registration Act, because by an unregistered instrument no conveyance is effected.

(b) As in the case of mortgages registration still remains optional, the title of the registered purchaser or mortgagee prevails notwithstanding the propriety in time of the unregistered instrument, provided there is no notice of the prior title from which fraud can be inferred.

**Handley, J.**—I would point out that the question referred is not of so much importance as would appear at first sight, because all transfers.

(1) 1 S. & L. 159.
of immovable property by way of sale or mortgage executed since 1st
July 1882, the date on which the Transfer of Property Act came into
force, if by writing, must be by a registered instrument whether the value
of the property or amount of the mortgage be or be not less than Rs. 100.
(Sections 54 and 59, Transfer of Property Act). In fact the Transfer of
Property Act has, as observed by Sir Richard Garth in Narain Chunder
Chuckerbutty v. Dataram Roy (1) virtually abolished optional registration.
When therefore the prior unregistered mortgage was executed since 1st
July 1882 the question referred cannot arise, for there can be no valid
cumbrance created by unregistered deed, and an encumbrance created
only by transfer of possession is protected by the exception to Section 48
of the Registration Act. The question referred must, however, be
answered as to cases like the present when the prior unregistered mortgage
was executed before the 1st July 1882. I agree to its being answered in
the negative on the understanding that it relates only to cases when the
prior instrument of mortgage is one, the registration of which is optional.
[180] The question implies this by the use of the words "valid prior
unregistered encumbrance." But our answer should, I think, make the
matter quite clear. All the Madras decisions relate to cases when the
registration of the first document was optional. When the registration of
the prior instrument is compulsory no valid encumbrance is created, for
by Section 49 of the Registration Act, the instrument being unregistered
does not affect, nor can be received as evidence of any transaction affecting
the immovable property comprised in it.

Subject to the foregoing remarks I agree to the question referred
being answered in the negative. It appears to me that when once this
Court admitted, as the later Madras decisions have done, that fraud would
disentitle the subsequent purchaser or mortgagee by registered document
to the priority given him by the Registration Act, it is practically abandoned
the principle of the decision in Nallappa v. Ibram (2). For the doctrine of
notice, which that decision declared to be inapplicable to the case of a
contest between a registered and an unregistered instrument is founded,
as I understand it, upon the principle that Courts of equity will not
allow fraud to be perpetrated under cover of a statute if they can help it.
And it is difficult to conceive how it can be anything else but a fraud for
a person with knowledge that another has advanced money on the faith
of having a security upon certain property, to seek in collusion with
the person who has received the money to make use of the Registration
Act to deprive the lender of his security. In Le Neve v. Le Neve (3)
Lord Hardwicke expressly puts the right to relief in such cases
on the ground of fraud. He says, after discussing the cases, "consider,
"therefore, what is the ground of all this and particularly of those
"cases which went on the foundation of notice to the agent. The
"ground of it is plainly this: That the taking of a legal estate, after notice
"of a prior right, makes a person a mala fide purchaser; and not that he
"is not a purchaser for valuable consideration in every other respect.
"This is a species of fraud and dolus malus itself: for he knows that
"the first purchaser had the clear right of the estate, and after knowing
"that he takes away the right of another person by getting the legal
"estate." And after quoting the Roman law of dolus malus he goes on
"Fraud or mala fides therefore is [181] the true ground on which
the Court is governed in the cases of notice." And the language

(1) 8 C. 597. (2) 5 M. 73. (3) II White & Tudor, p. 35.
of Sir William Grant in the case of Wyat v. Barwell (1) referred to in the order of reference shows that he also considered the doctrine of notice to rest on fraud. I take the explanation of the decisions upon this question by Lord Cairns in the case of The Agra Bank (Limited) v. Barry (2) quoted in the order of reference to mean that such was the way in which the Courts considered that they were able to give relief in cases of notice without contravening the Registration Act. But the foundation of the decisions was the determination not to allow fraud to prevail if the Court could prevent it. And in my opinion the Courts of this country, which are bound to decide according to equity and good conscience, cannot do otherwise than follow the long series of decisions wherein the most eminent of English Judges have expounded the principles upon which Courts of equity should so administer the registration laws as not to allow them to be made the instrument of fraud. The case would be different if the legislature had expressly declared by positive enactment that the principle of the English decisions upon this question was not to be followed by the Courts here. But I am not prepared to follow Nallappan v. Ibran (3) in holding that the mere repeal by Act XIX of 1848 of the provision of Regulation XVII of 1802 relating to notice and the silence of subsequent Registration Acts upon the question of notice are sufficient on the part of the legislature to sweep away the doctrine of notice as far as the Courts of this country are concerned. That doctrine has been well established by a long series of decisions of the Courts of highest authority in Great Britain as an integral part of the principles of equity, and ought therefore still to be maintained by Courts judging according to equity and good conscience, even though it has lost the sanction it once possessed of legislative enactment. I am fully conscious of the inconvenience of overruling a long course of decisions of this Court beginning with Nallappan v. Ibran (3), but, looking at the much longer series of decisions of the highest tribunals in Great Britain and to the fact that the Registration Acts in respect of which those decisions were passed were in their terms as stringent as, or more stringent than, the Indian Registration Acts, I think the time has come to [182] place this Court in accord with the other High Courts of India upon this question. I would put the decision upon the ground that Section 50 of the Registration Act contemplates a conflict between two bona fide transactions relating to the same property, and not a case where a subsequent purchaser or mortgagee having notice that there is a bona fide and valid encumbrance on the property seeks to make use of the Registration Act to avoid it, thus making an enactment intended to prevent fraud an instrument of fraud.

This second appeal then came on for final disposal before COLLINS, C.J. and WILKINSON, J., and the Court delivered the following judgment.

JUDGMENT (FINAL, OF THE DIVISION BENCH)

It having been decided by the Full Bench that the second mortgagee, taking with notice of a prior mortgage, is not entitled to priority, the second appeal fails and is dismissed, but without costs.
APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

In Appeal No. 153 of 1890.

PERIA AMMANI (Defendant No. 5), Appellant v. KRISHNASAMI (Plaintiff), Respondent.

In Appeal No. 166 of 1890.

ADINADHA (Defendant No. 6), Appellant v. KRISHNASAMI AND OTHERS (Plaintiffs and Defendants Nos. 2 to 5), Respondents.

[3rd, 4th, 7th and 8th, 9th, 10th March and 10th November, 1892.]

Hindu Law—Jains of Southern India—Personal law—Adoption—Proof of custom—Will of a Jain widow.

In a suit to declare plaintiff's right as the adopted son of a Jain (deceased) and as a beneficiary under the will of the adoptive mother, it appeared that the plaintiff had been taken in adoption by the widow without authority from her husband or consent of his kinsmen:

Held, that it lay on the plaintiff to prove by evidence that the adoption was valid and that he was entitled to take under the will according to the custom governing the family, and

[183] Held, on the evidence, that the plaintiff had failed to prove this.

Per BEST, J.—If a Jain widow succeeds to her husband's property absolutely and has the right to dispose of it as she likes, the adoption of a son to herself who may succeed to such property would be valid.

Observations of HOLLOWAY, J., in Rithcurn Lallah v. Soojun Mull Lallah 9 Mad., Jur., 21] distinguished, on the ground that there was no reason for supposing that the parties to the present suit were other than natives of Southern India whose ancestors had been converted to Jainism.


CROSS appeals against the decree of K. R. Krishna Menon, Subordinate Judge of Tanjore, in original suit No. 28 of 1887.

Suit for declaration that the plaintiff was the adoptive son of one Ramasami Mudaliar, deceased, and for a declaration of his rights as beneficiary under a will made by the widow of Ramasami Mudaliar, dated 20th August 1883.

The parties were Jains: the alleged adoption was made by the widow without the authority of her husband or the consent of his kinsmen.

The Subordinate Judge upheld the adoption and the will and passed a decree for the plaintiff.

These appeals were preferred by defendants Nos. 5 and 6, respectively. Rama Rau, Sadagopachariar and Kothandarama Ayyar, for appellant, in appeal No. 153 of 1890.

Bhashyam Ayyangar and Pattabhirama Ayyar, for respondent.

Mr. Gantz, Ramasami Raju, Ramachandra Rau Saheb and Tyagaraja Ayyar, for appellant, in appeal No. 166 of 1890.

Rama Rau, for respondent No. 5.

Bhashyam Ayyangar and Pattabhirama Ayyar, for respondent No. 1.

JUDGMENT.

BEST, J.—In appeal No. 153 of 1890, the appellant is a sister of one Ramasami Mudaliar, deceased, the respondent being a boy adopted by the

* Appeals Nos. 153 and 166 of 1890.
widow of the said Ramasami Mudaliar. The parties are Jains. The questions for decision are (1) whether the adoption of the respondent made by the widow, admittedly without authority from her husband or consent of his kinsmen, is valid; and (2) whether the will (Exhibit A) executed by the widow is valid.

In the Lower Court, the factum of the adoption and genuineness of the will were both denied and so also in the memorandum of appeal; but at the hearing the appellant's vakil has with [184] drawn the objection to the Lower Court's finding that the adoption was in fact made and the will executed by the widow of Ramasami Mudaliar and has confined his arguments to the question of their validity.

The Jains are seceders from Brahmanical Hinduism and their religious tenets have more affinity to the precepts of Buddhists than to those of the Brahmins. They do not accept the Vedas of the Brahmins and differ from the latter in their conduct towards the dead omitting all obsequies after the corpse is burnt or buried. They have neither Tithi nor Shraddha.

"With the Jains the dead are forgotten almost as soon as they are "buried, and, in three days after the funeral, there is no further mention "of them." Abbé Dubois, pp. 562-3, Ed. of 1817. They do not make offerings to their dead in the Shraddha; they say "of what use is it to "pour oil into the lamp after the wick is burnt to ashes." Their belief is "that the future births of men are regulated by present actions. Ward's "History of the Hindus," pp. 229-30. They retain, however, many of the customs of orthodox Hindus and it was held in Chotay Lall v. Chunno Lall (1) that where a custom different from the ordinary Hindu Law is set up as prevailing among Jains, the burden of proving such custom is on those who allege it, and in the absence of such proof the ordinary law must prevail. The strict scrutiny which evidence of a custom opposed to the ordinary law and usage of the country demands, will not be relaxed in favour of Jains, where a right of adoption beyond that allowed by precedent and text law to Hindus at large is set up, the Jains not believing in the spiritual necessity or advantage of adoption.

The only cases brought to our notice in which adoptions by a widow without the authority of her husband or consent of his kinsmen have been upheld are Maharajah Govind Nath Roy v. Gulal Chand (2), Sheo Singn Rai v. Mussumat Dakho (3), Lakhmi Chand v. Gatto Bai (4), Manik Chand Golecha v. Jagat Settani Pran Kumari Bibi (5).

In three of these cases—the first, second and fourth—the special custom was expressly found to be proved, and in the other case [185] also there appears to have been evidence on the point considered, namely, the validity of a second adoption by the widow. It does not appear what was the authority on which the learned Judges there proceeded in saying "it is true that the powers of a Jain widow in the matter of "adoption are of an exceptional character, namely, that she can make an "adoption without the permission of her husband or the consent of his "heirs and that she may adopt a daughter's son." It may be that the above point was conceded in that case on the authority of Sheo Singh Rai v. Mussumat Dakho (3), to which reference is also made in the judgment. But as was observed by Oldfield, J., in Bachebi v. Makhan Lal (6), "a

(1) 6 I.A. 15.
(3) 6 N.W.P. H.C.R. 382, on appeal 5 I.A. 87.
(4) 8 A. 319.
(5) 17 C. 518.
(6) 3 A. 55.
The statement of the Subordinate Judge that the decision of the Calcutta High Court in Lalla Mohabeer Pershad v. Mussamut Kundun Koowar (1) to the effect that Jains are governed by the Hindu law of inheritance applicable in the part of the country in which the property is situated was virtually overruled by the subsequent decision of the Allahabad High Court in Sheo Singh Rai v. Mussumat Dakho (2) is incorrect. The latter case went on appeal to the Privy Council and was upheld on the ground that the special custom was proved by the evidence given in the case. As was explained by their Lordships of the Privy Council in a later case, Chotay Lall v. Chunno Lall (3) the decision in Sheo Singh Rai's case (2) "did no more than adopt and affirm the law to be deduced from a long roll of cases in India, that when the customs of the Jains are set up they must be proved like other customs varying the ordinary law, and that, when so proved, effect should be given to them."

Equally unfounded is the Subordinate Judge's remark that Bhagwanadas Tejmal v. Rajmall (1) is "in favour of the widow's power of adoption."

There can be no doubt that in the present case it is incumbent on the plaintiff to prove the special custom set up on his behalf, and the question "has it been proved" must, I think, be answered in the negative. No doubt a number of witnesses have deposed [186] in support of plaintiff's contention as to the widow's independent power of adoption and disposal of her late husband's property. The number of such adoptions spoken to by the witnesses examined by the Subordinate Judge himself is twenty-seven as shown in the list attached to the judgment of the Lower Court. There is, however, rebutting evidence given on the other side, as noticed in the same list, with regard to twenty-two of those cases and the Subordinate Judge has only treated the other five as proved, and this on the simple ground that there is "no reason to disbelieve plaintiff's witnesses in the absence of any rebutting evidence." Of the five cases thus accepted as proved, No. 15 is spoken to by only one witness—plaintiff's 17th witness—who merely says it took place 40 years ago. Nos. 21 and 22 are also spoken to by a single witness—plaintiff's 26th witness—who says he was himself the subject of adoption No. 21. He does not know, however, whether there was, or was not, permission given by the deceased husband of his adoptive mother for the purpose. It is urged on behalf of appellant that the evidence in support of these cases was such as not to be worth rebutting. So also with regard to the alleged adoption No. 12 the only witness to which is No. 14 who deposes to having heard that his grandfather's father was adopted by the latter's aunt. Moreover, the witness is the natural father of the plaintiff. He is also one of the three witnesses who speak to the adoption No. 11, an adoption by one Vedattamal of her daughter's son which is said to have taken place 35 years before, when witness was a boy aged 14 years. The other witnesses for plaintiff who speak to this adoption are Nos. 17 and 24, the former of whom is the paternal uncle of Janadas Mudali, the next friend of the plaintiff in this suit; while 24th witness is the son of another brother of the 17th witness, that brother being no other than Purnachandra Mudali who is alleged to have been adopted by Vedattamal (adoption No. 11).

(1) 5 W.R. 116.  (2) 6 N.W.P.H.C.R. R. 392; on appeal 5 I.A. 87.
The 17th witness (whose age is 58 years) says an adoption took place 35 or 38 years ago. This witness's only reason for saying that the adoption was made by Vedattammal without permission is because "Purnachandra Mudali was my younger brother and Vedattammal asked that he should be given in adoption and conducted the adoption." The age of plaintiff's 24th witness is only 25 years. He has of course no personal knowledge of the adoption. He says "my father stated that [187] Vedattammal had adopted him without the permission of her husband and dayadis, when he gave evidence as a witness in the execution proceedings in suit No. 14 of 1881 on the file of this Court," but no such deposition has been produced. Exhibit H no doubt shows that Purnachandra Mudali described himself as the son of Anantappa Mudali (the husband of Vedattammal), but there is nothing in it to show that an adoption was made by the widow without authority from her husband or kinsmen.

Plaintiff's 14th witness referred to above also speaks to the 4th and 5th adoptions—not however in his examination-in-chief, but in cross-examination on being asked to give instances of adoptions by widows without special authority. Both these adoptions Nos. 4 and 5 had previously been spoken to by plaintiff's 9th witness, Rajarama Mudali, the natural father of the boy the subject of adoption No. 4. He says he gave his son in adoption to his (witness's) younger sister Dhanapati Ammal 13 years ago and that neither Dhanapati Ammal's husband nor his dayadis gave authority for the adoption. The adoption was oral. In the only document on record which relates to the boy, Exhibit XXXV—which is an extract from the Register of the College at Tanjore which he attends—in the column headed "Father's or guardian's name" is entered the name of this witness. It is admitted that there are three brothers living of the alleged adoptive father, but none of them has been examined and though those brothers admittedly own house property, the alleged adopted son of the brother, it is admitted, has no share in the house. The 9th witness also speaks to the alleged adoption No. 5, i.e., the adoption of one Appandai Mudali by one Ratnattammal, wife of Aiyana Mudali. Witness was admittedly not present at the adoption. There are dayadis of Ratnattammal's husband, but none of them has been examined. Appandai Mudali examined as plaintiff's 15th witness also speaks to the adoption of himself by Ratnattammal, wife of Aiyana Mudali. He is also the eldest son of his natural father and as in the case of No. 4, so here also all that the adopted son got by the adoption was moveable property. His natural father is alive; so also all his natural and adoptive mothers; but not one of these persons has been examined. There is thus only the evidence of the 15th witness, himself admittedly a boy of 10 years at the date of adoption, that the widow adopted "without the permission of any one."

[188] Plaintiff's 8th witness alone has spoken to the adoptions Nos. 1, 2 and 3, of which No. 2 is alleged to have been made by the witness's own elder brother's widow. Witness was 19 years old at the time (his present age is 52). He admits that he objected to the adoption and that the adopted son died in three years. Witness says he then purchased the property, but no deed of sale was executed. Witness's brother was a cart-driver. No document of any sort is produced.

The witnesses' evidence as to the adoptions Nos. 1 and 3 is no more satisfactory; in any case it is not sufficient to show that those adoptions, if made, were made without authority.
The only person who speaks to adoption No. 6 is the plaintiff's 10th witness. The witness is the son of Appavu Nainar who is alleged to have been adopted by one Ulagammal. The witness was admittedly not born at the time of the adoption and is not therefore in a position to know whether it was made with or without authority.

The same witness also speaks to adoptions Nos. 7, 8 and 9. He admittedly does not know whether for No. 9 the widow Ramammal had authority from her husband though he says there was no such authority in the cases Nos. 7 and 8; his evidence is far from conclusive on the point.

Plaintiff's 12th witness also speaks to four adoptions Nos. 7, 8, 9 and 10. He says he only heard of the last (No. 10), but that he personally knows of the other three and that they "were made with the permission of dayadis and relations."

No other witness has spoken to adoption No. 10, Nos. 11 and 12 have already been considered.

No. 13 is spoken to by plaintiff's 16th witness. The adoption was by the witness's paternal uncle's widow, when witness was 15 years old. Assuming that what the witness has said is true, his evidence shows that the adoption was made with the consent of witness's father and the latter's other surviving brothers. He says the lady before making the adoption asked if she might do so, when witness's father replied she might. He says "three were born with my father. That lady asked the three "persons other than the one deceased if she may adopt and they said she "may."

Adoption No. 14 is spoken to by plaintiff's 17th witness alone, whose evidence with regard to adoptions Nos. 11 and 15 has [189] been considered already. The adoption No. 14 admittedly took place prior to the witness's birth and he does not say that the widow acted without the authority of her husband or dayadis in making it.

The adoption No. 16 is spoken to by two witnesses, the 19th and 21st witnesses. Witness 19 also speaks to adoption No. 17 and witness 21 to adoption No. 18. The former witness merely "guesses (supposes) there was no permission" for the adoption by the widows in the cases spoken to by him, and witness 21 admits that he does not know whether or not Rukammal's husband and dayadi gave permission for the adoption No. 18, and he does not prove that there was not permission for the adoption No. 16.

Each of the other adoptions Nos. 19 to 27 is spoken to by a single witness. The 22nd and 25th witnesses who speak to adoptions Nos. 19 and 20 respectively do not say that they were made without permission. The 26th witness who speaks to adoptions Nos. 21 and 22 does not know whether there was or was not permission for No. 22; nor does he know there was no permission for his own adoption No. 21. Though he at first said that the woman who adopted him subsequently told him there was not, in his cross-examination by the 4th defendant he has said he did not ask his adoptive mother whether there was permission and that he only said that she did not get permission from her husband because she had "wept saying her husband had died suddenly."

The evidence of plaintiff's 27th witness who speaks to the adoption No. 23 is most unsatisfactory. He says that Padmavati Ammal, the widow of Perumal Nainar adopted one Appandai Nainar, as advised by the witness himself, because "her dayadis were troubling her." He does not know which dayadi was troubling her. Padmavati is alive and also the
man who is alleged to have given the boy in adoption, but neither of them has been examined.

Plaintiff's 31st witness who speaks to the adoptions Nos. 24 and 25 is careful to say that a Jain widow has power to adopt without the permission of her husband "only if he were a divided member," the reason being that two brothers of the witness are dead leaving widows. He says "my "brothers and I were undivided; therefore their widows cannot adopt." Finally he [190] admits that he was not present at the making of the adoptions spoken to by him. His evidence is therefore merely hearsay.

Adoptions Nos. 26 and 27 are spoken to by plaintiff's 32nd witness. As to No. 26 he explains that his reason for saying that permission was not given for that adoption is that the husband of the woman who made that adoption "became unable to speak as soon as he was attacked with "paralysis and died after two days' illness;" and as to No. 27 he admits that "even if no adoption had been made it is only the said boy that "should enjoy the properties." Finally he admits that he "does not "know whether or not it is customary that either the husband or the "dayadi should have given permission for the adoption by a widow."

Of the eleven adoptions spoken to by witnesses examined in Mysore, No. 1 is spoken to by plaintiff's 33rd, 34th and 40th witnesses. Though the first of these began by stating that the boy adopted in this case was the son of the adopting widow's younger brother, he has subsequently admitted that such was not the case, but that the boy was the son of the widow's late husband's brother, and so also says the 34th witness. The witnesses do not say that the boy's natural father did not authorize the adoption, and even if they did say so, it could not be believed. Anantammal, who is alleged to have made the adoption, is admittedly alive, but has not been examined. The presumption in this case is that the adoption, if made, was made with the consent of a dayadi, if not under authority given by the adoptive father.

Adoption No. 2 is spoken to by plaintiff's witnesses 33 and 38. The former has expressly stated that he does not know if Payamma who made that adoption had authority from any body to make it. 38th witness is the son of the alleged adopted son of Payamma and has no personal knowledge of the matter; he has merely heard that his father was adopted by Payamma. Payamma is admittedly alive but has not been examined. Both these witnesses gave evidence for plaintiff in the former suit No. 14 of 1881 where the only issue was as to the genuineness of a will.

The witnesses who speak to the adoption No. 3 are plaintiff's witnesses Nos. 34 and 38—the former of whom also spoke to No. 1 and the latter to No. 2. Neither of the witnesses says the adoption was made without authority. As the 34th witness was at the time of the alleged adoption "reading in school," the 38th [191] witness, who is his junior by 16 years, can have no personal knowledge of the adoption.

The same 34th witness also speaks to the alleged adoption No. 4. He is the only witness who speaks to it; and he says nothing about its being made by the widow without authority, whereas, according to his evidence, the boy adopted was related to Dharanappa, by whose widow the adoption is alleged to have been made.

Adoptions Nos. 5 and 6 are spoken to by plaintiff's 35th witness alone, and this only in his cross-examination. As to No. 5 he merely says that about 9 or 10 years ago Chikkanappa's wife (widow?) adopted a boy. He does not know how the boy was related to Chikkanappa, nor
does he say that the adoption was not authorized by Chikkanappa or
his brothers who are alive but not examined.

As to No. 6 he merely says one Padmavatamma adopted. He does
"not know if the elder and younger brothers and the dayadis were or
were not there." This witness also gave evidence for Lakshmimati
Ammal in the suit of 1881. Adoption No. 7 is spoken to by the same
35th witness and also by witnesses 36 and 37. Not one of them says
the adoption was made without authority.

So also with regard to adoption No. 8 which is spoken to by the
above 36th witness alone, and adoptions Nos. 9 and 10 to which plaintiff's
39th witness alone has spoken, and No. 11 as to which the only witness
is No. 40. These last two witnesses also gave evidence in original suit
No. 14 of 1881 for Lakshmimati Ammal, by whom plaintiff claims to
have been adopted.

As to the absence of rebutting evidence with regard to these alleged
Mysore adoptions, one of the grounds of appeal is that appellant "was
not allowed sufficient facilities to examine her witnesses on commission
in the Mysore territories;" and from the order directing return of the
commission, dated 13th September 1889, it is seen that appellant asked
for an adjournment in consequence of the non-appearance of the witnesses
(for the summoning of whom batta had been paid on 12th August), but
the request was not complied with on the ground that the "Subordinate
"Judge, Tanjore, has requested to expedite the execution of the com-
mmission and return of the same, as the suit could no longer be post-
poned."

[192] Under these circumstances the appellant would have been
entitled even now to an opportunity of examining her witnesses, were there
any real necessity for it, but the evidence of the plaintiff being what it is
and altogether insufficient to prove the special custom set up, there is no
necessity for further evidence on the side of the defendant (appellant).
The witnesses examined on behalf of the appellant as 5th defendant in
this suit before the Subordinate Judge of Tanjore and on behalf of plaint-
iff in original suit No. 7 of 1888 (which it was agreed should be consid-
ered as evidence also for this suit) swear that among Jains in South
India widows have no greater powers in regard to adoption and aliena-
tion of their husband's property than is possessed by widows under the
ordinary Hindu Law, and many of these witnesses seem to be entitled to
more credit than those examined on the other side, who start by claiming
in general terms unrestricted powers for the widow, but have failed to
establish the special instances of the exercise of such power.

With reference to the remarks of Holloway, J., in Ruthorn Lallah v.
Soojun Mull Lallah (1), which have been quoted by the Subordinate Judge,
it is to be observed that from the names of the parties to that suit it is clear
that they were immigrants from the North, and it may be that their
ancestors seceded from orthodox Hinduism centuries before the text of
Vasishta, "Let not a woman give or accept a son unless with the assent
of her husband," became a part of the Hindu Law. But there is no reason
whatever for supposing that the parties to the present suit are other than
natives of South India whose ancestors were converted to Jainism. It is
clear from the evidence of respondent's own witnesses that they still
observe many of the customs of the Hindus—including Homams at
marriages and Upanayanaams—though according to Wilson "the Homam


840
is an abomination" to Jains. Religions of the Hindus, page 287. There are also gotrams which are changed on marriage or on adoption. Though some of the witnesses deny division into four castes, others admit it. Also ceremonies are performed for the dead similar to those performed by orthodox Hindus. See the evidence of plaintiff's 18th witness who speaks of Pindam being offered and Masiam or the monthly ceremony being performed, as also Tithi or the annual ceremony. [193] There is no reason for supposing that this witness wishes to favour the defendant, now appellant, yet he has expressly stated that "widows should not adopt. They should not give property to any one by a will."

As has been remarked by Colebrookes in his "Observations on the sect of Jains"—Asiatic Researches, Volume 9, p. 288, though the Jains are seceders from Brahmanical Hinduism, they nevertheless constitute a sect of Hindus "differing indeed from the rest in some very important tenets, "but following in other respects a similar practice and maintaining like "opinions and observances." As observed by West and Buhler, p. 952, 3rd Edition, they generally submit to the Hindu Law of adoption, though denying important doctrines—"their capacity to adopt is therefore "governed by the ordinary rules." As is seen from Volume II of Punjab Customary Law, p. 154, even among the Jains of that province, the birthplace of Jainism, the consent of husband or kinsmen is necessary for adoption by a widow except in a few specified tribes.

Exhibit XXXVIII which is a deposition given by Lakshmimati Ammal (plaintiff's adoptive mother) in 1869 shows that she then stated that she was entitled to the property of her deceased husband "under Hindu Law," and in the will which is filed in this suit as plaintiff's Exhibit A, one of the objects of adopting plaintiff is stated to be that he should "perform all the rites incidental to religious matters for the enjoyment of spiritual welfare of my husband and myself," which is more in accordance with Brahmanical Hinduism than with the doctrines of Jainism.

At the close of his work on Buddhism, Monier-Williams has stated that Indian Jainism "is gradually drifting back into the current of Brahmanism which everywhere surrounds it." Buddhism, p. 536. Be this as it may, it is open to question whether among the converts to Jainism in the southern districts of this Presidency—to which the parties to this suit belong—there was any drifting away from Hinduism as far as the law regulating the devolution and alienation of property is concerned, and with regard to the powers of a widow to alienate property or to make an adoption to her husband without authority from her husband or his kinsmen, which are the questions for decision in this appeal. I am of opinion that the evidence adduced by plaintiff is altogether insufficient to prove the special custom.

[194] As to the application of the maxim cessante ratione legis cessat ipsa lex, it certainly does not strengthen the plaintiff's case. As adoption among Hindus rests on the advantage of having a son to perform funeral rites, and as the Jains deny this advantage, there ceases to be any reason for allowing a Jain widow to make an adoption to her husband. Of course, if she succeeds to her husband's property absolutely and has the right to dispose of it as she likes, the adoption of a son to herself who may succeed to such property would be valid. But some of plaintiff's own witnesses deny the right of a widow to alienate such property and defendants' witnesses are unanimous on the point.
1892

16 M. 194

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

VYTHILINGA AND ANOTHER (Plaintiffs), Appellants v. VENKATACHALA AND OTHERS (Defendants Nos. 2 to 9 and Representatives of Defendant No. 4), Respondents.*

[5th October and 2nd November, 1892.]

Evidence Act—Act 1 of 1872, Section 13—Ejectment—Notice to quit.

In a suit for possession of land, the plaintiffs claimed title under a lease from the shrotriemdar of the village where the land was situated. The defendants who had obstructed the plaintiffs from taking possession of part of the land, claimed to have permanent occupancy rights, and asserted that the shrotriemdar were entitled not to the land itself but to melvaram only. To meet this allegation the plaintiffs tendered in evidence documents executed by other tenants in the same village showing that they were purakudus merely. The defendants had received no notice to quit before suit:

[195] Held, (1) that the documents above referred to were admissible under Evidence Act, Section 13;

(2) that the plaintiffs were entitled to eject the defendants without proof of notice to quit, as it did not appear that the latter were in possession as tenants at the time when the suit was filed.

[Appr., 5 C.L.J. 55; R., 24 B. 591.]

APPEAL against the decree of H. H. O’Farrell, District Judge of Trichinopoly, in original suit No. 23 of 1889.

The facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court.

Issues 3 and 4, referred to in the judgment, were framed as follows:

"(3) Are plaintiffs entitled to possession of the plaint lands as against contending defendants?"

"(4) Are plaintiffs entitled to the kudivaram of the plaint lands and are the defendants kudivaramdar or tenants at will?"

The plaintiffs preferred this appeal.

Sankaran Nayar and Sankara Narayana Sastri, for appellants.

Parthasaradhi Ayyangar, for respondents Nos. 1, 2 and 4 to 8.

JUDGMENT.

The plaint sets forth that plaintiffs Nos. 1 and 2 and defendant No. 1 have taken on lease certain lands in the shrotriem village of Kolathangana-nallur from the shrotriemdar and have been put into possession of a great portion of the lands comprised in the said lease, but that defendants Nos. 2 to 9 obstructed plaintiffs in obtaining possession of the suit

* Appeal No. 167 of 1891.
lands, notwithstanding that they have been warned not to do so by the shrotriemdsars. Hence this suit for possession.

Defendants Nos. 2 to 9 claimed to be in possession and enjoyment of the suit lands under tenancy rights derived from their ancestors, and contended that the shrotriemdsars, as grantees of the village from the Udayar-pallei Zemindar, are entitled to the melvaram on the lands only, but not to the lands themselves.

Four issues were framed, but the District Judge states that issues 1 and 2 were dropped and that the suit was fought out on issues 3 and 4. On these he found that defendants Nos. 2 to 9 were raiyats with rights of permanent occupancy and that the shrotriemdsars and therefore their lessees (the plaintiffs) were not entitled to the lands themselves. The suit was therefore dismissed with costs and the plaintiffs appeal.

An objection was first taken that defendant No. 1 had not been made a respondent in the appeal, but on our intimating that [196] all that was needful was to add him as a formal respondent the objection was not pressed. He was examined as a witness in the Court below and intimated that he would have joined plaintiffs in bringing the suit but for his temporary absence from the district.

The real point in the case is whether the shrotriemdsars are the owners of the village or only entitled to the melvaram. In addition to the oral evidence the plaintiffs rely upon two classes of documents, viz.—

(1) Documents executed by the predecessors in title of defendants Nos. 2 to 9 showing that the executants were purakudis and not occupancy raiyats.

(2) Documents executed by other tenants in the same village which show that they were purakudis.

The District Judge doubted (paragraph 17 of the judgment, whether documents of this latter class were admissible in evidence, but we have no doubt that they may properly be considered. The defendants are not of course concluded by them, but the documents are relevant evidence under Section 13 of the Evidence Act as showing the tenure on which the village is held. See Ramasami v. Appavu (1) and Jnanutullah Sirdar v. Romoni Kant Roy (2).

Exhibits F, J and N are documents of the former class; Exhibit F was executed by the ancestor of fourth defendant, Exhibit J by the ancestor of defendants Nos. 6 and 7, and Exhibit N by the ancestor of defendants Nos. 2 and 3. These documents relate to the plaint lands. They are cultivation muchkals for two years each and Exhibit J contains a clause for surrender at the expiration of that time.

These documents are spoken to by the fifth witness for the defendants. Their general tenor is no doubt against the existence of occupancy rights, but the District Judge accounts for this by observing that the raiyats were in poor circumstances and that pressure was brought to bear in order to make them execute the documents. We may point out, however, that this was no part of the defence set up, and though the fifth defence witness does make such a statement, it was in answer to a question put by the Judge himself at the close of the case and was not elicited by the [197] pleader for the defendants. This witness was formerly a karnam in the service of the shrotriemdsars and was dismissed by them.

Turning to the oral evidence the first plaintiff was the first witness for the plaintiffs. He is one of the lessees and has been agent to the

(1) 12 M. 9. (2) 15 C. 233.
shrotriemdars for twenty years, so that he has certainly had full oppor-
tunity of ascertaining the tenure of the village before taking his lease. He
deposed that 211 cawnies of the land leased was in possession of the
lessees and that it was only the 35 cawnies now sued for of which they
had failed to obtain possession.

Witnesses were also called to prove that the defendants had only
been cultivating the lands for four or five years, the lands having been
previously let to kallars from Polurugudi. Against this oral evidence the
defendants have nothing (except the dismissed karnam), but four raiyats
who are still in possession of their holdings and who claim occupancy rights.
It is not shown that their lands are included in the lease to plaintiffs,
and on cross-examination they admitted they had no pattas and could
not produce any partition deeds, sale-deeds, &c., or documentary evidence
of any kind which would show that they had dealt with the lands as
possessing the kudivaram right therein.

The Judge refers to the Inam register Exhibit II as corroborating the
defendants’ case. In our opinion the reverse is the inference. These
high rates are inconsistent with occupancy rights. The facts (1) that the
shrotriemdars are the grantees under a Zemindar, (2) that the Inam title-
deed is for the land itself, (3) that no pattas have ever been given, (4) the
absence of any documentary evidence of sale or mortgage, (5) that the
shrotriemdars have rented the lands themselves at high rates, all go to
show that the shrotriem is not the melvaram, but the land itself. We
think the evidence altogether fails to prove that the individual defendants
have been for a long term of years in possession or that they have
inherited or acquired occupancy rights.

It was finally objected that in any case the defendants were entitled
to notice to quit. The cases cited by the learned pleader refer to suits
in ejectment brought by the landlord. Here, however, the evidence fails
to prove that the defendants were in possession as tenants at the date
when the suit was filed, and no issue was taken on this point though it
was expressly stated in the plaint that the shrotriemdars had warned
defendants not to [198] obstruct. The plaintiffs as lessees are clearly
entitled to bring the suit. See Achayya v. Hanumantrayudu (1).

On these grounds we must reverse the decree of the District Judge
and decree plaintiffs’ possession of the lands sued for with costs in both
Courts against defendants Nos. 2 to 9, who have made a joint defence.
The first defendant will bear his own costs in the Lower Court.

(1) 14 M. 269.
KRISHNABHUPATI v. RAMAMURTI

16 M. 199.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice,
and Mr. Justice Wilkinson.

KRISHNABHUPATI (Plaintiff), Appellant v. RAMAMURTI
AND ANOTHER (Defendants), Respondents.* [24th March, 1892.]

Civil Procedure Code, Section 154--Fraud—Suit to set aside decree on ground of fraud
and collusion.

A Judge cannot dispose of a suit at the first hearing if a party appears and
objects to the adoption of that procedure.

Decrees having been passed against the present plaintiff's father and his agent,
respectively, property claimed by the present plaintiff was attached. He filed
three suits by his next friend to have the attachments set aside, but these suits
were dismissed. He now sued to have set aside the decrees dismissing these
suits, alleging that his father's agent, defendant No. 2, had colluded with the
decree-holder, defendant No. 1, and given false evidence and that the decrees
had been obtained thereby:

Held, that the plaint disclosed a good cause of action.

[R., 12 C.P.L.R. 82; S Ind. Cas. 614.]

APPEAL against the decree of H. R. Farmer, District Judge of
Vizagapatam, in original suit No. 37 of 1890.

The plaintiff sued by his next friend praying the Court to set aside
the decrees passed in original suit No. 13 of 1887 and original suit No. 19
of 1888 on the file of the District Court of Vizagapatam.

The first of these decrees dismissed a suit brought by the present
plaintiff to cancel an attachment of certain property (claimed by the
plaintiff) in execution of a decree in original suit No. 374 of 1885 on the
file of the District Munsif of Vizianagram obtained [199] by the present
defendant No. 1 against defendant No. 2 who was the agent of the plaintif's
father. As to this part of the case paragraphs 3 and 11 of the plaint
stated as follows:

"Evidence is forthcoming to show that second defendant, Ramayya,
"who has, by virtue of a regularly executed and registered Muktyarnama,
"acted as plaintiff's Muktyar and administered the affairs of the lands
"comprised in the deed of gift and settlement made by the first
"paragraph of this plaint, colluded with first defendant on the under-
"standing that the latter would notexecute against him the decree in the
"said original suit No. 374 of 1885 of the District Munsif of Vizianagram,
"and gave such improbable and palpably untrustworthy testimony as is
"mentioned in the above transcribed paragraph 14 of the judgment in
"original suit No. 13 of 1887.

"The judgment and decree in original suit No. 13 of 1887 are tainted
"with fraud and mala fides, inasmuch as they were obtained by collusion
"and misrepresentation of facts which will be proved."

The second of the decrees sought to be set aside dismissed a similar
suit brought by the present plaintiff to cancel another attachment of the
same property in execution of a decree obtained by the present defendant
No. 1 against the plaintiff's father. This was dismissed for the reason
that it was governed by the decision in the other case.

* Appeal No. 144 of 1891.
The District Judge held that the suit was not maintainable, observing that to hold otherwise would render nugatory the provisions of Civil Procedure Code, Section 13, and added:

"It further appears to me that an action to set aside a decree on the ground of fraud can be brought only in those cases when, under Section 44, Indian Evidence Act, a party may show that the decree was obtained by fraud or collusion.

"There is no allegation of collusion between the parties in obtaining the decrees now impeached and as regards fraud. I take it that fraud in such cases must be what is described in the case of Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy (1) as bilateral fraud. In the present case unilateral fraud is alleged."

The District Judge disposed of the case at the first hearing, although the plaintiff's pleader objected to the adoption of this procedure, and he passed a decree dismissing the suit.

The plaintiff preferred this appeal.

Ramachandra Rau Saheb, for appellant.
Mahadura Ayyar, for respondents.

In the course of the argument Collins, C.J., said, with reference to paragraph 3 of the plaint above set out, that if the nature of the fraud was held not to be sufficiently pleaded, the plaint should be amended.

JUDGMENT.

Two objections are taken to the decree of the District Judge. First, it is argued that the Judge was wrong in disposing of the case at the first hearing, inasmuch as the plaintiff's pleader objected (Section 154 proviso of the Civil Procedure Code). The pleader has put in an affidavit in support of his assertion. We see no reason why we should not accept this affidavit, and must hold therefore that the Judge was not justified in acting under Section 154.

It is further contended that the plaint discloses a sufficient cause of action. We think that this is so. Reading together paragraphs 3 and 11 it appears that the plaintiff charges that first defendant fraudulently obtained a decree in original suits Nos. 13 of 1887 and 19 of 1888, the second defendant having colluded with him and assisted him to obtain that decree by giving evidence which plaintiff is in a position to prove false. There is no question of 'res judicata' if the plaintiff can prove that the decree in the former suit was obtained by fraud and collusion and Section 44 of the Evidence Act does not bear the construction put upon it by the Judge.

The plaint discloses a cause of action, and we must set aside the decree of the District Judge and remand the suit to be heard and determined on its merits. Costs hitherto incurred to abide result.

(1) 6 B, 703.
KUNHACHA UUMA v. KUTTI MAMMI HAJEE 16 Mad. 202

16 M. 201 (F.B.) = 2 M.L.J. 226.

[201] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Wilkinson.

KUNHACHA UUMA (Appellant in appeal against Appellate Order No. 22 of 1890), Appellant v. KUTTI MAMMI HAJEE (Respondent in ditto) Respondent.3

[5th and 11th February, 9th August and 13th December, 1892.]

Malabar Law—Gift of land to a wife and her children—Incidents of tawpad property.

Land, which originally belonged to one Tavurai, was given after his death to one of his wives and her children in accordance with a wish orally expressed by him. He had not expressed any intention as to how it should be held by the donees. It appeared that they were subject to the Marumakkatayam law:

Held, by the Full Bench, that they took the land with the incidents of property held by a tawpad;

Held, by the Division Court, accordingly, that a decree against the assets of one of the sons could not be executed against the land as a whole or against his share in it.


APPEAL under Letters Patent, Section 15, against the order of Shepherd, J. That order dismissed an appeal against an order of J. P. Fiddian, Acting District Judge of North Malabar, which modified an order made by the District Munisif of Pynad.

The appeal which came before Mr. Justice Shepherd and also the appeal under the Letters Patent were preferred by one who had preferred a petition, objecting, under Civil Procedure Code, Section 278, to the attachment of certain land in execution of the decree in original suit No. 485 of 1888. The petitioner's father (deceased) had been the owner of the land, but it appeared that it had been transferred, in accordance with a wish orally expressed by him to one of his wives and her children, including the petitioner and her brother Uthotti (deceased). The above-mentioned decree provided for the payment of the judgment debt out of the assets of Uthotti. The petitioner's family were admittedly governed by Marumakkatayam law, and the Munisif held that the property which was comprised in the gift should be regarded as property of a tawpad within a tawpad, and consequently was not liable to [202] satisfy the decree. The District Judge held that it was liable to the extent of Uthotti's share.

Sankaran Nayar, for appellant.
Byru Nambiar, for respondent.
Best, J.—The following are the facts of this case:

The present respondent obtained a decree for money to be paid "out of the assets of the deceased Uthotti" in the hands of defendants 2 and 3 in original suit No. 485 of 1888, on the file of the District Munisif of

Badagara. In execution of that decree property was attached, and the present appellant objected to the attachment under Section 278 of the Code of Civil Procedure.

The property so attached consisted of seven items. The Munsif allowed the appellant's objections with regard to all seven. The District Judge, on appeal, modified the Munsif's order to "the extent of making the judgment-debtor's share in Nos. 2 to 6 liable." He did this on the authority of the decision in Narayanan v. Kannan (1). This decision of the District Judge was upheld on appeal to this Court by Shephard, J., who further referred to the decision in Parvathi v. Koran (2). Hence the present appeal, in which it is contended (1) that the properties in dispute are not assets of the judgment-debtor, and (2) that even in his lifetime the judgment-debtor had not in these properties an interest liable to attachment and sale.

It is admitted on both sides that the properties in question belonged to one Taruval, the father of the judgment-debtor Uthotti and also of the present appellant. As is seen from Exhibit D, the truth of the statements contained in which is admitted by the respondent, these properties were given after Taruval's death to his first wife Ayissuuma and her children in accordance with his orally expressed wish. The appellant and Uthotti are two of the children of Ayissuuma. Other properties were, at the same time, given to Taruval's second wife and her children.

Appellant's contention is that the property thus given to Ayissuuma and her children was given to them as joint tenants; that they thus became with regard to this property a separate tarwad; and that the property was held by them subject to the incidents of tarwad property, and that it is consequently non-partible, and, therefore, not liable to attachment or sale in satisfaction of a decree obtained against one of the members of the tarwad.

(1) 7 M. 315.
(2) S.A. No. 1066 of 1889. Before COLLINS, C.J., and SHEPHARD, J.:

JUDGMENT.

There is no material difference between the facts in this case and those in Narayanan v. Kannan (I.L.R., 7 Mad., 315). Here a decree having been obtained against the first and second defendants, certain property was sold as being the share of the second defendant in lands given by his father to him and his sisters. The plaintiffs being the children of one of these sisters, now deceased, charge that the second defendant's share in the estate is not capable of being sold. According to the decision above cited, a share of property if obtained by a gift made to persons who are members of one tarwad, and even if made with the intention that the property, should be impartible, descending to the heirs in the female line as tarwad property it may be sold in execution of a decree against one of the donees. Whatever may be the intention of the donor he cannot, in our opinion, alter the fact that property acquired by gift is not in the hands of the original donees ancestral property to which the incident of impartibility attaches. The decision in Narayanan v. Kannan (I.L.R., 7 Mad., 315) was followed in Kelappan v. Koran (S.A. No. 1398 of 1887, unreported), and it is not correct to say, as the District Judge observes, that a different view of the matter was taken in Krishan v. Romar (S.A. No. 708 of 1884, unreported), for in that case an entirely different question arose. The question then was whether the children of one of several donees under a gift similar to that in the present case, was entitled to challenge a mortgage made by those of the surviving donees which was found to be merely colourable and collusive. It was held that they were so entitled, because a gift had been made to their mother and her brothers and sisters as to a tarwad. There was no decision, and it was not necessary to decide, as to the nature of the interests of the survivors. The decree of the District Judge is right, and we must, therefore, dismiss the appeal with costs.
On the other hand, respondent's vakil refers to Narayanan v. Kannan (1) and to Parvathi v. Koran (2) as authorities justifying the dismissal of this appeal.

Parvathi v. Koran (2) merely follows the decision in Narayanan v. Kannan (1) and the correctness of this latter decision has been questioned in Moidin v. Ambu (3) by Muttusami Ayyar, [204] and Shephard, J.J., who have pointed out that the decision Narayanan v. Kannan (1) appears to be in conflict with the principle laid down in Sreemutty Soorjeemoney Dosses v. Denobundo Mullick (4), Mahomed Shumscoll v. Sewakram (5).

The principal reason assigned by the learned Judges who decided Narayanan v. Kannan (1) for arriving at the conclusion come to by them, namely, that the right of partition is "an incident of the estate given by "Hindu law," is inapplicable to an estate under the Marumakkatayam law —of which estates impartibility and not partibility is the legal incident.

The case of Renaud v. Tourangean (6) also referred to in that decision, is no doubt authority for holding to be invalid an absolute prohibition of alienation, e.g., in the case dealt with in Narayanan v. Kannan (1), a prohibition of alienation by the tarwad itself, or by its karnavan acting on behalf of the tarwad; but it seems hardly authority for the proposition that in the case of property devised (as that was) to be held under the usual custom of Malabar, a prohibition of alienation of the share of any member (except with the consent of the tarwad or by its karnavan) is not valid against a creditor seeking to proceed against one member's interest in the joint property.

Finally, the mere fact of the property having been such that the grantor could have dealt with it as if it had been his self-acquisition, appears to be an invalid reason for holding it to be partible after it has been devised to a definite branch of the family for the purpose of being held jointly by that branch.

It is true that in the present case there is no express prohibition against alienation, nor is it stated in so many words that the property was to be held by the grantees as their tarwad property; but taking into

(1) 7 M. 315.
(3) S.A. Nos. 647 and 649 of 1890. Before Muttusami Ayyar and Shephard, J.J.:

**JUDGMENT.**

The question argued in these appeals had regard to the nature of the title created by Mayan Kutty and others in favour of the plaintiff's father, Kathir Kutty. It was argued, on the one hand, that Kathir Kutty and the fellow donees took the property as tenants-in-common, each being entitled to deal with his own share of it, and in support of that view the case of Narayanan v. Kannan (I.L.R. 7 Mad. 315) and cases following it were cited. On the other hand it was contended that the Subordinate Judge was right in holding that the donees taking under Exhibit I took the property as tarwad property and that, therefore, no one of them could deal with any part of it as his own. We are disposed to think that the principle laid down in Sreemutty Soorjeemoney Dosses v. Denobundo Mullick (6 M.I.A. 528) and Mahomed Shumscoll v. Sewakram (L.R. 2 I. A. 7) is applicable to the present case. The decision, however, in I.L.R. 7 Mad. appears to be in conflict with that principle, and we reserved judgment in order to see whether a reference to the Full Bench was necessary, but we think that the appeal may be disposed of without any such reference. Even assuming that Kathir Kutty did take a share in the property which it was competent for him to deal with individually, his sons, claiming by gift under him, could not recover in the present suit, inasmuch as it is not in the nature of a partition suit, and the co-donees of Kathir Kutty are not joined.

We dismiss these appeals with costs.

(4) 6 M.I.A. 526.
(5) 2 I.A. 7.
consideration what are known to be the ordinary notions and wishes of persons in Malabar in the position of Taruvaitey, the grantor of the property, and also the ordinary incidents of property in the same district, and also bearing in mind that other property was similarly granted at the same time to the second wife and her children, there can be no doubt, I think, that the intention was that the property shall be held by the grantees as joint tenants. The four unities of a joint tenancy are all found in this case, namely (1) of possession, (2) of interest, (3) of title, and (4) of the time of commencement of such title.

I would, therefore, allow this appeal were it not for the decision in Narayanan v. Kannan (1).

As the correctness of the decision in that case has been questioned by Muttusami Ayyar, J., one of the learned Judges who was party to it, and also by Shephard, J., who was a party to Parwathi v. Koran (2) in which it was followed, I am of opinion that the reference to the Full Bench contemplated in Moidin v. Ambu (3) (but subsequently found to be unnecessary in that case) should now be made, as the allowance or disallowance of the present appeal depends upon the correctness or otherwise of the decision in Narayanan v. Kannan (1).

S. Subramania Ayyar, J.—I concur in making this reference to a Full Bench. Narayanan v. Kannan (1) was decided in March 1884. Krishna v. Raman (4), which came from South Malabar, was decided in February 1885. There, a question similar to that raised here was considered. The finding in that case was that the gift was to a woman, her sisters and brother. It was contended that the donees did not take the property as tenants-in-common. With reference to his contention Muttusami Ayyar and Brandt, J.J., stated that "In the absence of any direct evidence that the intention of the donor was otherwise, we are of opinion that it is consistent with the custom in such cases in Malabar; and that we must assume that the gift was a gift to the brother and sisters constituting them, as such, a tarwad, and rendering the property conveyed by the gift subject to the ordinary incidents of property held by a tarwad."

This question which I propose to refer is whether Ayissumma and her children took the properties in question with the incidents of property held by a tarwad.

This appeal came on for hearing before the Full Bench (Collins, C.J., Muttusami Ayyar, Parkar and Wilkinson, J.J.)

[206] Govinda Menon, for appellant, argued that the intention of the donor must be presumed to have been that the donees should take the property jointly as tarwad property, and that accordingly the attachment was illegal.

Mr. Wedderburn and Pyru Nambiar, for respondent.

The reference by Best, J., to the incidents of joint-tenancy is misleading, for, in the present case, the question is not as to a right of survivorship in the English sense, but as to the incidents of tarwad co-partnership. No doubt the case must be determined according to the principles laid down in Mahomed Shumsool v. Sheuakram (5), so far as they are applicable; but here there is no special circumstance from which the intention which the appellant argues should be presumed to have been that of the donor can be inferred. For it appears that he was a

---

(1) 7 M. 315.
(2) See 16 M. p. 302.
(3) See 16 M. p. 203.
(4) Second Appeal No. 708 of 1884, unreported.
(5) 2 I. A. 7 (14.)
Muhammadan, and I am instructed that he was governed by Makkatayam law, while the wife and children were undoubtedly subject to the Marumakkatayam rule. Moreover they formed part of a tarwad to which the wife’s sisters and their children also belong. The donor cannot be presumed to have desired to benefit the whole of that tarwad, for that would diminish the benefit to be derived by his own wife and children; and it is submitted that the Court should so give effect to the gift as to benefit them as far as possible. The idea of separate self-acquired property has long been familiar in Malabar, and here the donees, if they took the property as self-acquisition, would be better off than if the gift was such as to leave the property fettered in the manner, now so irksome to holders of tarwad property. Moreover the Court should be averse to extend further than the personal law of the parties clearly requires the stereotyped rule of impartibility which will govern this property if it is tarwad property. If the property was taken by the donees as self-acquired, each of them could deal freely with his share, and consequently the share of each would be liable for his debts, and consequently the present attachment was legal.

JUDGMENT OF THE FULL BENCH.

The properties in question originally belonged to one Taruvai, and they were given after his death to his wife Ayissumma and her children in accordance with his orally expressed wish. The question referred to us is whether Ayissumma and her children took the properties with the incidents of property held by [207] a tarwad. In the case before us the donor expressed no intention as to how the properties should be held by the donees, and in the absence of such expression, the presumption is that he intended that they should take them as properties acquired by their branch or as the exclusive properties of their own branch, with the usual incidents of tarwad property in accordance with Marumakkatayam usage which governed the donees. This view is in accordance with the principle laid down by the Privy Council in Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick (1) and Mahomed Shumsool v. Shewakram (2). The decision in Narayanan v. Kannan (3) was not followed in Moidin v. Ambu (4), and it appears to us to be in conflict with the rule of construction indicated by the Privy Council.

We answer the question in the affirmative.

This appeal came on for final disposal before the Division Bench, and the Court delivered the following judgment:—

JUDGMENT OF THE DIVISION BENCH.

Following the decision of the Full Bench we set aside the orders of the District Court and of the learned Judge of this Court and restore that of the Court of First Instance.

There having been conflicting rulings on the subject, we make no order as to costs.
RAMACHANDRA JOISHI (Respondent in Appeal against Order No. 99 of 1890), Appellant v. HAZI KASSIM (Appellant in Appeal against Order No. 99 of 1890), Respondent. * [29th February and 15th April, 1892.]


It is inconsistent for an Appellate Court to remand a case when the Court of First Instance records evidence on all the issues, and at the final hearing decides the suit [208] erroneously on some particular point without expressing any opinion on the other issues.

A statement in a sale-certificate, granted by a Court, that the purchase is subject to a charge, is not conclusive evidence against the purchaser, when it is sought to enforce the charge by suit.

[F., 27 A. 631 = 2 A.L.J. 685 = A.W.N. (1905) 159; 6 O.C. 76 (78); Rel., 15 Ind. Cas. 5 (6)=15 O.C. 211; R., 19 M. 152; 19 M. 422; 20 M. 25; 22 M. 172; 8 C.L.J. 159; 12 C.R.L.R. 45; 13 C.R.L.R. 119; 9 Ind. Cas. 790=9 M.L.T. 373(1911)

APPEAL under Letters Patent, Section 15, against the judgment of PARKER, J., in civil miscellaneous appeal No. 99 of 1890. That judgment reversed an order made by S. Subbyayar, Subordinate Judge of South Canara, in appeal suit No. 260 of 1889, whereby the decree of S. Ragunathu Ayyar, District Munsif of Karakal, in original suit No. 13 of 1889 was set aside and that suit remanded for disposal.

Suit to recover Rs. 36-8-4 being the value of rice due to the plaintiff on account of pujas performed by him on behalf of his brother Lakshman Joishi. The plaint alleged that the sum sued for constituted a charge on certain land which was formerly the property of Lakshmana Joishi, but had been sold in execution of a decree obtained against him and purchased by defendant No. 1. It appeared from the sale-certificate that the land was sold subject to the plaintiff’s “right to recover rice muras 4 annually on the responsibility of the lands.”

The District Munsif held that there was no charge on the land in favour of the plaintiff and dismissed the suit without trying any other issues.

The Subordinate Judge on appeal made an order setting aside the finding of the District Munsif on the abovementioned issue, and remanding the suit for disposal. PARKER, J., reversed this order on the two grounds that the Subordinate Judge should not have remanded the suit under Civil Procedure Code, Section 562, but should have called for finding on the other points which arose, and that the finding of the Subordinate Judge on the point determined was not based on the due consideration of the documentary evidence.

The plaintiff preferred this appeal.
Sundara Ayyar, for appellant.
Narayana Rao, for respondent.

JUDGMENT.

MUTTUSAMI AYYAR, J.—This is an appeal preferred under Letters Patent against the order of Mr. Justice PARKER. In the suit to which it relates, three issues were raised for decision viz., (1) whether the plaintiff performed puja to certain idols, (2) whether the rice claimed in connection with it was a charge on the land mentioned in the plaint, and (3) what was the price of such rice. The parties to this appeal adduced evidence on all the three issues and though the District Munsif recorded it, yet he held on the second issue that the rice claimed was not a charge on the land and dismissed the suit without determining the other issues. On appeal the Subordinate Judge determined the second issue in the affirmative and remanded the case. Mr. JUSTICE PARKER considered that the decision on the second issue was not a decision on a preliminary point, and that the order of remand was illegal. He was also of opinion that neither the partition deed nor the sale subject to the plaintiff's claim created a charge, and set aside the order of remand and directed the Subordinate Judge to replace the appeal on his file, to come to a revised finding on the second issue after considering Exhibits A and B, and to dispose of the case in accordance with law. Two objections are taken to this decision, viz., (1) that the order of remand was legal, and (2) that as the respondent purchased subject to the charge claimed by the plaintiff, the decision of the Subordinate Judge on the second issue was correct.

As regards the first objection, it must be observed that the District Munsif recorded evidence on all the three issues, and even assuming that the decision on the second issue was one on a preliminary point, it was still not such a decision as excluded evidence on the other issues and created a necessity for the investigation of the merits. The order of the learned Judge is quite correct according to Section 562 of the Code of Civil Procedure as it stood prior to the Amending Act VII of 1888.

The real question is whether the amendment made by the last mentioned Act makes any difference. The amendment consisted in the omission from Section 562 of the words "so as to exclude any evidence of fact which appears to the Appellate Court essential to the determination of the rights of the parties" and in the substitution at the end of the section of the word "determine" for the word "investigate." The condition necessary to justify a remand consisted prior to Act VII of 1888 in the exclusion of evidence of a material fact, or in the omission to investigate the merits as the consequence of the decision on a preliminary question which the Appellate Court could not uphold. The condition necessary to a remand after the date of the Amending Act is the omission to determine the merits. Further, it seems to me that the expression "preliminary point" was used in Section 562 not in the sense of some point collateral to the merits, but of some point preliminary to a general investigation of the merits. This is the sense suggested by the context of the Section. If it is taken in the sense of a point not relating to the merits at all, there will be no power of remand when the Court of First Instance, owing to an erroneous decision on some point of law under Section 146, or on imperfect view of the evidence under Section 154 does not investigate the rest of the merits. In this view the words "preliminary point" must be taken after the amendment to refer to some point either collateral to the merits which precluded their determination altogether, or some particular question which though relating to the merits precluded their general determination. The intention which the amendment suggests and which is confirmed by
the report of the Select Committee was not unduly to limit the discretion of the Appellate Court as was found to have been done by Section 562 as it originally stood.

It would, therefore, be competent, I think, for the Appellate Court after the amendment to remand a case when the Court of First Instance mechanically records evidence on all the issues and at the final hearing decides the suit on some particular issue without expressing any opinion on the other issues, if in the circumstances of the case the Appellate Court considers a remand desirable. The contention, therefore, that the Subordinate Judge had a discretionary power to remand after the date of the Amending Act and that his order was legal must prevail.

As for the second objection, I see no reason to think that the learned Judge was in error in calling upon the Subordinate Judge to re-examine his finding on the second issue. The decision of that issue must depend on the question whether what respondent actually bargained and paid for was the land burdened with a charge of 4 muras of rice to be paid to appellant every year or the land affected only with notice of a claim to that effect. The sale certificate D which is statutory evidence of his title describes the land purchased as being subject to the charge, but this cannot of itself be treated as conclusive. If as observed by the learned Judge the order on the claim petition C was made without any [211] enquiry as to whether the claim was well founded, and if there is no legal basis on which to hold that there was a charge, a presumption might arise that what the purchaser intended to buy and did buy was the land itself though with notice of respondent’s claim, and that the description in Exhibit D was erroneous. Whether it was a misdescription or not, is a question of fact which it was for the Subordinate Judge to determine. His remark that Exhibit D is conclusive, and that no other circumstance needs be considered cannot be accepted as sound. Moreover his decision is that there is a charge only in regard to the amount now claimed, but not necessarily so in regard to payments which may hereafter become due is not intelligible since, if there is a charge in the one case, there must be a charge in the other also. We are not referred to any evidence showing that the order on the claim petition C was made after an enquiry as to whether there was really a charge. The partition deed did not, admittedly, create a charge and the Subordinate Judge did not consider Exhibits A and B. He held apparently that the purchaser was not entitled to show that there was a misdescription in the sale certificate, and I agree with the learned Judge that this view cannot be supported. If, as observed by him, the order on C was passed without any enquiry and if there was no other legal foundation for a charge, I am not prepared to say that the order in requiring the Subordinate Judge to consider Exhibits A and B and to come to a fresh finding on the second issue is open to question. I would, therefore, set aside the order of the learned Judge so far as it declares that the Subordinate Judge was not competent to remand the case and otherwise confirm it. I would direct each party to bear his costs of this appeal.

Best, J.—The learned Judge has set aside the order of the Subordinate Judge (which remanded the suit for trial by the District Munsif) on the ground that "though the District Munsif decided the suit upon the second issue, he did not decide it upon a mere preliminary point," and that therefore the Subordinate Judge should not have remanded the suit under Section 562 of the Code of Civil Procedure, but should have called for findings upon the other points which arose.
On behalf of the appellant it is contended that the Subordinate Judge's order remanding the suit was right, as the District [212] Munsif had dismissed it upon a "preliminary point," and the decree upon such preliminary point was reversed in appeal. The first question is therefore as to the meaning of the phrase "preliminary point" as used in Section 562.

For the respondent it is contended that it means some point, such as limitation or res judicata which can be decided without in any way entering on the merits of the case. I am however unable to find in the wording of Section 562 any thing warranting this limited construction of the words. There might have been ground for thus narrowing the meaning of the section prior to its amendment by Act VII of 1888, when it "contained the words so as to exclude any evidence of fact which appears to the Appellate Court essential to the determination of the rights of the parties." But these words were removed for no other reason than that they were "found to limit unduly the discretion of Appellate Courts." See Report of the Select Committee, published in the Gazette of India, dated 10th March 1888. However, even prior to this enlargement of the scope of the section, the opinion was expressed by Mahmood, J., that the expression "preliminary point," as used in the section, "is not confined to such legal points only as may be pleaded in bar of suit, but comprehends all such points as may have prevented the Court from disposing of the case on the merits whether such points are pure questions of law or pure questions of fact." See Sioombar Singh v. Lallu Singh (1). Cf. also judgment of Edge, C.J., and Mahmood, J., in Muhammad Allahdad Khan v. Muhammad Ismail Khan (2). I take it that a suit is disposed of on a preliminary point within the meaning of Section 562 when by reason of the decision on one or more of the issues recorded in the case, there has been no necessity for the consideration of the other issue; and that if in such a case the Appellate Court finds that the issues considered have been wrongly decided, and the suit in consequence wrongly dismissed, and that a consideration of the other issues is necessary for a proper disposal of the suit, a remand is allowable. Nor do I see any good reason for putting a narrow construction on the wording of the section, as none of the parties to the suit can be prejudiced by sending the case back to the Original Court for disposal of the case after deciding the issues which it has not considered in consequence of its decision on other issues which have been found on appeal to have been wrongly decided.

In the present case there has been no decision by the District Munsif on the first and third issues, which refer respectively to the performance of puja alleged by plaintiff and to the price of the rice claimed, a decision on these points having been considered unnecessary by reason of the finding on the second issue in the negative and in favour of the defendant as to the chargeability for the rice of the land in defendant's possession. In my opinion on the Subordinate Judge's finding in appeal that the decision on this second issue was wrong, he had a discretion to remand the suit for disposal by the District Munsif on the other issues.

But was the Subordinate Judge right in holding that the second issue had been erroneously decided? As observed by the learned Judge of this Court the mere fact of the sale certificate D reproducing the order passed on the claim petition, that the property is sold with notice of the claim

---

(1) 9 A. 90 (N).
(2) 10 A. 289.
that it is liable to a charge will not make such charge binding on the purchaser if the claim has in fact no legal foundation; and as the Subordinate Judge had accepted the statement in D as conclusive and consequently did not consider the other evidence on the point, I concur in upholding the order so far as it remands the case for restoration to the file of the Subordinate Judge for re-consideration of the second issue and disposal according to law, and also in its direction as to costs; and I agree with my learned colleague in directing each party to bear his own costs of this appeal.

16 M. 214 = 3 M.L.J. 89.

[214] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

KANARA KURUP (Plaintiff), Appellant v. GOVINDA KURUP (Defendant), Respondents.* [5th and 12th April, 1892.]

Transfer of Property Act—Act IV of 1882, Section 93—Redemption decree—Appeal—Time for redemption.

In a suit on a kanom or usufructuary mortgage brought by the mortgagor a decree was passed on 16th March 1889, whereby it was only directed that on payment by the plaintiff of a certain sum within six months the defendant should surrender the mortgage premises to him. Against this decree an appeal was filed objecting both to the direction for surrender of the mortgage premises and also to the sum fixed as the amount payable by the mortgagor. On 21st August 1889 the appeal was withdrawn so far as concerned the first of these matters: as to the second the Appellate Court heard the appeal in June 1890 and merely confirmed the original decree. In February 1890 the plaintiff applied for execution and tendered the amount mentioned in the decree stating that he would have paid it before but for the appeal. The Court of First Instance made an order as prayed, and the money was paid to the mortgagees, and the mortgage premises were surrendered to the plaintiff. On appeal by the mortgagees against this order:

Held, that the appeal should be dismissed on the grounds that the mortgagee had never obtained an order for sale under Transfer of Property Act, Section 93, and the mortgagor’s equity of redemption had not become extinct, and that the necessity for a sale was obviated by payment before any order was made under that section.

[R., 28 B. 102; 19 M. 40 (F.B.); 25 M. 300 (F.B.); 17 C.L.J. 120=17 C.W.N. 457 (458); 11 C.P.L.R. 115 (119); D., 19 A. 180.]

APPEAL under Letters Patent, Section 15, against the order of PARKER, J., on appeal against appellate order No. 59 of 1890, confirming the order of J. P. Fiddian, Acting District Judge of North Malabar, dated 30th July 1890, and made on miscellaneous petition No. 140 of 1890, reversing the order of C. Gopalan Nayar, Subordinate Judge of North Malabar, dated 25th February 1890, and made on execution petitions Nos. 104 and 176 of 1890.

The two petitions in the Subordinate Court were presented by the plaintiff and defendant No. 1 in original suit No. 41 of 1888 on the file of that Court. That suit was brought on a usufructuary mortgage by the mortgagor; and by the decree dated 16th March 1889 it was ordered "that on payment by [215] plaintiff into Court within six months from this date the sum Rs. 1,558-13-5 on account of bal-kanom " and of the sum of Rs. 1,717-4-0 on account of value of improvements.

"payable to several defendants . . . . the defendants do restore to
plaintiff the parambas with their appurtenances; that of the sums so
 deposited, Rs. 1,358-13-5, be paid to first defendant after three months
from date of such deposit, so as to allow time for the other defendants
to establish their claims to the several amounts of such kanom,
&c., payable to defendant and that the parties do bear their own costs."

An appeal was preferred against this decree. The appeal in the first
instance related both to the direction for the surrender of the land and
also to the amount payable on redemption, but so far as it related to the
first of these matters it was withdrawn on 21st August 1889. In June
1890 the appeal was disposed of and the Appellate Court hereby confirmed
the original decree. The plaintiff put in his petition above referred to on
6th February 1890, by which he applied for execution of the decree and
for an extension up to date of the time for payment into Court of the
amount mentioned in the decree, which he therewith produced, stating
that he would have paid it into Court before but for the appeal. In the
petition of defendant No. 1 the right of the plaintiff to the relief claimed
by him was denied on the ground, among others, of the expiry of the time
fixed for payment.

The Subordinate Judge passed an order as prayed by the plaintiff
holding that his right to the relief sought by him could be extinguished
only by an order under Transfer of Property Act, Section 93.

The Acting District Judge reversed this order on appeal holding that
Elayadath v. Krishna (1) was an authority governing the case.

The plaintiff preferred an appeal to the High Court and it came on
for disposal before PARKER, J., who dismissed it. He said: "No decree
"having been passed on appeal there is no possible ground for the contention
"that time should be reckoned from the date of the final order of the
"Appellate Court. See Patloji v. Ganu (2). The fact that the mortgage
"is usurious does not matter; the question is one of execution."

[216] The plaintiff preferred this appeal under Letters Patent,
Section 15.

Sankara Menon, for appellant.
Sundara Ayyar, for respondent.

JUDGMENT.

BEST, J.—The case is not on all fours with Patloji v. Ganu (2)
as supposed by the learned Judge under the mistaken impression that the
defendant's appeal was withdrawn on the 21st August 1889. It appears
that only so much of the appeal as objected to the surrender of the
property was withdrawn; but so far as it related to the amount payable
by plaintiff before he could redeem, the appeal was not withdrawn, but it
was dismissed and the Lower Court's decree affirmed on the 6th June
1890. The plaintiff's application for execution, which was made on the
10th February 1890, was therefore during the pendency of the appeal.
It was, however, after expiry of the six months allowed in the decree then
under appeal, the date of which is 16th March 1889.

It has been held by this Court in Manavikraman v. Unniappan (3)
that the mere pendency of the appeal will not extend the time, and that
though the decree passed on an appeal preferred by the defendant may
give plaintiff a fresh starting point of time within which he may
execute, it does not necessarily, unless the appeal decree so declares, give

---

(1) 18 M. 267.
(2) 15 B. 370.
(3) 15 M. 170.
him an extension of the time during which he must fulfil the condition precedent of making payment of the money within the time allowed or getting the time extended under the proviso to Section 93 of the Transfer of Property Act.

It has been held in Elayadath v. Krishna (1) that this proviso "has no application when the mortgagee does not apply for a foreclosure, or where the original decree does not contain the last clause mentioned in Section 92." It is, therefore, inapplicable to the present case.

As was observed, however, in Manavikraman v. Unniappan (2) inasmuch as the decree of the Appellate Court becomes the final decree in the suit, Section 92 imposes upon that Court the duty (if the decree of the first Court has not been executed) of prescribing a date within six months of the date of that decree within which plaintiff must pay the redemption money to the defendant or into Court.

The course adopted in that case was to set aside the orders therefofr passed and to remand the application for execution to the Court of First Instance, "for disposal after giving plaintiff time to apply to the District Court (which passed the final decree in the suit) for amendment of the decree in accordance with the statutory directions contained in Section 92."

In the present case, I do not think it necessary to adopt that course, because defendants have accepted the money paid by the plaintiff, and the latter is already in possession of the land. By accepting the money tendered by the plaintiff, the defendants must be held to have waived their right to object to the same as paid out of time.

I would, therefore, set aside the orders of the District Judge and also that of the learned Judge of this Court confirming the same, and direct each party to bear his own costs in this Court and in Lower Appellate Court.

Muttusami Ayyar, J.—I am also of opinion that the order appealed against cannot be supported. The decree sought to be executed was passed in original suit No. 41 of 1888 for the redemption of a kanom or an usufructuary mortgage. It directed surrender of the property demised on kanom upon payment of the kanom amount and the value of improvements within six months from the date on which it was passed, viz., the 16th March 1889. It did not, however, contain a direction, as required by Section 92 of the Transfer of Property Act, that on default of payment on or before the day fixed by the Court, the property should be sold. The defendants (mortgagees) appealed from the decree so far as it directed surrender of the kanom property and related to the amount payable to them prior to redemption. In August 1889, they waived the objection they took against the direction to surrender and to that extent withdrew their appeal. The remainder of the appeal was heard and the original decree was confirmed in June 1890. Though the six months fixed by that decree had then expired, the Appellate Court did not direct that the period be computed from the date on which the appellate decree was passed. Nor did it add to the original decree with reference to the last clause of Section 92 that "on default of payment within six months the kanom property be sold."

In February 1890 when the appeal was pending, the mortgagor applied for execution of the original decree producing in Court the amount which he had to pay under it prior to redemption and alleging that he had not tendered payment within six months from the date of the original

(1) 18 M. 267.  
(2) 15 M. 170.
[218] decree, as the defendants had appealed against it, and praying that, if necessary, the said period of six months be extended and the decree executed. The defendants opposed this application and objected to the extension of time. The Subordinate Judge who passed the original decree held that, if necessary, it was competent to him to extend the time, but that the plaintiff's right to execute the decree continued to subsist notwithstanding the expiration of six months until, after default, the defendants applied for sale and an order was made for sale under Section 93 of Act IV of 1882. On this view, he held that the original decree might be executed if the kanom amount and the value of improvements were deposited in Court by 3 o'clock P.M. next day. The amount was accordingly deposited and paid out to the defendants and the kanom property was placed by process of Court in plaintiff's possession. Though the defendants received the kanom amount yet they appealed to the District Court against the order of the Subordinate Judge. In July 1890, the District Judge set aside the order on the ground that a Court executing its decree was bound to construe it strictly and was not justified in extending the time fixed therein. The plaintiff appealed to the High Court against this order, and Mr. Justice Parker dismissed the appeal. The learned Judge observed that the appeal preferred against the original decree having been withdrawn and no decree having been passed on the appeal, there was no ground for the contention that six months should be reckoned from the date of the final order of the Appellate Court. Hence this appeal under the Letters Patent. It seems to me that the real question for determination is whether on the expiration of six months, the right of redemption became extinct under Act IV of 1882.

The mortgage of which redemption was decreed was a kanom or an usufructuary mortgage and under Section 92, the decree could only direct the sale of the kanom property on default of payment within the time fixed by the decree. Such being the case, the mortgagee could only claim, on default, an order under Section 93 that the property should be sold. It is no doubt true that according to the former practice in England, the decree for redemption directed that on failure of the plaintiff to pay the amount on the due date, the suit do stand dismissed and that such dismissal was held to operate as a judgment of foreclosure. But under the Conveyancing and Law of Property Act, 1881, 44 and [219] 45 Vict., Cap. XLI, Section 25, the Court was at liberty to order a sale in a suit for redemption and the provision for sale contained in Section 92 is apparently taken from the last-mentioned statute.

Thus the scheme of the Transfer of Property Act appears to be this: where the mortgage decreed to be redeemed is an usufructuary mortgage, the Court is to fix a time for payment of the mortgage debt, and make an order under Section 92 for the sale of the mortgaged property in default of payment on the due date; the mortgagee is to obtain an order under Section 93 on default being made that the property be sold; and the mortgagor's right of redemption is to cease then to be enforceable. Before however the property is actually sold, it will still be open to him, as judgment-debtor if not as mortgagor, to obviate the necessity for the sale by paying what is due in Court. In the case before us, the mortgagee never obtained an order for sale under Section 93 and the mortgagor's right of redemption never became extinct, and the necessity for the sale was obviated by payment before any order was made under Section 93. It must also be remembered that all that the mortgagee could claim by reason of the sale, permitted by Act IV of 1882, Section 92, is so much of
1892
APRIL 12.

APPELLATE CIVIL.

16 M. 214—
3 M.L.J. 89.

16 M. 220—3 M.L.J. 38.

[220] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

VENKATA (Defendant No. 1), Appellant v. PARTHASARATHI
(Plaintiff), Respondent [*] [5th and 25th October, 1892.]

Limitation Act—Act XV of 1877, Section 19—Acknowledgment in writing—Deposition signed by a witness.

In a suit brought in 1890 to recover the principal and interest due on a bond, dated 1st September 1879, which provided for the repayment of the debt secured thereby within six months from the date of its execution, it appeared that the obligor had made a part payment of Rs. 50 on the 24th July 1882, which was endorsed on the bond. No other payments had been made, but the plaintiff pleaded in bar of limitation that the debt had meanwhile been three times acknowledged in writing. One of the acknowledgments relied upon was said to be contained in a deposition given by the obligor and signed by him, as a witness in a suit to which he was not a party.

Held, that an acknowledgment in order to satisfy the requirements of Limitation Act, Section 19, must be an acknowledgment of the debt as such and must involve an admission of a subsisting relation of debtor and creditor, and an intention to continue it until it is lawfully determined must also be evident.

Semple per Muttusami Ayyar, J. (Wilkinson, J., dissenting), that a deposition given and signed by a party as a witness in a suit is as much a writing contemplated by Section 19, as is his written statement or a letter addressed by him to a third party.

[Appr., 20 M. 239—6 M.L.J. 266 ; R., 30 C. 699 (707); 10 Ind. Cas. 143 = 151 P.L.R. 1911 = 191 P.W.R. 1911; 52 P.R. 1909.]

APPEAL against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in original suit No. 16 of 1890.

Suit to recover principal and interest due upon a bond, dated 1st September 1879, and payable with interest in six months from that date.

The plaint was filed on 2nd April 1890. The plaintiff alleged in bar of limitation that the debt had been kept alive by acknowledgments contained in a deposition signed by the defendant and in other documents described in the following judgments of the High Court. The Acting District Judge held the suit was not barred and he passed a decree for plaintiff.

Defendant preferred this appeal.

[*] Appeal No. 172 of 1891.
(1) 15 M. 170.

860
Seshagiri Ayyar, for appellant.
Rama Rau and Krishnamacharir, for respondent.

JUDGMENT.

[221] Muttusami Ayyar, J.—The main question arising for decision in this appeal is as to limitation. The suit is one brought to recover a debt alleged to be due upon a bond, dated the 1st September 1879. The document provided for repayment of the debt within six months from the date of its execution, and on the 24th July 1882 the appellant paid Rs. 50 in part and endorsed the payment on the bond. The suit was, however, not brought till the 2nd April 1890, and it would clearly be barred unless the debt was acknowledged to be a subsisting debt within intervals of three years between the 24th July 1882 and the 2nd April 1890. The respondent's case was that Exhibits C, D and E contained together three such acknowledgments, but for the appellant it was contended that they were not sufficient to satisfy the requirements of Section 19 of Act XV of 1877. The Judge overruled the appellant's contention and decreed the claim, but it is urged before us that the decision of the Judge is bad in law.

Section 19 of Act XV of 1877 is in these terms: “If, before the expiration of the period prescribed for a suit in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.” Explanation I states that for the purpose of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the right, or avers that the time for payment has not arrived, or is accompanied by a refusal to pay or coupled with a claim to a set off or is addressed to a person other than the person entitled to the debt. Exhibit C is copy of a deposition given by the appellant in original suit No. 937 of 1884 on the file of the District Munsif of Nellore and Exhibits D and E are copies of his written statement and deposition in original suit No. 121 of 1887 on the file of the same Court. In connection with the language of Section 19, two points arise for consideration, viz., (1) whether the expression “writing signed by the party” includes a deposition signed by him and (2) whether the debt now sued for was acknowledged in those exhibits as a subsisting debt which it was the appellant's intention to pay, adjust or satisfy. On the first point, I am of opinion that a [222] deposition given and signed by a party as a witness in a suit is as much a writing contemplated by Section 19 as it is his written statement or a letter addressed by him to a third party. The form of the instrument appears to me immaterial, provided that it is signed by the party concerned. The intention is merely to exclude oral evidence of the contents of the acknowledgment, and to declare that an oral admission of a debt without a new contract or consideration is not sufficient to prevent the operation of the Act of Limitation. It is true that a deposition contains a statement made under compulsion of law and recorded by a Court of Justice, but it is not on that ground the less a record of his voluntary acknowledgment, provided it is signed by him and contains a definite admission that the debt in question is a subsisting debt which it is his intention to satisfy. As in 9 Geo. IV, Cap. 14,
Section 1, the object was to render an acknowledgment by mere words only ineffectual for the purpose of saving the statute, but not to prescribe a special form of writing. In Daia Chand v. Sarfraz (1), the record of rights prepared at a settlement and signed by a mortgagee was considered to contain a sufficient acknowledgment.

As regards the second point, the acknowledgment must be such as will lead the court to infer an intention on the part of the writer to pay or satisfy the debt. "The rule" in England, says Lord Justice Cotton in Green v. Humphreys (2), "seems to be this, that if there is an absolute, unconditional acknowledgment, not controlled by any other language in the letter, then the Court comes to the conclusion that by that acknowledgment the party intends a promise to pay that which he acknowledges to be due.... What I think we must find from the writing is not merely an acknowledgment of such a state of circumstances as will throw a duty upon the writer to pay, but words of such a character that you may reasonably infer from the words a promise to pay. It may be put in this way, that on a fair construction of the language there must be an acknowledgment of the claim as one which is to be paid by the writer." Though under explanation I appended to Section 19, the acknowledgment may be accompanied by a refusal to pay or coupled with a claim of set off, yet it must be an acknowledgment of debt qua debt. Adverting to Section 4 of Act [223] XIV of 1859, this Court observed in Krishna Row v. Hachapa Sugapa (3) that the section requires the greater certainty of a written acknowledgment, but no particular form of words. It does not render it necessary that the writing should, in express terms, contain a direct admission that the debt or part thereof is due and it is left for the Court to decide in each case whether the writing, reasonably construed, contains a sufficient admission that the debt or part of it is due. Again in Young v. Mangala Pilly Ramaiya (4), this Court pointing out a distinction between the result of the decisions in England and the language of Act XIV of 1859 observed as follows: "The admission will not be inoperative, because accompanied with expressions which prevent the inference of a promise to pay on request; the Act does not give a new action upon the new promise, but by virtue of the admission extends the period of limitation upon the old promise and to have this effect, however, there must be a distinct admission of a debt." It is therefore necessary that upon a reasonable construction of the language used by the debtor, in writing the relation of debtor and creditor must appear to be distinctly admitted, that it must be admitted also to be a subsisting jural relation, and that an intention to continue it until it is lawfully determined must also be evident.

Before proceeding to examine whether Exhibits C, D and E contain an acknowledgment clear and unambiguous in the sense indicated above, I shall refer to the circumstances in which those exhibits were given or filed. The bond sued upon was executed in favour of the respondent’s brother Ragava Chari, who died on the 11th January 1884, leaving him surviving a widow named Amirthammal and a brother named Parthasaradhi Ayyangar who is respondent—plaintiff—in this case. On the obligee’s death, a disagreement arose between the survivors as to the right of succession to Ragava Chari’s property, and Amirthammal had then a brother named Narrainasami and a paternal uncle named Bhashika Charlu, who

---

(1) 1 A. 117.
(2) 26 Ch. D. 478.
(3) 2 M. H. C. R. 307 (310).
(4) 3 M. H. C. R. 308.
was at that time Sheristadar in the District of Nellore. These two gentlemen took the side of Amirthammal and resorted to two devices for the purpose of frustrating the brother’s claim so far as it related to the debt sued for. The first consisted in taking a fresh document from the appellant on the 22nd February 1884 in [224] the name of Narainasami for Rs. 2,000 describing the debt falsely as one due upon a bond executed in favour of Bhashika Charlu. The intention was to represent the debt due to Ragava Charlu as a debt due to Bhashika Charlu, and thereby to enable the widow to exclude it from the list of debts due to her husband, for the collection of which she applied for a certificate on the following day under Act XXVII of 1860. The second device consisted in obtaining an agreement on the 3rd August 1884, whereby one Pattabi Rama Reddi and his sons undertook to pay on account of the appellant Rs. 2,000 to Bhashika Charlu in satisfaction of the debt sued for. Neither of those documents is now produced, but each was made the basis of a civil suit which failed. Amirthammal instituted original suit No. 937 of 1884 against Pattabi Rama Reddi and his sons upon the agreement taken by her uncle Bhashika Charlu on her behalf in August 1884, and Pattabi Rama Reddi contended that that agreement was not completed. The appellant was not made a party to that suit, but was examined as a witness, and Exhibit C is a copy of the deposition given and signed by him on the 14th July 1885. The defence set up by Pattabi Rama Reddi was upheld and the suit was dismissed. In 1887 Amirthammal’s brother Narainasami brought original suit No. 121 of 1887 upon the bond executed in his name on the 28th February 1884 against the appellant, his defence inter alia was that the plaintiff was not entitled to recover and the suit was dismissed on the ground that Narainasami was a mere namo-lender. In this suit, however, the appellant filed a written statement on the 4th April 1887 and gave a deposition as a witness on 21st February 1888 (Exhibits D and E).

The first passage in Exhibit C to which the respondent’s pleader draws our attention is this: “I owed a female named Tirumala Pitchamma. “That lady had been indebted very much to others. She desired that for “the debt due by me an assignment bond should be written in the name “of Ragava Charlu and given to her. I accordingly wrote a document “for Rs. 1,600 and handed it over to Pitchamma. The said Ragava “Charlu did not speak to me in regard to this matter. I did not at “all see Ragava Charlu.” This passage discloses no distinct admission “that any debt was due to Ragava Charlu even when the document now sued for was executed, but ignores, on the other hand, its delivery to Ragava Charlu or his connection therewith. The [225] appellant next referred in Exhibit C to two sums of Rs. 440 and Rs. 400 being due to him by Pitchamma, and this is not consistent with an intention to acknowledge any debt as due to Ragava Charlu, but implies, on the contrary, a desire to dispute the competency of Pitchamma to make over the document to Ragava Charlu. The next passage relied upon in respondent’s behalf is as follows: “After Ragava Charlu’s death, his junior paternal “uncle’s son gave me notice for his debt thinking that I owed him. “At 9 o’clock on the night of the 25th February of that year “Bhashika Charlu got a document for Rs. 2,000 executed by me for “the said document for Rs. 1,600 in the name of Narainasami in the “house opposite to that in which Bhashika Charlu resided. Pitchamma “was not present that day. Bhashika Charlu agreed that after that “lady came he would settle the dispute existing between me and her and
1892
Oct. 25.
APPEL-
LATE
CIVIL.
16 M. 220 =
3 M.L.J. 35.

return to me the document for Rs. 1,600. . . . When the said
document was executed it was said that Ragava Charlu’s wife had to put
in an application next day for a certificate to collect the debts due to him,
that if a separate document was executed for the said debt of Rs. 1,600,
there would be no necessity for including it in the list of debts to be filed
with her application, and that if it was included in that list her claim
might be questioned by others. Narrainasami caused it to be written
that the document for Rs. 2,000 was due in respect of dealings with Bha-
shika Charlu. Certain lands were mortgaged by the instrument. It was 
not registered. The dealings between me and Pitchamma were not settled.
I and that lady are not on speaking terms. Though Bhaskha Charlu
said he would settle he did not do so.” Neither does this passage show
that the appellant acknowledged that any debt was due by him to Ragava
Charlu. He distinctly states that he executed the document for Rs. 2,000
in favour of Narrainasami to aid Bhaskha Charlu in thwarting her rival
claimant and misdescribed the debt as one due to Bhaskha Charlu, and
adds that it was executed on the assurance by Bhaskha Charlu, that he
would settle the account between him and Pitchamma, that the dispute
between them was not settled, and that the document which was compul-
soirly registrable was not registered.

The last passage in Exhibit C on which reliance is placed relates to
the alleged undertaking by Pattabi Rama Reddi and [226] sons to pay
Rs. 2,000 on account of this debt. In this again the appellant stated
that Pattabi Rama Reddi’s undertaking was contingent on the appellant
and his brothers executing him a document, that they were willing to
give such document only on a certain share in a salt factory being con-
voyed to them in writing, and that no such share was conveyed. In the
whole of Exhibit C there is no unqualified and unequivocal admission that
the debt was due to Ragava Charlu’s widow. On the other hand, it
discloses an attempt to repel the inference that the appellant owed money
to him and to explain away the apparent effect of the bond being in the
name of Ragava Charlu, of the endorsement of part payment by appellant
and of the execution of fresh documents by which it was intended to be
superseded and satisfied. If the explanation is rejected as false and worth-
less, a state of circumstances might, no doubt, be disclosed which would
throw a duty on the appellant to pay the debt, but the acknowledgment
must be a matter of inference from the debtor’s statements, which must
be taken as they appear whatever may be our impression as to their truth.
Adverting to a similar state of facts Blackburn, J., said in Morgan v.
Rowlands (1) that “the promise to pay must be inferred in fact and not
merely implied by law.” It was also pointed out in Young v. Mangala
Pilly Ramaiya (2) that an assertion that a sum of money will be pay-
able on the accomplishment of a condition, that is, on the happening of an
event future and uncertain is not an acknowledgment of a debt, but the
allegation of incidents out of which a debt may sometime arise, whilst an
admission of a debt coupled with the averments that it is not yet payable
in point of time may be an acknowledgment of a debt.

Passing on to Exhibits D and E, the appellant admitted in the former
that he executed the document then sued on in favour of Narrainasami in
renewal of the one now sued upon, that the latter instrument was not
then cancelled and that Ragava Charlu’s widow having died, the present
respondent was the heir to his property. In Exhibit E also the appellant

(1) L.R. 7 Q. B. 493.
(2) 3 M.H. C. R. 306.
said, "It is only for this bond (the bond now in suit) I executed this document (then in suit) and that I myself wrote the endorsement regarding the part payment." These statements disclose an admission that the bond in favour of Nairaniasami was given in lieu of the [227] bond now sued upon and that he endorsed the part payment upon it. The natural inference is that the original document was superseded and that the new document was the only one alleged to be in force. Assuming that the repudiation of Nairaniasami's right to recover upon the new document as a mere name-lender affords ground for the inference that the debt due to Ragava Charlu was intended to be treated by the appellant as a subsisting debt due to his heir, still the suit would be barred unless Exhibit C also contained a sufficient acknowledgment, which I think it does not.

The result is that the appeal must be allowed, that the decree of the Judge reversed, and that the suit must be dismissed with costs throughout on the ground that Exhibit C contains no sufficient acknowledgment of the debt sued for and that it is barred by the Act of Limitations.

WILKINSON, J.—The plaintiff sues to recover money due on a bond executed on 1st September 1879 by the first defendant to Ragava Charlu. The defendant admitted the execution of the bond sued on, but pleaded that the bond was executed collusively, and that the suit is barred. The District Judge found that the bond had been executed for good consideration and that, as the first defendant had on three occasions admitted his liability, the suit was not barred. He accordingly decreed for plaintiff and first defendant appeals. The only question for determination is whether there has been any such acknowledgment of liability on the part of the first defendant as creates a new period of limitation.

The first of such acknowledgments is said to be contained in a deposition made by the first defendant on the 14th July 1885 (Exhibit C).

In one sense, no doubt, a deposition is a writing signed by the person making the deposition, but I am not prepared to hold that it is such a writing as was in the contemplation of the Legislature when framing Section 19 of the Limitation Act XV of 1877. As remarked by Mr. Justice West (Dharma Vithal v. Govind Sadvalkar (1)), the intention of the law is to make an admission in writing of an existing jural relation equivalent for the purpose of limitation to a new contract, and for this purpose the consciousness and intention must be as clear as they would be in a contract itself. But such consciousness and intention seem to me to be altogether [228] wanting when a witness is under examination and cross-examination in the course of a suit, and though the statement is made on solemn affirmation and is read over to and signed by the witness, I do not think it can be said that, in affixing his signature to the deposition, the witness does so with the knowledge that he is admitting his liability in respect of an existing right, and without such knowledge there can be no acknowledgment.

I am also of opinion that there is not in Exhibit C a single expression which can rightly be interpreted as containing an express or implied acknowledgment of an existing liability to discharge the bond of 1st September 1879. The first defendant admitted the execution of the bond in favour of Ragava Charlu, but alleged the subsequent execution of another deed which practically superseded Exhibit A, as well as other transactions between himself and the widow of Ragava Charlu, which

(1) S B. 99.
materially altered the relation of the parties. It has been held in *Ram Das v. Birzannu Das* (1) that an acknowledgment of this nature is not a sufficient acknowledgment to create a new period of limitation. In another case (*Mylapore Iyasamy Vyapoory Moodiar v. Yeo Kay* (2)), the Privy Council remark that by the word liability is meant a liability to the person who is seeking to recover or to some person through whom he claims. I do not find in Exhibit C any admission of liability to Ragava Charlu or to Ragava Charlu’s widow, who had instituted original suit No. 937 of 1834 against one Pattabi Rama Reddy, in the course of which the deposition marked Exhibit C was given. The first defendant stated that it was at the request of his creditor Pitchamma that Exhibit A was executed and that he had nothing to do with Ragava Charlu, and that when after the death of Ragava Charlu, he, at the request of Bhashika Charlu, executed a fresh bond for Rs. 2,000 in favour of one Narrainasami; he did so on the understanding that Bhashika Charlu would settle the dispute between him and Pitchamma and return the bond for Rs. 1,600. In the suit brought against him by Narrainasami (original suit No. 121 of 1887) on that second bond the first defendant denied all liability to Ragava Charlu. On the ground, therefore, that Exhibit C is not such a writing as is contemplated by Section 19 of the Limitation Act, and that it contains no acknowledgment that any debt was due to Ragava Charlu or his heirs under the bond [229] executed on the 1st September 1879, I hold the suit barred and would allow this appeal and, reversing the decree of the District Judge, dismiss the suit with costs throughout.

---

**16 M. 229.**

**APPELLATE CIVIL.**

_Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker._

**JAGANNADHA (Plaintiff), Petitioner v. GOPANNA AND OTHERS (Defendants), Counter-petitioners.***

[16th February, 1892.]

_Agency Rules 18 and 20—Agent to the Governor at Vizagapatam._

The Agent to the Governor at Vizagapatam dismissed an appeal under the agency Rules, No. 18. The appellant preferred a petition to the High Court against the order of the Agent:

_Held, that the High Court had no power to interfere._

[Diss., 36 M. 128 (130) = 21 M.L.J. 887 (889) = 10 M.L.T. 261 = (1911) 2 M.W.N. 237.]

_PETITION under the Agency Rules,† Number XX, praying the High Court to revise the order by W. A. Willock, Acting Agent to the Governor of Fort St. George, in the Vizagapatam District, dated 20th September 1889._

The above order was made in appeal suit No. 7 of 1889, in which the plaintiff appealed against the judgment of H. D. Taylor, Acting Special Assistant to the Agent, in original suit No. 29 of 1888. The order was as follows:

---

* Civil Miscellaneous Petition No. 319 of 1890.

† Rules framed by Government for the guidance of the Governor’s Agents in Gaojam and Vizagapatam, respectively, under Act No. XXIV of 1889.

(1) 9 C. 616.

(2) 14 C. 801.
"On perusal of the record of this suit and the petition of appeal, the "Agent sees no reason to doubt the correctness of the decision of the "Lower Court and dismisses the appeal under Rule 18 of the Agency "Rules."

The plaintiff preferred the present petition.
Anandacharlu, for petitioneer.
Mahadeva Ayyar for counter-petitioners.

JUDGMENT.

The Agent having dismissed the appeal under Rule 18 of the Agency Rules, we have no power to interfere. [230] Rule 20 only applies to cases in which the Agent has passed a judgment under Rule 19.
The petition must be dismissed.

16 M. 230 = 1 Weir 733.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

QUEEN-EMpress v. VEErammal.* [30th March, 1892.]

District Municipalities Act (Madras)—Act IV of 1884, Sections 180, 263, 264—Municipal building license—Building in excess of license—Requisition to demolish building.

A landowner in a Municipality, subject to Act IV of 1884 (Madras), applied for a building license under Section 180 of the Act. The Municipality having resolved that a portion of the land was required for widening a public lane, ordered the applicant to abstain from building on it, and granted a license for a building to be erected on the remaining portion. The landowner, however, erected a building upon the whole of the land. The Municipal Council then called upon her to demolish the building erected on the portion of the land which had not been licensed. This notice was not complied with. The landowner was then prosecuted and convicted under Sections 180, 263 and 264 of the Act.

Held, that neither of the abovementioned orders of the Municipal Council were legal and consequently that no offence had been committed by the landowner.

Semble, Act IV of 1884, Section 264, does not empower a Magistrate to impose a fine prospectively in respect of the period during which one convicted of the offence of omitting to comply with a notice to execute any work, may continue to leave such work unexecuted.

[R., 27 B. 221 (233); 2 Bom. L.R. 572 (577); 171 P.L.R. 1903 = 13 P.R. 1903; D., 21 B. 189 (194).]

Cases referred for the orders of the High Court under Criminal Procedure Code, Section 438, by S. II. Wynne, Acting District Magistrate of Madura.
The facts of these cases are fully stated in the judgment of Mr. Justice Best.
Counsel were not instructed.

JUDGMENT.

BEST, J.—In Criminal Revision Case No. 95 of 1892, one Veerammal has been convicted by the Second-class Magistrate of Periya-kulam in the Madura District, of "building contrary to the terms of a license"—an offence punishable under Sections 180 and 263 of the Municipal Act No. IV of 1884 (Madras), and [231] sentenced to pay a fine of

* Criminal Revision Cases Nos. 95 and 96 of 1892.
one rupee, and further ordered to pay a fine of four annas for every day during which the offence is continued.

The Acting District Magistrate, being of opinion that the conviction is illegal, has referred the case for the orders of this Court under Section 438 of the Code of Criminal Procedure.

The following are the facts of the case: The abovementioned Veerammal being desirous of building a house on her own land applied to the Municipal Council at Periyakulam for a license as required by Section 180 of the Act. The application was considered at a meeting on 10th March 1890, when it was resolved that “a piece of land (5233 feet) is required for widening the lane. Leaving this portion at the east side of the place on which the building is to be constructed, the remaining portion may be built;” and an endorsement to the above effect was made on the petition. But the building was erected on the whole land. Hence the prosecution and conviction under Sections 180 and 263, notwithstanding an express finding by the Magistrate that the accused “has really a right to the place.” The Second-class Magistrate was of opinion that, though the accused had this “right to the place,” as the Municipality would not allow her to enjoy it,” the fact of her having constructed, “whether rightly or wrongly, contrary to the terms of the license” was sufficient to constitute the offence, and that she must seek redress “by getting the order cancelled in appeal to proper authorities or by putting the Chair-man, or other authority responsible for the order, in the Civil Court for its cancellation.”

As is correctly observed by the Acting District Magistrate with regard to this suggestion of the Second-class Magistrate, there is no appeal allowed by law; and the Civil Courts cannot cancel a license, but can only award damages.

The question is whether the Second-class Magistrate was right in declining to consider the legality of the order of the Municipal Council which was challenged by the accused.

I am of opinion that the Magistrate ought to have considered the legality of the order and declined to convict on his finding it to be illegal.

It is clear on a perusal of Section 180 that no power is thereby conferred on the Municipal Council of depriving owners of the legitimate use of their land. The object of the section is no other [232] than to ensure the safety and sanitation of buildings to be newly erected. What the Council has to consider under the section is the plan of the proposed building; and the grounds on which the same can be disapproved are such as are stated in Clause 4.

I agree with the District Magistrate in finding that the order of the Municipal Council, on which the prosecution in this case was based, was not a legal order and that the conviction is therefore unsustainable.

I would therefore set aside the conviction and sentence and order refund of the fine realized.

MUTTUSAMI AYYAR, J.—I concur.

BEST, J.—Criminal Revision Case No. 96 of 1892. This case also relates to the same Veerammal, who has been further convicted by the Second-class Magistrate of Periyakulam, of omission to comply with a notice given to her by the Municipal Council, under Section 263, Clause 2, of the Municipal Act (IV of 1884), to pull down within one week the building constructed on the portion of her land which had been reserved for the formation of a lane, when license was given to her to build on the rest of her land. The conviction is under Section 264 of the Act, and
the sentence "a fine of Rs. five (5) for the offence, and a further fine of Rs. two (2) for every day during which the said offence is continued."

The notice given to Veerammal by the Municipal Council is as follows: "On your petition applying for permission to build a house, endorsement No. 391, dated 24th March 1890, was given to you that, as it had been resolved at the meeting to open a lane from Ellupottal to the Varahanadhi and as a space of 5 English feet east to west and 33 English feet north to south out of your house site in the eastern side would be required when the lane shall be opened, you might build your house on the remaining portion, leaving the aforesaid space for the road. It having come to notice that you were building beyond the space mentioned in the license granted to you and on the portion required for the lane, you were prosecuted for having acted contrary to the terms of the license, and the Magistrate convicted and punished you under Section 263 (1) of the Municipal Act. You should, within a week, pull down the building constructed on the ground without license and vacate it. This notice is [233] given under Section 263 (2) of the Municipal Act.

If you do not act in accordance with this notice within one week, you will be prosecuted under Section 264 of the said Act."

This notice contains a distinct admission that the portion of land which the Commissionerg wished to be reserved for the lane which they had resolved to newly open, was a portion of Veerammal's house site.

As already observed in disposing of the connected case No. 95, Section 180 of the Municipal Act, gives the Municipal Council no power to deprive owners of the legitimate use of their land. What the Council has to consider when an application is made to it under that section is whether the proposed building is objectionable on any of the grounds stated in Clause 4 of the same section. If private property is required for any public purpose by a Municipal Council it must be acquired in a legal manner (cf. Act X of 1870) and not in the exercise of the power conferred on the Councils for the limited purpose of securing the safety and sanitation of towns.

The order of the Council directing Veerammal to abstain from building on a portion of her land was therefore ultra vires; and their further notice directing her to remove the building for no other reason than that it had contravened such order was illegal, and therefore not one that she was bound to obey.

I would, therefore, set aside the conviction and sentence and direct that the fine realized be refunded.

It appears that a sum of not less than Rs. 214 has been realized under that part of the Second-class Magistrate's sentence which imposed "a further fine of Rs. 2 for every day during which the said offence is continued." Though Section 264 prescribes such further fine, I do not think it can be imposed prospectively. The proper course seems to me to be to institute further prosecution, if there is occasion for it, and allow the accused an opportunity of defending herself before the further fine is imposed.

MUTTUSAMI AYYAR, J.—I concur.
[234] APPELLATE CRIMINAL.

Before Mr. Justice Handley and Mr. Justice Best.

PONNAMMAL, In re.  

Criminal Procedure Code, Act X of 1882, Section 488—Maintenance case—Failure to pay process fees.

An application for maintenance under Criminal Procedure Code, Section 488, should not be dismissed on the failure on the part of the applicant to comply with an order for payment of process fees.

[F., 11 C.P.L.R. 14 (15); 4 Ind. Cas. 1045 = 5 M.L.T. 261]

CASE referred for the orders of the High Court under Section 438 of the Criminal Procedure Code by H.M. Winterbotham, Acting District Magistrate of Tanjore.

The case was stated by the District Magistrate as follows:

"The Head Assistant Magistrate has dismissed this application for maintenance under Section 488, Criminal Procedure Code, on the ground that the applicant failed to pay process fees as ordered. The record does not show what fees the applicant was called upon to pay, or for what purpose; but, presumably, it was for the issue of summons to the defendant.

"Neglect to maintain a wife is not an ‘offence,’ and the rules made by the High Court pursuant to Section 20 of the Court Fees Act (VII of 1870), to regulate the payment of process fees in the case of offences other than offences for which the Police may arrest without warrant, do not, I think, apply to applications for maintenance. I suppose the exemption to have been intentional, as in many cases the woman applying to a Magistrate for maintenance is a pauper, or not in a position to pay process fees. I think the Head Assistant Magistrate’s order dismissing the application is illegal and should be set aside."

Counsel were not instructed.

JUDGMENT.

We are of opinion that the District Magistrate is right. Section 20, Clause II of the Court Fees Act has reference only to fees for processes issued in the case of ‘offences,’ and it has been held that an order for payment of maintenance is not a conviction for an ‘offence.’ See Queen v. Golam Hossein Chowdhry (1); cf. Reg. v. Thakur Ira (2).

We, therefore, set aside the Head Assistant Magistrate’s order dismissing the application and direct the Magistrate to proceed with the inquiry and pass an order in accordance with law.

* Criminal Revision Case No. 468 of 1892.

(1) 7 W.R Cr. 10.  
(2) 5 B.H.C.B., Cr. 81.
QUEEN-EMPRESS v. GOVINDA PILLAI.*

1892
SEP. 1.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Handley.

QUEEN-EMPRESS v. GOVINDA PILLAI.* [1st September, 1892.]

Penal Code, Act XLV of 1860, Section 500—Defamation—Privilege of witness—Investigation by Police.

A statement made in answer to a question put by a Police officer under Criminal Procedure Code, Section 161, in the course of investigation made by him is privileged, and cannot be made the foundation of a charge of defamation.


Case referred for the orders of the High Court under Criminal Procedure Code, Section 438, by T. Weir, Sessions Judge of Madura.

The case was stated by the Sessions Judge as follows:

"The material facts are that in the course of an investigation by the Police into a charge of murder, which was afterwards committed to the Sessions Court for trial (Register Case No. 12 of 1891, Usilampatty Magistrate's file or Sessions Case No. 99 of 1891) the said Govinda Pillai, when examined by the Police Head Constable (third witness for the prosecution), stated, in the presence of others, that he was keeping the complainant, a married woman. When afterwards examined as a witness for the prosecution (eighth witness) before the Committee Magistrate who held the preliminary enquiry into the murder case, he repeated the same statement, and added that he was told by the complainant that the deceased in the murder case, was mistaken by her relations for him (Govinda Pillai defendant) and murdered under mistake, their object being to kill him (defendant) for his criminal intimacy with her. The Deputy Magistrate was of [236] opinion that the information given by the defendant to the Police regarding his intimacy with the complainant was untrue, that it offered no clue to the murder then under investigation and was not made for the public good nor to protect the defendant's own interests, and he accordingly convicted the defendant of an offence under Section 500, Indian Penal Code.

"On a perusal of the record I am unable to agree with the Deputy Magistrate. Although I am more than disposed to think that the Deputy Magistrate has not come to a correct finding on the evidence as a whole, I do not make the reference on this ground, but on the ground that the Deputy Magistrate has in my opinion, erred in law in not holding that the communication was, in the circumstances in which it was made a privileged or protected communication.

"I understand it to be the law that a defamatory statement is protected, except for purposes of a prosecution for perjury, when though not made in good faith it is made in the course of judicial enquiry, and is pertinent to the enquiry, or if it is made in answer to questions which were allowed to be put and which the person making the

*Criminal Revision Case No. 248 of 1892.
"statement was compelled to answer—Manjaya v. Sessa Shetti (1) and the English decisions therein referred to.

"In the present case it should be stated that the charge on which the accused has been tried and convicted is for some reason or other founded on the statement made to the Police on the 15th August (Exhibit B) and not on the more detailed statement to the same effect subsequently made on the 14th September to the Committing Magistrate, and it may perhaps be suggested, having regard to the definition of the terms 'investigation' and judicial proceedings in the Code of Criminal Procedure that the statement was not one made in the course of a judicial enquiry.

"Such a construction would, however, in my opinion, be an unduly narrow one and would defeat the object and intention of the law, inasmuch as all the reasons which justify the attaching privilege to a defamatory communication when made in a Court of Justice exist in my opinion still more forcibly for attaching the privilege to such statements made in this country to Police officers conducting an investigation.

"The pressure under which a statement is made to the Police [237] in this country is probably ordinarily greater than the pressure exercised in a Court of Justice. The witness, it is observed, is bound to answer the questions truly (Section 161, Criminal Procedure Code). No doubt an exception is made in favour of questions the answers to which would have a tendency to expose the witness to a criminal charge, but the witness may fairly be assumed, would not ordinarily be aware of this distinction.

"In the present case the evidence for the prosecution itself shows that the defamatory statement was made under pressure. The third witness (Head Constable) evidence on the subject is that he sent for the accused on information received and asked him. He said 'No.' Then I insisted on his telling me the truth. Then he admitted he was keeping the woman.

"As to the pertinency of the communication, there can, I think, be no reasonable question. The Police were investigating a murder, and the motive for the crime was obscure. The deceased, it should be mentioned, was killed, while being pursued after stealing betel-leaves (property of trifling value) from a garden, and the information that the deceased was killed in mistake for the present accused, against whom enmity was said to be entertained on account of the alleged criminal intimacy with complainant appeared to afford some reasonable motive for the commission of the offence.

"The information, such as it was, was at any rate accepted and put forward along with other matter by the Police as explaining the murder on their occurrence report of 15th August 1891, and it may here be stated that the evidence of the accused as to this fact of motive was only excluded by me at the Sessions Trial, because his alleged informant (the present complainant) had not been called or sent up as a witness.

"It may perhaps be suggested that the ground of public policy on which the principle of protecting a defamatory statement made by a witness before a Court of Justice is based, viz., that it concerns the public and the administration of justice, that witnesses giving their evidence

(1) 11 M. 477.
on oath in a Court of Justice, should not have before their eyes the fear of being harassed by suits for damages, does not apply in the case of the merely preparatory proceedings before the Police.

"This view, although deserving of consideration is, however, I think, scarcely well founded. Public policy, it appears to me, "requires that a witness should be protected equally when giving "information which may turn out to be pertinent to the Police as when "giving evidence in a Court of Justice."

"If I am correct in this view it can make no difference that the Magistrate has (erroneously as I am inclined to think) found the information given to be untrue."

Counsel were not instructed.

JUDGMENT.

We think that the Sessions Judge is right in holding that the principle of the decision in Manjaya v. Sessa Shetti (1) is applicable to the case of persons making statements in the course of an investigation by a Police officer. Such persons are bound by Section 161, Criminal Procedure Code, to answer truly all questions put to them, except such as tend to criminate themselves, and are therefore entitled to the protection which the law gives to witnesses. Accused, in the present case, made the statement, on which the defamation is laid in answer to a question by the Police Constable, and we think, under the principles laid down in the above decision, his statement is a privileged communication.

The conviction is set aside, and the fine, if paid, is to be refunded.

16 M. 238.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

MAYEN AND ANOTHER (Defendants Nos. 1 and 3), Appellants v. ALSTON AND OTHERS (Plaintiffs), Respondents.*

[6th, 7th, 8th and 9th September and 12th October 1892 and 3rd February, 1893.]


The plaintiffs, a firm of merchants, entered into an agreement (which was reduced to writing) with the defendants, who were dealers in coffee and other produce, to the following effect, viz.—that all consignments of produce, which the defendants might make to Europe, should be made through the plaintiff's firm; that the plaintiffs should receive a commission of 1 per cent. for themselves and 2½ per cent. for their agents at the port of consignment; that the plaintiffs should make [238] certain advances to the defendants against the produce; and that the sums advanced should be repaid with interest "at such rates as may be fixed at the various dates of such loans it being agreed that "such interest is to be regulated by the then prevailing rate at the office of the "Bank of Madras at Teilliccherry." The written agreement was silent as to the mode of sale, rate of exchange and other matters connected with the business; but it was at the same time further agreed orally that the sales of the defendant's produce were to be made under the directions and at the discretion of the plaintiffs. Business was carried on on the footing of the above agreements for eighteen months, during which period the plaintiffs furnished to the defendants copies of

* Appeal No. 129 of 1891.

(1) 11 M. 477.
the account-sales for the consignments made through them, and they were accepted without objection by the defendants. The business resulted in the defendants becoming indebted to the plaintiffs; and about nine months after the date of the aforesaid agreement the defendants executed in favour of the plaintiffs a mortgage in which the then amount of their indebtedness was recited. The defendants became further indebted to the plaintiffs, and the plaintiffs having furnished them with an account of the transactions between them now sued to recover the balance due. The defendants admitted the correctness of the debit side of the account, but denied in general terms that of the credit side. Evidence was given by the plaintiffs of the receipt of the account-sales in the ordinary course of business and of the delivery of copies to the defendants from time to time, and they were filed as exhibits without further proof. It appeared that in the account the defendants were charged on account of local exchange at a rate higher than that actually paid to the Bank, with which the plaintiffs had made a special arrangement without reference to the contract with the defendants. It also appeared that the plaintiffs, under an arrangement made with their agents at the ports of consignment, had received from them about 1 per cent. on the various consignments by way of return commission, and that this arrangement had not been communicated to the defendants:

Held, (1) that the account-sales were prima facie proof of the transactions to which they related:
(2) that evidence of the contemporaneous oral agreement was admissible;
(3) that the defendants were not entitled to the benefit of the special arrangement between the plaintiffs and the Bank;
(4) that the plaintiffs were liable to the defendants for the amount received by them as return commission.

[R., 7 A L.J. 459 (461) = 6 Ind. Cas. 126.]

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No. 35 of 1890.

The plaintiffs made advances to the defendants and consigned goods to Europe for them on the footing of an agreement filed as Exhibit A. The defendants mortgaged certain lands to the plaintiffs to secure the repayment of the advance. The mortgage was dated 16th December 1889 and was filed as Exhibit C.

Exhibit A was as follows:

"Agreement entered into this 27th day of January 1889 between Karuvandevalapil Mayen residing in Tellicherry of the [240] one part and Messrs. Alston Low and Co., carrying on business as merchants at Tellicherry and elsewhere of the other part witenaseth that in consideration of the promises and covenants hereinafter set forth, the said Karuvandevalapil Mayen hereby promises and covenants with the said Messrs. Alston Low and Co., that he the said Karuvandevalapil Mayen will on the execution of these presents deposit with the said Messrs. Alston Low and Co., all the deeds, documents and writings described in the schedule hereto attached as security for all or any sums or sum of money that is or may be due or owing to the said Messrs. Alston Low and Co., by him the said Karuvandevalapil Mayen and that he the said Karuvandevalapil Mayen will on demand made by the said Messrs. Alston Low and Co., execute, register and deliver to the said Messrs. Alston Low and Co., all such deed or deeds of mortgage, assignment or assurance over the properties referred to in the said deeds and any other property in which he the said Karuvandevalapil Mayen may be interested as to the said Messrs. Alston Low and Co., may seem necessary or advisable for the better security of all or any portion of such debt. And that he the said Karuvandevalapil Mayen will also on demand being thereto made
pledge or hypothecate to the said Messrs. Alston Low and Co., all coffee, pepper, timber or other goods or produce which he may be in possession of or entitled to for the securing of any monies that may at the time of the said demand be due to the said Messrs. Alston Low and Co., and place the said Messrs. Alston Low and Co., in possession of all such coffee, pepper, timber, goods or produce should possession thereof be demanded. And that he the said Karuvandevalapil Mayen will not sell or dispose of the said coffee, pepper, timber, goods or produce without previously allowing the said Messrs. Alston Low and Co., an opportunity of purchasing the same. And that he the said Karuvandevalapil Mayen will grant to the said Messrs. Alston Low and Co., formal promissory notes for all monies advanced to him under this agreement and will repay the said monies with interest on the same at such rates as may be fixed at the various dates of such loans, it being agreed that such interest is to be regulated by the then prevailing rate at the office of the Bank of Madras at Tallicherry and to be 2 per cent. less than the then current rate of the Bank on or before the 30th day of June next and that he the said Karu-\[241\]vandevalapil Mayen will not consign timber, goods or other produce for sale in Europe otherwise than through the said Messrs. Alston Low and Co., and will on all such consignment pay to the said Messrs. Alston Low and Co., in addition to the usual charges a commission of 1 per cent. for themselves and of 2½ per cent. for their agents at the port of consignment and that he the said Karuvandevalapil Mayen will deliver to the said Messrs. Alston Low and Co., for curing all such parchment coffee which may come into his possession or which he may influence, paying them the said Messrs. Alston Low and Co. the usual charges for such curing and that further that should he the said Karuvandevalapil Mayen require any advances on the security of such parchment coffee he will repay all such advances (which it is hereby agreed shall not exceed the rate of Rs. 10 per every bushel) with interest on the same at 8 per cent. per annum on such dates or within such time as may be agreed upon at the dates of the said advances and that he the said Karuvandevalapil Mayen will not during the continuance of this agreement borrow any monies from any other person or persons or execute, draw, accept, endorse any bonds, bills, negotiable instruments or promissory notes in favour of any other person or persons making himself liable for payment of any sums of money to any such person or persons and that he the said Karuvandevalapil Mayen will in the case of all sales of produce made by him to outsiders give immediate information of the same to the said Messrs. Alston Low and Co., and pay in to them against advances made all monies that may come into his the said Karuvandevalapil Mayen's possession on account of such sales and that he the said Karuvandevalapil Mayen will in case of breach of all or any of the above covenants pay forthwith to the said Messrs. Alston Low and Co., on demand being made in addition to any damage they may have thereby suffered all such sums of money as may be due or owing to them with interest as above provided and the said Messrs. Alston Low and Co., do hereby covenant with the said Karuvandevalapil Mayen that they the said Messrs. Alston Low and Co., will advance to the said Karuvandevalapil Mayen such sums or sum of money as he may require such advances when made on the security of timber or other goods or produce other than parchment coffee not to exceed 70 per cent. of the market value of
the said goods in the case of [242] parchment coffee at Rs. 10 per
" bushel and in other cases not at any time to exceed a lakh and that
" they the said Messrs. Alston Low and Co., will give him the said Karu-
" vandevalapil Mayen all such information as they the said Messrs.
" Alston Low and Co., may obtain as to the state and movements of the
" various markets.
" In witness whereof the said parties have hereunto set their hands
the day and year first above written.

" (Signed)."

" We, Karuvandevalapil Mayen Karyaden Kunhi Vatuvan and
" Karyaden Kuttiassen, do hereby to acknowledge that the above agree-
" ment was entered into with Messrs. Alston Low and Co., by one of us
" Karuvandevalapil Mayen for and on behalf of us all that all advances
" made under that agreement are to be looked upon as advanced to us
" three and that we are bound by the terms of the above agreement sub-
" ject to the following modifications:—
" That the said Messrs. Alston Low and Co. are not bound to provide
" advances against produce for more than seven lakhs of rupees and even
" that amount is to be advanced by them only when they are satisfied that
" the value of the produce shows such margin as is provided for in the
" above agreement that after the 31st March 1889 the amount due by us
" to the said Messrs. Alston Low and Co., is to be gradually reduced and
" by the 30th June all advances with interest and commission will be
" cleared by us.
" That in case of sales of produce by us to local firms of standing they
" the said Messrs. Alston Low and Co., are bound to provide us with funds
" sufficient to enable us to work such contracts of sale irrespective of the
" amount, then due by us to them.
" That we are not bound to consign any produce to Europe save and
" except the 100 tons which we have already consigned through the said
" Messrs. Alston Low and Co., and that we are at liberty to sell our produce
" according to our discretion without giving the said Messrs. Alston Low
" and Co., any option of refusal provided always that in case of all such local
" sales made after the 26th February 1889 exclusive of sales of parchment
" coffee cured in the works of Messrs. Alston Low and Co., and on which
" they are not entitled any such commission we agree to pay them a
" commission of 4 annas per cent.
" That should we wish to consign produce to Europe we are [243]
" bound to consign the same through Messrs. Alston Low and Co., alone,
" and that in the case of breach of this covenant we agree to pay them
" all such commission and profit as they would have made if the consign-
" ments had been made through them.
" That we are bound to give the said Messrs. Alston Low and Co.,
" immediate information of any sales we may make locally and that we
" agree to allow them to keep a man on our premises at their expense to
" make a note of all produce received and despatched from our godowns and
" to prevent the same being removed therefrom without their knowledge.
" Dated this 18th day of March 1889.

" (Signed)."

The further facts of the case appear sufficiently for the purposes of
this report from the following judgment of MUTTUSAMI AYYAR, J.

876
The Subordinate Judge passed a decree for the plaintiffs and the defendants Nos. 1 and 3 preferred this appeal.

Bhashyam Ayyangar, Sankaran Nayar Narayana Rau, Govinda Manon, Byru Nambiar and Seshu Chariar, for appellants.

The Advocate-General (Honorable Mr. Spring Branson) and Mr. Norton, for respondents.

JUDGMENT.

Muttusami Ayyar J.—Messrs. Alston Low and Co., plaintiffs, respondents, are merchants who carry on business as Commission Agents at Tellicherry and elsewhere. Appellants, first and third defendants, are Mappilla merchants who, together with second defendant since deceased, received advances from them from time to time on the security of produce to be collected and consigned through them for sale in Europe and Egypt, such as coffee, pepper, timber and other goods. During the year 1888, respondents dealt with appellants separately, each on his own account. In 1889 and 1890, the former carried on business with the latter in partnership, subject to the terms mentioned in agreement A, dated the 27th January 1889. The first appellant was the only party who first made the agreement, but on the 18th March next, the second appellant and the deceased second defendant who were first appellant's partners also became parties to that document and adopted it as altered by the addendum. The business commenced in January 1889 and continued till June 1890. During this interval, respondents furnished to appellants copies of account-sales which they received from the consignees at the several places of consignment, and on the 28th March 1889, the former sent to the latter a statement of account, which showed at that time a balance of Rs. 5,69,909 in respondents' favour. On the 16th December 1889 appellants executed document C, mortgaging thereby certain properties as security for Rs. 2,50,000. The business ultimately resulted in a loss the prices realized in Europe being less than those paid by appellants in India, and on the 6th May 1890, respondents furnished an account which showed then a balance of Rs. 2,87,470. Appellants were since called upon to pay it and on their failing to comply with the demand, respondents brought this suit on the 5th September 1890, to recover that amount with interest thereon at 8 per cent. per annum. They also prayed for a decree directing the sale of the properties mortgaged by document C in default of payment of Rs. 2,50,000 and interest thereon.

The issues fixed in this case sufficiently indicate the several grounds upon which appellants resisted the claim. The preliminary objection, that Nayan Vittil Assan ought to have been made a co-defendant as one of appellants' partners, was given up at the final hearing in the Court below. On the merits, the Subordinate Judge determined all the issues in respondents' favour and decree their claim. Hence this appeal.

The questions raised by the tenth and twelfth issues are not argued on appeal. Nor is there any reliable evidence to show that document C was obtained by misrepresentation as alleged in appellants' written statement. For the sake of clearness, I proceed to consider the questions raised by the other issues under three general heads:—viz., (1) whether the account rendered by respondents is correct and complete so far as it relates to consignments sold and sale-proceeds realized, (2) whether the charges entered therein are correct, and whether respondents made any and what profit in the agency business for which they are liable to account to appellants, (3) whether respondents acted in contravention of their duty.
as agents in regard to the sales of consignments and, if they did, whether any and what loss was thereby occasioned to appellants and whether such loss might be set off in this suit against respondents' claim.

Before proceeding to deal with the questions mentioned above, I may state that beyond denying the correctness of respondents' account and thereby raising the general issue, appellants neither surcharged nor falsified specific items. Again, they did not plead any set-off in their written statement nor did they refer to any cross claim or demand as such and furnish a statement of particulars as required by Section 111 of the Code of Civil Procedure. Further, they admitted the debit side of the account furnished to them, but impugned the credit side in toto. On the other hand, respondents, who admitted their liability to render an account, contended that they were not bound to prove in the first instance the credit side.

The first question considered by the Subordinate Judge is as to onus of proof and his decision regarding it appears to be correct although some of the reasons assigned by him in its support convey the impression that the party bound to account is bound only to prove the debit side. There can be no doubt that where there is an obligation to render an account, it includes a duty to show prima facie that the account rendered is correct and complete and that that duty extends to both sides of the account. Sales of consignments entrusted to commission agents and particulars of those sales are matters which lie specially within their knowledge, and every contract of agency imposes on the agent the duty of rendering a true and complete account regarding the subject-matter of the agency. This, the Subordinate Judge admits at the close of paragraph 7 of his judgment. He is clearly well founded in saying that so far as appellants impute to respondents' misconduct or dereliction of duty, it is for the former to establish their case. The presumption is against such misconduct or violation of duty until it is proved by the party who makes the imputation. The Subordinate Judge is also right in holding that when the agent produces prima facie proof of his account, it is for the principal to surcharge or to show that more monies came into the agent's hands than are acknowledged by him.

Although the Subordinate Judge compares the credit side of the account to a list of payments made by a debtor on account of an admitted debt, he does so for the purpose of indicating the necessity that exists for surcharging or falsifying and not for the purpose of absolving respondents from their obligation to produce prima facie proof.

The substantial question, therefore, is whether there is prima facie proof of the account rendered to appellants. Exhibit K series consist of account-sales received by Mr. Tathamf respondents' local agent, from the consignees at the several ports of consignment in Europe in the ordinary course of business, and he has given general evidence as to his having so received them and furnished copies of the same to appellants from time to time. He also appeared as a witness in the case and gave the appellants an opportunity of cross-examining him as to the general accuracy of the account, as to any discrepancy between it and the vouchers and as to any specific consignments in respect of which the quantities sold were considered by them not to correspond to the quantities consigned, or the prices stated in the account were believed to be less than what were actually realized. There is also the fact that the second defendant admitted the correctness of the account furnished by respondents on the
28th March 1889 and the explanation now offered by appellants, viz.,
that the second defendant did so because respondents refused otherwise
to make further advances is not satisfactory. There is the further fact
that in December 1889 appellants executed document Cos security for
Rs. 2,50,000. On the other hand, appellants refer us to no specific
evidence regarding the alleged mis-statements of prices and quantities,
but only contend that the account-sales are not of themselves legal
evidence, and that respondents were bound to have examined on commission
their agents at the several foreign markets in Europe and Egypt and
proved strictly each item on the credit side. I do not think this contention
is tenable. It was held by the High Court at Calcutta in Shearman v.
Fleming (1) and by the High Court at Bombay in Hodgson v. Rupchand
Hazarimal (2) that "when goods are consigned to be disposed of in a
foreign market, it must be considered that the consignor impliedly agrees
that the account-sales furnished by the correspondents abroad shall be
"taken as prima facie evidence of what the goods realized." In the last
mentioned case the learned Chief Justice said: "It would cause great
expense and inconvenience if the debtor, by merely objecting to the
account, could compel the procuring evidence from abroad; and seeing
that in practice merchants are satisfied with the truth of the account-
sales and ask for no further evidence, I think there is good ground for
holding that there is such an implied agreement." There is also the
dictum of Justice Blackburn in Smith v. Blakey (3) that account-sales
are prima facie evidence, subject to the right on the other side to
surcharge or falsify. Seeing that the procuring of the evidence of cor-
respondents at the several [247] foreign markets would occasion con-
siderable delay and expense and tend to paralyze trade, I am of opinion
that account-sales were properly admitted as prima facie proof. As for
the objection that those furnished by Busch and Co. are not signed,
it is sufficient to observe that signature is not indispensable, provided
they were really received from them in the usual course of business.
It is noteworthy that though copies of account-sales were furnished to
appellants from time to time, they do not appear to have taken exception
to them as they were received or within reasonable time after they were
received. The only letters which the first defendant remembers to have
written on the subject are Exhibits E, I and II. Exhibits I and II, which
are dated April 1889, show only that appellants used to examine accounts
and to obtain such information as they deemed necessary to render their
examinations efficient. Exhibit E which was written in November 1889
refers only to the rate of local exchange and to the charge made for curing
coffee and there is nothing in these letters impugning the correctness
of the quantities of goods sold or prices realised. As observed by the
High Court at Bombay in the case already cited, the law as to account-
sales is that where an account between merchants in different countries
is transmitted from one to the other, and no objection is made after
several opportunities of writing have occurred, the account is deemed in a
Court of Equity to be a stated account only to be re-opened when some
cogent reason is shown. The first defendant states in his evidence that
"whilst business was being conducted under document A, we used to go
to the plaintiffs’ office almost every day" and yet no objection appears to
have been taken to account-sales until a disagreement arose between the
parties. Upon the whole evidence I see no reason to hold that the

Subordinate Judge has not come to a correct finding on the fourth and fifth issues.

The next question which we have to consider relates to charges and profits forming the subject of the eighth, ninth and tenth issues. The only items finally disputed in the Court below are those of local exchange, sterling exchange, commission and brokerage, and on appeal, the objection to brokerage is not pressed upon us.

As to the local exchange, the objection is that the rate at which respondents paid the local Bank was from 8 to 10 annas per every Rs. 100, but that the rate at which they charged appellants [248] throughout was 12 annas. That there is this difference between the rates paid to the local Bank and those charged against appellants is admitted by Mr. Tatham, but his explanation is that the local Bank charged them the lower rate by reason of a special arrangement made with their firm, without reference to the contract of agency and that he is not bound to give appellants the benefit of the concession personal to his firm and antecedent to the contract of agency. The learned Advocate-General contends on their behalf that the case is similar to insurance, and that the benefit of special insurance terms needs not be given up to constituents in the absence of an express provision to the contrary. On the other hand, the learned pleader for appellants argues that an agent has no right to charge his principal more than what he actually pays, any special advantage enjoyed by him being in part the inducement to his selection by the principal. Document A is silent on the subject, but it is in evidence that when appellants did business with respondents in 1888, though not in partnership, they were charged 12 annas per cent. for local exchange. In the account furnished the appellants in March 1889 and admitted by them to be correct, the rate entered was 12 annas and the first time they objected to it was in November 1889. The favorable rate charged by the local Bank is in its nature an advantage growing out of respondents' position as merchants who habitually cash their bills at the local Bank and not dependent on contract of any particular agency. There was no express agreement to give the appellants the benefit of this favorable rate and not to charge them in a higher rate in common with their other constituents. Adverting to insurance, witness Zellweger states that he would not give his constituents the benefit of any special terms conceded for his firm. Having regard to the course of business between appellants and respondents in 1888 and 1889 and to the evidence of witness Zellweger relative to special insurance terms, I am not prepared to allow this objection.

As regards the sterling exchange, two objections are taken on appellants' behalf viz., (1) that the telegrams produced by Mr. Tatham are in cipher and (2) that the Subordinate Judge was in error in admitting a copy of the Madras Mail as evidence. As regards the first, it was appellants' fault if they did not choose to ask Mr. Tatham to explain the telegrams and to verify his statement that the charge made was in accordance with the quotations contained therein. As for the second objection, I think it must [249] prevail, copy of the Madras Mail being no legal evidence. Apart from it, however, there is the evidence of Mr. Tatham that the charge is proper and that the telegrams produced are vouchers in its support. I do not consider that appellants ought now to be permitted to object to the charge on the ground that Mr. Tatham did not verify his statement by volunteering translations of the telegrams in cipher. It is not alleged even now that the charge is not borne out by the telegrams,
but we are asked either to strike out the item or re-open the case on the ground that it had not been voluntarily verified. This I think we must decline to do.

As regards the commission, document A provides that appellants should pay respondents in addition to the usual charges a commission of 1 per cent. for themselves and of 2½ per cent. for their agents at the ports of consignment. It is admitted by Mr. Tatham that by a special arrangement made with some of those sub-agents, they paid him back out of 2½ per cent. commission fixed for them a return commission of 1 per cent. or so. It is also admitted that he never communicated this fact to the appellants. Nor does it appear that they were aware of it when document A was executed. The objection urged on appellant’s behalf is that the return commission or rebate as it is called is in the circumstances of this case a profit made by the agent in the agency business without the knowledge of the principal and that it must be given up to the principal. On the other hand, it is argued on behalf of respondents that the return commission is a payment made by consignees for employing them as such and enabling them to earn a commission. I am of opinion that the objection taken by appellants must prevail and that the question is governed by the principle laid down in Morison v. Thompson (1), viz., that profits directly or indirectly made in the course of or in connection with one’s employment as agent without the sanction of the principal belong absolutely to the principal. The Subordinate Judge is in error in holding that the law in India is otherwise. The return commission was the result of a dealing in the business of the agency on the agent’s own account without the knowledge of the principal; and to the benefit accruing therefrom, the latter must be taken to be entitled within the meaning of Section 215 of the Contract Act. The unreported case of Van Ingen v. Maclean (2) is not in point, for there, the agency ceased when the horse was bought in and the subsequent sale of the horse took place after the agency had terminated. The reason of the rule is not fraud or dishonest concealment but is, as stated by Lord Ellenborough in Thompson v. Havelock (3), the conflict which would otherwise arise between the agent’s interest and duty. Again, if Mr. Tatham had communicated to appellants when document A was executed that he expected to get a return commission, they might not have agreed to pay 2½ per cent. commission on the whole, viz., 1 per cent. to respondents and 2½ per cent. to their sub-agents or consignees at the ports of consignment. I do not think that the rule can be ignored on the ground that notwithstanding this payment the sub-agents at the ports of consignment discharged their duty well and that appellants were in no way prejudiced. Document A, clause 4, of the addenda provides, no doubt, that in case appellants broke their covenant and consigned produce to Europe otherwise than through respondents, the former should pay the latter all such commission and profits as they would have made if the consignments had been made through them, but upon its true construction, the term profit cannot be taken to include profits made in breach of their duty. The Subordinate Judge appears to infer from this clause that appellants were aware when they entered into agreement A that respondents were to receive this return commission, but there is no warrant for such inference. On the other hand, the evidence of the first defendant and Mr. Brown shows that when appellants pressed for the reduction of rate of interest,

(1)L.B. 9 Q. B. 480. (2) Referred Case No. 71 of 1877. (3) Camp. 527.
Mr. Tatham said that all that his firm got was 1 per cent. commission. Mr. Tatham himself does not state that appellants were aware of it. His evidence on this point is as follows: "I wanted to charge a certain rate of interest, probably 10 per cent. The first defendant probably asked me to lower it. I think in all probability he asked me to lower it to 8 per cent. It was finally agreed that we should charge 2 per cent. below the Bank rate fixed for natives. I do not certainly recollect saying that I could not give a lower rate because 1 per cent. commission was all we got. I can swear positively that I never said so. I never told the defendants that any portion of the 2\(\frac{1}{2}\) per cent. commission fixed for the agents at the port of consignment ever came to me. So far as I am concerned, defendants were not put upon notice of any repayment to me. I do not suggest that at the time of the execution of Exhibit A, defendants knew that any part of 2\(\frac{1}{2}\) per cent. commission came back to me. I did know at the time that I would get certain rates of return commission if I consigned to certain firms at certain ports. So far as any action on my part is concerned, the defendants were not aware when they acknowledged my account to be correct that any part of the 2\(\frac{1}{2}\) per cent. commission came to me."

It is true that he adds: "But I knew from other sources that they were already so aware. I say so because all these things are known in the bazaar among the traders and are no secrets. No trader told me that the defendants were aware of this usage. I think all the other firms here, European and Native, do know the exact terms under which one firm deals with its correspondents abroad. I do not know the exact terms on which Volkart Brothers deal with Busch and Co. But I am perfectly certain that the latter do allow them a return commission if goods are consigned for sale."

Mr. Zellweger, the Agent of Volkart Brothers, does not speak of any return commission though he states that Busch and Co. did business for them in 1888 as consignees for 4\(\frac{1}{4}\) per cent. commission. I am unable to hold that when it is incumbent on a party to prove notice or knowledge of a specific fact, a vague suspicion of the kind mentioned by Mr. Tatham can be accepted as proof of knowledge aliunde. The conclusion to which I come is that the respondents are liable to appellants for whatever return commission they have received, and in this respect the decision of the Subordinate Judge must be set aside.

Objections to the other charges mentioned in the ninth issue are not pressed on appeal. The third question we have to consider is as to the alleged breach of duty on the part of respondents in connection with the sale of appellants' goods. It was first urged that respondents did not exercise proper skill and care and sell the goods to appellants' advantage. There is not a particle of evidence to support this complaint. It was next contended that respondents did not comply with trade usages as other firms and that most of appellants' goods were improperly sold on what are called landed and delivered terms instead of cost and freight terms. There is nothing in document A on this point and the evidence in the case does not either establish a trade usage in appellants' favour, or show clearly that sales on cost and freight terms are more advantageous than on landed and delivered terms. In one place the first defendant states in his evidence that "cost and freight terms are more profitable" and in another, he says that "sales on delivered terms will fetch a higher price than those on cost and freight terms." Mr. Tatham deposes that he could not have secured
cost and freight terms even if he had attempted to do so and that he never sold on such terms as a rule. Mr. Zollweger, who is in charge of the firm of Volkart Brothers at Tellicherry, does not give evidence regarding any trade usage although he states that his firm sells always on cost and freight terms and does not consign. Mr. Brown, appellants' second witness, a trader at Tellicherry, said at first that cost and freight terms were more advantageous than landed terms, but since recalled that statement adding that it was not correct and that landed terms would fetch 7 francs more. The difference between these two modes of sale appears to consist in that when the sale is on cost and freight terms, the seller is not liable for the landing charges at the port of discharge, and it is by no means clear that when the charges are to be paid by the buyer the price will not be proportionately less. I cannot hold upon the foregoing evidence that there is proof of any trade usage as urged for appellants or that cost and freight terms are so beneficial as to exclude the discretion of the agent in the matter.

The next ground of complaint is that respondents did not communicate to appellants the state of foreign markets from time to time and the result of the several sales as they were effected, sixth issue. Document A provides that respondents shall give the first appellant all such information as they may obtain regarding the state and movements of the various markets. On this point, Mr. Tatham states in his evidence as follows:

"We get almost daily quotations from Europe during the season and we also wire to our agents at the various places for opinion as to the future state of the market. All this information I gave the defendants. In fact I often showed them the telegrams. Every day one of the defendants or their clerks came to me. Sometimes they came to my office two or three times a day. We kept defendants generally informed.”

On the other hand, the first defendant states that he never used to go to the plaintiffs' office every day, but used to go there at times and that on some of such occasions Mr. Tatham used to speak to him about the state of the European markets. He added also that: “Whenever we used to ask Mr. Tatham he always gave us information as to the state of the market.” This is all the evidence on this point and in my opinion the Subordinate Judge rightly decided the seventh issue against the appellants. As between Mr. Tatham and the first defendant, I agree in the opinion of the Court below that the evidence of the former is weightier than that of the first defendant. Document A contains no provisions about the result of each sale being communicated. The account-sales contain the information, and if information was in any case needed at once, it is clear on appellants' own showing that there was no difficulty in their securing it by applying to Mr. Tatham.

The next and the most important ground of complaint is that the sales were unauthorized and contrary to express instructions and it forms the subject of the second and third issues. It is in evidence that from April to June 1889 the coffee market in Europe was steady and the prices were high, but that towards the end of June it began to fall rapidly, and rose again from September next. Exhibits XXV and XXVI, dated the 7th and 19th June, show further that appellants were then under the impression that the market was rising day by day and likely to rise further and asked Mr. Tatham to hold their consignments and not to sell them without consulting appellants. In the reply which Mr. Tatham sent on the 29th June 1889 he stated that the market was falling instead of rising day by day as appellants alleged and added: "We must reserve to ourselves the right of dealing with your consignments as we think best."
Several consignments were sold in July and August before the market rose in September and the appellants' case is that if Mr. Tatham had complied with their instructions and waited till September, their consignments would have fetched higher prices than were realized when the market was low and depressed.

The contention on respondents' behalf is that as observed in Exhibit xxix the sales were under their direction, that there was an express oral agreement made to that effect when document A was executed and that it was on that understanding the business was carried on with appellants in 1889 and 1890. The Subordinate Judge held that the oral agreement, set up by Mr. Tatham was really made, and on referring to the evidence in this case, I see [254] no sufficient reason to come to a different conclusion. It was the case of both parties that there was some oral agreement, the only question being whether according to that agreement, the sales were to be under Mr. Tatham's or appellants' direction. On this point, the only positive evidence on record is that of Mr. Tatham and of the first appellant and although they contradict each other, there are several circumstances which turn the scale in respondents' favour. As already observed, Mr. Tatham's testimony is weightier than that of the first appellant who, as remarked by the Subordinate Judge, has made several mis-statements in his evidence. Again, appellants did not refer to the agreement set up by them either in their letters xxv and xxvi or in the reply which they sent to Mr. Tatham's letter of the 29th June or 1st July, 1889, or in the letter which they again addressed on the subject on the 8th July, 1889 (Exhibits xxviii and xxix). The tenor of those letters is compatible with respondents' rather than with appellants' case. This view receives an accession of strength from the fact that document C was executed in December 1889, and that the evidence discloses no objections taken at that time to the sales in July and August. It is no doubt true that in 1888 Mr. Tatham obtained second defendant's permission previous to the sales of his consignments, but as pointed out by Mr. Tatham, he expressly undertook to do so and wrote a letter to that effect in that year. The business which has given rise to this litigation is not part of that business but a new business carried on by appellants and second defendant in partnership and the large advances made by respondents to appellants in connection with it probablize Mr. Tatham's version of the matter. The only circumstance in appellants' favour is that document A is silent on the subject, but I do not consider it sufficient to counteract the other evidence and to warrant my disturbing on appeal the finding of the Original Court.

It is next urged by appellants' pleader that agreement A is a formal document and that no evidence of a contemporaneous oral agreement is admissible for the purpose of varying its contents under proviso 2 of Section 92 of the Indian Evidence Act which directs that the Court shall in such cases have regard to the degree of formality of the document. In the case before us, agreement A was no doubt drawn up by the High Court Pleader Mr. Rozario and on a subsequent occasion a foot-note was appended to it whereby its terms were revised. That there was an intention to [255] reduce to writing the terms subject to which the business was to be carried on and to give to that writing the character of a formal document is clear from the nature and contents of the document itself. According to Mr. Tatham he attached importance to securing a right to deal with appellants' consignments in consequence of the mode in which the second defendant interfered with the sales of consignments in 1888.
Again, the illustration to the second paragraph of Section 92 is also in favour of appellants' contention. Further, this illustration is in conformity to the course of decisions in England according to which this rule of exclusion applies not only to records, deeds, wills and other documents required by law to be in writing, but also to every document which contains the terms of a contract between two parties and is designed to be the evidence of their final intentions (see Taylor on Evidence, Vol. II, 8th Edition, page 963). I would uphold the objection if there was nothing more than a contemporaneous oral agreement, but I observe that the agreement in question is a mercantile contract and the course of business between the parties throughout the years 1839 and 1890 was in accordance with the oral agreement. The evidence does not show that appellants' permission was obtained in 1839 previous to the sale of each consignment as was done in 1888 in regard to the sale of second defendant's consignments. When the appellants asked respondents in June 1839 not to sell their consignments on the ground that they hoped that the market would rise, they did not complain of any departure from the usual course of business. Nor did they do so since prior to the suit. Again, document A is silent on several matters connected with the business such as the rates of local exchange, sterling exchange and the nature of sales on cost and freight terms or on landed and delivered terms. It could not have been the intention of the parties to exclude the course of business between them from being treated as part of document A so far as it relates to matters on which it is silent. On the ground, therefore, that the course of business between the parties was in accordance with the oral agreement I disallow this objection.

Another contention is that sales of consignments contrary to express orders amount to a breach of duty on the part of respondents to use their discretion to the best advantage of appellants. Exhibit xxvii shows that Mr. Tatham had information when he wrote it that the market was falling and not rising as appellants stated in Exhibits xxv and xxvi and there is no evidence that Mr. Tatham's statement is not correct or that he could have then foreseen that the market would rise again in September. The evidence is consistent with an honest belief on his part that appellants were speculating for large profits on erroneous information, and that it is not their interest to hold all their consignments for an indefinite length of time. It is conceded by appellants' pleader that if the oral agreement set up by Mr. Tatham is true and admissible in evidence, their objection to the sales must fail. It is, therefore, not necessary to discuss for the purposes of this appeal either the question whether the loss, if any, arising from the sales in July and August 1889 ought to be set off against respondents' claim in this suit or whether the Subordinate Judge is correct in holding that no loss was sustained.

The result is that the decree appealed against must be modified so as to give credit to appellants for the return commission received by respondents and confirmed in other respects. The costs of this appeal must be assessed proportionately on the extent to which the appeal is allowed and disallowed.

Wilkinson, J.—The plaintiffs are a firm of English merchants trading at Tellicherry and London, their business at the former place being managed by their agent Mr. R. Tatham. In January 1889 they entered into an agreement with the defendants, a firm of Mapilla merchants residing at Tellicherry to make advances upon produce shipped to Europe by the defendants' firm. They now seek to recover from the
defendants and by sale of the properties mortgaged the sum of Rs. 2,83,377 and interest due thereon as per schedule B.

The defendants admit the dealings between themselves and the plaintiffs' firm and the correctness of the debit side of the accounts filed by the plaintiffs, but take exception to certain entries on the credit side of the account.

The Subordinate Judge in his able and exhaustive judgment has gone fully into the arguments on both sides and the evidence, and his finding on each and every issue is in favour of the plaintiffs.

The defendants appeal against the whole decree. The first question argued before us is as to the burden of proof, the defendants contending that it is not enough for the plaintiffs to put in the account-sales received by them from the European firms which disposed of the defendants' shipments, but that they must [257] prove by evidence ad usque that the amounts realised in the various markets, the amount charged by the different firms for brokerage, commission, &c., were the actual sums entered in the accounts.

The question is really one of the onus of proof but of the sufficiency of proof. The plaintiffs were the agents of the defendants for the sale of certain produce shipped to Europe. Such produce was disposed of by plaintiffs' sub-agents at various markets. The sub-agents submitted their accounts to the plaintiffs showing sums realized by sale of produce and the local charges. There are 133 of these account-sales put in and marked K. It is argued on behalf of the defendants that these account-sales are not admissible as prima facie evidence, but can only be used as evidence corroborative of the statements made by persons who incurred the charges and that in the absence of such evidence these accounts are inadmissible. No authority is quoted in support of the defendants' argument.

On behalf of the respondents it is contended that the account-sales are admissible in evidence, that they are prima facie evidence of the transactions referred to therein, and that it lies upon the defendants who question the correctness of the accounts to prove their case.

The Subordinate Judge was of opinion that the account-sales were admissible in evidence under Section 32 of the Evidence Act as written statements of relevant facts made by persons whose attendance could not be procured without an unreasonable amount of delay and expense, such statements having been made in the ordinary course of business and consisting of documents used in commerce written or signed by the persons making them.

In paragraph 526 of his work on Equity Jurisprudence, Story thus states the rule as to what constitutes a stated account: "Between merchants "at home, an account which has been presented, and no objection made thereto after the lapse of several posts, is treated under ordinary "circumstances, as being, by acquiescence, a stated account. Between "merchants in different countries, a rule founded in similar considerations "prevails. If an account has been transmitted from one to the other, "and no objection is made after several opportunities of writing have "occurred, it is treated as an acquiescence in the correctness of the account "transmitted; and, therefore, it is deemed a stated account. An "account rendered shall be deemed an account [258] stated from "the presumed approbation or acquiescence of the parties, unless objection "is made thereto within a reasonable time. Upon like grounds, a fortiori, "a settled account will be deemed conclusive between the parties unless
"fraud, mistake, omission or inaccuracy is shown. The Court will not "generally open the account, but will only grant liberty to surcharge and "falsify." The question now in issue was considered by the Court of "Queen's Bench in Smith v. Blakey (1), and was thus disposed of by Black-"burn, J. : "As to the argument that there ought to have been a non-suit, "viz., that plaintiffs had made out no case, as they could not recover "unless they made out affirmatively what were the proceeds of the sales "by strict legal evidence, and that the account-sales were no evidence, the "answer is this—where there is a consignment of goods which are to be "sent to a different country for sale, it may well be that there is an implied "agreement by the consignor that account-sales sent from abroad shall "be good prima facie evidence of the proceeds until the contrary be shown, "leaving it open to the consignor to surcharge and falsify." The law as "to account-sales contained in the above extracts was followed by Couch, "C. J., in Hodgson v. Rupchand Hazarimal (2), who added: "It would cause "great expense and inconvenience if the debtor by merely objecting to the "account could compel the procuring evidence from abroad; and seeing "that in practice merchants are satisfied with the truth of the account-"sales and ask for no further evidence there is good ground for considering "that there is an implied agreement."

Now, what are the facts of this case? The first defendant as well "as the second and third defendants had dealings with the plaintiffs' firm "in the year 1888. The first defendant admits that he accepted all the "account-sales rendered of such dealings and took no objection to them. "The account-sales in the present case were in due course presented to the "defendants and no objection was taken to them until the written "statement in this case was filed and even then no specific objection was "raised. The defendants have not been able to point out any one entry as "incorrect or erroneous. It is, however, now urged that the account-sales "submitted by Messrs. Busch and Co. are not signed, [259] but no such "objection was raised in the Lower Court. Mr. Tatham was examined "about them and stated that he had been accustomed to see the firm sign "in the way the accounts filed are signed for 8 years. He further stated "that he had been in constant correspondence with the firms who sub-"mitted the account-sales marked K, and had received letters and papers "signed by them, and that the signatures appended to the several papers in "Exhibit K are the signatures of the several firms. He also deposes that "in the case of consignments to Europe the results of sales are according "to the usual mercantile custom communicated in the form of such docu-"ments.

No cause has been shown why these stated accounts should be "opened. The defendants impliedly agreed that the account-sales fur-"nished by the correspondents abroad should be taken as prima facie "evidence of what the goods realized. The onus was clearly on them to "surcharge and falsify the account and this they have entirely failed to do. "The next question argued was the right of set-off. The Subordinate "Judge was of opinion that the claim for set-off could not be gone into in "the suit. He did however go into the question of damages and found "that the plaintiffs were not liable in damages to the defendants.

In my opinion there is no question of set-off strictly so called in this "suit. Set-off has been well defined as a mode of defence by which the "defendant acknowledges the justice of the plaintiffs' demand, but sets up

a demand of his own against the plaintiffs to counterbalance it, in whole
or in part (Barbour on Set-off). There is a difference between what is
styled by American jurists reduction on the one hand and set-off on the
other. In the latter the ground taken is that defendant may owe plaint-
iff what he seeks, but that a part or the whole of this amount is in reason
and justice discharged by the debt which plaintiff owes to defendant.

It is admitted that Section 111 of the Code of Civil Procedure has no
application, but it is argued that Section 111 is not exhaustive of the
law of set-off, and that as both claims arise out of the same transaction
the defendant is entitled to set-off his claim against that of the plaintiff.
There are three answers to this. (1) The defendants have no claim
against the plaintiffs. They do not say "you owe us so much and
"that sum we claim to set-off against our [260] debt," but "if the accounts
"were correct, if you had not sold contrary to our express instructions, the
"amount at our credit would have been larger." That is matter of evidence,
not of claim. (2) If defendants are entitled to a set-off they are bound to
give plaintiffs the fullest particulars thereof and this they have not done.
(3) The amount of set-off must be reasonably certain. The defendants'
claim is absolutely vague.

The first specific objection taken to the plaintiffs' accounts relates
to the rate charged for local exchange. The defendants' plea is that as
plaintiffs were their agents they were not entitled to charge defendants
more than they themselves were charged by the local Bank, viz., 8 or 10
annas per cent. Admittedly there was no agreement as to the rates of
local exchange. What Mr. Tatham says on the point is as follows: "If
"I want to pay the defendants I give them a cheque on the Bank of
"Madras. If I sell cheques to the Madras Bank here (i.e., Tellicerry)
"drawn on Madras Exchange Banks, they charge me 6 annas per cent;
"on cheques on Exchange Banks in Bombay the charge is 8 annas. This
"is by special arrangement between us and the Madras Bank at
"Tellicerry. In either case I always charge 12 annas to all natives and to
"defendants. That is our custom." The plaintiffs having a well-established
reputation and an account with the Bank can get better terms from the
Bank than a native merchant. They offered to cash the bills for defend-
ants at the same rates as they charged others, and during 1888 and up
to November 1889 defendants acquiesced in the charge. It was no part
of the agreement between plaintiffs and defendants that the former were
to give the latter the benefit of their arrangement with the local Bank.
Such benefit was personal to the firm. The Bank were willing to give
plaintiffs a higher price for the Bills of Exchange than they would give to
an outsider. An analogous case is that of insurance and defendants' own
witness Mr. Zellweger asserts that his firm would not give to their
constituents the benefit of the uniform rate of insurance for which they
have contracted. In April 1889 defendants admitted the correctness of
the accounts submitted up to March and they cannot now claim to repudiate
or re-open those accounts in which 12 annas per cent. is charged for local
exchange.

It is not very clear on what ground objection is taken to the rates of
sterling exchange. In support of the charges made on [261] this
account we have the evidence of Mr. Tatham and the telegrams put in by
him. He says: "For our daily quotations of foreign exchange we had
"telegrams from our brokers in Bombay and we also wired at times to
"Madras. I fixed my foreign exchange with the defendants on the basis
"of such quotations." This was elicited in cross-examination, defendants'
counsel did not ask Mr. Tatham to produce the telegrams he referred to, but on re-examination he was questioned about them and produced them [FF]. No objection was then taken to them, but appellants' pleader now points out that they are in cipher and therefore unintelligible. The objection is too late. If Mr. Tatham had been asked to translate them when he put them in, he would doubtless have been able to do so, but he was not asked a single question about them. Moreover he deposes that he gave every information to the defendants during the continuance of the business showing them the telegrams received from Europe and from plaintiffs' agents at various places. The first defendant admits that he must have had conversation about the rates of European markets, but conveniently forgets whether Mr. Tatham spoke to him and his partners about the rates of European exchange. There is no evidence on the defendants' side. The objection to the rates of foreign exchange was taken for the first time in the written statement. The file of the Madras Mail and the account (P) prepared therefrom were not put in to prove that proper rates had been charged, but merely to show that the defendants had been charged very favourable rates. The defendants having failed to prove that the rates charged for foreign exchange were incorrect, their objection was rightly overruled.

With reference to the sales in Europe there are only two questions to be considered: (1) Was there, as contended by plaintiffs, a special oral agreement such that sales should be absolutely at plaintiffs' discretion? (2) Is evidence of such oral agreement admissible? With reference to the second question it is provided by Section 92 of the Evidence Act that the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. Admittedly Exhibit A is silent as to the mode of sale, and the agreement that the discretion of the plaintiffs should be unfettered is in no way inconsistent with any of the terms of the agreement. Evidence therefore is admissible. The only evidence is that of Mr. Tatham and his evidence is as follows: "In 1889 when second defendant became a partner with the first defendant I varied the old system of trading with second defendant whereby I took his instructions before selling his goods. I did so because second defendant gave me immense trouble the previous year and I saw the danger I ran. The second defendant was a tricky man. I did not consider it necessary to reduce the new condition into writing or to add it to Exhibit A, as the arrangement was already made with first defendant. I pointed out (to defendants) that I would not work in the same way as with second defendant in the previous year, as he had given me very considerable trouble in regard to the sale of his produce consigned through us, and I insisted that if consignments were made through us, which they had the option of doing or not, the sales must rest in our hands. This was agreed upon. When defendants Nos. 2 and 3 signed the agreement A the arrangement was that we should have sole discretion in the matter of sales. All the three defendants must have certainly understood so." The appellants' pleader can assign no valid reason why Mr. Tatham's evidence should be discredited. The evidence of the first defendant on the point is uncertain and contradictory. "He cannot positively swear" that Mr. Tatham told him consignments would not be sold without their (defendants') instructions. Here his pleader puts his case thus—there was no agreement one way or the other, but the defendants were under the impression they would be consulted. The second defendant has not come
forward for examination and I concur with the Subordinate Judge that
first defendant's evidence is unreliable. The probabilities are all in
favour of plaintiff's case. It is hardly probable that a man of business,
like Mr. Tatham, would, after the experience he had had in 1888, have
left himself entirely at the mercy of the defendants. He was bound to make
advances against produce to the extent of 7 lakhs of rupees, if satisfied
that the value of the produce showed a margin of 70 per cent., but the
defendants were not bound to consign any produce at all to Europe.
The law gives plaintiffs a lien on the goods for the advances made, and it
is difficult to believe that Mr. Tatham would have consented to give defend-
ants the power of controlling and virtually cancelling that lien by agreeing
to not sell without their orders. In March, April and May some 30 or 40
sales had taken place without the defendants being consulted. No objec-
tion was or is taken to these sales. The first defendant admits
that he and his partners used to go to the plaintiffs' office every day, that
he had complete confidence in Mr. Tatham, and that Mr. Tatham used to
send them accounts regularly 'one shortly after the other.' Not one of
these sales was repudiated although they were all made without consulting
the defendants, but on the 7th June the defendants having heard a
rumour that the European coffee market was likely to rise wrote to the
plaintiffs begging them not to sell their consignments before consulting
them. This letter was followed by one written from Bombay by second
defendant on the 19th June to the same effect. The plaintiffs' reply was
brief but decisive—'the market is falling not rising, we reserve to our-
'selves the right of dealing with your consignments as we think best.'
Nothing could be clearer than this, yet the defendants did not repudiate
the agreement, or refuse to have any further dealings with the plaintiffs'
firm. If there had been no such agreement as is spoken to by Mr. Tatham,
plaintiffs would undoubtedly have been bound to conduct the business
according to the directions given by the defendants, but the fact that
plaintiffs claimed the right of dealing with the produce as they thought
best offers strong corroboration of the agreement.

It being found that the plaintiffs were at liberty to sell according to
their own discretion, the defendants' contention that they suffered loss in
consequence of the sale of their consignments in a falling market is not
maintainable. The letter of Messrs. Busch and Co. (Exhibit V, dated
16th October 1883) shows that the sales were conducted by that firm
according to their 'best judgments.' It was the plaintiffs' own interest
to sell the consignments in the highest market, and there appears no
reason to doubt that the business of the agency was conducted with
reasonable diligence and skill.

As to whether the plaintiffs are liable to account to the defendants for
having sold the greater part of the produce consigned on landed instead of
on cost and freight terms, I observe that there is no certain evidence
to show that the cost and freight terms would have been more advan-
tageous or favourable to the defendants than the delivered or landed terms.
Admittedly there was no agreement as to the terms of sale and Mr. Tatham
deposes that he could not have got 'cost and freight terms if he had
tried.' Defendants' second witness Mr. Brown at first stated that sale by
[264] cost and freight terms was more advantageous to the consignors,
but subsequently admitted that that statement was incorrect. Defend-
ants' third witness Mr. Zellweger was not asked which was most advan-
tageous to the consignor, cost and freight or landed terms, but stated that
he preferred the former. It appears, however, that he has no experience
of landed terms, for he deposes that his firm always sell cost and freight and never consign. It does not appear that the defendants ever suggested that they wished their consignments sold on cost and freight terms, and they have failed to show that cost and freight terms were so manifestly in favour of the consignor as to throw upon the agent the onus of getting cost and freight terms in every case. It was agreed that the sales of produce consigned should be left absolutely in the control and at the discretion of the plaintiffs and the defendants cannot now complain because the consignments were sold on landed terms.

The only other matter which has to be dealt with is that of the commission allowed to the plaintiffs by the firms to whom defendants' produce was consigned. In Exhibit A it was stipulated that defendants should on all consignments pay to Messrs. Alston Low and Co., in addition to the usual charges a commission of 1 per cent. for themselves and 2½ per cent. for their agents at the port of consignment. Mr. Tatham deposes that Beam and Co. of Marseilles, Perdomo and Co. of Havre and Carr Brothers of Genoa allowed them a commission of 1½ per cent. while the London firm, Busch and Co. of Havre, and Macke and Bohamar of Hamburg allowed 1 per cent. It is contended on behalf of the defendants that Mr. Tatham fraudulently concealed from the defendants the fact that he was to get a commission from the sub-agents, and that as in connection with transactions which plaintiffs had with the European firms they were acting as plaintiffs' agents they are liable to account to defendants for whatever profit they made by way of commission. The Subordinate Judge found, and I think rightly, that there was no dishonest concealment or wilful misrepresentation on the part of Mr. Tatham. I do not believe that Mr. Tatham ever represented that no part of the 2½ per cent. would ever come back to the firm in the shape of commission. He states that he did not know at the time whether or not he would get any, and if so what, commission from the firms to whom produce was consigned. In fact Mr. Tatham did not know at the time when the agreement [265] was entered into to what European ports consignments would be made. It was not therefore in his power to inform defendants that his firm would obtain a commission from the European firms as a consideration for placing business in the hands of such firms. The same rate had been charged and paid without demur in 1886, and I see no reason to doubt that the consent of the defendants to pay 2½ per cent. for the agents at the port of consignments was given freely and not in consequence of any misrepresentation or fraud on the part of Mr. Tatham. But there remains the further question whether the plaintiffs are entitled to retain such commission. The Subordinate Judge was of opinion that they were. He found (but he does not say on what evidence) that the plaintiffs received defendants' sanction to receive this commission. No evidence in support of this finding has been brought to our notice. It may be that the Subordinate Judge implied consent from the former transactions. He admitted that the general principle was that in all cases where a person is, either actually or constructively, an agent, all profits and advantages made by him in his business, beyond his ordinary compensation, are made for the benefit of the principal. But he thought that the law in India, as contained in Sections 215 and 216 of the Contract Act, did not contain any corresponding rule, and that as the plaintiffs had not dealt on their own account in the business of the agency, the plaintiffs were not bound to pay to the defendants sums received on their plaintiffs' own account. The case quoted by the Subordinate Judge Van
Ingen v. Maclean (1) is not in point, because it was held that that case was governed by Section 215, not Section 216 of the Contract Act and defendants' pleader contends that Section 216 is applicable to the present case. That section deals with the case of an agent who, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, and the question is whether the acceptance of a commission from the sub-agents at the ports of consignment amounts to a dealing in the business of the agency. On behalf of the plaintiffs the learned Advocate-General contends that the arrangement made by the plaintiffs was entirely distinct from the agent, that as merchants plaintiffs were in a position to make consignments and that they are entitled to retain any [266] commission which the European firms may have been willing to pay to plaintiffs to influence consignments in their favour. I am unable to concede this. Mr. Tatham states that when he sent the consignment he wrote to the firm to whom the goods were consigned demanding the grant of a percentage which was granted and that "out of the sales on account of the plain dealings with " the defendants " the plaintiffs " got some Rs. 15,000 return commission more or less." In other words, the plaintiffs obtained a profit by consigning the goods of the defendants to firms of their own selection. I think that this must be held to be a dealing in the business of the agency, and as such dealing was not on behalf of the principal and was never disclosed to the principal, the latter is entitled to claim whatever benefit the agent has gained by the transaction. The general principle of all such cases is thus stated by Story: "In all cases when a person is an agent for others all profits and advantages made by him in the business beyond his ordinary compensation are to be for the benefit of his employers." The plaintiffs' firm was employed by defendants to dispose of their consignments. In so doing the plaintiffs made certain profits in the shape of a commission paid by the firms to whom the consignments were made. Such profits must be held to have been made for the benefit of the defendants.

In Turnbull v. Garden (2) Lord Justice James (then Vice-Chancellor) observed: "A person who is dealing with another man's money ought to give the truest account of what he has done, and ought not to receive "anything in the nature of a present or allowance without the full "knowledge of the principal that he is so receiving."

The commission paid to the plaintiffs in this case may be regarded as a present or allowance made to the plaintiffs' firm at Tellicherry for putting business in the hands of the European firms, who of course make their own profit out of such business and are therefore ready and willing to pay a commission to the Tellicherry firm for, as the Advocate-General puts it, influencing consignments.

It is, however, argued that the payment of this commission is a usage of the trade and that in consequence of the arrangement made plaintiffs' interest was not brought in conflict with his duty. [267] There is no evidence beyond Mr. Tatham's assertion as to its being a trade usage. Mr. Zellweger gives evidence as to the commission charged by Busch and Co. for doing business for his firm not of any commission allowed to his firm. The arrangement was one made between Mr. Tatham and the different firms and even if such commission had as Mr. Tatham asserts been paid by various consignees for many years, it does not appear that the defendants were aware of it. Mr. Tatham admits that he never

(1) Referred Case No. 74 of 1877.

(2) 39 L.J. Ch. 331.

892
mentioned it to them. It is not always easy to say whether the interest of the agent was adverse to his duty, but in Morison v. Thompson (1) Lord Cockburn stated in these terms the result of the authorities: "An agent "is bound to account to his principal for all profits made by him in the "course of his employment, and is compelled to account in equity. At "the same time there is a duty, which we consider a legal duty, incumbent "upon him, whenever any profits so made have reached his hands, to pay "over the amount as money absolutely, belonging to his employer, unless "there is an account remaining to be taken between him and his "employer."

I hold, therefore, that the plaintiffs are bound to account to defendants for whatever sums they have received from the consignees as commission on the sales made on behalf of the defendants.

In this respect I would modify the decree of the Subordinate Judge which in other respects is confirmed. Respondents are entitled to their costs of the appeal, but must pay appellants' costs on the amount hereafter found due as commission.

The Court then made the following

ORDER.

We shall therefore call upon the Subordinate Judge to submit a finding as to the actual amount of return commission received by respondents from their sub-agents in the matter of appellants' consignments within three weeks from the date of receipt of this order, and seven days after the posting of the finding in this Court will be allowed for filing objections.

Fresh evidence may be adduced by either party.

In compliance with the above order the Subordinate Judge submitted his finding as to the amount of the return commission. When the appeal came on for final disposal, this finding was accepted by their Lordships and judgment was delivered accordingly.

Wilson and King, Attorneys for respondents.


[268] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten, Hannan and Shand, Sir R. Couch and Sir E. Fry.

[On appeal from the High Court at Madras.]

SRI LAKSHMI NARAYANA ANANGA GARU (Defendant) v.
SRI DURGA MADHAWA DEO GARU (Plaintiff) [25th November, 1893.]

Agreement to maintain Zemindar's collateral relations—Construction—Charge on estate—Impartible Zemindari.

The holder of an impartible zemindari estate, in an agreement with the eldest son of his younger brother, settling family disputes, used words to this effect: "I have agreed to give you, through the Collector, every month Rs. 300, on "account of the maintenance of yourself, your younger brothers, three in all, "and the rest of your family."

The son of the youngest brother now sued the son and successor of that Zemindar for maintenance according to the agreement:

(1) L.R. 9 Q.B. 480.
Held, that the payment was not limited to the life of one, or all, of the
brothers, but that the issue of each of the three were included, and that main-
tenance at a proportionate rate had been rightly decreed to the plaintiff as a
charge on the estate.

Appeal from a decree (28th March 1890) of the High Court
modifying a decree (28th November 1887) of the District Judge of Ganjam.
The appellant, the Zamindar of Pedda Kimedy, in the Ganjam district,
was defendant in a suit brought by the respondent, a minor, through
his mother and guardian, for Rs. 4,180, as arrears of Taoji, or allowance
for maintenance, due for 22 months, from February 1885 to December
1886, at Rs. 190 a month, and for a declaration the he was entitled to
Rs. 230 a month thenceforward. He claimed through his father, Kamala
Lochana Deo, under an agreement, for maintenance, of the year 1835,
exeuted by the defendant's father, Pitambara Deo, the then Zamindar, in
favour of Jogi Deo, elder brother of the plaintiff's father. The agree-
ment, which is set forth in their Lordships' judgment, referred to three
brothers, of whom the plaintiff's father was the youngest, and who were
the sons of Parasurama Deo, brother of Pitambara. [269] the contracting
Zamindar. Kamala Lochana died on the 9th May 1885, and from that
date no further payments under the agreement of 1835 were made. The
plaintiff contended that, on its true construction, he was included in its
operation. The defendant's written statement, while admitting the
making of the instrument, disputed this construction, and denied that he
was a son of Kamala Lochana. This last question, however, was not in
dispute on this appeal, both the Courts below having found, in concurrence,
that he was. The amount of maintenance paid had been, after
the deaths of some who shared in it, proportionately reduced.

The District Judge decreed, in favour of the plaintiff, Rs. 760, arrears
of maintenance owing to Kamala Lochana at his death, and since then
unpaid. He dismissed the rest of the claim. In his judgment he took
the view that no claim could be set up by Parasurama's family except
under the agreement of 1835, which, in his opinion, applied only to those
expressly referred to in it, not extending to their descendants. On appeal,
a Bench (Muttusami Ayyar and Best, JJ.) reversed this decree and
awarded to the plaintiff maintenance from the death of Kamala Lochana,
and declared his right, for the future, to be paid Rs. 173 a month. They
saw no reason for holding that the provision for maintenance was
intended only for the members of the family then alive. They did not
consider "that Rs. 230 a month was an excessive allowance for Kamala
Lochana's branch."

Mr. J. D. Mayne and Mr. G. P. Johnstone, for the appellant, argued
that the true construction of the whole agreement of 1835 was that only the
family of Jogi Deo, the brother with whom the agreement was made, were
entitled to the maintenance mentioned, not the families of all the three
brothers. As to the construction of a grant for maintenance, in regard to
its duration, reference was made to Anand Lal Singh Deo v. Dheraj
Gurrood Narayan Deo.

The respondent did not appear.

Their Lordships' judgment was delivered by LORD HOBBHOUSE:—

JUDGMENT.

The defendant and appellant is the Zamindar of Pedda Kimedy, an
impartible raj. The plaintiff belongs to a branch of the same family, and
the sole question is, whether the plaintiff is entitled to be paid out of the
revenues of the zamindari the amount of a charge created by an agreement made between the defendant's father, Pitambara Deo, who was then Zamindar of Pedda Kimedy, and Jogi Deo, the eldest son of Pitambara's younger brother, and the uncle of the plaintiff. According to the agreement there seem to have been disputes between the elder and younger branches of the family, and the agreement is in the following terms:—Pitambara agrees "to give (you)—that is, Jogi Deo—" presently Rs. 10,000 (ten thousand), so that neither you nor your younger brothers "nor the members of your family may make any demand in future in "respect of the household articles, jewels, &c., or anything, or in respect "of the debts incurred by your deceased father, Parasurama Deo Garu." Their Lordships do not know the meaning of the expression "the debts incurred by your deceased father." Whether "incurred" is a wrong word used in the translation, or whether the deceased father may have incurred debts in such circumstances as would give a claim against the estate of the elder brother, their Lordships cannot tell; but it is quite clear that there were substantial disputes respecting a substantial property.

The next paragraph of the agreement is as follows: "To give (you), "through the Collector, every month Rs. 300 on account of the main- "tenance of yourself, your younger brothers, three in all, and the rest of "your family. As we hereby agreed that you, your younger brothers, and "the other members of the family shall have no concern whatever "henceforward in the said zamindari, or any other thing, you should enjoy "the said Taoja" that is, allowance. Jogi Deo and his two younger brothers are now dead, and the plaintiff is the son of the youngest of them, apparently the only issue of the three. It is contended, on behalf of the defendant, that the payment of Rs. 300 a month was only to endure for the life of Jogi Deo, or, at the most, for the lives of the three brothers. It is immaterial which of those constructions is put forward. Either of them seems to their Lordships to be directly at variance with the terms of the agreement. It cannot be reasonably suggested who is to be included in the expression "the rest of your family," unless the issue of the three brothers are to be included. It seems clear to their Lordships that the respondent, as the issue of one of the brothers, is to be so included, and that is the view taken by the High Court whose judgment is now appealed from. With respect to the amount of the maintenance, it seems to have been altered from time to time, but no question is now brought before their Lordships in regard to the exact amount which has been decreed by the High Court. Their Lordships see no reason for interfering with the decree of the High Court, and they will humbly advise Her Majesty to dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: Mr. R. T. Tasker.
16 M. 271.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

VENCATA MAHALAKSHAMMA (Plaintiff), Appellant v. RAMAJOGI (Defendant), Respondent.*
[18th October and 23rd December, 1892.]

Rent Recovery Act—Act VIII of 1869 (Madras), Section 12—Ejection—Occupancy rights—"Onus probandi."

A zamindari having given to the defendant, who was a cultivating raiyat in the zamindari, a notice to quit, now sued to eject him from his holding. The defendant pleaded that he and his ancestors had been jirayati raiyats from time immemorial and it was found that their holding had lasted at least 150 years.

The defendant had executed and delivered to the plaintiff a muchalka for one year, and he had made no default in payment of rent:

Held, that the plaintiff having failed to prove that the defendant’s tenancy had commenced under her or her ancestors, the suit should be dismissed.

Chockalinga Pillai v. Vythalinga Pundara Subnady (6 M.H.C.R. 164) distinguished.

SECOND appeal from the judgment of H. R. Farmer, District Judge of Vizagapatam, in appeal No. 148 of 1890, confirming the decision of the District Munsif of Yellamanchili in suit No. 471 of 1889.

Suit in ejection by a zamindari against a cultivating raiyat on her estate. The defendant claimed a right of permanent occupancy alleging that he and his ancestors had been in possession as jirayati tenants from time immemorial. The plaintiff did not prove that the defendant’s tenancy had commenced under her or [272] her ancestors and the suit was accordingly dismissed by the District Judge. The plaintiff preferred this second appeal.

The Advocate-General (Hon. Mr. Spring Branson) and Pattabhirama Ayyar, for appellant.

Ramachandra Rao Sahib, for respondent.

JUDGMENT.

The appellant is the zamindari of Kasimkota and respondent is a raiyat in the zamindari. In fasli 1298 the former gave the latter notice to quit, and there is no dispute as to the sufficiency of the notice. The respondent, however, denied that he was a tenant from year to year and contended that he had occupancy right. Both the Courts below dismissed the plaintiff’s suit. The District Munsif considered that it was for the plaintiff to show that defendant was a tenant from year to year and liable as such to be ejected after due notice. On appeal the District Judge held that, as between the zamindar and the raiyat, the former was merely the assignee of land revenue, whilst the latter was prima facie the owner of the soil, and that the zamindar was not entitled to eject the raiyat. For the appellant it is contended that it was for the raiyat to establish his occupancy right, and that, as he failed to do so, the zamindar was entitled to a decree. The facts found by the District Judge are that defendant’s family has been in possession for about 120 years, that about sixteen years ago defendant repaired an old well and formed a mango tope, that he executed the muchalka (Exhibit C)

* Second Appeal No. 1987 of 1891.
for one year only, viz., for Jash 1298, and that plaintiff has not proved that the tenancy commenced under him or his ancestors. The question is whether upon these facts the zamindar is entitled to determine the tenancy by notice to quit and to eject the defendant. We have been referred to the decision in second appeals Nos. 1627 and 1834 of 1888 and also to the decisions in Chockalinga Pillai v. Vythealinga Pandara Sunnady (1), Krishnasaami v. Varadaraja (2), Thiagaraja v. Giyana Sambandha Pandara Sannadhi (3) and Baba v. Vishvanath Joshi (4). It is clear from those decisions that in each of the cases the defendant conceded that the plaintiff or his ancestor was the original owner of the land. In the first case Chockalinga Pillai v. Vythealinga Pandara Sunnady (1) it was admitted that the land was the property of the Mutt, and that the tenancy commenced under a muchalka executed [273] by the defendant's father in August 1837. In Krishnasaami v. Varadaraja (2) the land was admitted to be the property of the temple. The same was the case in Thiagaraja v. Giyana Sambandha Pandara Sannadhi (3), and the tenancy commenced under the temple in 1827. Similarly, in the case of Baba v. Vishvanath Joshi (4) the plaintiff's title as owner was admitted and the tenancy set up was one which commenced under him. They are clear authorities for the proposition that when the plaintiff's family is acknowledged to be the owners of the land, and the tenancy set up is one which commenced under him or his ancestors, the onus of proving the permanency of the tenure is on the tenant, and that neither the Regulations nor Act VIII of 1865 operate to extend a tenancy beyond the period of its duration secured by the express or implied terms of the contract creating it. In second appeals Nos. 1627 and 1834 of 1888 the defence was an alleged grant from a former zamindar of Jalantra, and the fact that the zamindar's ancestor was the owner when the defendant's holding commenced was admitted.

In the case before us, however, there is no such admission, the defence being that defendant and his ancestors have been jirayati raiyats from time immemorial. The finding of the Judge is that the duration of the holding is at least 120 years, and it is quite possible that the holding was as old as the zamindari itself. We do not consider, in cases in which the raiyats' holding is not shown to have commenced subsequent to the permanent settlement, and when upon the evidence it is possibly as ancient as the zamindari itself, the principle laid down with reference to tenancies which admittedly commenced under the zamindar has any application. It may be that the raiyat was in possession when the zamindari itself was created, or that the zamindar, as pointed out by the Judge, was a mere farmer of the revenue. In such cases it is not unreasonable to hold that the onus of showing that the tenancy commenced under the plaintiff or his ancestors rests on the zamindar, and that until he shows it, the zamindar may be fairly presumed to have been the assignee of Government revenue, and the tenant liable to pay a fair rent and entitled to continue in possession as long as he regularly pays rent.

As regards the muchalka executed in 1298 there is nothing in [274] it inconsistent with the defendant's contention. Neither a patta nor a muchalka granted or executed under Act VIII of 1865 during the continuance of the holding is conclusive evidence that the holding is a tenancy from year to year. A patta or muchalka is ordinarily nothing more than a record of what the tenants have to pay for a particular year with reference to the pre-existing relation of landlord and tenant. We must also observe that

(1) 6 M.H.C.R. 164. (2) 5 M. 345. (3) 11 M. 77. (4) 8 B. 228.
the term tenant is defined in Act VIII of 1865 only for the purposes of that
Act and means nothing more than that the holding is subject to the payment
of rent. It does not necessarily imply that the tenant was originally let
into possession by the plaintiff's ancestor, and it may be that the payment
was due in consequence of the status of the zamindar as the farmer of public
revenue. Under the circumstances we are not prepared to reverse the
decrees of the Courts below and we dismiss the appeal with costs.

16 M. 274.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

Saminadha (Plaintiff), Appellant v. Samban (Defendant), Respondent.*
[29th February and 14th and 15th July, 1892.]

Limitation Act—Act XV of 1877, Section 14—Previous suit—Deduction of time.

In August 1885 the plaintiff and defendant entered into an agreement of part-
nership in a certain venture. On the 2nd September 1887 the plaintiff filed a suit
against the defendant in a District Munsif's Court to recover his share of the
profits under the agreement. In his evidence the plaintiff stated that there had
been a settlement of the accounts between himself and defendant. The suit was
thereupon dismissed as being cognizable by the Court of Small Causes, and the
plaint was returned on the 1st March 1889. On the 27th the plaint was filed in
the Court of Small Causes, an addition having been made to it. The Court held
that the addition was irregular and on the 19th November permitted the plaintiff
to withdraw his suit with permission to bring a fresh one. He accordingly
instituted the present suit on 6th December 1889.

Held, that in computing the period of limitation, the period from 2nd Septem-
ber 1887 to 1st March 1889 should be deducted under Limitation Act, Section 14.

Appeal under Letters Patent, Section 15, against the order of
Mr. Justice Parker made on civil revision petition No. 238 of 1890. [275]
confirming the decree of T. Ramasami Ayyangar, Subordinate Judge of
Nogapalayam, in small cause suit No. 1276 of 1889.

The plaintiff sued to recover Rs. 174-14-0 as his share of profits
realized under an agreement of partnership, dated the 20th August 1885,
and made between the plaintiff and defendant. Within three years of the
date of the agreement proceedings had been instituted by the plaintiff
against the defendants in respect of the plaintiff's claim under the agree-
ment. The nature of these proceedings appear sufficiently from the
judgment of the High Court.

The Subordinate Judge dismissed the suit as being barred by limitation,
and the civil revision petition above referred to, which was presented
against his decree, was dismissed by Mr. Justice Parker.

The plaintiff preferred this appeal under the Letters Patent.
Mr. Subramanyam and Panchapagesa Sastri, for appellant.
Krishnasami Ayyar, for respondent.

ORDER:—"It is contended that if the periods during which suits were
pending in other Courts be deducted, the suit would be within time. There
is an allegation in the plaint that such suits were instituted. The Subordi-
nate Judge has not noticed this. We shall, therefore, ask him to return
a finding as to whether plaintiff is entitled to any deduction of time on
this account, and, if so, how much, and would such deduction save the
suit from the limitation bar? One month's time is allowed for submission

of the findings and seven days will be allowed for filing objections. The
necessary evidence may be admitted on either side."

The Subordinate Judge then submitted his finding which was to the
effect that the plaintiff was not entitled to any deduction of time on
account of the previous suits.

He referred to the following cases:—Chunder Madhub Chuckerbutty v.
Bissessuree Debea (1), Nobin Chunder Kurr v. Rojomoye Dossee (2), Jibunti
Nath Khan v. Shib Nath Chuckerbutty (3), Nonoo Singh Monda v. Anand
Singh Monda (4).

The appeal having come on for final disposal, the Court delivered
judgment as follows:—

JUDGMENT.

The question is whether the suit has been rightly dismissed as being
out of time. The facts are as follow:

[276] The appellant, claiming to be entitled to a sum of Rs.174-14-0
as his share of moneys realized under an agreement, dated 28th August
1885, entered into between himself and defendant for taking emigrants to
Burmah, instituted against defendant on the 2nd September 1887 original
suit No. 91 of 1888 on the file of the District Munsif of Negapatam. That
suit was pending on the Negapatam Munsif's file till 5th March 1888,
when it was transferred to the District Munsif of Tiruturaiipundi. The suit
as brought was silent as to any settlement of accounts and if there had
been no such settlement, it was properly instituted as a regular suit and
having been brought within three years from the date of commencement
of the partnership was well within time, even if the date of the agreement
be taken as that from which the period of limitation should be calculated.
But in the course of his examination as a witness in the Tiruturaiipundi
Munsif's Court plaintiff stated that there had been a settlement of
accounts between himself and defendant after the latter's return to this
country from Rangoon in June-July 1887. In consequence of this
alleged settlement the suit was one triable in a Court of Small Causes. It
was, therefore, dismissed and the plaint returned to the appellant for
presentation in the proper Court. This was on the 1st March 1889.

On the 27th idem appellant filed his suit in the Subordinate Court at
Negapatam—on the Small Cause side—having added to the plaint that
there had been a settlement of accounts in August 1887 when the balance
of Rs. 174-12-0 was found against the defendant which the latter agreed
to pay within one week. Objection was then taken on behalf of defendant
that as by those additions the nature of the suit had been altered, "it was
not competent for him (plaintiff) to use the Court fee already paid on
"the plaint"—the meaning of which appears to be that the original plaint
which had been returned for the very purpose of presentation in a Court of
Small Causes was no longer available for the purpose, because of the
addition thereto of the clause showing how the suit came to be one
cognizable by such a Court! However, the objection was allowed to prevail
and plaintiff allowed to withdraw the suit "with permission to bring a
"fresh suit writing the plaint on a new stamp." This was on the 19th
November 1889, and the new suit was filed on the 6th of the following
month.

[277] Under these circumstances, is plaintiff entitled to a deduction,
under Section 14 of the Limitation Act, of the period from 2nd September

(1) 6 W.R. 184. (2) 11 C. 264. (3) 8 C. 819. (4) 12 C. 291.
1892
JULY 15.
APPEL-
LATE
CIVIL.
16 M. 278.

1887 to 1st March 1889, during which his original suit No. 91 of 1888 was pending on the files of the District Munsifs of Negapatam and Tirurapuipundi? It must here be observed, however, that even without this deduction the suit is within time if the cause of action be taken to have been in August 1887, when according to the plaint a settlement of accounts took place. It is only in case of the cause of action being held to have arisen in June 1885 that the deduction in question is necessary; and if the suit is one that is otherwise maintainable in a Court of Small Causes, we are of opinion that plaintiff is entitled to a deduction of the time during which his regular suit was pending on the files of the District Munsifs of Negapatam and Tirurapuipundi.

The cases referred to by the Subordinate Judge are not in point. There was in neither of those cases a suit pending in a Court which was unable to entertain it "from defect of jurisdiction or other cause of a like nature"—and we do not think there is ground for holding the appellant to have been wanting in due diligence. We allow this appeal therefore and setting aside both the learned Judge’s order and the Subordinate Judge’s decree, remand the suit for replacement on the file and disposal on merits.

Respondent should pay appellant’s costs of this appeal and also of revision petition No. 228 of 1890 and bear his own costs in both the cases before this Court.

The other costs will be costs in the suit.

16 M. 278=2 M L. J. 247.

[278] APPELLATE CIVIL.

Before Mr. Justice Mutthusami Ayyar and Mr. Justice Best,

ANANTAYYA AND OTHERS (Plaintiffs), Appellants v. PADMAYYA
AND OTHERS (Defendants), Respondents.*
[17th August and 13th December, 1892.]

Legal Practitioners’ Act—Act XVIII of 1879. Section 28—Agreement between pleader and person retaining him—Promissory note not filed—“Quantum meruit.”

The defendants’ brother engaged a vakil (since deceased) to defend certain suits on their behalf and made and delivered to him a promissory note for an agreed sum in respect of his fee. The note was not filed in Court end it exceeded in amount the vakil’s regulation fee. The defendants subsequently made a promissory note in substitution for the above and the vakil’s representatives now brought a suit upon the last-mentioned note:

Held, (1) that the agreement with the defendants’ brother was invalid by reason of Legal Practitioners’ Act, Section 28, and the plaintiffs were not entitled to recover the amount of the note;

(2) that the plaintiffs were entitled to recover in this action the amount due to the vakil independently of that agreement.


SECOND appeal against the decree of W. J. Tate, District Judge of South Canara, in appeal suit No. 341 of 1889, confirming the decree of S. Raghunathayya, District Munsif of Karkal, in original suit No. 304 of 1888.

* Second Appeal No. 1015 of 1891.
Suit on a promissory note. The note sued on was made in substitution for a note of which the maker was one Gummannu, the brother of the defendants. The holder of the note was a vakil (since deceased) who had been retained by Gummannu to defend certain suits on behalf of the defendants. The plaintiffs were the sons and widow of the deceased vakil.

It appeared that Gummannu's note had not been filed in Court, and that its amount exceeded the regulation fee ordinarily payable to the vakil.

The District Munsif dismissed the suit on the ground that the note had not been filed in Court in accordance with Legal Practitioners' Act, Section 28; and on appeal the District Judge affirmed his decree.

The plaintiffs preferred this second appeal.

[279] Pattabhirama Ayyar, for appellants.
Ramachandra Rao Sahib, Ranga Rao, for respondents.

ORDER.

The first contention on behalf of the appellants is that Section 28 of the Legal Practitioners' Act is inapplicable to this case in that Gummannu Heggade by whom the original promissory note was executed was not a party to the suit in which plaintiffs' father acted as pleader on behalf of the defendants. The section is, however, too comprehensive to limit it to agreements entered into by pleaders with the parties themselves. The words include all agreements entered into by a pleader with "any person " retaining or employing him in respect of business done or to be done by "such pleader." The consideration for the plaint promissory note is merely the previous note, Exhibit A, which was executed by Gummannu when employing plaintiffs' father as pleader for the defendants in the suits which they were defending. Such being the case, the Lower Courts are right in holding the agreement to be invalid under Section 28 of the Act by reason of its not having been filed in Court.

The next contention is that, even if the agreement is invalid, plaintiffs are entitled to a decree for the legal fee, or at least for the amount admitted by defendants to be due; and in support of this contention reference is made to Krishnasami v. Kesava (1).

As was observed by Straight, J., in Kazi-ud-din v. Karim Bakhsh (2), the object of Section 28 is "to protect necessitous, improvident or careless "litigants from being taken advantage of by unscrupulous legal advisers; "and provision is, therefore, made for agreements for remuneration in "excess of and apart from the amount allowable in taxation of the costs, "whereas Section 29 recognizes the right of a pleader to recover the "amount due to him, independently of such agreement, for the costs, fees, "charges and disbursements in respect of the business done."

The District Judge must, therefore, be asked to find what is the amount legally due to the late Krishna Poi, pleader for the defendants, independently of the promissory notes, Exhibits A and B.

In compliance with the above order, the District Judge submitted his finding which was accepted when the case came on for final disposal and judgment was delivered accordingly.

---

(1) 14 M. 63.  
(2) 12 A. 169.
[280] APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Best.

RAMAKRISHNA (Plaintiff), Appellant v. UNNI CHECK (Defendant), Respondent. [6th and 8th September, 1892.]

[Sections 52, 56—License—Permission to capture elephants.

The owner of a forest, in 1883, executed an instrument whereby he gave to the other party thereto permission to trap fifty elephants in the forest, and stipulated for a certain sum in respect of each elephant which was captured. In 1884, without the knowledge of the owner of the forest, the other party, by a similar instrument, gave permission to the defendant to trap ten elephants. The instrument of 1883 was expressed to be in force for six years, that of 1884 for four years. The latter instrument was not ratified by the owner of the forest, who, in 1885, granted the exclusive right of trapping elephants to the plaintiff. The plaintiff now sued the defendant for possession of two elephants which had been captured by him:

Held, that the instrument of 1883 was a license merely, and that, since the owner of the forest had never consented to or ratified the instrument of 1884, the plaintiff was entitled to a decree.

SECOND appeal against the decree of Lewis Moore, District Judge of South Malabar, in appeal suit No. 51 of 1891, confirming the decree of E.K. Krishnan, Subordinate Judge of South Malabar, in original suit No. 38 of 1889.

Suit to recover possession of two elephants captured by the defendant in 1886 and 1887 in forests belonging to the Edamana Tirumalpad, who had granted to the plaintiff the exclusive right of capturing elephants there for three years from 10th November 1885. It appeared that in 1883 the Tirumalpad had executed in favour of a Nambudiri an instrument, filed as Exhibit III, which was (omitting formal portions) in the following terms:

"Permission is hereby given to you for digging 50 elephants' pits from this day by spending your money in any place in the hills whose boundaries are mentioned in the subjoined schedule which are the jenu of the said Kovilakam and in its possession for removing and taking the elephants from the pits at your expense when they fall into them and for fellling the trees necessary for taking the elephants out of the pits, and for [281] covering up the pits. But you shall pay as a jenmahbhogam of one-sixth of the value, then estimated by four persons, of each of the elephants that fall into the pit, and take receipt. This agreement shall be in force and in effect for six years from this date, and it will become invalid subsequently."

On 13th January 1884 the Nambudiri executed in favour of the defendant an instrument, filed as Exhibit VII, which was (omitting formal portions) in the following terms:

"Permission is given to you hereby for digging 10 elephants' pits in any places you please by spending your money in the hills mentioned in the subjoined schedule and included in the mukti karar registered as No. 66 of 1883, in the Sub-Registrar's Office of Vandalur, on 20th Menom 1058 (1st April 1883) granted by Kutti Etn alias Vikramanichau Third Raja, guardian and brother of Sri Devi Lakshmi Kolapad (minor) of..."

* Second Appeal No. 1639 of 1891.
"Edamannakovalakam for removing and taking the elephants at your expenses, if elephants are dragged and for felling from the hills the trees necessary for removing these elephants and for closing the pits. You shall pay me as jenmalbhogam one-fourth of the value, estimated then by four persons, of each of the elephants falling in those pits, and take receipt. This agreement shall be in force and effect for four years from this date, and it will be invalid subsequently."

The defendant pleaded that, in capturing the elephants in question, he was acting within his rights under the above instruments.

The Lower Courts adopted the view that Exhibit III was not a mere license and dismissed the suit.

The plaintiff preferred this second appeal.

Sundara Ayyar, for appellant.

Sankaran Nayar and Achyutha Menon, for respondent.

JUDGMENT.

We are of opinion that the Courts below are in error in holding that Exhibit III is more than a license. The ground of decision apparently is that, whereas the grant of the right to trap elephants upon the plaintiff's land is a mere license, the right to carry away the elephants and reduce them to possession is something more. In coming to this conclusion, the Court have, we think, overlooked the definition of "license" contained in Section 52 of the Indian Easements Act. The right granted is not more than a license, unless it amounts to an easement or an interest in the property, i.e., in the immovable property. The right to carry away the elephants and reduce them to possession is not an interest in immovable property, nor does it amount to an easement as defined by Section 4, since it is not attached to the ownership of any immovable property for the better enjoyment of that property.

In Doe v. Wood (1), it was held in a case of grant of mining rights that the grant of a power to search for and get and carry away tin within a certain term was a mere license, no more than the grant of a right to a personal chattel, and that it did not amount to a grant of an estate or property in the land itself or any part of the ore or metals ungot therein.

The licensees may have a right under Section 56 of the Easements Act to employ his servants to dig the pits and aid in capturing the elephants, but this will not carry with it the right to transfer his license or any part of the rights contained therein.

It was found by the Subordinate Judge that the sub-karar VII had been executed by the licensees with the knowledge and consent of the plaintiff. The District Judge gives no finding upon this point, but observes that Exhibit IV shows that the Trunalpati made no objection to the transfer of his rights by the licensee to the defendant. In this observation we are not able to concur. Exhibit IV makes no mention of the sub-karar, but is a receipt given to the Nambudiri. It is true that it mentions the elephants were in possession of Unni Check and were caught in pits dug by him, but this is consistent with the defendant having acted as an employee under the Nambudiri. There is no finding on the evidence that the plaintiff either consented to or subsequently ratified the sub-karar VII.

(1) 2 B. & Ald. 724.
We must, therefore, reverse the decree of the Lower Appellate Court and remand the appeal for rehearing. The appellant is entitled to the costs of this second appeal and the costs in the Courts below will abide and follow the result.

16 M. 283.

[283] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

CHANNAMMA AND ANOTHER (Plaintiffs), Appellants v. AYYANNA AND ANOTHER (Defendants), Respondents.*

[3rd October, 1892.]


A letter, receiving a request for a loan, calling on the address to pay the amount to the bearer of the letter, and continuing "this sum I shall repay with interest . . . . and get back this letter: I request you will not neglect to pay the amount on the strength of this letter," is a promissory note and not a mere proposal for a loan.

[Overruled. 27 M. 1 = 19 M. L.J. 65; Diss., 23 M. 166 (F.B.) = 7 M.L.J. 220; F., 4 Bom.L.R 912]

SECOND, appeal against the decree of S. Subbayyar, Subordinate Judge of South Canara, in appeal suit No. 45 of 1890, confirming the decree of S. Raghunathayya, District Munsif of Karkal, in original suit No. 216 of 1889.

Suit for principal and interest due on account of money lent by the plaintiff’s husband, deceased, to the defendant. The plaintiff tendered in evidence a letter to her deceased husband from the defendant, of which the material portion was the following:

"I personally asked you for a loan of Rs. 500 in order to pay off the debt due by me to Cherdappa Shanbhoga on the mortgage of the property I purchased from him; pay the sum to the bearer of this letter, Narayana, on my account and obtain a receipt from him. This sum I shall repay with interest at 12 per cent. per annum within 30th Phalguna of this year and get back this letter. I request you will not neglect to pay the amount on the strength of this letter, 8th Bhadrapada."

It bore an unstamped receipt endorsed in it as follows:

"Received on account of Ayyanna into my hands according to his letter, Rs. 500-0-0. 9th Bhadrapada Shudha."

The letter was not stamped and the District Munsif referring to Pothi Reddi v. Velayadastvan (1), held that it was a promissory note and for that reason inadmissible in evidence, and he dismissed the suit. The Subordinate Judge confirmed his decree.

[284] The plaintiff preferred this second appeal.

Pattabhirama Ayyar, for appellants.
Narayana Rao, for respondent No. 2.

JUDGMENT.

It is argued that the letter, Exhibit A, contains merely a proposal to borrow and does not amount to an unconditional undertaking to pay and

* Second Appeal No. 1859 of 1891.
(1) 10 M. 94.
we have been referred to a case Dhoodbhat Narharbhat v. Atmaram Moreswar (1). That case is not in point, because the document did not contain, as Exhibit A does, any words indicative of the writer's intention, that if the addressee consented to make the loan the letter itself should operate as a security for repayment. The use of the words "I will obtain back this letter" and "you will lend on the strength of this letter," indicate the intention of Ayyanna that the document should be retained by plaintiff's husband, if he sent the money as an unconditional undertaking to pay back the money on a certain date. The case is similar to one, in which a promissory note is sent along with a letter applying for a loan with the intention that the promissory note should be retained if the loan is made. The mere fact that the intention that the document should operate as a promissory note only in case the loan is made does not deprive Exhibit A of its character as such when the loan is actually made. In Nandan Misser v. Chatterbati (2) the use of the words 'take back' were held sufficient to indicate an intention that the document should operate as a security for repayment. We see no reason to interfere with the discretion of the Courts below as to costs.

Both second appeal and memorandum of objections are dismissed with costs.

15 M. 285.

[285] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

AYYANNA AND ANOTHER (Defendants), Appellants v.
NAGABHOOSHANAM (Plaintiff No. 2, Respondent.*

[13th and 15th September, 1892.]

Civil Procedure Code—Act XIV of 1882, Sections 2, 541, 582—Order rejecting an appeal
—Vakalatnama executed in favour of two vakils accepted by only one—Presentation of appeal under such vakalat.

An intending appellant executed in favour of two vakils a vakalatnama; it was accepted only by one of the vakils and he presented the appeal. The appeal was placed on the file by the District Judge, but on its coming on for disposal before the Subordinate Judge, he held that it had not been duly presented and made an order rejecting it:

Held, (1) that an appeal lay against the above-mentioned order ;
(2) that the appeal had been duly presented.

[F., 22 M. 155 ; R., 27 M. 21=13 M.L.J. 300.]

SECOND appeal against the order of M. B. Sundara Rau, Subordinate Judge of Ellore, rejecting appeal suit No. 422 of 1890, preferred against the decree of Y. Janakirama Ayyar, District Munsif of Ellore, in original suit No. 324 of 1889.

The above appeal was presented by a vakil, acting under a vakalatnama, executed in favour of himself, together with another vakil who did not accept it. The appeal was placed on the file by the District Judge; but it came on for disposal before the Subordinate Judge, who held, in view of the circumstances above mentioned, and with reference to the circular of the High Court, No. 2074, dated 26th August 1889, that the

* Second Appeal No. 1687 of 1891.

(1) 13 B. 669.
(2) 13 B.L.R. App. 33.
appeal had not been duly presented, and he accordingly made the order now appealed against rejecting the appeal.

Sivagama Mudaliar, for appellants.
Parthasaradhi Ayyangar, for respondent.

JUDGMENT.

It is contended for the respondent that no appeal lies to this Court from the order rejecting the appeal. We are unable to accede to the contention. An order rejecting a plaint is treated by Section 2 of the Code of Civil Procedure as a decree, and we are of opinion that the order rejecting an appeal must also [286] be treated as a decree under the provisions of Section 582. We observe that the Subordinate Judge rejected the appeal after it had been filed by the District Judge, which he was not at liberty to do. The principle laid down in Gulab Rai v. Mangli Lal (1) governs this case. The preliminary objection is disallowed.

It is urged on behalf of the appellants that, though in the vakalat filed in the Court below, the names of two vakils are entered, and though the vakalat was accepted only by one of them, yet the presentation of the appeal by the Pleader, who accepted the vakalat, is a sufficient presentation within the meaning of Civil Procedure Code, Section 541. It is doubtless a general rule that when an authority is given to two persons to do an act, the act is valid to bind the principal only when both concur in doing it, and that the authority must be construed strictly. The rule of interpretation is, however, not so rigid as to overcome the obvious intention of the principal, if the words in which the authority is given are capable of being so construed as to amount to an authority to both or either of them to do the particular act. In the case before us, the vakalat was accepted only by one of the vakils, and not by both, and until it is accepted by both, it does not become a joint authority. Again the rule is intended to protect the principal, and it does not appear that the principal has repudiated the act done on his behalf in this case. Moreover, the acts authorized are the presentation and prosecution of the appeal, and the filing of the appeal is an act necessary to the preservation of the right of appeal and on that ground beneficial to the appellant. The circular order is intended to regulate the practice of the Courts under Sections 541 and 543, but it does not preclude the principal from insisting either that the authority is not in substance a joint authority or that he has not forfeited his right of appeal when he is willing to abide by it and to amend the vakalat.

We set aside the order of the Subordinate Judge and direct that the appeal be restored to his file and adjudicated upon on the merits. Costs of this appeal will be provided for in the revised judgment.

(1) 7 A.42.

906
VIRARAGHAV A V. VENKATA

16 M. 287 = 3 M.L.J. 25.

[287] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Wilkinson.

VIRARAGHAV A AND ANOTHER (Defendants Nos. 1 and 3),
Appellants v. VENKATA (Plaintiff), Respondent.*
[20th April and 1st August, 1892.]

Civil Procedure Code—Act XLV of 1882. Sections 244, 294—Order cancelling an execution sale of land—Subsequent suit for possession brought by judgment debtor.

A decree-holder attached land of his judgment-debtor and brought it to sale and himself became the purchaser in execution of his decree. The purchase having been made without the permission of the Court, the sale was set aside on the application of judgment-debtor, who now sued to recover possession of the land:

Held, that the suit was not maintainable under Civil Procedure Code, Section 244.

F. 23 A. 478; R, 21 C. 789; 13 M L.J. 354; D., 18 M. 13; 5 P.R. 1907 = 40 P.W.R. 1907 = 23 P.L.R. 1908.

SECOND appeal against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 85 of 1891, reversing the decree V. Srinivasa Chariu, Subordinate Judge of Kumbakonam, in original suit No. 31 of 1890.

Suit for possession of land which had been brought to sale and purchased by the defendant and delivered to him in execution of a decree which he had obtained against the plaintiff in original suit No. 104 of 1876, on the file of the Subordinate Court of Kumbakonam. The above purchase had been made without the permission of the Court, and on this ground an order was made cancelling the sale on the application of the judgment-debtor who now sued as above to recover possession of the land in question.

The Subordinate Judge held that the suit was not maintainable with reference to the provisions of Civil Procedure Code, Section 244. The District Judge held otherwise and passed a decree as prayed.

The defendant preferred this second appeal.

Bhashyam Ayyangar and Gopalasami Ayyangar, for appellant.
Pattabhirama Ayyar, for respondent.

JUDGMENT.

[288] The suit is one to recover possession of land with mesne profits. Veeraragava Ayyangar, the first defendant, obtained a decree for money against the plaintiff, Venkata Chariu, in original suit No. 104 of 1876. In execution of that decree, he attached and brought to sale the plaintiff and other lands. In July 1878, at the Court auction, first defendant himself purchased the plaintiff land and was put in possession. Plaintiff thereupon filed a suit to set aside the sale on the ground that first defendant had purchased without the permission of the Court. It was held in second appeal (Veeraragava v. Venkata(1)) that a suit would not lie and that plaintiff's remedy, if any, was in execution. Plaintiff then applied to the Subordinate Court which passed orders cancelling the sale. Plaintiff now brings a suit for

* Second Appeal No. 1657 of 1891.
(1) 5 M. 217.

907
possession. The Subordinate Judge was of opinion that, as the matter is one which arises in the execution of the decree, the suit is barred by the provisions of Section 244 of the Civil Procedure Code. On appeal, the District Judge held that the order cancelling the sale was not a decree and was therefore not capable of execution, and that as Section 294 contained no provision for giving possession, Plaintiff's only remedy was by suit.

On second appeal it is argued that no suit would lie. Plaintiff's remedy, if any, being in execution.

In Viroghava v. Venkata (1) the learned Judges held that the question whether the sale could be impugned on any ground was a question relating to the execution of the decree, and therefore a question which the parties were prohibited from raising by separate suit. If, they went on to say, the decree-holder purchased without having obtained leave to bid, the Court executing the decree would, on that ground, be bound to declare the sale void. Application was then made to the Subordinate Court to declare the sale in execution void, and in September 1882 the Subordinate Court cancelled the sale. Instead of applying for possession, the plaintiff has filed this suit. But the same objection appears to us to be valid against this suit, as was held to be valid against the former suit. In execution of the decree in a suit to which both plaintiff and first defendant were parties, first defendant obtained possession of the land. The question as to first defendant's right to hold the land appears to us to be a question relating to the execution of the decree. The Court executing the decree has already declared the sale void and it is that Court which must replace plaintiff in possession. The decree in original suit No. 104 was satisfied by the amount of the first defendant's bid having been set off against the amount due by the plaintiff. That satisfaction having now been cancelled by the order of the Court executing the decree, the question as to defendant's possession is one arising between the parties to the suit relating to the execution and satisfaction of the decree, and therefore one which must be disposed of under Section 244 and not by separate suit.

On behalf of the plaintiff-respondent it is argued that, as an order under Section 294 is appealable under Section 588 (16), the provisions of Section 244 do not apply to this case. This is the argument adopted by the District Judge. He says that the question is how, when the sale has been set aside, is the person in whose favour the order is made to get re-delivery. The answer appears to us to be clear; the Court which did the erroneous act, that is, which put the first defendant in possession must undo it, and that is the Court executing the decree. The fact that an appeal is provided against an order passed under Section 294 in no way bars the applicability of the general principle laid down in Section 244. According to what appears to us to be the proper construction of that section, the only Court which can grant the relief which the plaintiff seeks is the Court executing the decree and a suit for possession will not lie.

The decree of the District Judge must be reversed, and that of the Subordinate Judge restored with costs in this and the Lower Appellate Court.

(1) 5 M. 317.

908
Rama Kurup v. Sridevi


[290] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

Rama Kurup (Plaintiff), Appellant v. Sridevi and Others (Defendants Nos. 3, 1 and 2), Respondent.*

[1st March and 29th April, 1892.]


In a suit to redeem a kanom brought by the plaintiff who had purchased the land in execution of a decree against the jenmi, it appeared that the land had previously been purchased in the name of one who was joined as a supplementary defendant with the funds of the jenmi's tarwad, and with the object of defrauding the creditors of that tarwad. A decree for redemption was passed, which was reversed on appeals filed by supplementary defendant and the kanomdar respectively. The plaintiff preferred a second appeal against the decree in the first mentioned appeal, joining the kanomdar as respondent. But it was held that the plaintiffs could not succeed, as the kanomdar was not a party to the appeal against which the second appeal was preferred.

Semble, apart from the above objection, the plaintiff was not entitled to a declaration that the purchase by a supplementary defendant was bennam for the tarwad of the original jenmi and consequently invalid as against plaintiff.

Kamalal Sukma v. Monohar Das, 12 C. 201, dissented from.

[Diss. 21 C. 519; R. 21 A. 238; 17 M. 283; 20 M. 349 (353); 20 M. 362; 9 C.P.L.R. 55; 9 M.L.J. 298; 8 O.C. 306 (311).]

Second appeal against the decree of J. P. Eddian, District Judge of North Malabar, in appeal suit No. 89 of 1890, reversing the decree of V. Kulu Eradi, District Munsif of Paynad, in original suit No. 61 of 1889.

Suit to redeem a kanom. Defendants Nos. 1 and 2 were the kanomdar and his tenant. The plaintiff had purchased the land in execution of a decree against the jenmi in 1883. Defendant No. 3 had previously purchased it, and it appeared that the purchase had been effected with funds supplied by the jenmi's tarwad in order to defraud its creditors. This defendant was brought on to the record after suit filed on the plaintiff's application.

The District Munsif passed a decree for redemption against which defendants Nos. 1 and 3 preferred separate appeals, and the District Judge in each appeal reversed the decree.

[291] The plaintiff now preferred this second appeal joining all three defendants as respondents against the decree passed by the District Judge on the appeal of defendant No. 3 in which defendants Nos. 1 and 2 were not brought on the record.

Baskyam Ayyangar and Sankara Menon, for appellant.

Sankar Nayar, for respondent No. 1.

JUDGMENT.

It is the case for all parties that the land sued for originally was the jenm of Thekkadath Nair. Plaintiff's case is that it was demised to first defendant's tarwad in 1038 (1862-63) on a kanom of Rs. 65, that the jenm right was sold in 1883 in execution of a decree against the Thekkadath

* Second Appeal No. 479 of 1891.
Nair and purchased by Raman Nambiar from whom it was purchased by plaintiff. Hence plaintiff sues to redeem the kanom and recover the land from first defendant and this tenant, second defendant.

The first defendant denies that he holds under the kanom sued on and alleges that prior to the purchase by Raman Nambiar the jenm right of the Thokkadath Nair had been sold in execution of a certain decree against the jenm and purchased by Sridevi Ammal, a female member of the tarwad of the Thokkadath Nair, reserving a kanom right of Rs. 325 in favour of defendant No. 1, which was subsequently renewed for Rs. 525. Sridevi Ammal was made defendant No. 3 and supported defendant No. 1.

The Munsif found that the purchase by defendant No. 3 was made in her name with funds supplied by her tarwad in order to defraud the creditors of the tarwad. Plaintiff agreed to redeem the kanom of Rs. 325 set up by defendant No. 1, and the Munsif accordingly decreed for surrender of the plaint lands by defendants to plaintiff on his paying defendant No. 1 the kanom amount Rs. 325 and ordered that first and third defendants should pay plaintiff's costs. Defendant No. 3 appealed to the District Court in appeal No. 89 of 1890 and defendant No. 1 in appeal No. 117 of 1890. Defendant No. 2 did not appeal.

The District Judge in appeal No. 89 of 1890 concurred in the finding of the Munsif as to the nature of the purchase by defendant No. 3, but held that the suit was barred by Section 317 of the Civil Procedure Code and accordingly passed a decree in that appeal, reversing the decree of the Munsif and dismissing the suit, but without costs. In appeal No. 117, the District Judge for the same reasons as in appeal No. 89 reversed the original decree [292] and dismissed the suit without costs. Both appellate decrees were passed on the same day.

In second appeal No. 479 of 1891 plaintiff appeals against the decree in appeal No. 89 making all three defendants respondents. First and second defendants' names must be struck off the record as respondents, as they were no parties to the appeal out of which this second appeal arises. Plaintiff has not appealed against the decree in appeal No. 117. The suit, therefore, stands dismissed without appeal against defendant No. 1, and plaintiff cannot obtain the only relief he sought, viz., a decree for redemption on payment of the kanom amount to first defendant. This seems sufficient to dispose of this second appeal; for even if we were of opinion that the District Judge was wrong in his view of the effect of Section 317 of the Civil Procedure Code, we could not give plaintiff the decree he asked for. But it is urged that defendant No. 3 having been made a party at the instance of plaintiff, and plaintiff having asserted as against her that her purchase was made beneeme for the tarwad and therefore could not defeat plaintiff's title, plaintiff was at least entitled as against her to a declaration to that effect. We doubt whether such a declaration could be made in this suit; but assuming for the sake of argument that it could, we think Section 317 would clearly be a bar to plaintiff's obtaining it. Treated as a suit against defendant No. 3 for a declaration that her purchase was made beneeme for her tarwad, the case comes exactly within the very words of the section. It is a suit against the certified purchaser on the ground that the purchase was made on behalf of another person, and the section says that such a suit shall not be maintained. We cannot agree with the decision in Kanisak Sukina v. Monohur Das (1) which seems to us to contravene the clear meaning of the section. It is not in our opinion a

---

(1) 12 C. 204.
sufficient reason for not carrying out the express terms of the section, that
to do so would be to allow a fraud to be perpetrated. The person in whose
name a purchase has been made for the benefit of and with the money of
another, of course, commits a fraud in claiming the property as his own.
Nevertheless the law says that a suit shall not be maintained against him
on the ground that the purchase was benamee and thus provides that his
fraud shall prevail. The object of the section, we [293] consider, was to
put a stop to benamee purchases at execution sales, and this object can only
be carried out by enforcing it in all cases without regard to consequences.
In any view therefore we think the second appeal must fail and dismiss it
with costs.

There is nothing in the memorandum of objections and we dismiss it
with costs.

16 M. 293.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

SRIMANA Vikraman AND ANOTHER (Plaintiffs Nos. 1 and 2),
Appellants v. RAYAN AND OTHERS (Defendants Nos. 1 to 3 and 5 to 8),
Respondents* [19th September, 1892.]

Civil Procedure Code—Act XIV of 1882, Section 544—Appeal by two persons—With-
drawal of one appellant from appeal—Reversal of decree on appeal.

A decree was passed for the plaintiff in a suit to redeem a kanom brought
against various persons said of whom disclaimed all interest. An appeal was
preferred by one of the defendants who claimed to be the jenni of the premises
comprised in the kanom and another who held a kanom from him. The first
mentioned appellant withdrew from the appeal which, however, was prosecuted
by the other and the Appellate Court reversed the decree:

Held, that since the appellants were the only substantial defendants the Appel-
late Court was right in allowing the appeal to proceed.


SECOND appeal against the decree of E.K. Krishnan, Subordinate Judge
of South Malabar, in appeal suit No. 756 of 1890, reversing the decree
of A. Annaswami Ayyar, District Munsif of Ernad, in original suit No. 419
of 1889.

The facts of this case appear sufficiently for the purposes of this
report from the following judgment of the High Court.
The plaintiffs preferred the second appeal.
Sankaran Nayar, for appellants.
Ryru Nambiar, for respondent No. 8.

JUDGMENT.

The only point urged is that the Subordinate Judge was in error in re-
versing the whole decree when only two [294] of the defendants appealed,
one of whom withdrew from the appeal and reliance is placed on the word-
ing of Section 544, Civil Procedure Code, and a case reported Boydonath
Surmah v. Ojan Bibee (1). That case is not on all fours with the present.
The ground common to all the defendants was that the plaintiff was not

* Second Appeal No. 1567 of 1891.
(1) 11 W.R. 288.
the jenmi and that defendants Nos. 1 and 2 never held under him. The first and second defendants disclaimed all interest. The third defendant claimed to be the jenmi and the eighth defendant, the appellant in the Lower Appellate Court, claimed as kanomlar under the third defendant. The decree of the District Munsif proceeded on the ground that the plaintiffs were the jennis and that defendants Nos. 1 and 2 held under them. The defendants Nos. 1 and 2 having disclaimed all interest, the only substantial defendants were the third and eighth. We cannot, therefore, say that the Subordinate Judge was wrong in reversing the decree of the Court of first instance on the appeal of one of the defendants alone. The second appeal is dismissed with costs.

16 M. 294—3 M.L.J. 98.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

BALAKRISHNA (Plaintiff), Appellant v. THE SECRETARY OF STATE FOR INDIA (Defendant), Respondent.*

[23rd September, and 4th October, 1892.]

Limitation Act—Act XV of 1877, Schedule II, Articles 120, 131—Periodically recurring right—Denial of right.

In a suit brought in 1889 by a landholder against the Secretary of State for a declaration of his rights against Government to have certain remissions made in the sum to which he was annually assessed, no consequential relief was sought, and it appeared that the plaintiff's claim for the remission had been made in 1873 and had been refused by Government:

Held, that Limitation Act, 1877, Schedule II, Article 120, and not Article 131 applied to the case and the suit was barred by limitation.

SECOND appeal against the decree of J. W. Best, District Judge of Chingleput, in appeal suit No. 6 of 1891, confirming the decree [295] of C. Sury Ayyar, District Munsif of Chingleput, in original suit No. 482 of 1889.

The facts of this case appear sufficiently for the purposes of this report from the following judgment of the High Court.

The Lower Courts passed decrees dismissing the suit: the plaintiff preferred this second appeal.

Parthasaradhi Ayyangar, for appellant.
Sundara Ayyar, for respondent.

JUDGMENT.

This was a suit brought by the appellant to establish his right to certain yearly remissions and to have it declared that the Government is not entitled to levy full assessment without granting those remissions. They are called tiyagakari remission and varam remission under the orders of the Board of Revenue. The appellant rested his claim on a permanent cowle alleged to have been granted by the Government to his ancestors on the 29th April 1755. He stated further that so long as the amani system prevailed, the Government paid to appellant's family the excess kudivaram at the rates mentioned in the cowle and that, when the system of fixed money assessment was substituted for the amani system, the Government remitted

* Second Appeal No. 1694 of 1891.
a portion of the money assessment at certain rates till 1878. It was contended for respondent that the Civil Courts had no jurisdiction to entertain a suit relating to the rate and amount of assessment payable to the Government, and that the claim was barred by limitation. The only questions tried in this suit were those of jurisdiction and limitation. The District Munsif determined them both against the appellant and, on appeal, the District Judge considered it sufficient to decide that the suit was barred. It is urged before us that the right in question is one which recurs every year and that Article 131, second schedule of the Act of Limitation, is applicable to this case. We do not consider, however, this contention to be tenable. Article 131 applies only to those suits in which a decree for consequential relief is asked for by virtue of the periodically recurring right, and, in the present case, no such relief has been asked, although the remission claimed has been refused from the year 1878. We must, therefore, hold that Article 120 applies to this suit which was brought to obtain a merely declaratory decree. It was held in Pachamuthu v. Chinnapan (1), that a suit for declaration of title to [296] land was barred by Article 120, and we observe that even according to Article 131, time begins to run from the date when the plaintiff is first refused the enjoyment of his periodically recurring right.

As the present suit was not brought within six years from the date when plaintiff’s right was denied, and, as it is for declaration of title, it is barred.

The second appeal is dismissed with costs.

18 M. 296.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

SYED AMEER SAHIB AND OTHERS (Plaintiffs), Appellants v.
VENKATARAMA AND OTHERS (Defendants Nos. 2 to 5),
Respondents.*  [31st August, 1892.]

Local Boards Act—Act V of 1884 (Madras), Sections 27, 128, 156—Suit against Taluk Board—Suit framed erroneously—Error persisted in—Things done under the Act—Special period of limitation.

In a suit brought against, among others, the President of a Taluk Board constituted under Local Boards Act, 1884 (Madras), to recover land on which the Panchayat of a Union within the taluk had erected a public latrine, it was pleaded that the suit, as against the abovementioned defendant was wrongly framed and also that it was barred by the special rule of limitation contained in Section 156 of that Act. The plaintiff asked for no amendment, but proceeded to trial:

Held, that the suit was not maintainable under Local Boards Act (Madras), 1884. Section 27, on the ground that it was not brought against the Taluk Board.

Quere, whether Section 156 is applicable to suits other than suits for compensation for wrongful acts committed under colour of the Act.

[Ref. 16 M. 817; 32 M. 271 =4 Ind. Cas. 32 (33) =19 M.L.J. 333 =4 M.L.T. 209 (F.B.); A.W.N. (1906) 165; 3 M.L.J. 325; D., 28 M. 551.]

SECOND appeal against the decree of P. Dorasami Ayyar, Subordinate Judge of Salem, in appeal suit No. 169 of 1890, affirming the

* Second Appeal No. 1476 of 1891.

(1) 10 M. 218.
Suit to recover possession of certain land on which a public latrine had been built by the Panchayat of the Sandamangalam Union, of which defendant No. 1 was Chairman; defendant No. 5 was the President of the Taluk Board. Both of these defendants [297] objected that the suit was not maintainable against them under the provisions of the Local Boards Act (Madras), 1884. The name of the former was struck off the record by an order made by the District Munsif with reference to Section 128, but the suit was proceeded with against the latter. The District Munsif dismissed the suit as being barred by limitation under Section 156 of the Act. The Subordinate Judge affirmed his decree concurring in the above finding. He also referred with regard to the form of the suit to Section 27.

The abovementioned sections are in the following terms:

Section 27: Every Local Board shall be a body corporate by the name of the Local Board of the local area for which it shall have been established and over which it has authority, shall have perpetual succession and a common seal, with power to acquire and hold property, both moveable and immovable, and, subject to such rules as may, from time to time, be prescribed by the Governor in Council, to transfer any property held by it, and to contract and to do all other things necessary for the purposes of its constitution, and may sue and be sued in its corporate name.

Section 128: (1) Every Panchayat shall, subject to the provisions of this Act, be the agent and under the control of the Taluk Board; (2) and the Taluk Board, and not the Panchayat, may sue and be sued in respect of any act or omission of the Panchayat, giving rise to a cause of action.

Section 156: No action shall be brought against any Local Board, or any of their officers, or any person acting under their direction, for anything done or purporting to be done under this Act until the expiration of one month next after notice in writing shall have been delivered, or left at the office of the Local Board, or at the place of abode of such person, explicitly stating the cause of action and the name and place of abode of the intended plaintiff; and, unless such notice be proved, the Court shall find for the defendant; and every such action shall be commenced within six months next after the accrual of the cause of action, and not afterwards; and if any person to whom any such notice of action is given shall, before action brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover more than the amount so tendered, and shall pay all costs incurred by the defendant after such tender.

[298] The plaintiffs preferred this second appeal.

Bhashyam Ayyangar and Tiruvenkatachariar, for appellants.

Pattabhirama Ayyar, for respondent No. 4.

Subramania Ayyar, for respondents Nos. 1 to 3.

JUDGMENT.

It is contended in the first place that the Lower Courts were in error in holding that the suit was barred by limitation and that the special limitation of six months provided by Section 156, Act V of 1884, is not applicable to the case. The suit was one in ejectment brought on the ground that the land upon which the defendants had entered belonged to the plaintiffs. We do not think that Section 156 of the Local Boards Act applies to such a suit. As observed by Garth, C.J., in the Full Bench case
(Chunder Sikhar Bundopadhyya v. Obhoy Churn Bagchi (1), the section is only applicable to suits for compensation claimed for wrongful acts committed under colour of the Act. The decision in that case had reference to Section 87, Bengal Municipal Act III of 1864, but the language of that section was substantially the same as that of Section 156. The Bombay High Court have decided the question in the same way with reference to Bombay Municipal Act VI of 1873 (Johormal v. The Municipality of Ahmednagar (2).) The same view was also taken by the Allahabad Court with reference to a similar provision (Municipal Committee of Moradabad v. Chatri Singh (3)) in Section 46, Act XV of 1873. The ruling however in Rathnasabapathi v. Vythilinga Pandara Sannidhi (4) is in conflict with the above decisions which, however, are not referred to in the judgment. If it were necessary to decide the question of limitation, we should be disposed to follow the judgments of the other High Courts, as we do not think that it could have been the intention of the legislature to allow local bodies to appropriate the lands of private individuals otherwise than under the Land Acquisition Act, or to curtail the rights of such individuals to establish their claims within the time provided by the general law of limitation. But we are of opinion that the suit must fail on the ground that the Taluk Board was not sued as is required by Section 27 of the Act. It was the Board which was liable to be sued in its corporate capacity and not the President of the Board. It is argued that this is a mere error of form, and [299] reference has been made to an Allahabad case (Manni Kasauandhan v. Crooke (5)), in which it was held that where the Secretary of a Municipality had been sued in place of the President, the error was one of form only. But we observe that in this case the fifth defendant called the attention of the plaintiffs to Section 27 at the outset, and that the plaintiffs' pleader was aware of the necessity of amending the plaint at the very first hearing. Not only was no application made to amend, but the error was persisted in even in the Appellate Court, and the grounds of appeal to that Court contained the mis-statement that it was by the order of the Munisif that the fifth defendant had been brought in. We do not, therefore, consider that this was a case of a bona fide mistake.

The second appeal fails and is dismissed with costs of fifth defendant.

1892
AUG. 31.

---

APPEL.

LATE

CIVIL.

---

16 M. 296.

(1) 6 C. 8.
(2) 6 B. 580.
(4) Second Appeal No. 975 of 1889, unreported.
(3) 1 A. 269.
(5) 2 A. 296.
VENKATA VARATHA THATHA CHARIAR AND OTHERS (Appellants) v. ANANTHA CHARIAR AND OTHERS (Respondents).*

[24th March, 1893.]

Civil Procedure—Powers of an Appellate Court to remand for decision upon evidence—Adherence to the Code.

The sections in Chapters XL and XLII, Civil Procedure Code, relating to the hearing of appeals, provide the only powers that can be exercised by an Appellate Court in remanding a suit for the consideration of evidence by the Court from which the appeal is preferred.

[R. 30 M. 158 = 17 M.L.J. 1 = 2 M.L.T. 69; 138 P.R. 1903; Cons., 17 M.L.J. 128.]

PETITION for special leave to appeal from a decree (28th July 1891) of the High Court, affirming a decree (24th April 1889) of the District Judge of Chingleput.

This application was made by members of a sect of Brahmans in Conjeevaram in the Chingleput district, known as the Vadakatars Tahtha Chariars, between whom and the respondents, members [300] of another sect of Brahmans known as the Tengalai Sri Vaishnava, a contest had arisen as to rights to recite mantras in temples at Conjeevaram and to receive the emoluments. The respondents, in their plaint filed on the 25th August 1886 in the Court of the District Munsif of Chingleput against sixty-five defendants, asked for a decree declaring that they had the exclusive right to what was termed the Thodakka Adya Pakam Miras, the recitation which they claimed make, and that the defendants should not obstruct them. Some of the defendants denied the 'plaintiffs' right and alleged their own exclusive right.

On the 4th April 1888, the District Munsif decreed substantially in favour of the plaintiffs. An appeal to the District Judge was dismissed by him on the 24th April 1889.

The petitioners then appealed to the High Court, drawing attention to some material documents. The High Court thereupon made an order in the following terms: "Without expressing any opinion as to the weight to be attached to the evidence, we must ask the District Judge to take these documents into his consideration and to submit a revised finding within four weeks from the date of the receipt of this order."

The District Judge, not the same officer, but another, who had succeeded to the office in the interval, submitted a conclusion upon the whole evidence "that the Adya Pakam Miras belonged exclusively to the appellant Tahtha Chariars;" he was of opinion that the right belonged to the present petitioners, an opinion the reverse of that of his predecessor. The first and fourth of the present respondents filed objections to this finding on the merits of the matter. The High Court, in its judgment of the 28th July 1891, after referring to the evidence, oral and documentary,

* N.B.—For a report (in extenso) of this case, see 3 M.L.J. 150 Ed.
including prior judgments that were relevant, declared that the Court was "unable to accept" the revised finding and dismissed the appeal with costs.

The defendants applied, under Section 600, for a certificate that the case was a fit one for appeal to the Queen in Council, urging that, although the value of the suit was below Rs. 10,000, the decree affected a large section of the community and involved questions of law. This, on the 10th March 1892, the Court refused, and the defendants now petitioned for special leave.

Mr. J. D. Mayne, for the petitioners, submitted that the case might be viewed thus: The second or revised finding had taken the place of the former judgment of the Lower Appellate Court, this being equivalent to a withdrawal of the first judgment. It was true that the High Court could not have overruled the former judgment on the facts, nor could they have substituted a judgment of their own. But, as the second finding stood exactly on the same footing as a finding in the District Judge's first judgment, no other objection could be taken to it than such as could be taken under Chapter XLII of the Code, on a second appeal, under Sections 584 and 585.

Their Lordships intimated that the power of the High Court to remand for further consideration of the evidence was limited to, and defined by, the Code: that the second or revised judgment of the District Judge had been irregularly obtained, and had not been obtained upon an order authorized by any one of the Sections 562 to 567 of the Code; and that the High Court had done right at last in rejecting it.

The petition must be rejected on that ground. On a further objection that the matter could hardly be considered the subject of a civil suit, it was observed that there was a question of emoluments, which could be preceded by a question of ritual without being barred by it.

Petition rejected.

Solicitors for the petitioners:—Messrs. Lawford, Waterhouse and Lawford.

1893
MARCH 24.
PRIVY COUNCIL.
16 M. 269
(P.C.) = 3
M.L.J. 150=
6 SAR. P.C.J.
364.

16 M. 301.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

RAJARAM (Plaintiff), Appellant v. KRISHNASAMI AND ANOTHER (Defendants Nos. 1 and 3), Respondents.* [3rd October, 1892.]

Transfer of Property Act—Act IV of 1882, Section 3—Constructive notice—Notice of a deed, notice of its contents—Right of pre-emption reserved in family partition deed—Covenant by guardian of infant coparcener—Tender of price.

The plaintiff and his step-mother, as guardian of her son, defendant No. 1, then an infant, made a division of the family property under a deed of partition by which a house was divided: the deed contained a covenant that if either coparcener should desire to sell his share of the house, the other should have the right of pre-emption. Defendant No. 1, without the knowledge of the plaintiff, sold his share of the house to defendant No. 3 for Rs. 130 under a sale-deed which referred to the deed of partition. The plaintiff now sued to enforce his right of partition and in the course of the suit offered to pay Rs. 130:

* Second Appeal No. 1920 of 1891.
Held, (1) that the purchaser had constructive notice of the covenant in the deed of partition;
(2) that the covenant was not invalid and that it was unnecessary for the plaintiff to prove tender by him of the purchase-money before suit.

[Rel., 6 C.L.J. 134 (139); 7 Ind. Cas. 218 (224).]

SECOND appeal against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No. 105 of 1891, reversing the decree of G. Ramaswami Ayyar, District Munsif of Tanjore, in original suit No. 394 of 1889.

Suit to enforce the plaintiff’s right of pre-emption. Plaintiff and defendant No. 1 were half-brothers. In 1878 a partition of the family property was made between the plaintiff and the mother and guardian of defendant No. 1 who acted on his behalf. The deed of partition contained the following provision:

"If either of us were to mortgage, hypothecate, sell or otherwise dispose of the said house including the manjibah land, such a disposition shall be made only between us two; or one of us may, with the consent of the other, make it to a stranger."

Defendant No. 1 sold part of a house, forming a portion of the family property which fell to his share on the above partition, to defendant No. 3 under a sale-deed, dated 22nd August 1889, which recited the fact that the house was comprised in the deed of partition. The plaintiff now sued as above praying for a decree that possession of the house be delivered to him on his paying such price as the Court might fix. In the course of the suit the plaintiff offered to pay Rs. 130 which was the consideration paid by defendant No. 3 on the sale.

The District Munsif passed a decree as prayed adopting the valuation of Rs. 130. The Subordinate Judge reversed his decree, holding that the plaintiff had purchased bona fide without notice of the covenant in the deed of partition.

The plaintiff preferred this second appeal.
Pattabhirama Ayyar, for appellant.
Ramachandra Ayyar, for respondent No. 2.

JUDGMENT.

The only question for determination is whether the defendant No. 3 took with notice of the plaintiff’s right of pre-emption and of the necessity of his consent. The partition deed was the first defendant’s deed of title. By the partition he obtained a right to the specific portion of the house which he conveyed to the defendant No. 3. As remarked by Jessel, Master of the Rolls, in Patman v. Harland (1), constructive notice of a deed is constructive notice of its contents, provided that the deed is a deed relating to the title and forming part of the chain of title. Jones v. Smith (2), which is relied on by the respondent, was referred to and it was held that that class of cases has no bearing at all on a case where the vendee knows that the deed of which he has notice is a deed affecting the land, and the question as to the extent to which it does affect the land can be ascertained only by looking at the deed itself. The third defendant’s attention was drawn by the sale-deed to the deed of partition, and his omission to ascertain its contents must, with reference to the principle indicated in the remarks of the Master of

(1) L.R. 17 Ch. D. 353.
(2) 1 Hare 43.
the Rolls in the above case, be construed as wilful abstention from an inquiry which he ought to have made.

With reference to the question of tender, we observe that the plaintiff expressed his readiness to pay the price fixed by the Court and that he offered to pay the Rs. 130 paid by third defendant to first defendant. We cannot, therefore, concur with the opinion of the Subordinate Judge that the absence of tender deprived appellant of his right of preemption.

As for the contention of the respondents' pleader that the Subordinate Judge recorded no finding on the first issue, we observe that this point was not pressed upon him, although it was taken in the memorandum of appeal. Both Courts found that the covenant was beneficial to both parties, and we cannot, therefore, allow the contention that the covenant was not binding on first defendant because concluded by his guardian. We cannot adopt the suggestion that the covenant is binding only on the guardian, and it is clearly not in contravention of the rule against perpetuity.

The decree of the Lower Appellate Court is reversed and that of the District Munsif restored with costs in this and the Lower Appellate Court.

16 M. 304.

[304] APPPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

NAGAPPA (Defendant), Appellant v. SUBBA AND ANOTHER
(Plaintiffs), Respondents.† [6th September, 1892.]

Easements Act—Act V of 1882, Section 15—Easement—Kumki right in South Canara.

The kumki right of landholders in South Canara is not an easement, but a right exercised over Government waste by permission of Government and it does not entitle the landholder to a decree for possession.

[Expl., 15 Ind. Cas. 278 (279).]

SECOND appeal against the decree of W. J. Tate, District Judge of South Canara, in appeal suit No. 189 of 1890, modifying the decree of I. P. Fernandes, District Munsif of Kundapur, in original suit No. 116 of 1889.

Suit for possession of land. The District Munsif passed a decree as prayed. The District Judge dismissed the claim for possession, but made a declaration of the plaintiff's kumki right over part of the land.

The defendant preferred this appeal, and the plaintiff filed a memorandum of objections.

Pattabhirama Ayyar, for appellant.
Ramachandra Rao Saheb, for respondents.

JUDGMENT.

Strictly speaking the suit should have been dismissed, as plaintiffs sued for possession of the land and failed to make out any right to such

—“Whether the alienation made by defendant No. 1 to defendant No. 3 was made with the plaintiff's consent within the meaning of the terms alluded to in the pleading?”

† Second Appeal No. 1462 of 1891.
possession. But as the District Judge has given plaintiffs a decree-declaratory of their kumki right over the lands in question, we shall not interfere since it is found such right exists and defendant is not prejudiced by the declaration, because the decree expressly exempts from its operation the buildings with which alone he is concerned.

There is no question of limitation, for the suit is brought within twelve years from the time of defendant's interference with plaintiffs' rights. It is argued that kumki right is in the nature of an easement and, therefore, the suit is barred by Section [305] 15 of the Easements Act. In our opinion, it is not an easement, but a right exercised over Government waste by permission of Government.

The second appeal fails and is dismissed with costs.

As to the memorandum of objections the Judge was right in holding that kumki right did not entitle plaintiffs to a decree for possession. It is a right to do certain things over Government waste. As to land No. 2, it is found to be more than 100 yards from plaintiffs' warg and, therefore, they can have no kumki right over it. This is a finding of fact which is conclusive in second appeal, as there was evidence to support it. The memorandum of objections is also dismissed with costs.

16 M. 305.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

VENKATAVARAGA (Defendant), Appellant v. THE DISTRICT BOARD OF TANJORE in CHARGE OF THE NADAR CHATTARAM (Plaintiff),
Respondent.*  [5th and 22nd September, 1892.]

Limitation Act — Act XV of 1877, Schedule II, Articles 110, 120 — Suit to recover customary dues payable on account of a chattaram — Rent.

In a suit by the District Board in charge of a chattaram to recover a certain sum as the arrears of various merais, being customary dues payable by the defendants for the benefit of the chattaram on account of lands held by them the defendants raised no objection on the ground that there had been no exchange of pattas and muchalkas, but among other defences they relied upon a plea of limitation:

Held, (1) that the defendants should be considered to have admitted tacitly that the exchange of pattas and muchalkas had been dispensed with;

(2) that the suit was governed by Limitation Act, Schedule II, Article 120, and not by Article 110 as a suit for rent.

Second appeal against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 807 of 1890, confirming the [306] decree of S. Ramasami Ayyangar, District Munsif of Tiruvadi, in original suit No. 132 of 1890.

Suit by the District Board in charge of a certain chattaram to recover certain sums of monies alleged to be the value of certain merais, called Easvaram Kovil merai, Kalvadi merai, Kanakkaruppu merai, water-shed merai and one-eighth share in Arthamania melvaram, besides ready-money payments for kattukarai theeruvah and kaval fees, alleged to be due

* Second Appeals Nos. 1440, 1441 and 1548 of 1891 and Civil Revision Petition No. 370 of 1891.
by the defendants for faslis 1293 and 1294 in respect of the nunja and punja lands included in defendant’s merais.

The defendants had executed no muchalkas and recovered no pattas on account of the land in question, but they raised no objection to the maintainability of the suit on this account. It appeared that these dues had been collected on account of the chattram as of right for many years, and the District Munsif passed a decree as prayed. The District Judge confirmed this decree, and the defendants preferred this second appeal.

Rama Rau, for appellant in second appeals Nos. 1440 and 1441 of 1891.

Pattabhirama Ayyar, for respondent.

Parthasaradhi Ayyangar, for appellant in second appeal No. 1548 of 1891, and civil revision petition No. 378 of 1891.

Pattabhirama Ayyar, for respondent.

JUDGMENT.

The principal point argued in these appeals is limitation. For appellant it is contended that the amendment of the plaint ordered by the District Judge by which the District Board was substituted for the President of the Local Fund Board was in fact the substitution of a new plaintiff, and that, therefore, by Section 22 of the Limitation Act, the suit must be deemed to have been instituted at the date of the order, and at that date (12th March 1890) the suit was barred by limitation, being a suit for merais for faslis 1293, 1294 which ended 30th June 1886. The appellee’s vakil argues that the suit comes under Article 110 of Schedule II of the Limitation Act, suits for arrears of rent, and that the period of limitation is therefore three years. We think this is not a suit for arrears of rent. The merai or customary dues sued for are not claimed by plaintiff as landlord, but as due to the chattram by custom. There is no definition of the term rent in the Limitation Act, and we must construe it strictly in the case of a disenabling statute. So construing it we think it does not include customary [307] dues of the kind claimed in this suit. The relation of landlord and tenant does not exist between the plaintiff and defendants and we think there is a clear distinction between suits like the present and ordinary suits for arrears of rent, a distinction which is recognized by the Provincial Small Cause Courts Act by placing the two kinds of suits under different heads in the schedule (Articles 8 and 13 of Schedule II of Act IX of 1887). If the suit does not come under Article 110 of the Limitation Act, it does not appear to fall under any other description of suits in the schedule, and therefore is governed by Article 120 as a suit for which no period of limitation is provided elsewhere in the schedule and the period is six years. Even regarding the suit as instituted at the date of the District Judge’s order of 12th March 1890 it is brought within six years from the date of the cause of action and is therefore not barred.

In this view it is unnecessary to consider the question whether Section 22 of the Limitation Act applies to the case, and we therefore express no opinion upon it.

Another point raised is that exchange of pattas and muchalkas was a condition precedent to the plaintiff’s right to sue. This contention was not raised by the defendants themselves, and, we agree with the District Judge that this amounted to a tacit admission that pattas and muchalkas had been dispensed with by the parties. Lastly, it is argued that the
merits claimed are unreasonable. Both Courts have found that they are fair and reasonable and have been claimed as of right for a long period.

The second appeals fail and are dismissed with costs. Civil revision petition No. 378 of 1891 is also dismissed with costs.

16 M. 308 = 2 Weir 579.

[308] APPELLATE CRIMINAL.


QUEEN-EMpress v. BARTLETT." [12th and 30th August, 1892.]

Criminal Procedure Code, Section 454—European British subject—Relinquishment of right to be dealt with as such British subject—Trial by Second-class Magistrate,

A European British subject was prosecuted in the Court of a Second-class Magistrate, who was a Hindu, on a charge of mischief. The accused appeared and did not plead to the jurisdiction of the Magistrate, who proceeded with and disposed of the case:

_Held_, that the Magistrate had not acted ultra vires since the accused had relinquished his right to be dealt with as a European British subject.

[F., 37 C. 467 (518) = 14 C.W.N. 1114 = 7 Ind. Cr. 359 (378) = 11 Cr. L.J. 453 ]

CASE referred for the orders of the High Court under Criminal Procedure Code, Section 438, by J. Thompson, District Magistrate of Chingleput.

The case was stated as follows:

"I have the honour to submit for the orders of the High Court, under Section 438, Criminal Procedure Code, the records in calendar No. 83 of 1892, on the file of the Sheristadar Second-class Magistrate of Saidapet taluk.

"The defendant in the case, Mr. W. H. Bartlett, was accused under Section 429, Indian Penal Code, of mischief by killing a horse over Rs. 50 in value. The witnesses examined having failed to give evidence against him, he was discharged under Section 253, Criminal Procedure Code.

"I have no doubt, on perusal of the record and on hearing the station-house officer who is entered in the charge-sheet as a witness, but was not examined, that the case was compromised, a chief witness kept out of the way, and that the three other witnesses perjured themselves.

"The inquiry has been grossly gone about by the Magistrate; but apart from that, Mr. Bartlett being a European British subject, was not, under Section 443, Criminal Procedure Code, [309] triable by this particular Magistrate, who is neither a Magistrate of the first class nor a European British subject. Mr. Bartlett waived his right to be specially dealt with, and the Second-class Magistrate considered he had jurisdiction under Section 454, Criminal Procedure Code. That section apparently bas reference to cases where the Magistrate has no reason to consider that the accused is a European British subject and the accused is silent; but when the Magistrate was satisfied, as in the present case, his jurisdiction was ousted.

* Criminal Revision Case No. 234 of 1892.
"The whole proceedings appear, therefore, to be void, and I request "the orders of the Honorable the Judges that the proceedings held be "quashed and the case be tried before competent Court."
Mr. R. F. Grant, for the accused.
The Acting Government Pleading and Public Prosecutor (Subramanya Ayyar), for the Crown.

JUDGMENT.

We are unable to accept the view of the District Magistrate as to the interpretation of Section 454, Criminal Procedure Code, which must, we think, be read along with Section 443. The Second-class Magistrate was disqualified to try the accused solely because the accused was a European British subject. When the accused appeared before the Magistrate he relinquished his right to be dealt with as such British subject and therefore lost all the benefit of the special procedure laid down in Chapter XXXIII. This is the view taken of the law by both the Calcutta and Bombay High Courts, and we think it is the proper construction to be put upon Sections 443 and 454.
We decline to interfere.

16 M. 310.

[310] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

BRAHMAIYA AND ANOTHER (Plaintiffs) v. LAKSHMINARASIMHAM AND ANOTHER (Defendants).* [29th August, 1892.]

Court Fees Act—Act VII of 1870, Section 7—Decree for rejection and mesne profits—Court fee on memorandum of appeal.

A memorandum of appeal from a decree directing ejectment and awarding mesne profits is chargeable with Court fees calculated both on the land and on the mesne profits.

[8, 23 M. 84.]

CASE stated under Civil Procedure Code, Section 617, by G. T. Mackenzie, District Judge of Kistna.
The case was stated as follows:
"In suit No. 565 of 1890 on the file of the District Munsif of Masulipatam plaintiffs, who are agraharandars, sued to eject a tenant. They paid Rs. 30 Court fees on the plaint under Section 7, v (c) of the Court Fees Act. The defendant pleaded permanent occupancy rights, but the District Munsif passed a decision ejecting him. Against this decision the defendant appeals and contends that he has occupancy rights and cannot be ejected. He has paid only 8 annas on his appeal under clause v of Schedule II of the Court Fees Act and in support of this he cites Bibi v. Morfan (1).

"Such suits for ejectment in the Civil Courts of this district have become frequent. Hitherto they have been classed under Section 7, v (c) of the Court Fees Act, but my attention is now drawn to this decision, "Bibi v. Morfan (1) classifying them under No. 5 of Schedule II with a fixed Court fee of 8 annas.

* Referred Case No. 11 of 1890.
(1) 11 C.L.R. 91.
"The present case is that of an appeal by a defendant, and he contends that his appeal has no concern with possession, because the land is in his possession. He contends that his appeal is to establish his occupancy right in the words of Schedule II, 5.

"Section 7, xi (d) refers to suits to contest a notice of ejectment. "I do not understand what suits these can be. In [311] Mahomed v. Lakshmipathi (1) the High Court says that a 'mere notice' does not afford a cause of action."

Counsel were not instructed.

JUDGMENT.

The appeal is from a decree which directed ejectment and awarded mesne profits. The Court fee should be calculated on the land and the mesne profits which are the subject-matter of the appeal.

The Judge is right in his opinion that Section 7 of the Court Fees Act is applicable to the case.

16 M. 311 – 3 M.L.J. 144.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SUNDARAM (Defendant), Appellant v. SITHAMMAL AND ANOTHER (Plaintiffs), Respondents.* [19th July and 4th October, 1892.]

Limitation Act XV of 1877, Schedule II, Articles 91, 144—Suit for land—Cancellation of instrument affecting the land by plaintiff.

In a suit brought in 1889 to recover land, it appeared that the defendant had been in possession since 1833, having obtained in 1838 a conveyance of the land from one of the plaintiffs. It was found on the evidence that the conveyance had been obtained by fraud and was supported by no consideration. The other plaintiff claimed under an instrument of 1881 which recited that of 1883 and was executed by the same person. The plaint contained no prayer for the cancellation of the conveyance of 1883:

Held, that the suit was not barred by limitation.


SECOND appeals against the decree of C. Venkobacharier, Subordinate Judge of Madura (West), in appeal suits Nos. 278 and 280 of 1890, confirming the decrees of T. Sadasiva Ayyar, District Munsif of Madura, in original suits Nos. 27 and 29 of 1889.

Suit to recover possession of land. The fact of these cases are stated sufficiently for the purposes of this report in the judgment of MUTTUSAMI AYYAR, J.

The defendant preferred these appeals.

Mr. K. Brown, for appellant.

Subramany Ayyar, for respondents.

JUDGMENT.

[312] MUTTUSAMI AYYAR, J.—The second respondent is a person of weak mind, and the first respondent is his adoptive mother. The land in dispute originally belonged to the former, and on the 22nd December

* Second Appeals Nos. 925 and 927 of 1891.
(1) 10 M. 368.

924
1889, he executed a sale-deed (Exhibit IX) regarding it in appellant’s favour for Rs. 60. On the 9th February 1884, he conveyed all his properties, including the land in question, under document B to his adoptive mother. In 1889 respondents brought this suit to recover the land with mesne profits on the ground that appellant took wrongful possession of it in 1885 and since continued to hold possession adversely to them. The plaint did not refer to the sale-deed (IX), nor did it pray that it should be cancelled or set aside, and the suit, as based on the averments in the plaint was one brought to recover possession of immovable property from appellant, who held it adversely to respondents, and as such, it would be governed by Article 144 of the second schedule of the Act of Limitations. For appellant it was contended that Exhibit B was obtained by fraud, and that he was lawfully in possession as purchaser under instrument IX. It was further alleged that both respondents could not maintain the suit, and that the claim was also barred by limitation. The first and second issues fixed in the suit raised three questions, viz., whether the sale-deed (IX) was genuine, whether it was valid, and whether the suit was barred by limitation. As for the first and second questions the District Munsif found that appellant and three others had conspired to deprive second respondent of his properties, that Exhibit IX was the result of such conspiracy, that it was either a forgery or at least a spurious document executed for no consideration, and that appellant took wrongful possession of the land in dispute in the beginning of 1885. On appeal the Subordinate Judge concurred in the finding that Exhibit IX was the result of a conspiracy to defraud second respondent and not a bona fide transaction supported by consideration. As regards the genuineness of the document, however, he did not come to a clear finding, but observed that second respondent denied his signature in Exhibit IX that the signatures did not correspond with his genuine signatures, and that much need not be said about it. The fact, therefore, definitely found by both the Courts below is that Exhibit IX was obtained by fraud and is supported by no consideration. As regards the question of limitation, the Subordinate Judge held that the sale being the result of fraud and [313] based on no consideration whatever, it was void, and that it was not necessary for respondents to set it aside before recovering possession, and that their claim was, therefore, not barred by Article 91, Limitation Act. He observed further that even assuming that that article did apply, the sale-deed not being registered, respondents could not have known of its existence, and its production in Court might be taken as fixing them with notice of its existence. It is contended on appellant’s behalf that respondents were bound to set aside the sale-deed (IX) before they could recover possession, that a suit to set it aside for fraud would be barred by Article 91 of the Act of Limitation, and that on this ground the appeal must be decreed. In support of this contention appellant’s Counsel draws our attention to the decision of the Privy Council in Janki Kunwar v. Ajit Singh (1) and Jagdamba Ohoodrani v. Dakhina Mohun Roy Chacdhri (2). On the other hand it is argued on respondent’s behalf that they were at liberty to claim possession on title, that the sale evidenced by Exhibit IX was part of appellant’s case, that it was for him to show that it was true and valid, and that Article 91 did not apply to a suit to recover possession. Reliance is placed in support of this contention on Boo Jinatboo v. Sha Nagar Valab Kanji (3).

(1) 15 O. 58.  (2) 13 O. 308.  (3) 11 B. 78.
In Exhibit B a reference is made to Exhibit IX and the former being
dated 1884. Respondents must be taken to have been aware of its existence
at least from 1884. The observation of the Subordinate Judge that respondents
must be taken to have discovered its existence only when it was pro-
duced cannot be supported. The substantial question is whether respond-
ents are bound first to set aside the sale-deed (IX), and whether by omit-
ting to do so they forfeited their title to the land, though twelve years had
not elapsed from the date of the sale, and though the document was really
obtained by fraud and there was no consideration for it. It is a clear rule
of law that no party can recover property against his own instrument
without showing that such instrument is inoperative for fraud. It is also
clear that title to land may continue to subsist, though a claim arising
therefrom to a particular relief, such as a claim to rent in arrears for more
than three years, may be time-barred. The real point for consideration is
whether the cancellation or setting aside of an instrument is, upon the true
construction of [314] Article 91, a specific relief as contemplated by
Section 35 of Act 1 of 1877 or a special transaction affecting the title to land.
According to the general scheme of the Act of Limitations, title to land is
acquired or lost only by adverse possession extending to twelve years or
more. It is provided by Section 28 of that Act that at the determination of the
period thereby limited to any person for instituting a suit for possession of
any property, his right to such property shall be extinguished. There is hard-
ly room for doubt that a suit to cancel or set aside an instrument is not a
suit for possession of property since it is open to the party in possession
to institute such suit. I am of opinion that Article 91 is not applicable
to suits in which the substantial relief claimed is the recovery of land. A
reference in such suit to an instrument obtained by fraud is necessary
only by way of confession and avoidance and not as part of the
relief claimed. This is also the view taken by the High Court at Bombay
in Abdul Rahim v. Ksraram Daji(1), in Boo Jimalbooo v. Sha Nagar
Valab Kanji(2). In the former the suit was brought by a person who
claimed under the lady who executed the instrument which was impugned
as fraudulent, and it was held that Article 95 did not bar the suit to recover
his share in her estate. In the latter, the document impugned was
executed by one of the plaintiffs, and it was yet decided that Article 92
was not applicable. This was also the opinion expressed by Straight, J.,
in Hazari Lal v. Jadaun Singh(3). The remarks made in with reference
to Article 92 are equally applicable with reference to Article 91. The
learned Judges observed there that if it were possible for the Court to
award to the plaintiffs' possession of the land and hold that the
defendants had no right to keep the same without declaring the bonds
to be void, the plaintiffs would hardly care much whether the bonds
were cancelled or not, whilst in order to bring the case under Article
92, Schedule II of the Limitation Act there must be a bare declaration
asked regarding the cancellation of the bonds. Again Article 91 describes
the suit to which it is applicable as one in which the relief claimed is the
cancellation or the setting aside of an instrument, and does not in terms
apply to a suit for possession in which an averment regarding an outstanding
instrument is made by way of confession and avoidance in order to
prevent the defendant from [316] setting it up as an answer to the claim.
Such an averment, it seems to me, cannot alter the nature of the suit.
The appellant's Counsel draws attention to the decision of the Privy

---

(1) 16 B. 1186 (89).
(2) 11 B. 78.
(3) 5 A. 76.
Council in *Janki Kunwar v. Ajit Singh* (1). But the plaintiffs in that case asked for a decree for their property being restored upon their paying to defendants so much of the consideration as might be found to be justly due under the sale-deed which was impugned for fraud. The prayer for the cancellation of the instrument and for the declaration that it created only a charge for the amount actually paid, was essential part of the relief claimed in the plaint.

Another case on which appellant’s Counsel relies is *Unni v. Kunchi Amma* (2). The decision in that case proceeded on the ground that the cancellation of the instrument was not an essential part of the relief claimed in the plaint. It is true, as observed there, that, as a matter of substantive law, the party seeking to recover property against his own instrument must show that it is void for fraud for the obvious reason that as long as an instrument creating a later title is not invalid, his prior title cannot prevail. It is also true that so long as the prior title is not extinguished by twelve years’ adverse possession, his right to avoid the later instrument by confession and avoidance exists. Otherwise there would be this anomaly. Suppose that the party executing a fraudulent sale-deed is in possession of the property notwithstanding the sale, and that the purchaser brings a suit after the lapse of three years, there must, in that case, be a decree in his favour on the ground that, notwithstanding his possession, the vendor cannot set aside the deed under Article 91. Thus the purchaser would acquire a valid title to land in the fourth year, though the sale-deed might be fraudulent, whilst according to Section 28 of the Act of Limitation, title to immoveable property is not lost unless there has been adverse possession for more than twelve years.

I would dismiss these appeals with costs.

**Best, J.**—The parties to these two appeals are the same, and the question for decision in both is also the same, namely, whether the suits (instituted by the respondents) are barred by Article 91 of Schedule 1 of the Limitation Act.

As the sale-deeds relied on by the appellant are dated so far back as 1883 and 1889, and these suits were not instituted till 1889, they are clearly time-barred if Article 91 is applicable.

In support of appellant’s contention that the article referred to above applies, reference has been made to a dictum of a Bench of this Court in *Unni v. Kunchi Amma* (2), which is as follows: “There can be no doubt that when a person seeks to recover property against an instrument executed by himself or one under whom he claims, he must first obtain the cancellation of the instrument and that the three years’ rule enacted by Article 91 applies to any suit brought by such person.” *Janki Kunwar v. Ajit Singh* (1), which is referred to as authority for the above dictum, was a suit in which plaintiffs came into Court expressly asking that a deed admittedly executed by one of them should be set aside on the ground of its having been obtained by fraud and undue influence, and further praying that the property be restored to them “upon their paying to the defendant so much of the consideration money as might be found to be justly due.” The case was thus one in which the conveyance was not only admittedly executed, but had also admittedly had operation given to it, so as to affect the property, and, as was observed in *Raghunath Dyal Sahu v. Bhikya Lal Misser* (3), it is difficult to see how a person who omitted or neglected to have such a conveyance set aside within the time allowed for a suit for

---

(1) 16 C. 59.  
(2) 14 M. 26.  
(3) 12 C. 69.
doing this can afterwards challenge its operation or effect and recover property, "the title in which it, if valid, operated to transfer, such transfer being further actually carried out." In the cases now under appeal, however, the finding of the Lower Appellate Court is that neither was their consideration for the documents on which appellant relies nor did possession of the property pass under them, but that appellant subsequently got possession of the lands by persuading the tenants to join him to defeat the plaintiff's title. Such being the case, appellant's possession must be held to be that of a trespasser and consequently these suits brought within twelve years from such possession being taken are not time-barred.

I concur therefore in dismissing both these appeals with costs.

16 M. 317 = 3 M.L.J. 12.

[317] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

President of the Taluk Board, Sivaganga, and Another (Defendants), Appellants v. Narayanan (Plaintiff), Respondent.*

[7th November, 1892.]

Local Boards Act (Madras)—Act V of 1834, Sections 27, 156—Notice of action—Form of suit—Injunction against Taluk Board.

The plaintiff built a wall on his land situated within the limits of the Sivaganga Taluk Board. The Local Board called upon him to remove the wall as constituting an obstruction, and gave him notice that in default of his doing so it would be demolished by the authorities. The plaintiff now brought a suit against the President of the Taluk Board and the Chairman of the Union, within the limits of which the land was situated, for an injunction restraining the defendants from interfering with the wall. No notice of action was given under Local Boards Act, Section 156. In the Courts of first instance and first appeal no objection was taken to the frame of the suit with reference to the provisions of Section 27:

Held, (1) that the defendants shall not be permitted on second appeal to raise such objection to the frame of the suit;

(2) that previous notice of action under Section 155 was not necessary


Second appeal against the decree of T. Weir, District Judge of Madura, in appeal suit No. 69 of 1891, confirming the decree of S. Dora-sami Ayyangar, District Munsif of Sivaganga, in original suit No. 455 of 1890.

Suit against the President of the Taluk Board, Sivaganga, and the Chairman of a Union within the taluk, for a permanent injunction restraining the Taluk Board and the Union in question from in any manner interfering with a wall erected on certain land, described in the plaint, which was the property of the plaintiff. No notice of the claim was given under Local Boards Act, Section 156, which is in the following terms:

"No action shall be brought against any Local Board, or any of their officers, or any person acting under their direction for anything done or purporting to be done under this Act until the expiration of one month next after notice."

* Second Appeal No. 319 of 1892.
or left at the office of the Local Board, or at the place of abode of such person, explicitly stating the cause of action and the name and place of abode of the intended plaintiff; and, unless such notice be proved, the Court shall find for the defendant; and every such action shall be commenced within six months next after the accrual of the cause of action, and not afterwards; and if any person to whom any such notice of action is given shall, before action brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover more than the amount so tendered, and shall pay all costs incurred by the defendant after such tender.

The District Munsif passed a decree as prayed, and it was confirmed on appeal by the District Judge.

The defendants preferred this second appeal stating, among other grounds, the plaintiff's suit ought to have been dismissed also on the ground that the suit ought to have been brought against the Taluk Board, Sivaganga, as provided by Section 27 of the said Act and not against Messrs W. B. Ayling and Ramasami Ayyar.

Bhashyam Ayyanar, for appellants. Ramachandra Rau Saheb, for respondent.

JUDGMENT.

Both Courts have found that the land in dispute is the private property of the plaintiff and that finding must be accepted in second appeal. We do not think Section 156, Madras Act V of 1884, applies. The cases contemplated in that section are suits for compensation and for damages, and the principle is to allow public bodies time for tender of amends to the parties as to avoid litigation—see Chunder Sikhur Bundospya v. Obhoy Churn Bagchi (1) followed in Syed Ameer Sahib v. Venkatarama (2), Price v. Khilat Chandra Ghose (3), Sorabji Nassarvanji v. The Justice of the Peace for the City of Bombay (4) and Jotharmal v. The Municipality of Ahmednagar (5).

This principle cannot apply when the object of the suit is to obtain a declaration of title to immovable property and for an injunction to restrain interference with immovable property. No question as to misdescription or defect of parties was taken in the Courts below, and the point does not affect the merits of the case. The second appeal is dismissed with costs.

16 M. 319.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

MALLIKARJUNA (Plaintiff), Appellant v. PULLAYYA AND OTHERS (Defendants) Respondents.* [23rd December, 1892.]

-Civil Procedure Code—Act XIV of 1882, Section 53—Amendment of plaint—Substitution of legal representative for deceased defendant.

A suit was brought to recover arrears of rent. The persons whose names were entered on the record as defendants were in fact dead when the suit was instituted. The suit was dismissed. The plaintiff appealed, and sought leave to amend

* Referred Cases Nos. 36 and 41 of 1892.

(1) 6 C. S. 8. (2) 16 M. 296, (297). (3) 5 B.L.R. App. 50.
the plaintiff by substituting for the names of the dead men those of their legal representatives, as against whom the suit would then have been barred by limitation:

Held, that the amendment should not be allowed.


\text{C} \text{A} \text{S} \text{E} \text{s referred for the decision of the High Court under Civil Procedure Code, Section 617, by G. T. Mackenzie, District Judge of Kistna.} \text{The case was stated as follows:}

"The Zamindar of Chalapalli filed these two suits before the District Munsif of Masulipatam to recover rent due by tenants. The tenants had died before the suits were filed, but the zamindar's office was not aware of that. The District Munsif dismissed the suits. On appeal it is contended that plaintiff ought to be permitted to amend the plaint by substituting for the names of the dead men the names of their sons. The sons have been served as respondents and appear at the hearing of the appeals."

"It is contended for plaintiff that a fresh suit against the sons is time-barred and that a refusal to permit the amendment of the plaint is a denial of justice. It is contended that the father and son are one legal and continuous persona, and that this amendment does not change the nature of the suit. Especially [320] may this be contended in the case of tenants under a zamindar, who enjoy, if not permanent occupancy right, at least an hereditary tenure from year to year, which can be terminated only under Section 12 of Act VIII of 1865."

"I have yielded to his argument in a revenue appeal, where a patta was tendered to a father and a suit to enforce acceptance was filed after his death. In that case I substituted the son's name, because it appeared to me that tender and suit were one continuous legal process. But I am unable to extend this to a suit in a Civil Court to collect rent. Such a suit commences with the plaint, and if the defendant is dead before the plaint is filed I think that plaintiff must file a fresh suit against the heirs. There is some force in the argument about the hereditary tenancy, but I think that this does not sufficiently differentiate this case from the case of any other Hindu father and son."

"Holding this view, I was disposed to confirm the decision of the District Munsif and to dismiss these appeals, but the plaintiff represented that there is no second appeal and asked that a reference might be made, because the question is of importance to him, as it is impossible that his central office should have immediate information of the death of every raiyat who dies on the estate."

\text{Pattabhirama Ayyar, for appellant.}

The respondents were not represented.

\text{JUDGMENT.}

It does not appear that leave to amend was asked for in the Court of First Instance before decree. We do not think that an amendment ought to be allowed on appeal; if by so doing the defendant is likely to be precluded from pleading limitation. \text{Weldon v. Neal (1).}

Upon the facts stated, therefore, we are of opinion that the amendment asked for should be refused and the plaintiff left to his remedy by a regular suit.

\text{(1) L.R. 19 Q.B.D. 394.}
RAMALAKSHMI v. COLLECTOR OF KISTNA

16 M. 321 = 3 M.L.J. 188.

[321] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

RAMALAKSHMI (Claimant), Appellant, v. THE COLLECTOR OF
KISTNA, Respondent. *

[22nd December, 1892 and 8th February, 1893.]

Land Acquisition Act—Act X of 1870, Section 55—Reference by a Collector—Jurisdiction of a District Court.

A Collector is not competent to refer nor a District Judge to decide any question arising under Land Acquisition Act, Section 55.

CASE referred for the orders of the High Court under Civil Procedure Code, Section 617, by G. T. Mackenzie, District Judge of Kistna.

The case was stated as follows:

"Ummanedi Ramalakshmi owns a house and compound at Bezwada. The railway took up a portion of her compound and she accepted the Collector's offer of compensation. The railway now requires another strip of her compound, extent 40½ square yards. The Collector offers ten annas a yard. Claimant does not object to this valuation, but she contends that under Section 55 of Act X of 1870 the Collector must take the whole house and compound.

"The Collector, thereupon, referred the matter to the District Court.

"Claimant relied upon Khairati Lal v. The Secretary of State for India (1). The Government Pleader, on the other side, cited Taylor v. The Collector of Purnea (2).

"I held that my duty was merely to value the land actually taken up, that I had no power to compel the railway to acquire the whole house and compound, that the remedy under Section 55 must be by a suit, and that, on the merits, Section 55 would not apply to this case. As there is no dispute about the valuation of the land taken up, I approved the Collector's offer. At claimant's request I now state the dispute regarding Section 55.

"There seems to be no appeal. Under Section 28 my decision on this point of law is final. I do not understand how [322] there was an appeal to the High Court in Khairati Lal v. The Secretary of State for India (1).

"In Taylor v. The Collector of Purnea (2) the High Court set aside the District Judge's order under Section 55 as ultra vires.

"It appears to me that the view taken by the Calcutta High Court is correct. When the Collector makes a reference to the District Court under this Act, the District Court derives its jurisdiction from the reference and its powers are limited to settling the amount of compensation for the land actually taken up or apportioning that compensation.

"Kharshedji Nasaroonji Cama v. Secretary of State (3) was a suit to compel a railway to take up the whole of a mill after they had taken the well whence water was obtained for the mill. It was under Section 32 of Act VI of 1857, which was in the same words as is Section 55 of the present Act. This shows that a suit is the correct remedy.

---

* Referred Case No. 37 of 1892.

(1) 11 A. 378.  (2) 14 C. 423.  (3) 5 B.H.C.R.O.C. 97.

931
"If the point can be decided by the District Court on a reference, then, upon the merits, I think that the claimant's contention must fail. The land acquired is a portion of the compound in front of the house. The house will be habitable as before and this appropriation of 40 square yards of compound in front of it will make little difference. Claimant relies upon the decision in Khairati Lal v. The Secretary of State for India (1) and upon the English decisions under Section 92 of the Land Clauses Consolidation Act of 1845. I admit that these decisions are in claimant's favour, but I doubt if they will be followed in the Madras Presidency where compounds are so large. A compound in front of a house is not a necessity; many houses have a frontage immediately on the street.

"Also, I do not understand how claimant's contention regarding Section 55 can be reconciled with the third clause of Section 24 which contemplates damages for severance.

"I have therefore the honour to submit the following questions:
(a) Can a District Court, on a reference from the Collector under Act X of 1870 regarding the amount of compensation for part of premises taken up, apply Section 55 and compel the Collector to take up the whole?

"[323] (b) If so, in the present case, ought the Collector to acquire the whole house and compound?"

Pattabhirama Ayyar, for the claimant.
The Acting Government Pleader (Subramanya Ayyar) for the Collector.

JUDGMENT.

As observed by the Calcutta High Court in Taylor v. The Collector of Purnea (2), the Collector is not competent to refer and the Judge is not competent to decide any question arising under Section 55 of the Act. The Act confers only a special and limited jurisdiction to the Judge to deal with two classes of questions, viz., the award of compensation and its apportionment among several claimants. When there is a difference of opinion as to whether the whole house should be taken up by Government or not, the proper course for the party is to institute a regular suit.

We are of opinion that the view of the Judge is correct.
The costs of this reference will be the costs of the cause.

16 M. 323=3 M.L.J. 131.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

RAJAH OF VENKATAKATHI (Defendant No. 1), Appellant v. YERRA REDDI (Plaintiff), Respondent.* [10th January, 1893.]

Rent Recovery Act (Madras)—Act VIII of 1865, Section 49—Suit for restoration of specific moveable property.

A raiyat brought a suit in the Court of a Deputy Collector as under the Rent Recovery Act, praying for the release from attachment and the restoration to him of certain moveable property and for some other subsidiary relief:

* Second Appeal No. 7 of 1892.

(1) 11 A. 378. (2) 14 C. 423.
Held, that the Deputy Collector had no jurisdiction to entertain the suit under Rent Recovery Act, Section 49.

SECOND appeal against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in appeal suit No. 111 of 1891, reversing the decision of T. Jagannatham, Deputy Collector of Nellore, in summary suit No. 2 of 1891.

In this suit, brought before the Deputy Collector under the Rent Recovery Act (Madras), the plaintiff sought to recover crops of the value of Rs. 260, alleged to have been wrongfully attached for arrears of rent by defendant No. 1 and to be at the time of suit in possession of defendants Nos. 1 and 2. The decree of the Acting District Judge was passed in favour of the plaintiff.

Defendant No. 1 preferred this second appeal.

Bashyam Ayyangar, for appellant.
Ramachandra Rau Sakeb, for respondent.

JUDGMENT.

We are of opinion that the suit is not sustainable under Section 49 of the Rent Recovery Act. The prayer of the plaint is not for damages, but for the release and restoration of specific moveable property, together with some other subsidiary relief. The Revenue Court in which the suit was instituted is one of special and limited jurisdiction, and no such suit as the present will lie under Section 49.

It might have been open to the plaintiff to prefer a petition under Section 32 for the release of the property, but in that case there would be no appeal.

The suit must, therefore, fail; but as this point was not taken before the District Judge, and on the facts found the conduct of the defendants has not been free from blame, we shall not award costs in their favour.

The decree of the District Court must be reversed and the suit dismissed, each party bearing his own costs throughout.

16 M. 325.

[326] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

RAMASAMI (Plaintiff), Appellant v. BASAVAPPA (Defendant), Respondent.* [14th and 16th March, 1893.]

Civil Procedure Code, Sections 332, 462—Sale of decree-holder’s interest under a decree —Right of vendee when execution is refused.

The assignee for value of a decree obtained by two persons, of whom one was a minor, applied for execution of the decree, but his application was refused under Civil Procedure Code, Section 332. He now sued to recover from his assignor the sum paid by him for the assignment:

Held, that the plaintiff was entitled to recover.

SECOND appeal against the decree of W. J. Tate, Acting District Judge of Salem, in appeal suit No. 222 of 1891, reversing the decree of J. S. Krishna Ayyar, District Munsif of Krishnagiri, in original suit No. 22 of 1891.

* Second Appeal No. 1034 of 1892.
The plaintiff was the assignee of a decree obtained by the defendant and an infant for whom he had been appointed guardian ad litem. The plaintiff paid Rs. 1,000 for the assignment of the decree to him. He was not, however, permitted to execute the decree, the Court considering, with reference to Civil Procedure Code, Section 232, that the interest of the infant decree-holder might be injured if effect were given to the assignment. The plaintiff now sued for the recovery of the Rs. 1,000 paid by him, and the District Munsif passed a decree in his favour. This decree was reversed by the District Judge.

The plaintiff preferred this second appeal.

Subramanya Ayyar and Rajagopala Ayyar, for appellant.
Subramanya Ayyar, for respondent.

JUDGMENT.

In order to facilitate the realization by defendant of a judgment-debt and to procure the release of the judgment-debtor from jail, the plaintiff paid Rs. 1,000 and took a transfer of the decree from defendant. The decree was, however, in favour of a minor as well as of defendant, and the Court refused to recognize the transfer. The plaintiff could not have appealed from an order under Section 232, as no appeal lies, and he was clearly entitled to be replaced in the same position as before. He could not anticipate that the Court would refuse to recognize the transfer, or that the transfer of the minor's interest by defendant would be held to be void. The defendant could not enter into the agreement without the leave of the Court (Section 462, Civil Procedure Code); the contract was therefore, incomplete, and the defendant failed to make in plaintiff's favour a valid transfer. The case appears to be within the rule laid down by the Privy Council in Seth Jaidyal v. Ram Sahat (1).

The decree of the District Court may be reversed and that of the District Munsif restored. The plaintiff is entitled to his costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

VASUDEVA (Plaintiff No. 2), Appellant v. MADHAVA AND OTHERS (Defendants), Respondents.* [29th September, 1892.]

Court Fees Act—Act VII of 1870, Section 7, Clause 9—Civil Courts Act—Act III of 1873 (Madras), Section 13—Suits Valuation Act—Act VII of 1897, Section 11—Valuation of mortgage suit—Appeal.

In a suit in the Court of a Subordinate Judge to redeem certain land on payment of Rs. 1,625, being a quarter of a debt for which it had been mortgaged together with other land, a decree was passed for redemption of part of the land, but the Court held that the plaintiff had not established his right to the rest. The plaintiff appealed to the High Court paying ad valorem Court fees computed on the value of the land exonerated only:

Held, (1) that the ad valorem Court fees should be computed on one-fourth of the mortgage debt;

(2) that the appeal lay to the District Court, and since Act VII of 1887, Section 11, did not apply to the case, the petition of appeal should be returned for presentation in that Court.

* Appeal No. 161 of 1891.
(1) 17 C 433.
V.]

VASUDEVA v. MADHAVA 16 Mad. 328

[R., 14 C.P.L.R. 154; 8 Ind. Cas. 973 (976) = 5 L.B.R. 209; 11 Ind. Cas. 742 (743) =
U.B.R. (1911) 1st. Qr. 82; 23 P.R. 1909 = 197 P.L.R. 1909; 23 T.L.R. 123;
D., 30 M. 96 = 16 M.L.J. 458 = 1 M.L.T. 311.]

APPEAL against the decree of S. Subba Ayyar, Subordinate Judge of
South Canara, in original suit No. 40 of 1889.

[327] The facts of this case appear sufficiently for the purposes of
this report from the following judgment of the High Court.
The plaintiff preferred this appeal.
Narayana Rau, for appellant.
Pattabhirama Ayyar, for respondents Nos. 3, 4, 6 and 7.

JUDGMENT.

Two preliminary objections are taken to the hearing of this appeal
(i) that the appeal has not been properly stamped and (ii) that the appeal
lies to the District Court and not to the High Court.
The appeal is from a decree for the redemption of one-fourth of the
property in the schedule on payment of one-fourth of the mortgage-debt.
The Subordinate Judge held that 15½ padipads claimed by defendants
Nos. 3 to 18 as their jemm were not liable to the mortgage-debt and
belonged to the defendants Nos. 3 to 18. He decreed redemption of one-
fourth part of the remainder of the property mortgaged. Plaintiff appeals
on the ground that the decision of the Subordinate Judge so far as it
relates to the 15½ padipads was erroneous. Instead of valuing the appeal
as required by Section 7, Clause 9 of the Court Fees Act at one-fourth of
the mortgage-debt, he has fixed an arbitrary value of Rs. 200 on the 15½
padipads and paid Rs. 15 only. No explanation is given why this arbitrary
value was fixed. The proper stamp duty payable is Rs. 110 and the
appellant must pay the difference.

With reference to the second objection, we have no doubt that the
appeal does lie to the District Court and not to the High Court. Under
Section 13 of the Civil Courts Act, this Court has appellate jurisdiction in
cases heard by a Subordinate Judge only when the amount or subject-
matter of the suit exceeds Rs. 5,000. In the present suit the value of
the subject-matter is Rs. 1,625, the one-fourth of the mortgage-debt. Our
attention is drawn by appellant's pleader to Section 11 of Act VII of 1889,
and it is argued that the entire mortgage-debt, which was taken by the
Subordinate Judge to be the value of the suit for the purpose of jurisdic-
tion, must be taken as the value which regulates the appeal. That sec-
tion only applies to cases in which the objection taken on appeal refers
to the improper valuation of a suit by a Court of First Instance or of
appeal for jurisdictional purposes. It does not apply to a case like the
present, in which we have to determine what was the real value of the
subject-matter in the Subordinate Court. That was one-fourth of the
mortgage-debt and not [328] the whole debt. The erroneous view taken
by the Subordinate Judge is not rendered binding upon us by Section 11,
because we are not now deciding whether or not he had jurisdiction, but
whether an appeal lies to this Court. The case Vydinatha v. Subramanya
(1) has no reference to a suit for redemption of a mortgage.

The appeal lies to the District Court. We order therefore that, on
payment of the deficient stamp duty, the appeal be returned for presenta-
tion in the proper Court. If the deficient stamp duty be not paid within
one month from this date, the appeal will stand dismissed.
The respondents are entitled to their costs in this Court.

(1) 8 M. 285.

935.
1892
Oct. 5.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice,
and Mr. Justice Handley.

KONNA PANIKAR (Plaintiff), Appellant v. KARUNAKARA
AND OTHERS (Defendants), Respondents.* [15th August and
5th October, 1892.]

Evidence Act—Act I of 1872, Section 114—Estoppel—Transfer of Property Act—Act IV
of 1882, Section 60—Partial redemption—Indivisibility of mortgage—Civil Courts
Act—Act III of 1873 (Madras), Section 14.

The kannavan of a Malabar tarwad, having the jennu title to certain land and
holding the uraima right in a certain public devasom to which other land
belonged, demised lands of both de creptions on kanom to the defendants’ tarwad,
and subsequently executed to the plaintiff a melkamon of the first-mentioned
land and purposed to sell to him the jennu title to the last mentioned land. In
a suit brought by the plaintiff to redeem the kanom, and to recover arrears of
rent:

Held, (1) that, for the purposes of determining the jurisdiction of the Court of
appeal, the value of the subject-matter of the suit was the aggregate value of the
two heads of relief;

(2) that the defendants were not estopped from denying the plaintiff’s
right to redeem on the ground that he did not represent the devasom;

(3) that the plaintiff who had denied the title of the devasom in the Court
of first instance, was not entitled to redeem the kanom as a whole, by virtue of
his admitted title to part of the premises comprised in it.

[R., 22 M. 209 = 8 M.L.J. 309; 14 C.P.L.R. 154 (156); 17 Ind. Cas. 442 (444) = 12 M.
L.T. 493; 7 O.C. 154; D., 19 M. 16.]

[329] APPEAL against the decree of E. K. Krishnap, Subordinate
Judge of South Malabar at Calicut, in original suit No. 26 of 1889.

Suit by the plaintiff as the kannavan of his tarwad to redeem a kanom
comprising 26 parcels of land and recover arrears of purapad.

The plaintiff claimed title for his tarwad to some of the parcels of
land as purchaser and to the others as holder of a melkamon from the
jennu, viz., the Kolathill illom. Most of the defendants were the members
of a tarwad of which defendant No. 1 was kannavan, namely, the kanom-
dars under the kanom sought to be redeemed, and their tenants. The
other defendants were members of the Kolathill illom. This illom held the
uraima right in a public devasom to which belonged part of the property
in suit, viz., those parcels of which the plaintiff claimed to be jennu by
right of purchase.

The Subordinate Judge held that since the alleged purchase by the
plaintiff passed to him no title to the last-mentioned parcels, he could not
redeem them, and that since the kanom was indivisible, he could not
redeem the other parcels alone, and accordingly he dismissed the suit.

The plaintiff preferred this appeal.

Bashyam Ayyar and Govinda Menon, for appellant.

Sankaran Nayar, for respondents Nos. 1 to 4.

JUDGMENT.

Mr. Sankaran Nayar for respondents raises the preliminary objection
that the appeal lies to the District Court and not to this Court, as the
value of the subject-matter of the suit does not exceed Rs. 5,000.

* Appeal No. 79 of 1891.
We consider that there are two distinct causes of action in the suit, namely, the claim for redemption and that for the arrears of rent, and that, therefore, the value of the subject-matter of the suit is the aggregate value of these two heads of relief, i.e., Rs. 5,000 for the suit to redeem and Rs. 122 for the claim for arrears of rent.

We, therefore, overrule the objection and hold that this Court has jurisdiction to try the appeal. This is a suit brought by plaintiff as karnavan of his tarwad to redeem 26 parcels of land demised on kanom to the tarwad of which first defendant is the karnavan and defendants Nos. 2 to 67 are members by the karnavan and two members of the Kolathill illom, and to recover arrears of purapad.

Plaintiff claims as melkanomdar of items 4, 5, 9, 16, 20, 23 and 24 and purchaser of the jemm right in the other plaint items.

Defendants Nos. 68 to 91 are persons in possession under first defendant and the ninety-second defendant was added as defendant as claiming that item 1 was the jemm of her Vennayur Devasom. Items 1, 2, 3 and 26 are admitted to be jemm of the Kolathill illom. The main defence raised by defendants Nos. 1 to 4, who were the principal contesting defendants in the Lower Court, and on appeal, was that items 6 to 8, 10 to 15, 17 to 23 and 25 were the property of the Pisharikovil Bhagavati Devasom of which the Kolathill illom held only the uraiha right, and therefore the sale of the jemm of these items to plaintiff’s family was invalid and conferred no right to redeem. It is admitted that items 4, 5, 9, 16, 20, 23 and 24 are the property of the last-named devasom. Upon these items plaintiff acquired only a melkanom right, which, if it is conceded, would, subject to the question of splitting the kanom, entitle him to redeem and place himself in the place of the kanomdar. Plaintiff denied the title of the devasom to the other items, and the issues chiefly fought in the Lower Court were the first and second relating to items 6, 7, 8, 10 to 15, 17 to 23 and 25.

Defendants Nos. 1 to 4 also set up an agreement to renew evidenced by a document (Exhibit I), but this was found by the Subordinate Judge to be a forgery. Upon the first two issues the Subordinate Judge found that the items to which they relate were the property of the devasom which was a public or quasi public devasom, and therefore the sale of jemm right in these lands to plaintiff was invalid and gave plaintiff no right to redeem them. As the mortgage-debt, which was a charge upon all the items, could not be split and plaintiff could not redeem these items, he could not redeem at all and the suit was, therefore, dismissed.

In appeal the findings of the Subordinate Judge as to the items the subject of the first issue being the property of the devasom and as to the nature of the devasom were not disputed, nor was the finding as to the falsity of the document (Exhibit I), appellant’s vakil, in support of the appeal, relied chiefly on the following grounds:

1. That defendants who claim by mortgage under the Kolathill illom cannot dispute their right, and the right of plaintiff as their assignee to redeem, whether their title be that of jennis or urialas of the devasom.

2. That plaintiff being admittedly entitled to redeem some of the items subject to the kanom has a right to redeem the whole kanom.

3. That the purchase by plaintiff was bona fide and for the benefit of the devasom and is therefore binding upon it.

We shall deal with these three points in order. As to (1) the kanom deed to the first defendant (Exhibit V) describes all the 26 items as the property of the devasom. First defendant had therefore notice that the
Kolathill illom was merely trustee for the devasom, and was bound to see that the person seeking to redeem the property represented the devasom. Had he not done so he might be liable at the suit of the devasom to account over again for the arrears of purapad. It is argued that as the members of the Messad family, who represented the Kolathill illom, could have themselves brought a suit to redeem, so can plaintiff as their assignee. The answer to this is that the Kolathill illom could have sued to redeem, because they represented the devasom, whereas plaintiff not only does not represent the devasom, but denies the title of the devasom as to the items of property the subject of the first issue. We think defendants were entitled to question the right of plaintiff to redeem on the ground that he did not represent the devasom.

As to (2), we observe that the point does not appear to have been argued before the Lower Court and is not distinctly raised in the grounds of appeal to this Court. The argument is this: plaintiff is admittedly owner of the items 1, 2, 3 and 26, which were the jenn property of the Kolathill illom. He is also entitled to redeem the items 4, 5, 9, 16, 20, 23 and 24 by virtue of the melkanom. He cannot redeem these items without offering also to redeem all the other items subject to the kanom (Transfer of Property Act, Section 60). He is, therefore, entitled to redeem all the items subject to the kanom. In support of this position appellant's Vakil relies on the case of Hall v. Heward (1). In that case real and personal estates were mortgaged together and the mortgagor died, leaving a will as to his personal estate, but intestate as to his real estate. It was not known who was the heir-at-law, and the mortgagee took possession. The executrix of the [332] mortgagor sued to redeem the whole property mortgaged, and it was held that she was entitled to a decree subject to the equities of the other persons interested. The Court, however, distinctly held that the heir-at-law, if known, ought to have been made a party. We think that the principle laid down in this case, and that of Pearce v. Morris (2) which it followed, has no application to the present case. Plaintiff did not frame his suit as owner of part of the mortgaged property and therefore entitled to redeem the whole. If he had done so, he must have made some person a party to represent the devasom which has been found to be the owner of part of the property. He could not have so framed his suit, for to do so would have been inconsistent with his case which was a denial of the title of the devasom as to the items the subject of the first issue.

It is not a case of unknown persons interested in the equity of redemption as in the English cases, but of a known person interested in the equity of redemption, whose title plaintiff denies; to allow plaintiff, having failed in his case as originally set up, to fall back upon his right to redeem as part-owner of the mortgaged property would be to allow him to succeed on a case different from and inconsistent with that set up in his plaint. It is urged that some persons representing the devasom might now be made a party. Plaintiff never applied for this to the Lower Court, indeed he could not well have done so considering what his case was, and we do not think this indulgence should be granted to him at this stage of the suit. As he failed in his case as originally put forward in his plaint, the Subordinate Judge was, in our opinion, right in dismissing the suit. It is to be noted that plaintiff does not mention the devasom in the plaint even as owner of the items subsequently admitted.

(1) L.R. 32 Ch. D. 490. (2) L.R. 5 Ch. App. 227. 938
to be its property. He must have known of the title of the devasom at least to these items, for his melkanom deed (Exhibit D) recites it. This and other circumstances in the case point rather to a collusive attempt between him and his vendors to defraud the devasom.

As to the third point taken by appellant’s Vakil it is open to the same objection that it was not raised in the Court below and is inconsistent with plaintiff’s case. No issue was raised upon it, and the case was fought out in the Lower Court upon entirely different questions. We must decline, at this stage, to allow the question to be raised.

No good reason has been shown for interfering with the decision of the Lower Court, and we confirm it and dismiss the appeal with costs.

Defendants Nos. 1 to 4 put in a memorandum of objections against the disallowance of their costs. They set up a deed of agreement, to renew which was found to be a forgery, and the Subordinate Judge was quite right in disallowing their costs.

The memorandum of objections is dismissed with costs.

---

16 M. 333 = 2 M.L.J. 279.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RAMACHANDRA (Defendant No. 1), Appellant v. NARAYANASAMI AND ANOTHER (Plaintiff’s Representative and Defendant No. 2), Respondents.* [2nd September, 1892.]

Irrigation channels — Power of Collector to regulate water-supply.

In a suit between raiyats holding lands under Government, in which the Collector of the district was joined as second defendant, it appeared that the first defendant, in pursuance of an order of the Sub-Collector, made on a petition preferred by him, had opened a new irrigation channel, thereby materially diminishing the supply of water necessary for the cultivation of the plaintiff’s land and causing damage to him. The Lower Court passed a decree for damages and issued an injunction directing that the channel be closed:

Held, that the order of the Sub-Collector was in excess of his powers.


SECOND appeal against the decree of T. Ramasami Ayyar, Subordinate Judge of Kumbaconam, in appeal suit No. 331 of 1890, confirming the decree of A. Kuppusami Ayyangar, District Munsif of Kumbaconam, in original suit No. 312 of 1886.

Suit for an injunction and damages. The plaintiff and defendant No. 1 were raiyats holding land under Government. The plaintiff alleged that he had suffered loss by reason of the act of defendant No. 1 in making an irrigation channel and diverting of water from his land to that of defendant No. 1. It appeared that the channel had been made in pursuance of the order made by the Sub-Collector of Kumbaconam on a petition of defendant No. 1 and dated 30th September 1885. Defendant No. 2 was the Collector of Tanjore.

The District Munsif passed a decree for damages, and also issued an injunction that defendant No. 4 should close the new channel. This

* Second Appeal No. 1498 of 1891.
decision was affirmed on appeal by the Subordinate Judge, whose findings of fact appear sufficiently for the purposes of this report from the following judgment.

Defendant No. 1 preferred this appeal.

Subramanya Ayyar, for appellant.

Pattabhirama Ayyar, for respondent No. 1.

The Acting Government Pleader (Subramanya Ayyar), for respondent No. 2.

JUDGMENT.

The Subordinate Judge has found that the channel in dispute was newly dug; that appellant's statement that an old channel had existed is not proved; that the diversion of water from the Pattabhirama channel caused a material diminution in the supply necessary for the cultivation of plaintiff's lands, and that actual damage was sustained in consequence in fasti 1295. Upon these facts it is clear that the order of the Sub-Collector was in excess of the power possessed by him for the regulation of the supply of water for irrigation purposes among raiyats holding lands under Government. As observed in Krishna Ayya v. Venkatachella Mudali(1), the Government has an undoubted right to distribute the water of Government channels, but that power does not include the power to disturb existing arrangements to the prejudice of any tenant during the continuance of the tenancy. This is also the view taken by the Bombay High Court in The First Assistant Collector of Nasik v. Shamji Dasrath Patil (2).

As regards the direction that appellant should pay the costs of the second defendant (the Collector) in the Court of first instance, we cannot disturb the same, as appellant did not make him a party in the Lower Appellate Court.

The appeal fails therefore and is dismissed with costs—two sets.

16 M. 335 = 3 M. L. J. 141.

[335] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Handley.

NANU (Plaintiff), Appellant v. RAMAN AND OTHERS

(Defendants Nos. 1 to 11), Respondents.*

[6th October and 10th November, 1892.]

Mortgage-deed passing possession of certain parcels of land and hypothecating others—Remedy of mortgagee—Previous decrees for rent obtained against mortgagees—Res judicata.

The obliged under an instrument, dated 1878, by which certain land was usufructually mortgaged and other land merely hypothecated to him, having obtained against the mortgagees decrees for rent due on part of the land under the terms of pattamchits executed by them on the date of the mortgage, now sued to recover the principal and interest due under that instrument:

Held, that he was not precluded from obtaining a decree by reason of his previous suits, and was entitled to a decree for the amount due, and in default of payment for the sale of the mortgage premises.

* Appeal No. 101 of 1891.

(1) 7 M. H. C. R. 60.

(2) 7 B. 209.
APPRAL against the decree of V. P. de Rozario, Subordinate Judge of South Malabar at Patigbat, in original suit No. 1 of 1890.

Suit to recover principal and interest due on an instrument of mortgage, dated 28th April 1878, and executed on behalf of the tarwad of the defendants in favour of the plaintiff.

The material part of the instrument, which was filed as Exhibit A, was as follows:

"The amount received by us from you by conveying to you on usufructuary mortgage Villen Kandam and fourteen other items of property at Kolaparoth Padom which are our jemn and are mentioned in the subjoined schedule and by hypothecating the jemn right over items 16 to 20 after reserving Puvakkurisi Kunneth Raman Menon’s kanom of 740 fanams over items 16 to 19 and Kalakkattil Kalaprotth Kummini Amma’s kanom, of 260 fanams over land No. 20, for the purpose of paying off the Panayom claim of Palathal Nambudri and for paying off the encumbrances on other properties is 14,000 fanams equivalent to Rs. 4,000. For this sum of Rs. 4,000, you shall hold possession of properties Nos. 1 to 15 which have been made over to you and you shall appropriate annually the paddy fixed as rent for the said properties, viz., 760 Vadippens of paddy (by the Vadippen of 40 malies) made up of 630 Vadippens of paddy being the interest on the 14,000 fanams borrowed from you at the rate of 4 1/2 Vadippens for 100 fanams and of 150 Vadippens of paddy for 150 fanams, the Government revenue of the said properties, you shall from this day take possession of and hold properties Nos. 1 to 15 and appropriate interest after paying Government revenue and surrender the properties, together with the title-deeds on payment of your mortgage amount. It is further hereby agreed that we all shall neither jointly nor any of us severally raise any amount either by hypothecating the jemn right over properties Nos. 1 to 15 which have been made over to your possession or over and above the existing encumbrance on properties Nos. 16 to 20 till your mortgage claim is paid off. If this stipulation is violated, such amount will be paid by us personally. It will not, on the other hand, be charged on the jemn right over these properties, and it will be no hindrance to the realization of your mortgage amount from these properties as well as other properties of ours."

The plaintiff had recovered certain sums on account of rent accrued due under pattiachits relating to part of the mortgage premises, and on this ground the Subordinate Judge held, with reference to Gurusamy v. Chinna Mannar (1), that his remedies were exhausted and accordingly dismissed the suit.

The plaintiff preferred this appeal.

The further facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court.

Sankaran Nayar, for appellant.
Sankara Menon, for respondents Nos. 5, 6 and 8.

JUDGMENT.

In 1878 the then karnaven of defendants’ tarwad and the anandravens, including defendants Nos. 1 to 5 and 8, borrowed Rs. 4,000, from

(1) 5 M. 37.
plaintiff and executed a mortgage-deed (Exhibit A), mortgaging with pos-
session items 1 to 15 of the plaint lands and hypothecating items 16 to 20. 
As to the fifteen items the mortgage purports to be a usufructuary mortgage, the surplus income after payment of Government revenue to be 
taken by plaintiff as interest. Actual possession of items 1 to 15 was not, 
[337] however, given to plaintiff, as they were under mortgage to a third 
party, but the karnaves and two of the anandravens executed a pattam-
chit on the date of the mortgage agreeing to rent the lands from plaintiff. 
Plaintiff sued the executants of the pattamchit in original suit No. 308 of 
1881, Nadunganad District Munsil’s Court, for the rent for the years 
1054, 1055 and 1056 and obtained a decree. He again sued for the rent 
for the years 1057 and 1058 in original suit No. 445 of 1883 in the same 
Court, and also for possession of the lands demised, and obtained a decree 
in execution of which he subsequently obtained possession of items 1 to 
15. In execution of the decree in original suit No. 308 of 1881 plaintiff 
causedit be attached certain of the tarwad properties. Present defendants 
Nos. 4, 5 and 8 presented a claim petition which was allowed and the 
attachment dissolved.

Plaintiff then filed original suit No. 146 of 1886 in the same Court 
for a declaration that the lands which had been attached were liable to 
be sold in execution of the decree in original suit No. 308 of 1881. That 
suit was dismissed on the ground that the defendants in original suit 
No. 308 of 1881 had not been impleaded as representing the tarwad, and 
therefore, according to the decision of the Full Bench in Ittiachan v. 
Velappan (1), the tarwad property could not be made liable for the decree. 
Plaintiff now sues for recovery of the principal and interest up to the time 
when he recovered possession of the lands, items 1 to 15, by sale of the 
mortgaged properties and from defendants personally. The Lower Court 
has dismissed plaintiff’s suit for the principal of the mortgage on the 
ground that the mortgage is a usufructuary mortgage, and therefore a 
suit for recovery of the mortgage-debt or for sale of the mortgaged 
property will not lie, there being no covenant for payment of the debt. 
He also disallows the claim for interest on the ground that plaintiff 
having sued for it in the form of rent in original suits Nos. 308 of 1881 
and 445 of 1883 has exhausted his remedy and cannot sue again for it as 
interest. Plaintiff appeals.

The mortgage-deed was executed before the Transfer of Property Act 
came into force, and therefore by Section 2 (c) of that Act its provisions 
do not affect the rights or liabilities of the parties to the mortgage or the 
relief in respect of such rights or liabilities. [338] But it is argued 
for respondents that the law as to usufructuary mortgages was the same 
before the Transfer of Property Act as is laid down by that Act. This 
question has never been decided by this Court, and is by no means free 
from doubt. But we do not think it necessary to decide it in this case, as 
we are of opinion that the mortgage cannot be treated so far as the rights 
and liabilities of the mortgagors and mortgagee under it are concerned as a 
usufructuary mortgage. As to items 16 to 20 it is only a hypothecation, 
and as to these items therefore there is nothing to prevent plaintiff from 
suing for the mortgage-debt or for sale of the mortgaged property. 
But he cannot split the mortgage, and it follows, we think, that, in order 
that he may obtain his legal rights over the hypothecated items he must be 
allowed to bring the whole property to sale. He would at least be entitled

(1) 8 M. 484 (188).

942
under his hypothecation to a decree for the mortgage-debt, and for the above reason, we think he is also entitled to a decree for enforcing the same by sale of the mortgaged property.

As to the reasons given by the Lower Court for disallowing the interest claimed, we think they also are unsound. The suits 308 of 1881 and 443 of 1882 were suits against the executants of the pattamchit for recovery of rent and possession. The defendants in these suits were not sued as representing the tarwad and therefore, as decided in original suit No. 146 of 1886, the decrees in these suits could not be executed against the tarwad property. The present suit is against the tarwad on the mortgage. The cause of action is not the same as that in the former suits, and therefore the decision in Gurusami v. Chinna Mannar (1) relied on by the Subordinate Judge does not apply. The obligation sought to be enforced in this suit is not the same obligation as that which was the foundation of the former suits. Neither is the decision in Ittiachan v. Velappan (2) quoted here in point. That case, which was the authority on which original suit No. 146 of 1886 was decided, only decides that a decree against a karnaven and some members of a tarwad in a suit in which they were not impleaded in a representative character cannot be executed against the tarwad property. There is no question in the present suit of executing a decree obtained against individual members of the tarwad against tarwad property, but of enforcing a mortgage [339] against the mortgagees and the mortgaged property. On the other hand, Govinda v. Mana Vikraman (3) is a direct authority for giving plaintiff the relief claimed in this suit. The decree of the Lower Court is reversed, and there will be a decree for plaintiff for recovery of the amount claimed from defendants Nos. 1 to 5 and 7 and 8 personally and by sale of the mortgaged property.

Appellant is entitled to his costs in this and the Lower Court.

16 M. 339.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

AMUTHU (Defendant), Appellant v. MUTHAYYA (Plaintiff), Respondent.* [15th November and 23rd December, 1892.]

Limitation—Account settled but not signed—Oral promise by debtor to pay balance—Commencement of limitation.

The plaintiff and the defendant, who was his agent, examined the account between them on 13th July 1887 and a balance was found due by defendant, who orally promised to pay it in one month. The account was not signed. The plaintiff sued on 10th July 1890 to recover the amount, and it appeared that the last item in the account to the debit of the defendant was dated 28th May 1887.

Held, that the suit was barred by limitation.


SECOND appeal against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 194 of 1891, confirming the decree of V. Narayana Rau, District Munsif of Negapatam, in original suit No. 219 of 1890.

* Second Appeal No. 1906 of 1891.

(1) 5 M. 37.
(2) 8 M. 484 (486).
(3) 14 M. 284.
Suit filed on 10th July 1890 for money due on a settlement of account between plaintiff and defendant. The plaintiff employed the defendant as captain of a vessel, and kept a running account with him. The account, in which the last entry to debit of the defendant was dated 28th May 1887, was examined on 13th July 1887, and it was ascertained that a balance of Rs. 642-5-6 was due thereon by the defendant to the plaintiff. The plaint alleged that the defendant orally promised to pay this amount in one month, and the date of the accrual of the cause of action was 13th July 1887. The defendant raised the plea of limitation.

[340] The District Munsif passed a decree as prayed. On appeal the District Judge referred to Dukhi Sahu v. Mahomed Bikhu (1), but held that that authority was not applicable to the present case. He said: "Had the defendant in this case merely admitted the correctness of the account, that case would apply to this; but here not only the allegation, "but the proof by plaintiff’s witness was that the defendant made an express promise to pay the balance, and that being so, a new contract "was thereby entered into, and taking either the date thereof or its breach "as the starting point of limitation, this suit was brought within three "years and was therefore in time."

He accordingly confirmed the decree of the District Munsif. The defendant preferred this second appeal.

Bhashyam Ayyangar and Seshachariar, for appellant.

Besides the case mentioned in the judgment, Hirada Karibasappah v. Gadigi Muddappa (2) was referred to on the part of the appellant.

Rama Rau, for respondent, supported the judgment on the grounds stated by the District Judge.

JUDGMENT.

It has been found that there was a settlement of accounts between plaintiff and defendant on 13th July 1887, and that defendant promised to pay Rs. 642-5-6, the balance struck, with interest at 12 per cent. per annum, within one month. The suit was instituted on the 10th July 1890. The question is whether the promise to pay amounted to a new contract. On behalf of the defendant-appellant it is argued that the agreement was void as made without consideration.

The learned Judge appears to have misapprehended the remarks of Garth, O.C.J., in Dukhi Sahu v. Mahomed Bikhu (1). An account stated is only a substantive cause of suit in itself when it is in writing signed by the defendant or his agent duly authorized in this behalf. As remarked by the learned Chief Justice, a promise to take a debt out of the operation of the Limitation Act must be in writing. The promise in the present case was only oral and amounted to no more than an admission of the debt due. It is, however, argued for the respondent that the giving a month’s time amounted to consideration. No case has been cited in support of this contention, nor do we think it can prevail. The [341] transaction did not amount to a new contract extinguishing the old cause of action. If the defendant had given a promissory note for the amount found due, it would have been different, but a mere oral promise to pay is not sufficient to take the case out of the statute. The decrees of the Lower Courts must be reversed and the suit dismissed with costs throughout.

---

(1) 10 O. 294 (396).
(2) 6 M.H.C.R. 197.
VENKATASAMI v. KRISTAYYA

16 M. 341 = 3 M.L.J. 169.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hundle.

VENKATASAMI (Defendant), Appellant v. KRISTAYYA (Plaintiff),
Respondent.* [2nd and 21st February, 1893.]

Registration Act—Act 111 of 1877, Sections 36, 72 to 77—Compulsory registration—Suit to compel registration.

The plaintiff and defendant agreed that, in consideration of a sum of money already paid and of a further sum to be paid on the completion of the transaction, the defendant should transfer a certain mortgage to the plaintiff, and an instrument of transfer was prepared and executed to give effect to that agreement, but it was not registered. The plaintiff now sued for a decree compelling the defendant to execute and register that or a similar instrument:

Held, that the plaintiff was not entitled to a decree for compulsory registration, and should have proceeded under Registration Act, Sections 36, 72 to 77.

[Dist., 12 C.L.J. 461; 8 Ind. Cas. 794 (795); F., 6 M.L.J. 263; D., 20 M. 19; 20 M. 250; 16 Ind. Cas. 483 (484) = 12 M.L.T. 301.]

SECOND appeal against the decree of H. G. Joseph, Acting District Judge of Ganjam, in appeal suit No. 141 of 1891, affirming the decree of K. Ramalinga Sastri, District Munsif of Chicocone, in original suit No. 29 of 1891.

The plaintiff alleged that it had been agreed between him and the defendant that the defendant, for consideration received and a further sum to be paid when the transfer should be completed, should transfer to him a mortgage deed executed to the defendant by certain persons on 18th August 1887; it was further alleged that a deed of transfer had been prepared accordingly, but not registered; and he now prayed for a decree directing the execution and registration of a deed of transfer, to effectuate the above agreement. The defendant pleaded that the plaintiff had failed to carry out his part of the contract.

[342] The District Munsif passed a decree that the defendant do execute and register a deed of transfer and that the plaintiff do pay to the defendant the consideration remaining unpaid. This decree was confirmed on appeal by the District Judge, and the defendant preferred this second appeal.

Srirangachariar, for appellee.
Seshagiri Ayyar, for respondent.

JUDGMENT.

The relief asked for in the plaint is a direction "that the deed of transfer (Exhibit A) or any other document that may be caused by the Court to be written by defendant in the manner the Court thinks proper" be registered by him and handed over to plaintiff. There is also a prayer for delivery of possession of the lands, the mortgage of which is the subject of the transfer deed (Exhibit A). The Lower Courts have refused this latter relief, but have given plaintiff a decree directing defendant to execute a fresh transfer deed to plaintiff on the terms of Exhibit A at his own expense and present it for registration and on his part do all that is necessary to get it duly registered.

The question is whether plaintiff is entitled to that relief or any other relief in this suit.

* Second Appeal No. 661 of 1892.
The first prayer of the plaintiff, viz., for compulsory registration of the document A, clearly cannot be complied with. We agree with the decision of the Calcutta High Court in Edwon v. Mahomed Siddik (1), approved of in Kunimmu v. Viygathamman (2), that independently of the provisions of Section 77 of the Registration Act, no suit to compel registration of a document will lie, and dissent from that of the Allahabad High Court reported in Ram Ghulam v. Chotey Lal (3), which is practically overruled by Bhagwan Singh v. Khuda Bakhsh (4). One fatal objection to such a suit is that the document sought to be registered cannot, except under the special provisions of Section 77, be received in evidence, and therefore the Court cannot ascertain that there is a document requiring registration. Another objection is that by Section 23 of the Registration Act, subject to the provisions of Sections 24, and 25 and 26, no document other than a will shall be accepted for registration unless presented for that purpose within four months from date of execution. Unless, therefore, the decree compelling registration were passed within four months from the date of execution of the document, or at least within the additional four months to which the Registrar may extend the time, the decree of the Court would be a nullity, for the registering officer could not be compelled to do that which the law forbids him to do. Moreover, we think that such a suit will not lie upon the general principle that, when a statute creates a right or an obligation and provides a method of enforcing it, that method, and not the remedy at common law, must be followed.

The District Judge is in error in supposing that in the present case no action under the Registration Act could have been taken by plaintiff. He seems to have omitted to notice that documents can be presented for registration not only by the executants, but also by any person claiming under the document. Plaintiff, therefore, who had possession of the document within the time allowed for registration, could have presented it for registration and obtained a summons for defendant's appearance under Section 36. If defendant had appeared and admitted execution, the document would have been registered. If he had appeared and denied execution, registration would have been refused and plaintiff would have been entitled to an inquiry before the Registrar under Sections 73 to 76. If defendant did not appear, plaintiff might have proved execution of the document, and on such proof would have been entitled to registration. If the registering officer was not satisfied with his evidence of execution and refused to register, an appeal would have lain to the Registrar under Section 72. If the decision of the Registrar under Section 72 or 76 had been adverse to plaintiff, he would have had a remedy by suit under Section 77 of the Act. Plaintiff had therefore a complete remedy under the Act, and not having chosen to follow it, has only himself to blame that the efficacy of the document has not been completed by registration.

There remains the question whether plaintiff can have a decree such as the Lower Courts have given him for execution and registration of another document. In our opinion he is entitled to no such relief. The fallacy of the Lower Courts consists in treating the document (Exhibit A) as evidencing merely an agreement to transfer the mortgage, whereas it purports to be an operative transfer of the mortgage. If it had been merely an agreement to transfer contemplating a future formal deed of transfer [344] it would not have required registration, Section 17 (h). The agreement to transfer the mortgage was so far carried out that the

---

(1) 9 C. 150.  (2) 7 M. 535.  (3) 2 A. 48.  (4) 3 A. 297.
dood of transfer was executed and no suit will lie to compel defendant to do that which he has already done. The only act wanting on his part to complete the contract was to register the deed of transfer, and this act, as we have shown, he could only be compelled to do by the proper proceeding under the Registration Act, followed by suit under Section 77, if plaintiff failed to obtain his rights by such proceedings.

We must reverse the decrees of the Courts below and dismiss the suit throughout, but without costs, as it has been found that defendant was not justified in his refusal to register the document.


APPELLATE CIVIL.

Before Mr. Justice Mullusami Ayyar and Mr. Justice Best.

KASI DOSS (Plaintiff) vs. KASSIM SAIT (Defendant).[*]

[2nd and 5th May, 1892.]

Civil Procedure Code - Act XIV of 1852, Section 413 - Defence of minority - Procedure on trial of preliminary issue.

When minority is pleaded as defence to an action, a guardian should be appointed for the defendant and a preliminary issue should be framed and tried as to whether defendant is or is not a minor.

CASE referred for the decision of the High Court by P. Srinivasa Rau, Second Judge of the Court of Small Causes, Madras, under Civil Procedure Code, Section 617, and Presidency Small Cause Courts Act, Section 69.

The case was stated as follows:

"In this suit the plaintiff sues for Rs. 550 as being the principal and interest due upon a promissory note alleged to have been executed to him by the defendant at Madras on the 5th May 1890.

"Mr. King, Attorney-at-law, appearing under a vakalatnamah granted to his firm by defendant, stated that the defendant [345] was a minor, and requested that a guardian might be appointed for him. Mr. Branson, the plaintiff's attorney, stated that the defendant was not a minor, and objected to the appointment of a guardian, unless the fact of his minority was first proved. I held that this contention was correct under Section 443 of the Code of Civil Procedure.

"Then Mr. King requested that an issue might be framed for proof of defendant's minority. Mr. Branson objected to the framing of an issue at this early stage.

"I think the objection is valid. If an issue be framed, the Court would be obliged to receive evidence on both sides and record a finding upon the question of defendant's minority, a course which would be quite irregular, as the defendant, who is said to be a minor, cannot be considered to be properly represented in the suit until a guardian is appointed for him; and there would, therefore, be no person legally capable of joining issue with the plaintiff. Moreover no defence can be put in until a guardian is appointed for the minor defendant under Section 443 of the Code of Civil Procedure; and the framing of an issue before the defence is advanced is nowhere sanctioned in the Code.

"It is provided in Section 443 of the Code that the Court should be satisfied of the fact of his (defendant's) minority; but the procedure to
be adopted for the production of evidence is not prescribed. The proper
"course, I think, to be pursued under the circumstances is to adopt the
"provision made in Section 456 for the verification of facts by means of
"affidavits. It is true that this section applies to the appointment of a
"guardian, and not to the question of minority itself; but I think that
"the application for the appointment of a guardian necessarily involves
"the fact of minority also. If this is so, affidavits will have to be put in
"by the defendant himself if he is sufficiently old to take an oath, and
"also by the would-be guardian, and such others as may be deemed
"necessary, subject to the provisions contained in Chapter XVI of the
"Code on affidavits; and then the question of the appointment of a
"guardian, as well as that of defendant's minority, so far as it may
"concern the appointment of a guardian, would be summarily decided,
"and the further progress of the suit would abide by the result of such
"decision.

[346] "As the subject is not altogether free from doubt, and as the
"suit is for a sum above Rs. 500, the defendant's attorney requires that
"I should state a case for the opinion of the High Court, and I respect-
"fully submit the following question accordingly:

"Whether an issue can be framed for proof of defendant's minority
"before the appointment of a guardian and before the defence is put in;
"or whether the evidence of minority, so far as may be necessary for the
"appointment of a guardian, should be confined to affidavits."

Plaintiff was not represented.

Mr. R.F. Grant, for defendant.

JUDGMENT.

A minor cannot be treated as if he was of full age during the investi-
gation of any material averment in a suit. He must always be represented
by a guardian, and no order made without his being so represented is valid,
under Section 444 of the Code of Civil Procedure. The general rule is
that though a minor may appear by an attorney or pleader, he can only
plead or conduct the defence by his guardian. Section 443 is taken from
Rule 11 of the Calcutta High Court, dated 10th June 1874, the words 'on
being satisfied of the fact of his minority' being added (1). The apparent
intention is not to treat one who alleges that he is a minor as not being a
minor and thereby to ignore the general principle that a minor cannot
act for himself, but to indicate that a finding that he is really a minor is
necessary to the appointment of a guardian for the suit and to act on
his behalf generally in the conduct of the case. No sufficient reason appears
from the letter of reference for trying the question of minority, which is
as material as any other question in the suit, by affidavits instead of in the
regular way. We are of opinion that on minority being alleged and
denied, a guardian should be appointed for the purposes of the inquiry
contemplated by Section 443; that a preliminary issue should be recorded
raising the question whether or no the defendant is a minor; that it should
be tried and adjudicated upon in the same way in which any other
material issue is tried and decided; that if the defendant is found to be
a minor, a guardian for the suit should be appointed for him; and that if
he is found not to be a minor, the guardian appointed for [347] the inquiry
indicated by Section 443 should cease to act, the defendant conducting his
own case.

Wilson and King, Attorneys for defendant.

(1) See Belchamber, 570.
QUEEN-EMPRESS v. KONDA

16 M. 347 = 3 M.L.J. 180 = 1 Weir 672.

APPELLATE CRIMINAL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and
Mr. Justice Shephard.

QUEEN-EMPRESS v. KONDA.* [1st and 3rd March, 1893.]

Criminal breach of Contract—Act XIII of 1859, Section 2—Limitation of civil
claim—Order by the Magistrate for repayment of advances.

In a prosecution for breach of contract under Act XIII of 1859, it appeared
that the complainant had advanced certain sums of money to the accused, but
that a suit to recover the same was barred by limitation; and the Magistrate
thereupon dismissed the charge:

Held, that there was no reason why the Magistrate should not have ordered
repayment to be made by the accused under Section 2.

CASE referred for the orders of the High Court under Criminal Pro-
cedure Code, Sections 435 and 438, by J.D. Rees, District Magistrate of
Nilgiris.

The case was stated as follows:

"On the 13th April 1888 one Konda received an advance of Rs. 10
"from the complainant, Tanor A. maistry, and agreed in writing to work
"with one cooly on the Guindy Estate in the Ochterlony Valley from 1st
"August 1888 to 31st March 1889, and it was further agreed that, in case
"of default in the due performance of the contract, the advancee should
"continue to work after the expiry of the term for as many days as he or
"his cooly should have neglected to work during the prescribed term.

"The complaint in the case was filed before the Lower Court on 4th
"October 1892, i.e., more than three years after the expiry of the contract
"period. The Sub-Magistrate gives the following reasons for dismissing
"the complaint under Section 203, Criminal Procedure Code.

[348] "It is now more than four years that the advance was paid,
"and principal term of the contract expired some three years ago. There
"seems to be no limitation prescribed for proceedings to be taken under
"Act XIII of 1859 which is a quasi criminal and quasi civil law. The
"contract was, however, to do plantation work for eight months, such
"period to commence apparently at or within a reasonable time after the
"date of contract, and it is now more than four years that the advance
"was paid. I do not, therefore, think it desirable to take further criminal
"proceedings in the case, as a suit for the recovery of the advance, even
"in a Civil Court, is barred by limitation.

"The accused has, no doubt, agreed to continue to work after 31st
"March 1889 for as many days after the said date as he shall have made
"default in the due performance of his contract, but such work should
"be in continuation of work commenced apparently at or within a rea-
"sonable period after the date of contract as observed above.

"The clause 'to continue to work, &c.,' seems to have been inserted
"only with the view that criminal action can be taken at any future
time. The Contract Act is already of a stringent nature, and to enforce
"a contract after a lapse of a long time, and perhaps at any time within
"the last living day of the accused, could not have been the intention of
"the legislature.

"In criminal revision cases Nos. 773 of 1883 and 183 of 1884 it
"was laid down by the High Court that no action would lie under

* Criminal Revision Cases Nos. 715 to 718 of 1892.
1893 MARCH 3. 16 M. 347 = 3 M.L.J. 180 = 1 Weir 672.

"Act XIII of 1859 in cases where the specified period of contract had expired.

"It was probably with a view to evade the principles thus enunciated that the form of contract in the case now under reference which is widely used throughout this district was drawn up. The contract in question binds the advances to continue to work for as many days after the expiration of the original term of contract as they shall have failed to work upon during the prescribed period. A test case was submitted to the High Court in 1894, and in criminal revision case No. 551 of 1884 it was ruled that the additional stipulation thus introduced was a legal one and could be enforced.

"Although the High Court has determined in Kittu in re (1) [349] that the law of limitation does not apply to Act XIII of 1859 any more than it does to any other penal statute, yet in view of the fact that in the case now under reference the remedy sought for is against the person and not the pocket of the advances, and that it would appear that there is nothing in contracts of the sort now under reference to prevent criminal action being taken against advances, after the lapse of many years from the date of the execution of the contract, and that too, even though the contract may have been performed almost in its entirety, I venture to bring the present case to the notice of the High Court.

"The present case is by no means an isolated one. I submit the records of three other cases (Nos. 37, 92 and 93 of 1892) on the file of the same Magistrate which have been dismissed on similar grounds and to which my attention has been called by the Sub-Divisional Magistrate.

"I think the order of dismissal was equitable, but doubt if it is legal.

The Acting Government Pleader and Public Prosecutor (Subramanya Ayyar) in support of reference.

JUDGMENT.

In these cases the Magistrate dismissed the charge laid under Section 2 of Act XIII of 1859 on the ground that the term for which the contract between the parties had been made had expired. In our opinion this affords no reason why the Magistrate should not have adopted the alternative course provided in Section 2, and have directed the accused to repay the money advanced or such part thereof as might seem to the Magistrate just. The mere fact that the advance was made so long ago that the money could not be recovered by action is in our judgment no sufficient ground for refusing altogether to give effect to the penal provision of the Act.

In cases in which there has been great or unexplained delay on the part of the complainant, the Magistrate can use his discretion as to the amount which he may direct to be awarded. The orders of dismissal are set aside and the Magistrate directed to proceed according to law.

(1) 11 M. 392.

950
SANGILI v. MOOKAN

16 M. 850 = 3 M.L.J. 137.

[350] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SANGILI AND OTHERS (Defendants), Appellants v. MOOKAN (Plaintiff), Respondent. [7th, 8th and 18th November, 1892.]

Civil Procedure Code—Act XIV of 1882, Section 392—Reference to a commissioner—Local inquiry.

The local investigation referred to in Civil Procedure Code, Section 392, presupposes the existence on the record of independent evidence which requires to be elucidated and that section does not authorize a Court to delegate to a commissioner the trial of any material issue which it is bound to try.

[R., 35 M. 239 (343) = 10 Ind. Cas. 697 = 21 M.L.J. 210 = 9 M.I.T. 421 = (1911) M.W. N. 223; 6 C.L.J. 71 = 11 C.W. N. 733 = 8 Ind. Cas. 504; D., 21 M. 958.]

APPEAL against the decree of H. H. O’Farrell, District Judge of Trichinopoly, in original suit No. 32 of 1887.

Suit for partition of family property which was described in the plaint. The defendants pleaded that the plaintiff had been adopted by one Tayumuthu and consequently was not entitled to share in the family property. The first issue framed on this plea was decided in favour of the plaintiff. Other issues were framed as follows:

"Whether all plaint properties are family properties?"

"Whether the plaint-mentioned moveable properties are in existence, and, if so, what is their value?"

"Whether the debts enumerated in the plaint are due to the family?"

"Whether plaintiff is in possession of any immoveables, and, if so, what is their value?"

The District Judge made an order as follows:

"I think it is necessary, before going into the evidence on the other issues in order to save a tedious enquiry, to appoint a commissioner under Section 392, Civil Procedure Code, to proceed to the spot and make a local investigation with regard to the items of family property which are said by the defendants not to be in their possession and report whether they are or are not in the defendants' possession."

The District Judge passed a decree in accordance with the report of the commissioner.

The defendant preferred this appeal.

Bhashyam Ayyar, and Krishnasami Ayyar, for appellants.

Subramanya Ayyar, Sundara Ayyar, and Rajagopala Ayyar, for respondent.

JUDGMENT.

The first point taken in appeal is as to the alleged adoption of the plaintiff by his aunt Tayumuthu. As to this we agree with the District Judge that the evidence adduced to prove the adoption is altogether unreliable. Tayumuthu was not called as a witness. According to first defendant's own evidence, she had been a widow five or six years at the date of the alleged adoption. It is not explained why she should have delayed so long if she really wished to adopt a son to her late husband, and not a single question was put to show that the lady had any...
authority to make an adoption either from her late husband or from his sapindas. The only witness for defendants not of the Kollar caste, the kurnam, fifth witness, deposed that the plaintiff had lived with his father till he was turned out of the house on account of his marriage, and we agree with the District Judge that this was the true cause of the quarrel between father and son.

The next point urged is that the District Judge was in error in deputing to the commissioner the inquiry as to what items of property were in possession of the defendants and their title thereto. It is pointed out that the Judge virtually transferred the trial of every issue except the first issue to a commissioner, thus investing him with much larger powers than can be legally delegated under Section 392 of the Code of Civil Procedure. On this point we are constrained to hold that the objection must prevail. We are of opinion that "a local investigation requisite for the purpose of elucidating any matter in dispute" presupposes the existence of some independent evidence on record which requires to be elucidated, and that a Court is not at liberty under Section 392 to delegate to a commissioner the trial of any material issue which it is bound to try. This was the view taken by another Bench of this Court in Narasimharao v. Suriya [352] narayana (1), and is in accordance with the view taken by the High Court of Calcutta in Iswarchandra Das v. Jugal Kishor Chuckerbutty (2); see also Bindabun Chunder Sirkar Chowdhry v. Nobin Chunder Biswas (3) and Buruda Churn Bose v. Ajoodyhia Ram Khan (4). Earlier cases have been quoted, which go to show that evidence taken by a commissioner may legally be treated as evidence; but in the case before us no evidence was taken by the Judge before the issue of the commission on any issue except the first. We are of opinion that Section 392 does not authorize the wholesale delegation of these important issues for investigation to the commissioner, and that the local investigation contemplated by that section has reference to questions relating to the identification of lands, their physical features, market value, and estimate of profits, but not to question of title to, and possession of, the lands themselves.

We must, therefore, set aside the decision of the District Judge upon these issues and remand the case in order that they may be properly determined. In so doing we may point out that the issues themselves require amendment, and that fresh issues should be framed as to the different plaint items so as to leave the parties no room for misconception as to the burden of proof. With regard to items which are admitted to be family property, the only question can be as to plaintiff's proportionate share. Other items are claimed as belonging to the family, the possession and existence of which first defendant denies. As to these the burden would be on plaintiff. Then again there are properties of which first defendant admits the possession, but alleges to be self-acquired. As to these the onus is on him. Proper issues have to be framed with reference to the allegations in the written statement. The plaintiff must prove subsisting outstanding debts due to the family, and we observe that it is alleged one debt due to the family has been discharged.

We observe also that the Judge decreed partition in jewels of the value of Rs. 150 merely on the ground that first defendant's wives were wearing some of that value. That reason is manifestly insufficient when the jewels worn by the ladies are alleged to be their stridhanam.

---

(1) Second Appeal No. 1149 of 1887, unreported.  
(2) 4 B. L.R. App. 33.  
(3) 17 W.R. 292.  
(4) 23 W.R. 286.
The District Judge has made no provision for debts due by the family. It is admitted on both sides that he was also in error in decreeing mesne profits for six years before suit when only mesne profits from date of suit were prayed for in the plaint.

With reference to civil miscellaneous petition No. 170 of 1892, we are of opinion that the proportionate share to be decreed to plaintiff must be that to which he is entitled on the date of the final decree. No final decree has yet been passed, since no issue except the first has been tried. As the father has died during the pendency of these proceedings, the plaintiff is apparently at the present moment entitled to one-fourth share. We must set aside the decrees of the Court below in both appeals and remand the suit in order that the District Judge may frame and try fresh issues and after recording findings on them pass a fresh decree for partition. The costs hitherto incurred will be provided for in the final decree.

16 M. 353 = 3 M.L.J. 139.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

RATHNAM (Defendant), Appellant v. SIVASUBRAMANIA (Supplemental Plaintiff), Respondent.  
[18th November and 23rd December, 1892.]

Hindu Law—Legacy by an undivided father of a Hindu family—Babu quest for religious purposes.

A Hindu made his will, whereby he bequeathed Rs. 600 to supply a silver image for a pagoda, and died leaving the defendant, his undivided adopted son, him surviving. He was not shown to have been possessed of any separate property. In a suit by the trustee of the pagoda to recover the above amount: Held, that the legacy was not binding on the defendant.

SECOND appeal against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in appeal suit No. 161 of 1889, confirming the decree of M. A. Tirumalachariar, District Munsif of Kuliteale, in original suit No. 10 of 1889.

Suit brought by the manager and trustee of a Hindu pagoda to recover from the defendant a sum of Rs. 600 for a silver Vrishabhavahanam for the temple in accordance with the will left [354] by the adopted father of the defendant. The testator was not shown to have left any self-acquired property. The Lower Courts held that the legacy was valid and binding on the defendant and passed decrees accordingly.

Defendant preferred this second appeal.

Bhashyam Ayyangar and Ranga Ramanujachariar, for appellant. 
Parthasaradhi Ayyangar, for respondent.

JUDGMENT.

WILKINSON, J.—It is contended that the Lower Courts erred in giving plaintiff relief on grounds not alleged in the plaint. The Lower Courts have decided that the defendant, the adopted son of one Narayanasami Ayyar, is bound to pay to plaintiff Rs. 600 bequeathed by the deceased Narayanasami Ayyar in his will for a silver Vrishabhavahanam. It appears from the plaint that the plaintiff rested his case on two grounds—the

* Second Appeal No. 396 of 1892.
direction in the will and the liability of the deceased to repay a loan. The latter cause of action, however, was relinquished and the plaintiff relied on the bequest alone.

It is then contended that the legacy is void and that the defendant is not bound to carry out the promise made by his father. The District Judge upheld the legacy on the ground that it was a gift to religious uses which the son can be compelled to carry out. There is no Madras case in support of this contention. So long ago as 1874 it was decided (Villa Butten v. Yamanamma (1)) that a member of an undivided family cannot bequeath even his own share of the joint property, because at the moment of death the right by survivorship is at conflict with the right by bequest, and the title by survivorship being the prior title, takes precedence to the exclusion of that by bequest. This principle has been recognised by the Privy Council—Suraj Bansi Koer v. Sheo Proshad Singh (2) and Lakshman Dada Naik v. Ramchandra Dada Naik (3). In the case of Baba v. Timma (4) it was decided by the Full Bench that a Hindu father, if unseparated, has not power, except for purposes warranted by special texts, to make a gift to a stranger of ancestral estate, moveable or immoveable. No special texts has been cited in support of the gift of a silver Vrishabhavahanam to a kovil. It certainly was not an indispensable act of duty, nor a gift through affection or [355] for support of the family or relief from distress, which are specified in the Mitakshara ch. (I, s. I s. 27) as gifts which a father has power to make. I am not prepared to say that the gift of Rs. 600 for a silver Vrishabhavahanam was a gift for a religious purpose. It is evident from the form of the plaint and from Exhibit B that the Rs. 600 had been received by the testator in the year Yuva on a promise to repay it in four months' time, and that the bequest was, in truth, made with the intention of repaying a barred debt.

The decrees of the Lower Courts must be reversed and the plaintiff's suit dismissed with costs throughout.

MUTTUSAMI AYYAR, J.—I am also of the same opinion. The averment in the plaint that the money sought to be recovered was a debt due by defendant's adoptive father has since been abandoned. The claim that it was a legacy to the temple is untenable. For the reasons and on the authorities mentioned by my learned colleague, the defendant's father had no testamentary power over family property common to himself and his adopted son for any purpose. The contention that the legacy can be treated as an executory gift made for religious uses is not tenable, inasmuch as the defendant's father had no testamentary power at all either to give legacies or make gifts out of joint property.

(1) 8 M.H.C.R. 6. (2) 86 I.A. 88. (3) 5 B. 49, (92). (4) 7 M. 357.
APPENDATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and
Mr. Justice Handley.

ABBU (Plaintiff), Appellant v. KUPPAMMAL (Defendant), Respondent.*

[15th and 21st December, 1892.]

Hindu Law—Request to a boy directed by the testator to be adopted by his widow—
Direction for the boy's maintenance—Rights of the legatee—No adoption having been
made.

A Hindu made his will whereby he provided that his property should be enjoyed
by his widow, who should maintain certain persons, including the plaintiff, whom
she was thereby directed to take in adoption, and added: 'my aforesaid wife
shall enjoy all my above-mentioned properties in every way as long as she may
be alive, and after her death the same shall be taken possession of by the
aforesaid adopted son.' The testator died, not having taken the plaintiff in
adoption, and his widow did not adopt him. In a suit by the plaintiff for main-
tenance and for the declaration of his title under the will:

Held, that all the provisions of the will relating to the plaintiff were intended
by the testator to come into effect only in the event the adoption being made,
and consequently that the plaintiff had no right to the family property or to
maintenance in the family.

[R., 9 C.W.N. 309.]

APPEAL against the judgment of WILKINSON, J., sitting on the
original side of the High Court in civil suit No. 327 of 1890.

Plaintiff sued for a declaration that he was entitled to certain
properties in reversion after the death of the defendant, who was the
widow of K. Narain Chetti deceased, and for a declaration that certain
aliensations of property made by her were not binding on him. He also
sought a decree for maintenance.

The plaintiff's claim was founded upon a will left by the defendant's
husband, of which the material portion was as follows:

"As I think that my death is approaching, therefore all the immove-
able and moveable properties, consisting of ancestral and self-acquired
jewels, &c., of gold, silver and precious stones, brass and wooden articles,
houses, gardens and lands, &c., which are my own shall be enjoyed in
every way by my wife Kuppamal, otherwise called Theroomaliammal,
herself. Besides, my aforesaid wife Kuppamal, otherwise called
Theroomaliammal, shall support and maintain these three persons,
"namely, my mother Audiammal, my younger aunt Tuliasiammal, and my
"younger sister Choodiammal's son Abbu Chetty, who is about 14 years
"old, so that they may not be in want of anything. Besides with regard
to taking in adoption the child named Abbu Chetty, my above-named
"younger sister's son, whom I have been bringing up, his father is not
"in this place at present, therefore my aforesaid wife shall, after his
"return, keep him by and take the aforesaid boy in adoption. Besides, my
"aforesaid wife shall enjoy all my above-mentioned properties in every way
"as long as she may be alive, and after her death the same shall be taken
"possession of by the aforesaid adopted son Abbu Chetty, with regard to
"the business of broker in pearls and corals, which has been carried on
"in my family from generation to generation and which has been carried
"on by me also, a person in whom my wife may have confidence shall,

*Appeal No. 13 of 1892.
" until the [357] aforesaid child attains proper age, be with the aforesaid child and conduct the aforesaid business in a respectable manner."

It appeared that the plaintiff, Abbu Chetti, had not been taken in adoption either by the testator or by the widow.

Balajee Rau, for plaintiff.

Ananda Charlu, for respondent.

WILKINSON, J.—The question in this case is as to the correct interpretation of a will. The plaintiff's case is that under the terms of the will he is entitled to maintenance and to succeed to the property of the deceased on the death of the widow, and is therefore, as presumptive heir, entitled to question the alienations made by the widow. On behalf of the defendants it is contended that the plaintiff has no locus standi, that his adoption is made a condition precedent to his title as heir, and that as he has not been adopted, he cannot question the alienations made by the defendant.

The plaintiff relies upon Jhivam Bhai v. Jhivu Bhai (1) in which it was held that if the language of the testator sufficiently indicates the person who is to be the object of his bounty, the person so indicated will not be prevented from taking, because the testator conceived him to possess a character which in point of law cannot be sustained. But that case has been virtually overruled by a decision of the Privy Council in the case of Panindra Deb Raikat v. Rajeswar Das (2). Their Lordships say: "We feel no difficulty about Rajeswar being sufficiently designated as the object of the gift. They think that the question is whether the mention of him as an adopted son is merely descriptive of the person to take under the gift, or whether the assumed fact of his adoption is not the reason and motive of the gift, and indeed a condition of it." After distinguishing the case of Nidhoomoni Debya v. Saroda Pershad Mookerjee (3), their Lordships say: "Their Lordships are of opinion that it was Jogendra's intention to give his property to Rajeswar as his adopted son, capable of inheriting by virtue of the adoption, and the rule that it is not essential to the validity of a devise or bequest that all the particulars of the subject or object of the gift should be accurate, is not applicable."

[358] I think these remarks are pertinent in the present case. The testator by his will devised all his property, moveable and immovable, to his wife to be "enjoyed by her in every way." He then directed her to support and maintain Appu Chetty (the plaintiff) and two others, and went on to intimate that he wished her to take Appu Chetty in adoption, and after specifying that his wife "shall enjoy all my properties in every way as long as she may be alive," directed that after her death it should be taken possession of by the aforesaid adopted son Appu Chetty. The intention of the testator clearly was that Appu Chetty should, if adopted, succeed to the property. He did not know at the time he made the will whether Appu Chetty's father, who was then absent, would consent to give his son in adoption, and he evidently did not intend that Appu Chetty should inherit all his property if not adopted. The persona designata is not Appu Chetty, but "the adopted son Appu Chetty." Until adoption, therefore, plaintiff has no locus standi under the will and cannot question the alienations made by the widow.

Nor do I think that, according to the true construction of the will, plaintiff has any right to be maintained by the defendant. It is argued that the bequest to defendant is subject to the condition that she should

---

(1) 2 M.H.C. R. 463.  (2) 11 C. 463.  (3) 3 I. A. 253.
maintain the plaintiff. I do not think so. If the testator had intended to make the bequest to defendant subject to the maintenance, he would have made provision for the devolution of the property in case his wife failed to carry out his directions. The question is one of intention to be gathered from the language of the will. The intention of the testator to bequeath the whole of his property to his wife for her life is unquestionable. I look upon the clause as to maintenance as the mere expression of a wish on the part of the testator that his wife should maintain certain persons. He wished her to adopt Appu Chetti, but can it be said that if Appu Chetty's father refused to give his son in adoption, it was the intention of the testator that defendant should continue to maintain Appu Chetty so long as she lived? I think not.

The plaintiff is not entitled to maintain the suit, which, therefore, fails and is dismissed with costs.

Plaintiff preferred this appeal.

Balajee Rau, for appellant.
Ananda Charlu and Varadayya, for respondent.

JUDGMENT.

[359] In our opinion the learned Judge in the Court below was right in holding that on the true construction of the will of K. Naraina Chetty the gift of his estate to plaintiff on the death of testator's widow was contingent on his being adopted by the widow, and that not having been so adopted, he cannot maintain this suit. The question in such cases is, as pointed out by the Judicial Committee in Panindra Deb Raihat v. Rajeswar Das (1), one of intention, and reading the whole will we have no doubt that the gift to plaintiff was made in contemplation of his adoption, and with the intention that he should take as the adopted son, and was, therefore, conditional on his being adopted. The arrangement made by the will is that after the return of plaintiff's natural father the widow shall take the boy in adoption, then that the widow shall enjoy the estate during her life and after her death "the same shall be taken possession of by the aforesaid adopted son." The adoption is an integral part of the arrangement, and, failing the adoption, the arrangement, so far as regards the designated adopted son, falls through. The case of Nidhoomoni Debjy v. Saroda Pershad Mookerjee (2) is distinguishable from the present case. There the testator declared that he had adopted the object of the gift, and it was held that the omission by the widows to perform certain ceremonies which might be essential to complete the validity of the adoption could not operate to invalidate the gift. Here there is a direction to adopt and a gift to the boy to be adopted, and it appears to us that the testator had no intention to give the estate to the boy irrespective of the adoption to be made by the widow in accordance with the direction. It is argued for appellant that the widow is put to her election and cannot take the estate for her life unless she adopts plaintiff. That question is not in issue in this suit. The only question here is whether plaintiff can sue as reversioner under the will on the death of the widow. Even if the argument as to election were well founded, it would not follow that because the widow could not take under the will, therefore plaintiff is entitled to maintain this suit. Whatever are the consequences of the widow's not complying with the direction in the will to adopt plaintiff, it is clear to our minds that plaintiff has no right under the will unless and until he is adopted. It

(1) 11 C. 463. (2) 3 I.A. 263.
is stated by respondent's vakil that one reason why plaintiff was not adopted was that his natural father would not give his consent. Of this there is no evidence before us, and we conceive that we are not concerned in this appeal with the reasons why the adoption has not been made. The fact remains that it has not been made, and that is a sufficient answer to plaintiff's claim to the estate under the will. Appellant's vakil states that plaintiff as sister's son of testator is his nearest heir. This is denied on the other side, and it is asserted that he is only the son of a distant female relative of testator. However this may be, and no evidence upon the point has been taken, the question is irrelevant in this suit. Plaintiff sues for a declaration of his title under the will, and, for the reasons given above, we hold he has no title.

Lastly it is argued for appellant that at least he is entitled under the will to maintenance, as the direction to maintain him does not refer to him as the adopted son. We think the arrangement made by the will as to plaintiff must be taken as a whole, and that the part relating to plaintiff's maintenance, equally with the other arrangements for his benefit, has reference to the adoption, and was intended by the testator to come into effect only in the event of the adoption being made. Not having been adopted, plaintiff has no more right to be maintained in the family during the widow's lifetime than he has to succeed to the estate after her death.

We confirm the decree of the Lower Court and dismiss this appeal with costs.

16 M. 361 = 3 M.I. J. 134.

[361] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and
Mr. Justice Handley.

NILAKANTA (Defendant), Appellant v. IMAMSAHIB AND ANOTHER
(Plaintiffs), Respondents.* [7th October and 11th November, 1892.]

Limitation Act—Act XV of 1877, Schedule II, Articles 62, 120—Suit by the purchaser in execution sale to recover the purchase money—Civil Procedure Code—Act XIV of 1882, Section 315—Saleable interest.

The plaintiff purchased land sold in execution of a decree in favour of the defendant, but was subsequently evicted by the son of the judgment-debtor, he now sued in 1889 to recover the purchase money paid by him, on the ground that the judgment-debtor possessed no saleable interest in the property in question. It appeared that the son of the judgment-debtor had obtained a decree in 1888 against the plaintiff and others declaring that he (the judgment-debtor) had no saleable interest in the property, and that in that suit the present defendant had given evidence in support of the present plaintiff's contention; the judgment in that suit was now admitted in evidence against the defendant:

Held, (1) that Limitation Act, Schedule II, Article 120 contained the rule of limitation applicable to the suit, which was accordingly not time-barred, since the cause of action did not arise until 1888;

(2) that the judgment above referred to was not evidence against the defendant;

(3) that the suit should be dismissed on the ground that there was no legal evidence, that the judgment-debtor whose interest in the land had been purchased by the plaintiff possessed no legal interest therein.

* Second Appeal No. 1828 of 1891.
SECOND appeal against the decree of S. Subbayan, Subordinate Judge of South Canara, in appeal suit No. 136 of 1890, modifying the decree of S. Raghunathabhaya, District Munsif of Karkal, in original suit No. 317 of 1889.

The plaint stated that the defendant, in execution of a decree obtained by him against one Subbamma in original suit No. 255 of 1882, brought to sale in execution the mortgage right alleged to belong to the judgment-debtor in two pieces of land which were purchased by the plaintiff on the 9th October 1882. The greater part of the first plaintiff's purchase money was paid to the defendant in satisfaction of his decree. The plaintiff now sued to recover this amount from the defendant on the ground that the judgment-debtor had at the time of the sale no saleable interest in the property in question. It appeared that the judgment-debtor's son, who was an infant at the time of the sale, subsequently obtained a decree in original suit No. 65 of 1887 on the file of the District Munsif of Udipi against the present plaintiff No. 1 and others, whereby the decree was set aside on the ground, inter alia, that his mother possessed no saleable interest in the land, and that possession had subsequently been recovered from the present plaintiff. The cause of action was stated in the plaint to have arisen on 4th February 1889, which was the date when the decree passed in the first mentioned suit by Subbamma's son was affirmed on appeal. The defendant raised the plea, inter alia, of limitation. In the Lower Court a copy of the judgment delivered in original suit No. 65 of 1887 was admitted in evidence for the plaintiff, and it appeared that the present defendant had given evidence in that suit supporting the allegations now made by the plaintiff. Both the Lower Courts overruled the plea of limitation and passed decrees in favour of the plaintiff, which differed merely in that that of the District Munsif allowed and that of the Subordinate Judge disallowed the plaintiff's claim to interest.

The defendant preferred this second appeal.

Pattabhirama Ayyar, for appellant.

Narayana Rao, for respondent No. 1.

JUDGMENT.

The first point taken in this second appeal is that the suit is barred by limitation. The argument for appellant (defendant) is that the cause of action arose at the time of the purchase by plaintiff in 1882, and therefore that the suit brought more than six years after that date is barred, whether the case is governed by Article 62 or Article 120 of the second schedule to the Limitation Act. In our opinion the lower Courts were right in holding that the cause of action arose at the date of the decree in original suit No. 65 of 1887, declaring that Subamma, the judgment-debtor, whose hypothecation right plaintiff purchased, had no saleable interest in the property. Plaintiff could not have brought the present suit prior to that decree, for until then he maintained that Subamma had a saleable interest. The present suit is really brought under Section 315 of the Code of Civil Procedure, which has been held to apply to suits—Pachayappan v. Narayana (1). No special period of limitation is fixed.

(1) 11 M. 269.

959
for such suits, and therefore Article 120 of the second schedule to the Limitation Act applies. The decree in original suit No. 65 of 1887 was in 1888, and therefore the suit brought in 1889 is not barred.

The next point taken on behalf of defendant in this appeal is that it had not been proved in this suit that Subbamma whose interest in the hypothecated property plaintiff purchased at the Court auction had no saleable interest. It is argued that the only evidence of this offered on behalf of plaintiff was Exhibit A, copy of the judgment in original suit No. 65 of 1887, and this is no evidence against present defendant, who was no party to that suit. We think this objection to the decree must prevail. The lower Courts have apparently admitted the copy of judgment (Exhibit A) as evidence against defendant, because as a witness he supported present plaintiff's contention in that suit, which the District Munsif holds makes him "constructively" a party to the suit. This is no good reason for treating a judgment in a suit, to which defendant was no party, as evidence against him of the truth of the matters it decides. The words in Section 315 of the Civil Procedure Code, "when it is found that the judgment-debtor had no saleable interest in the property, &c.," must, in our opinion, be taken to mean "when it is found in some proceeding by which the judgment-creditor is bound." To compel the judgment-creditor to refund the purchase money of property brought to sale in execution merely because in some proceeding between other parties a Court has decided that the judgment-debtor had no saleable interest would be contrary to all principles of justice. On the ground that it is not proved by any legal evidence in this case that the judgment-debtor, whose interest in the hypothecation plaintiff purchased, had no saleable interest therein, we think plaintiff's suit should be dismissed. The decrees of the Lower Courts are reversed and plaintiff's suit is dismissed with costs throughout.

The memorandum of objections is also dismissed with costs.

---

18 M. 364 = 3 M.L.J. 178 = 1 Weir 422.

[364] APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

QUEEN-EMPRESS v. RAMASAMI AND OTHERS.*

[30th November, 1892.]

Revenue Recovery Act—Act II of 1884 (Madras), Section 8—Removal of crop under attachment—Theft—Dishonest intention.

Certain crops which had been distrained for arrears of revenue were harvested and removed by the owners and occupiers of the land, who were thereupon charged with theft. The accused were not the defaulters, the demand having been made upon certain other persons in whose name the pattas stood as the registered proprietors. The accused were acquitted:

Held, that the acquittal was wrong in the absence of a finding whether or not the accused were aware of the distrainment, and dishonestly removed the crops with such knowledge.

Case referred for the orders of the High Court under Criminal Procedure Code, Section 438, by J. Thompson, District Magistrate of Chingleput.

The case was stated as follows:—

* Criminal Revision Case No. 506 of 1892.
I have the honour, under Section 438, Criminal Procedure Code, to submit the records in summary trial case No. 9 of 1893 on the file of the Deputy Magistrate, Trivellore division.

Musali Nayudu, Village Munsif of Nayanakkam village, complained to the Taluk Magistrate, Trivellore, that Ramasami Reddi, Marapa Reddi and Virasami Reddi removed the crops attached for arrears of revenue due on pattas Nos. 6 and 51 in the village, registered in the names of other individuals and thereby committed an offence punishable under Section 379, Indian Penal Code.

The Taluk Magistrate examined two witnesses for the prosecution, when the Deputy First-class Magistrate took the case on his file and tried it summarily under Section 260, Criminal Procedure Code.

The Deputy Magistrate found that the standing crop was attached and copy of the list of attached property given to the [365] pattadars, but held, on the authority of the ruling of the High Court in criminal revision case No. 321 of 1882, that the distress was not lawfully made, as neither the demand notice nor the list of attached property was given to the accused persons who occupied the land, and, in this view, discharged the accused persons under Section 253, Criminal Procedure Code.

In criminal revision case No. 321 of 1882 on the file of the High Court, the tenants of a defaulting shrotriemdar were charged with theft of crops distrained for arrears of revenue due to Government, and convicted by the Sheristadar-Magistrate of Guddur taluk. But the High Court quashed the conviction on the ground that there was no evidence to prove that a copy of the demand in writing was handed over to the accused, or that a list of the property distrained was endorsed thereon, with such particulars as are mentioned in Section 8 of Act II of 1864.

I beg to point out that Section 8 of Act II of 1864 only enjoins that copy of the demand in writing, with the prescribed endorsement, should be furnished to the defaulter, who is the registered proprietor of the land. It, therefore, seems that an omission to furnish copy of the demand or the list of attached property to the occupying tenant will not render an attachment illegal. Section 2 of Act II of 1864 provides that the products of the land shall be regarded as security for the public revenue.

I, therefore, consider that the finding of the Deputy Magistrate that the attachment in the present case was not lawfully made, and the order of discharge based thereon are not correct. The guilt of the accused in this case apparently turns on the question as to whether they had knowledge of the attachment when they removed the crops. The Deputy Magistrate has failed to record a finding on this point.

Gopalacharla, for the accused.

The acting Government Pleader and Public Prosecutor (Subramania Ayyar) for the Crown.

JUDGMENT.

In this case certain standing crop was distrained for arrears of revenue. The accused are the real owners of the land on which the crop had stood and the parties in possession. But the pattas stood in the names of others and the demand in writing and the list of distrained property prescribed by Act II of 1864 were given to them alone. The accused carried away the [366] crop and were charged with theft. Their defence was that they knew nothing of the distraint, that they cut and carried away their own crop, and that no one objected to their doing so. The Deputy Magistrate
acquitted the accused on the ground that no demand was served upon
them and that no list of distrained property was furnished to them. The
District Magistrate considers that as Section 8 of Act II of 1864 requires
the service of a demand in writing only on the defaulter and the delivery
of the list of distrained property only to him, the acquittal is wrong and
refers the case for the orders of this Court.

The Deputy Magistrate relied on the decision in criminal revision
case 321 of 1882, but that decision proceeds on the view that the demand
should be served on, and the list of attached property delivered to, the
tenant in possession. As pointed out by the District Magistrate, Section 8
refers only to the defaulter who is the pattadar or registered proprietor.

The Deputy Magistrate was, therefore, clearly in error in acquitting
the accused on the ground that notice of demand and a list of distrained
property should have been given to them.

There is no distinct finding as to whether they were in fact aware of
the distraint, and with such knowledge dishonestly removed the crop.
We must set aside the order of acquittal and direct a retrial.


APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

UPPI HAJI (Plaintiff), Appellant v. MAMMAVAN (Defendant No. 1),
Respondent.* [11th January, 1893].

Limitation Act—Act XV of 1877 Section 19—Acknowledgment of liability—Requirements of the section.

In a suit to redeem a kanom of 1805 the plaintiff set up in bar of limitation
an acknowledgment contained in the will of the deceased mortgagee, who thereby
devised to his son lands therein described as held by him on kanom. The
mortgagee’s name was not mentioned nor the date of the kanom, nor was there
any [387] further description of the land which, however, was admitted to be the
land in question in the suit:

Held, that the will constituted an acknowledgment under Section 19.

[R., A.W.N. (1908) 226.]

SECOND appeal against the decree of A. Thompson, District Judge
of North Malabar, in appeal suit No. 460 of 1891, reversing the decree of
A. Venkataramana Pai, District Munsif of Tellicherry, in original suit No.
96 of 1891.

The plaintiff sued to redeem a kanom of 1805-06. Defendant pleaded
that the suit was barred by limitation. To meet this plea, the plaintiff
filed the will of the mortgagee, dated in July 1833, whereby he devised to
his son lands "demised to me on kanom." There was no dispute as to
the identity of the land and the kanom mentioned in the will with the
land and kanom in question in the suit, but the name of the mortgagee
was not mentioned in the will, and also there was no further description
of the land. The District Munsif held that the passage in the will above
referred to constituted a good acknowledgment under Limitation Act,
Section 19. He accordingly passed a decree as prayed. The District Judge
on appeal, after referring to Padmanabhan Nambudri v. Kunhi Kolendan (1),

* Second Appeal No. 438 of 1892.
(1) 5 M.H.C.R. 320.
Narainra Tantri v. Ukkoma (1), Venkataramanayya v. Srinivasa (2), Mylapore Iyasawmy Vyapoorry Moodiayar v. Yeo Kay (3), held that the requirements of Section 19 were not satisfied, he thereupon dismissed the suit as barred by limitation.

The plaintiff preferred this second appeal.

Sankaran Nayar, for appellant.

Govinda Menon, for respondent.

JUDGMENT.

Rellying on Mylapore Iyasawmy Vyapoorry Moodiayar v. Yeo Kay (3) the Lower Appellate Court has held that the acknowledgment in Exhibit A is not sufficient to remove the bar of limitation. Exhibit A was a will executed by the mortgagee, the predecessor in title of the defendants. The testator thorin described the plaint lands as "demised to me on kanom." The question is whether this is such an acknowledgment of liability in respect of the property as to bring it within the requirements of Section 19 of the Limitation Act. There can be no doubt that it was an acknowledgment by the testator that he then held [368] the estate on kanom title. The defendant in this suit admitted that the mortgage of 1805 was true, but relied on the Act of Limitations. He failed to show that there was any other mortgage to which the acknowledgment of the testator could have referred. Under these circumstances the decision of the Munsif that the acknowledgment is sufficient must be upheld, unless we are prepared to hold that the absence of the name of the mortgagor and of the date of the mortgage are sufficient to deprive the acknowledgment of validity. Section 19 does not provide for the mention of the name of the mortgagor, but lays down that the acknowledgment is sufficient, though it omits to specify the exact nature of the right. Under the Act of 1871 an acknowledgment of the mortgagor's title or right of redemption was required, and if it had been the intention of the Legislature that the name of the mortgagor should appear, the alteration was unnecessary. On the contrary the intention of the Legislature appears to have been to adopt the principles laid down in the English cases, e.g., Stansfield v. Hobson (4) and Anon (5) decided by Sir J. Jekyll. As to the decision of the Privy Council on which the Judge relies, we observe that the admission made by Bennet on which the plaintiff relied had no reference to the title set up by the plaintiff in the suit, whereas in the present case the admission of the testator Kutiyyatha that he held the property under a subsisting kanom amounted to an acknowledgment of the title of the mortgagor, and that title is in the plaintiff. We reverse the decree of the District Judge and restore that of the Munsif with costs in this and the lower Appellate Court.

---

(1) 6 M.H.C.R. 267.
(2) 6 M. 182.
(4) 16 Beav. 236 = 3 De G. M. & G. 620.
(5) 3 Atkyn's Rep. 311.
(3) 14 C. 801.
The Land Acquisition Act, 1870—Act X of 1870, Sections 15 and 18—Compensation—Mode of assessment—Antiquities not proved to have any market-value—Persons interested in the land acquired.

The Government having, under the Land Acquisition Act X of 1870, commenced proceedings to acquire a plot of land containing granite quarries besides ancient temples and sculpture, a reference was made to the District Judge (Sections 15 and 18) as to the amount of the compensation to persons interested in the land:

Held, (1) with regard to the nature of the property that only the value of the stone quarries as yielding profit could form the subject of assessment, and the value of the antiquities could not: for, under the circumstances, no market-value could be assigned to the antiquities;

(2) the right if not the only course of proceeding was to estimate the rent at which possibly the whole plot might be leased, on the basis of how much rent a portion of the plot when leased for quarries had in fact obtained for the zamindar;

(3) to calculate the purchase-money, as the first Court had done, at twenty-five years of such rent was proper, and no reason appeared for reducing this number of years to fifteen:

(4) though quarry men had been employed and had earned money, the plot, they were not interested therein, in the sense intended by the Act; and their earnings, in which the zamindar was not interested, could not enter into the question of compensation and increase the award:

(5) under Section 42, fifteen per cent. was to be paid on the sum awarded.


CROSS-APPEALS from an order (3rd May 1889) of the High Court, varying an award (12th March 1888) of the District Judge of Chingleput on a question of compensation referred to him in accordance with the provisions of Act X of 1870.

The claimants were the representatives of Nalathur Ramasami Mudaliar, who, till his death in April 1886, was the registered zamindar of the village Mahabalipuram, in the Chingleput district. [370] Within the ambit of that village is the tract of land of the same name, having on its surface, besides stone quarries, the temples and rock-cuttings, called 'the Seven Pagodas.' The Government having, in 1886, taken proceedings to acquire the plot for public purposes under the Land Acquisition Act, 1870, the present appeals resulted, raising the questions whether any market-value was assignable to the antiquities, and whether the assessment of the compensation to be paid had proceeded on a right principle.

The Collector having, under Section 9 of the Act, required all persons interested to appear and to state their respective interests, with the
amount of their claims to compensation, the zamindar, now represented
by his son and two nephews, claimed Rs. 9, Rs. 51 and Rs. 730 as com-
pensation. Forty-two mirasidars asserted a right to payment in respect of
the quarries, claiming Rs. 31 and Rs. 640. The dharmakaarta of a temple
claimed Rs. 14,000 as compensation in respect of two mandapams. The
Collector, under Sections 15 and 18, referred the question of compensation
to the District Judge, who, with two assessors, took the evidence. It was
agreed before him that the inquiry should be confined to determining the
value of the acquisition. He found that the zamindar "Ramasami had
in 1881 leased out the right to quarry stone in a certain portion of the
said rocks at Rs. 140 per annum. He thought that for the right to
quarry anywhere on the said hills the rental might fairly be raised to
Rs. 200, and he was of opinion that twenty-five years' purchase would
be a proper price to pay, so he assessed the compensation payable in
respect of the said acquisition at Rs. 5,000, to which he added Rs. 124
as 15 as the value of the land not containing stone fit for quarrying;
and he accordingly awarded Rs. 5,124 as 15 as the compensation to be
paid, the tribute or revenue being reduced, as allowed by the Collector,
by Rs. 12 as 8 ps. 10 a year; and he further directed that each party
should bear his or their own costs."

Both parties appealed from this, and the High Court increased this
sum to Rs. 55,458. A Division Bench (WILKINSON and SHEPARD, JJ.)
supported the District Judge's opinion that the antiquities had no market-
value, and that their acquisition by the Government would in no way
injuriously affect either the property, or the earnings, of the claimants,
and that, therefore, no compensation could be awarded under this
head of claim. The judgment of the senior Judge proceeded as follows:—

"It remains to consider whether the principle adopted by the Judge
in awarding compensation for the stone quarries is the proper one. He
capitalized the rent which, in his opinion, would have been paid to the
landlord by the stone-cutters, if they had been allowed to quarry where-
evener they pleased, at twenty-five years' purchase, and awarded Rs. 5,000.
On appeal, it is argued that the Judge should have ascertained the annual
net profit and have capitalized that at twenty-five years' purchase.

"We are not here concerned only with the market-value of land,
between also ascertain the damage, if any, sustained by the persons in-
terested in these stone quarries at the time of awarding compensation,
by reason of the acquisition injuriously affecting their property or
earnings (see Section 24, Act X of 1870).

"In 1879 the zamindar granted a lease of the hills to certain stone-
cutters for five years at an annual rent of Rs. 140. There is nothing
on record to show that the zamindar ever obtained a higher rent
than this, or that he ever collected any dues or fees from the stone-
cutters. This is one of the items which has to be taken into con-
sideration in determining the amount of compensation. I think it
would be equitable to allow fifteen years' purchase or Rs. 2,100 under
this head.

"That the acquisition will injuriously affect the profits derived from
working the quarries cannot be denied. It is argued that the Judge
has sufficiently taken this into account. The Judge has altogether
omitted to notice the evidence on the record as to the actual profits
earned by the persons who work the quarries. That there is a market
for the stone at Mahabalipuram is established by the evidence of the
first, second, third and seventh witnesses who have purchased stone

965
there for the erection of buildings in Madras. None of these witnesses produced any accounts, so that their evidence does not enable us to arrive at any conclusion as to the amount they spent annually. The agreements filed by the first witness show that in 1874 he contracted for the supply of Rs. 537 worth of stone. If, as he asserts, he has since then spent Rs. 10,000 in all, his annual expenditure would be about Rs. 500. The evidence of seventeenth and nineteenth witnesses as to the value of the stone, which a stone-cutter quarries annually, is of too vague and general a character to be of any use. The eighteenth witness is himself a quarryman. He puts down his monthly profit at Rs. 8 or 10. His annual profit would, therefore, amount to say Rs. 100. Accepting the evidence of the thirteenth, fourteenth and fifteenth witnesses that the profit is one-third of the cost of quarrying, the value of the stone quarried annually by the eighteenth witness, who may be taken as an average stone-cutter and a representative of the class, would amount to Rs. 300. The seventeenth and twentieth witnesses state that there are about forty-six persons in Mahabalipuram who earn their livelihood by stone quarrying. The amount of profits of which the claimant would annually be deprived may, therefore, be set down at Rs. 1,600. There is nothing on the record to show that the supply of stone which commands a market-value is unlimited, and the market must always be a fluctuating one. Mahabalipuram is a long way from Madras, and, though there is a market, it does not appear to be a very lively one. Under these circumstances, I would allow ten times the annual loss or Rs. 46,000 for the damage sustained by the persons interested by reason of the acquisition injuriously affecting their property or earnings.

"In addition to this, there is the market-value of the land, plus the fifteen per cent. which has to be added under Section 42. The total amount of compensation to be awarded will, therefore, be Rs. 55,458.11.3. Appellants are entitled to their costs in the District Court and to proportionate costs of this appeal."

His colleague agreed in the above as to the antiquities, and also as to the amount to be awarded; but, in his opinion, no question arose as to loss of earnings for which compensation could be awarded, in regard to Clause 3 of Section 24. It was the market-value of the property taken, which alone the Court had to ascertain. With such materials as there were, the only way of ascertaining the value of the property acquired was to take the aggregate of the profits derived, and to capitalize it, at so many years' purchase.

The Secretary of State preferred the present appeal from the High Court's order on the ground that the compensation given was excessive. The deceased zamindar's son and nephews were respondents, but Shanmugaraya Muddalier alone appeared at the hearing. They preferred their cross-appeal, alleging the compensation to be insufficient. Neither the mirisidars, nor the dharmakarta, were respondents.

On this appeal Mr. J. H. Branson and Mr. J. R. Paget, for the appellant, argued that the compensation awarded by the High Court had not been calculated on the right basis. The order, so far as it increased the amount of compensation awarded by the Judge of Chingleput, should be set aside. The only question rightly raised was the market-value of the plot of land taken. Not adhering to this, the District Judge and the High Court, as their judgments stood, had awarded payment in respect of the earnings of persons not interested in the land, for the reason...
that the latter had made profits through work done upon it. Thus, as
things now stood, the appellant would have to compensate two sets of
parties, only one of whom was really interested in the land, in the sense
that the Act contemplated, in respect of the same acquisition of land. The
High Court should not have accepted as a ground for compensation the
fact that persons had made profits by working the stone quarries. As to
the principle on which the High Court ought to have acted in calculating
the amount of compensation to be awarded, he referred to Penny v. Penny (1)
and to Crippes on Compensation, 139. The Courts below had been right
as to the non-valuation of the antiquities.

Mr. J. D. Mayne, for the respondent and cross-appellant, argued that
the character, and extent, of the antiquities, the existence of which
had led to the acquisition of the land by the Government, should have been
regarded. He referred to the Imperial Gazetteer, Volume VI, pages 190-
196, and to Ferguson’s History of Architecture, mentioning the general
classification of the temples, carvings, and excavations. He submitted
that the Courts were wrong in holding that no money-value could be
assigned to them as antiquities. They had some commercial value in that
character. The Collector had not taken the ground that they had no such
value. He had contended that they were the property of the general Hindu
community; but that propo-[374]sition could not be maintained. They
were the property of the zamindar. They were the very objects of which
the special value rendered the acquisition by the Government, for their
preservation, a necessary undertaking. The valuation put upon them by
one of the assessors, viz., Rs. 25,800 was a fair one, and should be affirmed.
In regard to the amount allowed for the stone quarrying it was contended
that it was inadequate, and that the valuation was based on an erroneous
mode of calculation. The true mode was to estimate the market-value of
the stone made available for use, and this value was its selling price, from
which the cost of getting the stone had to be deducted. The sum arrived
at in that way would not be less than that fixed by one of the assessors,
viz., Rs. 1,13,000. Next it was argued that the High Court had been right
in assessing the entire compensation due to every one who had an interest
in the property as the mirasidars had, and that no question of title as be-
 tween parties with conflicting interests could arise on this inquiry. Disputes
as to the apportionment of the compensation could be the subject of proceed-
ings other than the present under Sections 37–39 of the Act. The respond-
ents, as cross-appellants, should have the amount of compensation awarded
by the High Court increased to Rs. 1,59,764. Fifteen per cent. on this
amount was payable to the respondents on this account under Section 42
of the Act.

Mr. J. H. A. Braunsou replied: Afterwards on the 18th of February
their Lordships’ judgment was delivered by Lord Hobhouse.

JUDGMENT.

These appeals arise from the circumstance that the Government of
India is desirous of saving from destruction, and of preserving as public
monuments, certain works in the vicinity of Madras known as the Seven
Pagodas of Mahabalipuram. The works are on the open sea beach, and
they are constructed out of a small extent of granite hill which lies exposed
at that spot. They consist, partly of raths or monolithic temples com-
pletely disengaged from the hills, partly of caves cut into the living rock.

(1) L.R. 5 Eq. 227.
and partly of figures carved upon its face. The place is very celebrated. Fergusson speaks of it as "more visited and more described than any other place in India." One gigantic rockcarving he describes as "the most remarkable thing of its class in India." He speaks of the raths as the "oldest examples of their [375] class," and ascribes them to the fifth or sixth century A.D. Crolle thinks they are several centuries older than that; perhaps belonging to the second century B.C. Whatever their origin, there is no doubt of their historical interest and value, or that the destruction of them would be a public misfortune.

The hills supply granite of good quality, for which there is some demand in Madras, and it has been quarried for many years past. No injury to the monuments was anticipated from the original style of working, but when the zemindar took to blasting the local authorities felt alarmed and advised the Government to interfere.

The zemindari belongs to a joint family who may be called the Mudaliars. In the year 1885 some negotiations for the purchase of the property took place between the Government and the then head of the family, who was willing to sell at a very moderate price; but those may be passed over, because the Government was advised that no satisfactory title could be procured in that way, and that it was better to proceed under the Land Acquisition Act X of 1870.

The notices required by that Act were given, and the matter came before the Sub-Collector of the District, who under the provisions of the Act (Sections 15 and 18) referred the question to the District Court. The terms of the reference showed the properties which the Government sought to take, and the offer and claims made in respect of them. The Mudaliars claimed an exclusive right to the lands, and demanded upwards of 9½ lakhs of rupees as compensation. Another class of villagers, called mirasidars, denied that the Mudaliars had any right in the bulk of the lands, apparently those parts where granite could be quarried, and asserted their own exclusive right to them, and demanded upwards of Rs. 30,000. A priest or custodian of a temple was stated to claim a large compensation, but by his statement in the record he does not claim anything except leave to use the blocks called mandapams. The Sub-Collector offered Rs. 190-13-11 for the whole.

When the parties came before the District Judge, they agreed that the inquiry should be confined to determining the value of the property. Therefore nothing was then decided as between the rival claims of the zemindars and the mirasidars. The claims [376] for compensation were reduced by the claimants' assessor to Rs. 25,800 for the temples and works of art, and Rs. 1,13,800 for the unquarried stone. For the carvings and temples the District Judge allowed nothing, as he found that they never had been, and never were likely to be, a source of any income. The claim for stone, reduced as it was, he considered to be still highly exorbitant. It was arrived at by estimating the contents of the hills at about 25 millions of cubic feet. Putting the value of 1 rupee on each 100 feet, as the claimants did, a much larger sum than Rs. 1,13,000 is brought out. How the claimants' assessor effected the reduction to the latter sum does not clearly appear. Nor is it of much importance to know, because no evidence was given to enable the Court to judge of the rate at which the stone was being carried to market, and no details serving to show what part of the market price should be attributed to the ownership of the stone, as distinguished from the labour bestowed on preparing it and carrying it to market.
The District Judge found that the only evidence available to him of the value of the ownership was a lease by which the zamindar had granted the right of quarrying over portions of the hills for five years at the rent of Rs. 140 a year. He found that at the same rate a right of quarrying over the whole area might command a rent of Rs. 200. On this sum he allowed twenty-five years' purchase, bringing out the sum of Rs. 5,000 as the value of the stone. A further sum of Rs. 124 as 15 was added for some small plots, the price of which was not in dispute. It was also agreed that the zamindar's pesheush should be reduced, and that he should have liberty to remove the trees growing on the ground. The District Judge's award proceeded on these grounds, and further directed that each party should bear his own costs.

It is agreed that on the point of costs the award is erroneous, because the sum awarded exceeded the sum tendered by the Collector, and in that case the 33rd Section of the Act directs that the costs shall be paid by the Collector.

It is also pointed out that the award does not give the additional 15 per cent. on the market-value, which is directed by Section 42 of the Act to be paid by the Collector. It is a matter of very little importance, but according to the exact terms of the Act the award is only to ascertain the market-value, and then the [377] Act itself imposes a further obligation on the Collector to pay the 15 per cent. The effect is the same whether the award is silent about the added percentage, or expressly includes it as has been done by the High Court.

There is no reason to suppose that the award would not have been put into correct shape on application to the District Judge. But all parties were dissatisfied with the principle of his valuation. The Mudaliars appealed to the High Court, and the Government met their appeal by objections in which they adhered to the original offer of the Collector. No appeal was presented by the mirasids. Their Lordships have been informed by the Counsel of the parties that in a subsequent proceeding it has decided that the claim of the mirasids is not well founded.

The case was heard by Mr. Justice Wilkinson and Mr. Justice Shephard. As regards the temples and carvings, they both agreed with the District Judge that they have no market-value. It is highly improbable that they should have any. No evidence was offered to show that there is any; and Mr. Justice Wilkinson adds that the claimants' Counsel did not assist the Court by suggesting any price which might be offered as a fancy price. Their Lordships find themselves in a like position with the High Court, and all they can do is to express agreement with the Courts below on this point.

With respect to the stone, Mr. Justice Wilkinson thought that the District Judge had awarded too much in respect of the zamindar's rent. He thought that the basis of calculation should be the actual rent of Rs. 140 instead of the estimated rent of Rs. 200; and that instead of 25 years only 15 should be allowed. That cuts down the market-value to Rs. 2,100.

On the other hand, the same learned Judge held that the District Judge had erred in omitting to notice the evidence as to the actual profits earned by the persons who work the quarries. He refers to evidence showing that there are about 46 persons in the village who earn their livelihood by stone-quarrying; and calculating their annual profits at Rs. 100 a piece, he concludes that the amount of profits of which the claimants would annually be deprived may be set down at Rs. 4,600.
On this amount he allows ten years' purchase and so brings out a sum of Rs. 46,000, which he says is the damage sustained by the person interested by reason of the acquisition injuriously affecting their property or earnings.

Mr. Justice Shephard agrees with his learned colleague as to the amount of compensation, but not in his reasoning. He says that no question arises with respect to loss of earnings under Clause 3 of Section 24 of the Act. But he adds that the only way of ascertaining the market-value is to take the aggregate of the profits or earnings derived from the land and to capitalize it.

By their decree the High Court altered the award of the District Judge by substituting the sum of Rs. 55,458-11-3 (which includes the additional 15 per cent.) for the sum of Rs. 5,124-15-0; and by ordering the respondent to pay the costs of the claimants in the District Courts; they also ordered him to pay a proportion of the costs in the High Court. From that decree the present appeals are brought.

It appears to their Lordships that the District Judge was right in estimating a rent for the whole of the lands instead of taking the rent actually received for part. It was the best, if not the only method he had for getting at the market-value of the ownership. As regards the number of years' purchase, though it seems large, no reasons are given why it was fixed on, nor why the High Court took a much smaller period; and their Lordships see no cause for departing from the opinion of the District Judge, who had all the parties and their agents before him. They therefore agree with the District Judge as regards the value of the zamindar's interest calculated on the footing of the rental.

In estimating the price of the stone, it seems to them that the two learned Judges, though differing in language, have in effect followed the same principle. Each has included the earnings of the quarrymen, and the estimated loss of those earnings, as an element in the compensation. Whether they are included directly as earnings injuriously affected according to one Judge, or indirectly as swelling the market-value, according to the other, the result is the same. Their Lordships are of opinion that an erroneous principle has been introduced by the High Court. No compensation is tendered by the Collector or ordered by the Act, except to persons interested in the land. If the acquisition injuriously affects the earnings of the person interested, he is to obtain further compensation beyond the market-value of the land. But no compensation is given to persons not interested in the land, on the ground that their earnings may be affected by the change of ownership or indeed on any ground. The 46 quarrymen are no more interested in the land than a ploughman or a digger is interested in the land on which he works for wages. Nor are their earnings the earnings of the zamindar, who is interested. The market-value of a property is not increased by the circumstance that a number of persons work on it and so earn their livelihood. That is no profit to the owner; it may be expense to him. And the award of the High Court has the extraordinary result of putting a large sum into the pocket of the Mudaliars on the ground that some of their neighbours will be injured by losing their employment.

The conclusion is that the High Court have been mistaken in departing from the principles which the District Judge followed in assessing compensation, and that his award should in substance be reinstated. It will suffice if the decree of the High Court is varied by inserting the figures Rs. 5,124-15-0 instead of the figures Rs. 55,458-11-3, and with
that variation affirmed. That will leave the original award as to market-
value standing, and will also leave standing the directions of the High
Court as to payment of costs. The Collector will, of course, have to pay
15 per cent. on the sum awarded according to the provisions of Section 42
of the Act before he can make his title perfect. With respect to the costs
of these appeals, their Lordships think it right that each party should bear
his own. They will humbly advise Her Majesty in accordance with these
opinions.

Appeal allowed; decree varied.

For the appellant — The Solicitor, India Office.
For the respondent — Shanmugaraya Mudaliar, Mr. R.T. Tasker.

16 M. 380 = 3 M.L.J. 121.

[380] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

CHINNASAMI AND ANOTHER (Plaintiffs), Appellants v.
HARIHARABADRA AND ANOTHER (Defendants), Respondents.

[8th and 21st February, 1893.]


On an application for probate of a will under the Probate and Administration Act, 1881, which was opposed by the widow of the alleged testator and her father, it appeared that an application had previously been made under the Guardians and Wards Act, 1890, on behalf of the widow for a declaration that she was the guardian of the person and the property of the infant son of the alleged testator, and that application had been opposed by the present petitioners who claimed to be testamentary guardians of the property appointed by the will now propounded, and that the will had then been found to be a forgery:

Held, that the question of the genuineness of the will was not res judicata for the purpose of the proceedings under the Probate and Administration Act.

[8., 13 C.L.J. 547 = 15 C.W.N. 1021 = 10 Ind. Cas. 431 (437).]

APPEAL against the order of T. Weir, District Judge of Madura made on civil miscellaneous petition No. 139 of 1892 in original suit No. 14 of 1892.

The petitioners propounded a will, dated 4th August 1890, as the last will and testament of one Kandasami Pillai deceased, whereby the petitioners were appointed his executors and guardians of his infant son, and presented the above petition under the Probate and Administration Act, Act V of 1881, Section 62, praying for probate of this will.

It appeared that a similar petition had been preferred in July 1890, but had been erroneously rejected by the Court for want of jurisdiction. In the same year the maternal grandfather of the infant son made an application in the District Court under the Guardians and Wards Act VIII of 1890 for a declaration that his daughter was the guardian of the infant’s person and property. The present petitioners opposed that application on the ground that they had been appointed guardians by the will now pro- [381] pounded. At about the same time the present petitioners applied to the same Court for a succession certificate under

* Appeal against Order No. 100 of 1892.
Act VII of 1889, basing their claim on the will. The District Judge, after going into evidence, came to the conclusion that the will was a forgery and made orders accordingly. An appeal was preferred against the order under the Guardians and Wards Act to the High Court, which confirmed it, accepting the District Judge’s view that the will was a forgery.

It was now contended on the part of the widow of the deceased and her father, who appeared on citation in the present proceedings under the Probate and Administration Act, that the question of the genuineness or otherwise of the will was res judicata.

The District Judge adopted this view, referring to Ram Kirpal v. Rup Kuari (1). He accordingly rejected the petition.

The petitioners preferred this appeal.

Mr. K. Brown, for appellants.
Bhashyam Ayyangar and Krishnasami Ayyar. for respondents.

JUDGMENT.

The appellants, claiming to be executors appointed by the will of one Kandasami Pillai, deceased, applied to the District Court of Madura, on 2nd July 1890, for probate of the said will. Their petition was returned by the then Acting District Judge, Mr. Twigg, on the ground that Act V of 1881 (The Probate and Administration Act) was not applicable to the district. This order, it is now admitted, was erroneous.

In August 1892, appellants again applied to the District Court for probate of the said will. The late District Judge of Madura, Mr. Weir, has refused their application on the ground that in the course of certain proceedings before Mr. Twigg under the Guardian and Wards Act (Act VIII of 1890) and the Succession Certificate Act (Act VII of 1889), intermediate between the former and present applications for probate, it has been decided that the will propounded is not a genuine will, and that by virtue of this decision the question as to the genuineness of the will is res judicata and cannot be re-opened in the present proceeding.

It is conceded by respondents’ vakil that the proceedings under the Succession Certificate Act could not operate as a bar to the present application for probate. Section 25 of the Act [382] expressly provides that no decision under the Act upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceedings between the same parties.

It is only upon the ground that this is a proceeding between the same parties as that under the Succession Certificate Act that the bar of res judicata could be pleaded, and this section expressly removes it.

But the decision of Mr. Twigg as to the genuineness of the will was passed with reference to proceedings pending before him under the Guardian and Wards Act, as well as those under the Succession Certificate Act. It is necessary, therefore, to consider whether, treating the decision as passed under the former Act, it is a bar to the present application for probate. The proceedings under that Act, so far as they affect the question, were as follows:

On 22nd July 1890 the father of the widow of Kandasami Pillai applied to the District Court, on her behalf, for an order appointing her guardian of the person and property of the minor son of Kandasami Pillai. Appellants put in a counter-petition, setting up their right to guardianship under the will. In the course of the proceedings it was

(1) 6 A. 269.

972
admitted that the will gave them no right to guardianship of the boy's person, and an order was passed by consent appointing the widow guardian of the person. On 1st October 1890 Mr. Twigg, having taken evidence, passed the decision, finding the will to be a forgery, apparently upon the petition of the widow's father and the counter-petition of appellants. Subsequently he held that the widow was not the fit person to be entrusted with the guardianship of the property, and he appointed her father. Treating the decision as passed upon the petition and counter-petition under the Guardian and Wards Act, an adjudication as to the genuineness of the will was necessary, for the will purposed to constitute appellants guardians of the boy's property and if this appointment was valid the Court was precluded by the Act from appointing any other guardian.

But it is urged that the decision of Mr. Twigg was only a decision inter partes, and cannot, therefore, affect the present application for probate, the adjudication upon which will have the effect of a judgment in rem and will affect not only the parties [383] to the previous proceedings, but the beneficiaries under the will and the world at large. It is stated that the son of the alleged testator is a deaf-mute, and therefore possibly, but for the will, might take no share in his father's property, and that he is therefore, vitally interested in maintaining the genuineness of the will. It is also said that certain charities are interested in the will.

But apart from any considerations peculiar to this particular case, we are of opinion that upon general principles the decision of Mr. Twigg in the proceedings under the Guardian and Wards Act does not operate to make the question of the genuineness of the will res judicata so as to bar the present application for probate. By Section 41 of the Evidence Act a final judgment, order or decree of a Court of Probate has the effect of a judgment in rem, and is conclusive proof, inter alia, that any legal character which it takes away from any person ceased at the time when the judgment declares that it ceased.

The judgment of the Probate Court refusing probate takes away from the executors named in the will the legal character of executors, and from the legatees and beneficiaries their legal character, as such, and this result is final as against all persons interested under the will. It is admitted that if the decision of Mr. Twigg had been in favour of the genuineness of the will, it would still have been open to the counter-petitioners in the probate proceeding to question it. It seems impossible to argue that, because the decision was the other way it is conclusive. It is argued that the judgment of a Court of Probate refusing probate is not a judgment in rem, though a judgment granting probate is. We can see no good reason for any such distinction.

In our opinion the judgment of a Probate Court granting or refusing probate is a judgment in rem, and therefore the judgment of any other Court in a proceeding inter partes cannot be pleaded in bar of an investigation in the Probate Court as to the factum of the will propounded in that Court.

There are other reasons why the judgment of Mr. Twigg should not be held to make the question of the genuineness of the will res judicata in the present proceedings. For instance, the subject-matter of the former application was the guardianship of the property of the minor son of the alleged testator and not the estate of the testator as in the probate proceedings. But we [384] prefer to rest our decision upon the general
principle that the only judgment that can be put forward in a Court of Probate in support of the plea of res judicata is a judgment of a competent Court of Probate.

We must reverse the order of the District Judge of 31st August 1892 and direct him to restore the application for probate to the file and proceed to dispose of it according to law. Costs of this appeal to be dealt with in the final order.

16 M. 384 = 3 M.L.J. 80.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

IN APPEAL NO. 145 OF 1890.

PAPAMMA (Defendant No. 1), Appellant v. V. APPA RAO AND OTHERS (Plaintiff, Defendant No. 2, and Plaintiff's Representative), Respondents.*

IN APPEAL NO. 148 OF 1890.

N. APPA RAO (Defendant No. 2), Appellant v. V. APPA RAO AND OTHERS (Plaintiff and Plaintiff’s Representatives), Respondents.*

14th, 15th, and 16th December, 1892, and 19th January, 1893.]

Hindu Law—Adoption—Competency of step-mother to give in adoption—Adoption of an adult.

In a suit to set aside an adoption, it appeared that the person said to have been adopted was an unmarried man of forty years of age, who had already succeeded to his father's estate for twenty years at the time of the alleged adoption, and that he had been given in adoption by his step-mother without the previous consent of her husband, deceased:

 Held, that the adoption was invalid on the ground that under the Hindu law a step-mother cannot give her step-son in adoption.

Semel: the adoption was not invalid by reason of the age of the alleged adopted son or of his having previously taken his patrimony in his natural family.

Per cur: the English law of attainted did not apply in India in 1793.

[R., 15 C.L.J. 97 (101) = 15 C.W.N. 524 = 7 Ind. Cas. 427.]

[385] CROSS appeals against the decree of M. B. Sundara Rau, Subordinate Judge of Ellora, in original suit No. 14 of 1888.

Suit for declaration that the plaintiff was the next heir to a zamindari on the death of defendant No. 1, and that an adoption by defendant No. 1 of the father (deceased) of defendant No. 2 was invalid.

The further facts of this case appear sufficiently for the purposes of this report from the following judgment of the High Court.

The Advocate-General (Hon. Mr. Spring Branson) and Desikachariar for defendant No. 1 (appellant) in appeal No. 145 of 1890.

Subramanya Ayyar, Anandacharlu and P. Subramanya Ayyar, for respondent No. 2.

Bhashyam Ayyangar and Gopalammi Ayyangar, for respondent No. 3.

Mr. P. A. DeRozario, Subramanya Ayyar, Anandacharlu and P. Subramanya Ayyar, for defendant No. 2 (appellant) in appeal No. 148 of 1890.

Bhashyam Ayyangar and Gopalammi Ayyangar, for respondent No. 2.

Ramachandra Rau Sahib, for respondent No. 3.

Krishnamachariar, for respondent No. 4.

* Appeals Nos. 145 and 148 of 1890.
JUDGMENT.

The property which is the subject of this litigation is the zamindari of Nidadavole in the Godavari district. Rajah Narayya Appa Rau was its last male owner, and on 7th December 1864 he died leaving him surviving two widows named Rajah Papamma Rau, the defendant No. 1, and Rajah Chinnamma Rau who died in 1861. In June 1885 Rajah Papamma Rau adopted Venkata Ramayya Appa Rau, the father of the minor defendant No. 2. The last male owner had two half-brothers named Ramachandra Appa Rau and Narasimha Appa Rau, and the plaintiff Venkatadri Appa Rau, was the son of the latter.

The previous history of the family, as shown by the pedigree set out in Exhibit XII, is shortly this. One Rajah Narayya Appa Rau was the common ancestor of the plaintiff and the first defendant's husband. He had married five wives and had one son by his third wife, viz., Venkata Narasimha Appa Rau, and two sons by his fifth wife, viz., Ramachandra Appa Rau and Narasimha Appa Rau. Narayya Appa Rau rebelled against the late [386] East India Company in 1783 and his zamindari was declared to be forfeited to the Government, but some time after his death it was granted to his eldest son. The zamindari then consisted of two estates, viz., Nidadavole and Nuzvid, and in 1802 the former was permanently granted under a sannad to Venkata Narasimha Appa Rau, the eldest son by third wife, and the latter to the eldest of two sons by the fifth wife Ramachandra Appa Rau. No provision, however, being made for the second son by the fifth wife, Narasimha Appa Rau, he and after him his son, the plaintiff, received an allowance for their support from the zamindars of Nuzvid and Nidadavole. Venkata Narasimha Appa Rau had no issue and adopted the plaintiff's natural brother Narayya Appa Rau, and Ramachandra Appa Rau was succeeded by his son Sobhanadri Appa Rau. Rajahs Narayya Appa Rau and Sobhanadri Appa Rau since granted to the plaintiff in perpetuity for the support of his family two mittas, the former, the Mitta of Tangalambudy out of the estate of Nidadavole and the latter, the Mitta of Chinnavendra out of the Nuzvid estate. Sobhanadri Appa Rau had six sons and the minor second defendant's father was one of them, and his mother was the sister of the first defendant.

Venkataramayya Appa Rau, the adopted son of the first defendant, died on the 1st January 1888, and was succeeded by his minor son, the second defendant, who is now under the guardianship of the Court of Wards. In June 1888 plaintiff brought this suit to have it declared that the adoption of the second defendant's father was invalid, and that as the nearest reversioner, he (the plaintiff) was entitled to the estate of Nidadavole on the death of the first defendant. The plaint, as originally framed, stated among other things that the plaintiff and the late Rajah Narayya Appa Rau were undivided and that the former was the chief heir to the first defendant, but the plaintiff's vakil has since made a statement to the effect that the plaintiff rested his claim only on his position as reversionary heir and not as an alleged coparcener.

The substantial question, therefore, for determination in this suit was whether the adoption of the second defendant's father Venkataramayya Appa Rau was invalid. In paragraph 5 of the plaint the adoption is impeached on five grounds, viz., (i) that Venkataramayya Appa Rau was at the time of adoption about [387] forty-three years of age and neither his father nor his mother was then alive; (ii) that prior to his adoption he had instituted a partition suit and obtained a decree for a
share in the estate of his natural father Sobhanadri Appa Rau; (iii) that he was not eligible for adoption as even after his adoption, he separately performed the sraddha of his natural father; (iv) that the first defendant had no authority to make the adoption, and (v) that she made the adoption from corrupt motives contrary to the intention of her co-widow Chinnamma Rau.

It was contended for the defendants that the first defendant had her husband's authority to make the adoption, that though Venkataramayya's parents had died prior to his adoption, his step-mother was alive and gave him in adoption, as she was entitled to do under Hindu law, that the plaintiff consented to and acquiesced in the adoption, and that the other objections urged against it were entitled to no weight. Another ground of defence was that the common ancestor Narayya Appa Rau was a proclaimed rebel and the plaintiff who had to trace his relationship to the late zamindar through him could not under the English law of attainted assert his claim as reversioner.

The two issues that relate to the adoption are the 5th and 6th, and the factum of the adoption was not disputed by the plaintiff. The Subordinate Judge considered that the first defendant had been authorized by her husband to make the adoption, but he was of opinion that Venkataramayya Appa Rau was not eligible for adoption as his natural parents had died prior to it and as his step-mother was not competent to give him in adoption. He considered further that, although Venkataramayya Appa Rau was forty or forty-one years of age at the time of his adoption, he was unmarried and his adoption could not be impeached on account of his age according to decided cases. He thought however that in the circumstances of this case the adoption was in the nature of an adoption in the Krutima form. He held further that neither plaintiff's consent to the adoption nor his acquiescence therein was proved, and that the other objections urged against it were not tenable. He was also of opinion that the plaintiff was not debarred from maintaining this suit by the rebellion of the common ancestor Narayya Appa Rau. On the ground, however, that a step-mother was not competent to give her step-son in adoption, that Venkataramayya Appa Rau was really an orphan at the date of the adoption, and that his adoption was invalid, he decreed the claim. From this decision both defendants have appealed, the first defendant in appeal No. 145 and the second defendant in appeal No. 148 of 1890.

Appeal No. 145 of 1890:—As regards this appeal it is urged that the observation of the Subordinate Judge in paragraph 348 of his judgment is irregular and one which he was not at liberty to make. In her written statement the first defendant did not deny or impugn the adoption of the second defendant's father, but alleged that it was made subject to the condition that the first defendant's right as the late zamindar's widow to the enjoyment and management of the estate was not to cease on adoption, but that she was to continue to manage the estate during her lifetime with the aid and assistance of her adopted son Venkataramayya Appa Rau.

At the first hearing the first defendant's vakil asked for an issue relating to the condition set up by her, and his application was resisted on the second defendant's behalf on the ground that the question was one which arose between the first and second defendants only and not between the plaintiff and the defendants or either of them. The Subordinate Judge was also of opinion that it was not a necessary issue and refused to raise it.
In his judgment, however, he referred to her evidence that she was entrapped by a stratagem into making the adoption, and observed with reference to it that her conduct amounted to *res judicata*, that the adoption was effectual against her and that the adoption by a widow, however invalid it may be against her husband’s *sapindas*, is binding on her and divests her of the property she had inherited from her husband. These remarks no doubt are too wide and apparently amount to an adjudication on the question of management, but it appears from paragraph 351 that they were not so intended. It is therefore sufficient to say that the question whether the adoption was made subject to the covenant set up by the first defendant was not intended to be and is not adjudicated upon in this suit.

As regards the validity of the adoption, the learned Advocate-General who appeared for the appellant relied on the arguments which might be addressed to us by the second defendant’s pleader, [389] and for the reasons mentioned in our judgment in appeal No. 148 of 1890, we are not prepared to attach weight to those arguments. This appeal must fail and is hereby dismissed with costs; two sets, one for the second respondent and one for the third respondent.

Appeal No. 148 of 1890:—The main question for decision in this appeal is whether Venkataramayya’s step-mother was competent to give him in adoption. It is urged on the appellant’s behalf that the step-mother Venkataramayya Rau had been directed by her husband to give her step-son Venkataramayya in adoption whenever the first defendant should ask her to do so, that the plaintiff was present at and acquiesced in the adoption, and that apart from those facts a step-mother is, in default of natural mother, competent under Hindu law to give her step-son in adoption.

As regards Sobhanadri’s authority to give his son in adoption, the step-mother deposed as the ninth witness for second defendant that two or three days prior to his death Sobhanadri sent for her and told her as follows: “The Ranees of Sanivarapet desired me to give them in adoption Buchi Nayana (Venkataramayya Appa Rau). I promised them. You should therefore fulfill the said promise.” She stated further that he had insisted on obtaining an assurance from her that she would act in accordance with his directions, and that she had given him that assurance. She went on to state that he had also told her a year or two previously to his death that the Ranees of Sanivarapet wanted him to give Venkataramayya in adoption, and that he promised to do so whenever they desired. On this point, however, the first defendant contradicts her and denies that she had any conversation with Sobhanadri about the adoption. As regards the alleged direction prior to Sobhanadri’s death, the twelfth witness supports the statement of the ninth witness, but he is her cousin. His evidence is also open to the remark that though he was then staying with the ninth witness, he did not give his evidence until four days after she had been examined. In paragraph 15 of the written statement the second defendant did not refer to any express death-bed direction on the part of Sobhanadri, but stated generally that he had intended and expressed his intention that his son should be given in adoption. [390] At the first hearing the second defendant’s counsel refused to state to the plaintiff's vakil whether he intended to prove any express authority from Sobhanadri. Sobhanadri had several adult sons at the time and two of them, who are now alive, the second defendant’s thirteenth witness and his brother examined on commission, deny all knowledge of the authority,
though they say that they constantly attended on their father during his last illness by turns. It is strange that Sobhanadri should not have communicated his desire to them, and that they should not have been aware of this direction. It is suggested that the step-mother was hostile to the second defendant and withheld the necessary information, but her evidence which is in the second defendant's favour does not bear out this suggestion. It is next urged that Sobhanadri would have actually desired to see both the estates of Namvid re-united in his own branch of the family and that this circumstance renders the evidence probable. This mode of reasoning assumes that Papamma Rau was anxious to make an adoption during his life, and there is no evidence in support of the assumption.

As observed by the Subordinate Judge there is no writing to show that Sobhanadri ever contemplated the adoption by the first defendant of one of his sons. Considerable stress is laid on Venkataramayya Appa Rau's ear-boring ceremony being deferred till 1872, and reliance is placed on it as corroborative evidence. It appears, however, from the evidence that the ceremony was so deferred because there was a vow to perform it at Tirupati, and that a pilgrimage was undertaken to that place only in that year. It is also in evidence that in the case of several other sons of Sobhanadri the ear-boring ceremony was likewise deferred. Venkataramayya Appa Rau's natural brother, the second defendant's thirteenth witness who gives evidence on the subject traces no connection between it and the adoption. Further, the adoption took place in 1885 and the ceremony was performed in 1872. We do not consider that the delay in its performance has any value as corroborative evidence. We are of opinion that the Subordinate Judge was right in refusing credit to the story about Sobhanadri's authority to give his son in adoption after his death.

As regards the plaintiff's alleged consent to the adoption and his acquiescence in it, the Subordinate Judge discusses the evidence on the subject in paragraphs 293 to 342 of his judgment. The second defendant's case on this point is that the plaintiff was present during the adoption, offered a present, and gave a blessing to the adoptee, and that he thereby acquiesced in the adoption. The Subordinate Judge found that the plaintiff was present at the ceremony owing to the pressure put upon him by the Rajah of Pitapur, but that he made no present and offered no blessing and that there was no acquiescence in or consent to the adoption. The evidence is set out at length and carefully considered by him and we entirely concur in the conclusion arrived at by him. It is urged on behalf of the appellants that the plaintiff's presence during the ceremony, though it may not amount to an estoppel, shows that the plaintiff did not then think that the adoption was improper. Assuming that the plaintiff then believed that a step-mother could give her step-son in adoption, this would surely be no bar to his now contending that the adoption is invalid. Further, the relief imputed to the plaintiff is inconsistent with his conduct both at the time of the adoption and subsequent to it. It is true that the suit was brought in 1888 whilst the adoption took place in 1885, but this cannot deprive him of his legal right to set aside the adoption if it is bad in law.

The next question for consideration is whether in default of the natural mother, a step-mother is competent under Hindu law to give her step-son in adoption. On this point the appellant's contention in the Court below was that Venkataramayya Appa Rau was not an orphan in the sense in which the word is understood in English law, that his step-mother took the place of his natural mother on the death of the latter, and
that she was therefore competent to give him in adoption. After discussing the question at considerable length in paragraphs 139 to 195 of his judgment the Subordinate Judge holds that a step-mother has no property in her step-son, and that she is therefore incompetent to dispose of him by gift in adoption. It is argued on appellant’s behalf that the word used in all the texts is mother, that the word mother is a generic term and includes step-mother, and that she is therefore competent to give her step-son in adoption. It is further urged that in theory gift is prescribed in the case of adoption by reason of parental authority, that that authority is real only so long as the son is a minor, that when he attains majority he is [392] sui juris, that his mother has no independence of action, and is practically under his control if his father happens to die, that gift is then necessary in the case of his adoption as a mere matter of form by reason of the legal fiction, and that it is sufficient if the step-mother gives her step-son in adoption.

As far as we are aware, there is no Smriti which deals expressly with the step-mother’s power. There are, however, three principal Smritis which define an adopted son, and the definitions show that a mother has power to give in adoption, and that she has the power because she gave birth to her son.

Vasishtha says:—“A son formed of seminal fluids and of blood proceeds from his father and mother as an effect from its cause; both parents have power to give or sell or desert him. Let no man give or accept an only son, since he must remain to raise up progeny for the obsequies of his ancestors. Nor let a woman have or accept a son without the assent of her lord.” (Madras Edition, Colebrooke’s Digest, vol. II, book V. chapter IV, ver. 273.)

It is conceded that the received interpretation is that either parent has power to give, and that the mother’s power is restricted only during the lifetime of her husband.

Manu declares:—“He is called a son given whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress, confirming the gift with water.” (Manu, chap. IX, 168.)

Yajnyavalkya says:—“He whom his father or his mother gives for adoption shall be considered as a son given.”

All the leading commentators in Southern India adopt the definition. See Mitakshara, chap. I, Section XI, placitum 9; Smriti Chandrika, Krishnasami Ayyar’s Translation, Chap. IV, placitum III, 2; Sarasvati Vilasa, Foulkes’ Translation, placitum 359, and Madhaviya, Burnell’s Translation, p. 20. There can, therefore, be no doubt that after the father’s death the mother has power to give her son in adoption. Does the word ‘mother’ include step-mother?

As argued on appellant’s behalf the term ‘mother’ is no doubt generic, but in its primary sense it connotes only natural mother, and the word ‘step-mother’ is used when the father’s wife is intended to be denoted. Etymologically also the word matha refers to the natural mother, and means ‘maker’ that is [393] the maker of the child in the womb (Monier-Williams’ Sanskrit Dictionary). In offering funeral and annual obsequies, the Sanskrit word used to denote step-mother is ‘sapatni matha’ that is to say co-wife-mother. It is true that in a secondary sense it includes step-mother. So it does in the chapter on allotments made for widows: Mitakshara, chap. I, Section VII and in the chapter on sapinda.
relationship. But there must be a special reason either in the subject-matter of the text or in the context for departing from the ordinary meaning. In the case before us there is reason to conclude that the word is used in its primary sense only. Vasishtha's text shows that besides the father, the natural mother has alone property in the son, and without ownership there can be no power to give in adoption. Again, adoption is proscribed for determining the filial relation arising from birth, and creating a new filial relation by gift, and the very nature of subject indicates that the father and on his default, the natural mother must be the persons competent to determine it. It is also unreasonable to hold that a step-mother can dispose of her step-son by adoption, for when she has sons of her own she is likely to exercise the power in favour of her own sons and to the prejudice of her step-son. That parental affection which ordinarily prevents a father or mother from giving the son in adoption when it is not to the son's advantage is, as a general rule, wanting in the case of a step-mother.

We are not prepared to accede to the contention that after the son attains his majority the gift in adoption is only a formal act and it may be made by the step-mother. If so why should not a brother or maternal or paternal uncle be likewise competent to give.

The Indian Majority Act has nothing to do with the Hindu law of adoption, and the true theory is that the filiation arising from birth does not cease until and unless it is lawfully determined by the father or mother. If the appellant's contention were to prevail, the adoption would practically amount to the adoption of a son self-given, which is forbidden by Adityapurana, cited in Dattachandrika in the note 7 to Section 9, the aurasa and the dattaka being the only two classes of sons recognized in the present age. It is true that when among brothers one brother has sons, Manus says that they are the sons of all the brothers. This [394] does not mean that a brother who has no son is not at liberty to adopt when he has nephews, but it is intended to denote that brothers' sons are to be preferred to strangers for adoption. It is next urged that when a step-son is alive, no adoption is permitted, though his father may have married several wives, and that he is considered to be the son of all. This is because a widow can only adopt for her husband and under his authority. The author of the Dattaka Mimansa notices both the above mentioned objections and concludes in Section II, plac. 67 and 70 that among sapindas a brothers' son must only be affiliated, and that the step-son is the son of all the step-mothers, because he originated from portions of their husband, whilst the brother's son is not so connected by containing portions of either husband or the wife. The author of the Dattachandrika comes to the same conclusion in section I, plac. 25 to 37. The principle appears to be this:—that the power to give in adoption is either with the father or natural mother, with whom alone the son is connected by containing portions of his or her body.

As regards authority, we are referred to no decided case which is on all fours with the one before us. Several of the decisions referred to by the Subordinate Judge throw light however on the principles which ought to guide our decision.

In Kumaravelu v. Virana Goundan (1) it was held that a step-mother is not entitled to succeed to her step-son in preference to a sapinda. The

(1) 5 M. 29.
ground of decision] is that the very reason assigned in Mitakshara, Chapter II, Section 3, for the preference of the mother over the father shows that the natural mother is intended in that passage. This decision is only authority for the proposition that when the reason of the rule excludes its applicability to the step-mother, the step-mother is not to be taken as coming within that rule. The second case is that of Muttammal v. Vengalakshmiannam (1). It is only an authority for the proposition that a step-mother is not an heir in preference to the paternal grandmother. The ground of decision is that the name of the latter is, whilst that of the former is not, specified among the heirs mentioned in the Mitakshara. The third case is that of Mari v. Chinnammal (2). It was held that a paternal uncle excludes the step-mother, and the principle laid down in it was [395] approved. The fourth case is Subbaluvammal v. Ammakutthiammal (3). It was held in that case that an orphan cannot be adopted, and it is an authority for the proposition that to constitute an adoption there must be a giving as well as a receiving, and that in the case of an orphan there is no one competent to give. The fifth case, viz., that of Narayanasami v. Kuppusami (4) in which it was held that a widow cannot give her only son in adoption and she is competent to give in adoption where her husband is legally competent to give, and where there is no express prohibition from him. It is an authority for the proposition therein laid down, viz., that three principles appear to regulate the power to give in adoption (i) the son is the joint property of the father and mother for the purpose of a gift in adoption, (ii) when there is a competition between the father and the mother, the former has a predominant interest or a potential voice; and (iii) after the father’s death the property survives to the mother. The sixth case is that of Bai Daya v. Natha Govindal (5). It was held in that case that a step-son is under no legal obligation to support his mother independently of the existence of family property in his hands. Adverting to Manu’s text “a mother, a father, in their old age, a virtuous wife and an infant son must be maintained,” the Court observed that the word used in the text is ‘matha,’ that the primary meaning of ‘matha’ is natural mother, that it is only in a secondary or figurative sense that it could mean step-mother, and that the conclusion that it is intended to be used in the latter sense must be drawn from the context or comparison of cognate texts. The seventh case is Basketiappa Bin Baslingoppa v. Shivinippa Bin Ballappa (6), and it was there decided that a gift in adoption by the brother, made after the death of the father and mother, though made with previous assent of his father, is invalid. The ground of decision was that the Hindu law does not permit a man after the decease of his father and mother, either with or without the authority of both or either of them, to give his brother in adoption. We are of opinion that there is no warrant either in the Smritis or in the decisions for the contention that a step-mother is competent to give her step-son in adoption.

[396] The next question argued before us is that raised by the eighth issue, and the Subordinate Judge has fully discussed it in paragraphs 72 to 131 of his judgment, and we agree in the conclusion at which he has arrived. We also think that the old English law of attainder did not apply in India in 1783, and that, even if it did, there was no formal conviction for treason nor judgment of outlawry.

---

(1) 5 M. 32. 
(2) 9 M. 107. 
(3) 2 M.H.C.R. 139. 
(4) 11 M. 43. 
(5) 9 B. 279. 
(6) 10 B.H.C.R. 263.
The resumption of the zemindari was an act of State and the law applicable to the case is that laid down in the Mayor of Lyons v. East India Company (1). There the question for decision was whether that portion of the English law which incapacitates aliens from holding real estate and transmitting it by descent or otherwise extended to Calcutta, and the Privy Council held "where a foreign settlement is obtained in an inhabited country by conquest or by cession from another power, the lex loci applies and the law of the country continues to apply until the Crown or the Legislature changes it." Attainder was feudal in its origin and was an incident of the relation of lord and vassal, and not of sovereign and subject, and in this sense it was unknown to Hindu law.

There is no other ground of objection argued in support of this appeal. Though Papamma Rau's authority to adopt was denied in the plaint, the Subordinate Judge considered it proved and there is sufficient evidence to warrant the finding. Again the second defendant's father was at the time of adoption forty or forty-one years of age, but he was unmarried. In Dattachandrika, Section II—33, the commentator, after discussing the question, concludes thus: "the practice of the ancients, even in respect to the adoption of a son unlimited to a particular time, is upheld."

We are unable to hold that Venkataramayya Appa Rau's adoption is invalid by reason of his age. Nor is the fact that he obtained a share in Sobhanadri's estate prior to adoption fatal to its validity. It is true that adoption severs one from one's natural family, but there is no text to the effect that the taking of a share in one's patrimony fixes one in the natural family so as to render him subsequently ineligible for adoption. It is true that the adoption of a person who is forty years old and who has [397] inherited to his father twenty years after the latter's death is unusual, but it is under Hindu law no ground of invalidity. Though it is some evidence to show that the motive with which the adoption was made was a desire rather to favour the first defendant's sister's son at the expense of her husband's reversioner, than to secure her husband's spiritual benefit, we cannot set aside the adoption on that ground.

We do not consider it necessary to dwell further on this part of the case, as the objection that the adoption was not made bona fide is not pressed at the hearing on plaintiff's behalf. On the ground that the adoption made by a step-mother is not valid, this appeal fails and we dismiss it with costs. So far as the vakil's fee is concerned, it is to be divided into four parts, half of it to be awarded to the second respondent and a quarter to each of the third and fourth respondents.

(1) 1 M.I.A. 175 (273).
Gopal v. Bank of Madras

18 M. 397 = 3 M.L.J. 197.

Appeal Civil.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1893

Appeal

Civil.

16 M. 397 =

3 M.L.J. 197.

Gopal and another (Defendants Nos. 2 and 3), Appellants v.
Bank of Madras (Plaintiff), Respondent.*

[28th October, 1892 and 24th January, 1893.]

Transfer in fraud of creditors—Transferee in good faith and for value.

A transfer of property made to certain creditors fraudulently and in contemplation of the insolvency of the transferor is not voidable at the suit of another creditor if the transferee were purchasers in good faith and for consideration.

[R., 25 B. 202.]

Appeal against the decree of T. M. Horsfall, Acting District Judge of North Arcot, in original suit No. 4 of 1890.

The plaintiff was a creditor of defendant No. 1, who had made and delivered to the plaintiff certain promissory notes, and on their maturity had dishonoured them, and about the same time, viz., on 6th May 1889, had ceased to carry on his business as a merchant in Madras and ascended from the original jurisdiction of the High Court. Defendants Nos. 2 and 3 were also creditors of defendant No. 1, and on 12th April 1889 had obtained from him in discharge of their debts, and in further consideration of Rs. 55 paid by them in cash, an instrument, whereby he assigned to them a decree for Rs. 57,000, passed against the Zemindar of Karvetnagar, and whereby it was provided that they, out of the proceeds of the decree, should discharge debts, including their own, to the amount of about Rs. 24,000, and pay a further sum of Rs. 24,000 to the father of the assignor. The plaintiff, alleging that the instrument of transfer had been fraudulently and collusively entered into by the defendants with the object of unduly preferring the debts of the creditors named therein and of delaying and defeating the claims of the plaintiff and the other creditors of the first defendant, now sued for a declaration that it be declared void, or if be declared void as against the plaintiff. The District Judge held that the first defendant had entered into transaction fraudulently, but that defendants Nos. 1 and 2 had taken the transfer in good faith and for good consideration. On this finding he passed a decree declaring the instrument to be void.

Defendants Nos. 2 and 3 preferred this appeal.

Bhashyam Ayyangar and Gopala Sambam Ayyangar, for appellants.

Mr. K. Brown, for respondent.

Judgment.

The suit out of which this appeal has arisen was instituted by the Bank of Madras for a declaration that an instrument, dated 12th April 1889, executed by first defendant to second and third defendants, transferring to the latter a decree held by the former against the Zemindar of Karvetnagar, is void, if not altogether, at least as against the plaintiff’s bank.

The plaintiff’s case is that the instrument in question was executed by first defendant fraudulently and in collusion with second and third defendants with the object of delaying and defeating the just claims of the plaintiff to

* Appeal No. 143 of 1891.
whom he was indebted at the time on account of bills executed or endorsed by him amounting to Rs. 25,000. The first defendant has not defended the suit. The second and third defendants pleaded that the transfer in question was neither fraudulent nor collusive, but that it was taken by them in good faith and for valuable consideration.

The District Judge has found that the second and third defendants acted in good faith in accepting the plaint transfer and that they have paid considerable sums to creditors on the strength of it, but that it is nevertheless void because the instrument in question (Exhibit A) is not really a sale-deed, but a deed of trust in favour of certain preferred creditors, including the trustees themselves (second and third defendants) and another according to English law a trust evincing an unfair preference of creditors is bad, no matter what may have been the importunity of such creditors. He has, therefore, decreed that Exhibit A is fraudulent and void.

Hence this appeal by defendants Nos. 2 and 3.

The first question is whether the Judge is right in holding Exhibit A to be merely a deed of trust and not a sale. By it first defendant makes over absolutely to these appellants a decree under which he is stated to be entitled to a sum of Rs. 57,000 and odd for a sum of Rs. 48,000-11-2, of which Rs. 23,945-6-0 are to be paid to certain named creditors (including second and third defendants) of first defendant (the vendor) and Rs. 24,000 to the vendor’s father, the balance Rs. 55-5-2 having been paid in cash to the vendor himself. There is no good reason for holding that the document is merely a deed of trust and not a sale-deed as it purports to be.

Such being the case, is it void simply by reason of its having been executed by first defendant in contemplation of his approaching failure and insolvency? The mere fraudulent intent of the vendor cannot avoid the deed if the purchasers were free from that fraud. Cf. In re Johnson: Golden v. Gillam (1) at page 394; see also Motilal Ravichand v. Utem Jagjivandas (2). In the present case it is found by the Judge that second and third defendants are not shown to have acted otherwise than in good faith in accepting the transfer of the decree, and that they have paid considerable sums to creditors on the strength of it. This finding is well supported by the evidence. As observed by the Judge, it is clear that the plaintiff’s bank was lending money to first defendant in belief of his solvency until just before he ran away to Pondicherry, and there is nothing to show and no inference can be fairly drawn, that second and third defendants had any better knowledge of first defendant’s contemplated act of insolvency. Nor is it shown that the appellants were even aware of first defendant’s indebtedness to the plaintiff.

[400] Under these circumstances the plaintiff is not entitled to a decree declaring the instrument to be void. In addition to the Bombay case above referred to see Sankarappa v. Kamayya (3) Gnanabhai v. Srinivasa Pillai (4), and Pullen Chetty v. Ramalinga Chetty (5).

The decree of the lower Court must be set aside and plaintiff’s suit dismissed with costs of second and third defendants in both Courts.

Barclay, Morgan and Orr, Attorneys for respondent.

(1) L.R. 20 Ch. D. 389. (2) 13 B. 484. (3) 3 M.H.C.R. 231.
(4) 4 M.H.C.R. 84. (5) 5 M.H.C.R. 368.
JAGANNADHA v. PAPAMMA

16 M. 400—3 M.L.J. 193.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

In Appeal No. 148 of 1891.

JAGANNADHA (Plaintiff), Appellant v. PAPAMMA and Others (Defendants), Respondents.

In Appeal No. 183 of 1891.

BUCHAMMA (Defendant No. 2), Appellant v. JAGANNADHA (Plaintiff), Respondent.

In Appeal No. 20 of 1892.

PAPAMMA (Defendant No. 1), Appellant v. JAGANNADHA (Plaintiff), Respondent.*

[15th and 16th November and 23rd December, 1892.]

Hindu law—Adoption by widow—Agreement between adoptive mother and natural father.

A Hindu, who is taken in adoption by a widow, acting under an authority from her husband, is not bound by an agreement entered into by her with his natural father at the time of the adoption.

[R. 26 M. 143 (153)=12 M.L.J. 197 (205); 27 M. 577=14 M.L.J. 310.]

[401] CROSS appeals against the decrees of G. T. Mackenzie, District Judge of Kistna, in original suit No. 25 of 1889.

Suit for possession of land.

The facts of this case appear sufficiently for the purposes of this report from the judgment of the High Court.

Parthasaradhi Ayyangar and Seshacharyar, for the plaintiff, appellant in appeal No. 148 of 1891.

Mr. P. A. DeRozario and Rangacharyar, for respondent No. 1.

Ramachandra Rau Saheb, for respondents Nos. 2 and 3.

Ramachandra Rau Saheb and P. Subramanya, Ayyar for defendant No. 2, appellant in appeal No. 183 of 1891.

Parthasaradhi Ayyangar and Seshacharyar, for respondent.

Mr. P. A. DeRozario and Rangacharyar, for defendant No. 1, appellant in appeal No. 20 of 1892.

Parthasaradhi Ayyangar, for respondent.

JUDGMENT.

These are appeals against the decree of the District Court of Kistna in original suit No. 25 of 1889.

In that suit plaintiff, a minor, by his natural father as next friend sued for a declaration that he is the adopted son of one Rajah Kamadana Sobbanadri Row, deceased, and for recovery of the property, moveable and immovable, of his adoptive father. The adoption is alleged to have been made by the two widows of Sobbanadri under an authority given by his will. First defendant is the surviving widow and second and third defendants are her daughters. Defendants denied the genuineness of the will of Sobbanadri and pleaded that it was concocted by his senior wife.

* Appeals Nos. 148 and 183 of 1891 and 20 of 1892.
Semtamma who persuaded first defendant to join in the adoption and other proceedings in order to secure the continuance of the Government allowance. They also pleaded that the 109 acres 14 cents of her lands claimed in the plaint were the stridhanam properly of Semtamma who had given them by will to second defendant. They denied possession of any moveable property belonging to Sobhandri or Semtamma. They also set up an agreement entered into between the widows and the natural father of plaintiff at the time of the adoption recognizing Semtamma's right to dispose of the above-mentioned inam lands and providing that the widows should have the guardianship of the adopted boy and management of the property till he attained his majority, on which event happening if disputes should arise between them and him, he should enjoy a moiety of the property and the other moiety until the death of the survivor of the widows when the adopted son should take the whole.

The District Judge found that the adoption was duly performed, but that she put forward as that of Sobhandri was not genuine and the adoption was therefore invalid. He held, however, the first defendant was estopped by her conduct in making the adoption and otherwise from denying the validity of the adoption. He found that the alleged will of Semtamma was not genuine, but that the inam lands with which it purported to deal were her stridhanam property and being undisposed of by her went to plaintiff as her heir by virtue of the estoppel. He held that plaintiff was not bound by the agreement between his natural father and the widows. He gave a decree that plaintiff should have possession of the whole estate against first defendant during her life-time, that the 109 acres 14 cents of Semtamma's stridhanam should pass to him absolutely and that on first defendant's death the estate of Sobhandri should pass to his reversioners.

Plaintiff appeals in appeal No. 148 of 1891, first defendant in appeal No. 20 of 1892 and second defendant in appeal No. 183 of 1891.

(Their Lordships after discussing the evidence continue:—)

In our opinion on the evidence and the probabilities of the case the balance is in favour of the genuineness of the will of Sobhandri, and upon the first issue we must differ from the learned District Judge, and find that Rajah Kamadana Sobhandri Row left a will authorizing his widows to adopt a son.

The factum of adoption is found by the District Judge and his finding on that point is not disputed on appeal. It follows that plaintiff is entitled to a decree for possession of the property of his adoptive father, subject to the question as to the effect of the agreement (Exhibit I) to be considered in appeal No. 20 of 1892.

Next we have to consider the question of the genuineness of the alleged will of Semtamma, the senior widow, raised in appeal No. 183 of 1891. There are in fact two wills of Semtamma put forth (Exhibit IV) of 8th August 1887 and Exhibit III of 9th August 1887. By Exhibit IV she gives to second defendant 109 acres 14 cents of inam land and by Exhibit III she makes certain provisions as to the Government pension being enjoyed by first defendant and her maintaining their mother-in-law, and as to moveable property and debts and a Government bond which stood in her name and recites that she had made a will the day before as to the immoveable property.

The first point in favour of the genuineness of these documents is that it is improbable that any one intending to forge a will of Semtamma

986
should increase the risk of detection by forging two documents. And here again the evidence in support of the wills appears to be very strong and the reasons for discrediting them very weak. The attesting witnesses to the will (Exhibit IV) were the father of Seetamma, now dead, and defence eighth witness, a man apparently of some position. Plaintiff's first witness admits that the signature to Exhibit IV is like Seetamma's and that he produced the document before the Tahsildar with a vakalutanamah. Plaintiff's tenth witness says that Seetamma did make a will on the day of her death as to moveables and that something was said in that will about immovable property. Exhibit G, the petition by first defendant, of 26th August 1887, mentions that Seetamma died on 9th August having made a will in her favour. Exhibit III is proved by the writer and two of the attesting witnesses and defence witnesses 10, 11 and 13. Against all this evidence in favour of the genuineness of these two wills the only objection seems to be that they were not mentioned publicly till 26th August, and that in certain documents by first defendant before that date (Exhibits U, V and Y) she does not mention the will. The non-mention of the will in these documents is to some extent explained by Exhibit W, and we do not think it is fatal to the genuineness of the will. The Judge says he can place no confidence in the evidence of the writer of the will (Exhibit IV), because he says he was persuaded also to write Exhibits O, which purports to be a copy of the will which plaintiff says was executed by Seetamma. What this witness (defence ninth witness) does say is that he wrote Exhibit O not as a copy from any original, but at the dictation of another man. We do not see that this seriously impairs the value of his evidence. It is not clear what Exhibit O is, and it has not been proved that any will of which this is a copy was executed by Seetamma.

On the whole, we think, the balance of testimony is in favour of the genuineness of the wills (Exhibits III and IV), and we find issue 5 (a) for second defendant.

The Judge has found that the property disposed of by Exhibit IV was the stridhanam property of Seetamma, and that she had power to dispose of it by will, and that finding is not questioned in appeal.

There remains the question raised by appeal No. 20 of 1892 whether plaintiff is bound by the terms of the agreement (Exhibit I) between his natural father and the widows.

As to this we agree with the learned District Judge that the decision of the Privy Council in Bhasab Rabindab Singh v. Indar Kunwar (1) is an authority for holding that an agreement between a widow making an adoption under an authority derived from her husband and the natural father of the adopted son cannot prejudice or affect the rights of the son which can only arise when the parental control and authority of the natural father determine. The case of Lakshmi v. Subramanya (2) relied on for appellant was one of an agreement between the adoptive father and the natural father, and is not, in our opinion, in conflict with the decision of the Privy Council above quoted. The Madras case rests upon the principle that the adoptive father, inasmuch as he can, before adoption, dispose of his property as he chooses, can, at the time of adoption, impose such conditions as he thinks fit upon the enjoyment of his property by the adopted son. But a widow, with a power of adoption, derived from her husband, has no such power of disposition over the property, and

---

(1) 16 C. 556.
(2) 12 M. 490.
cannot therefore impose any conditions as to the enjoyment of the property by the adopted son. The question becomes therefore simply one of agreement between the widow and the natural father of the adopted son, and the natural father cannot bind his son by any such agreement for the reason given by the Privy Council.

The result of this judgment is that the decree of the Lower Court must be modified, and there will be a decree declaring that plaintiff is the adopted son of Rajah Kamarada SobhanadriROW deceased, and as such entitled to possession of his property, moveable and immovable, and that he do recover from first defendant possession of the immovable property and of the moveable property found by the District Judge to be in her possession with proportionate costs, that his suit be dismissed as to the 109 acres 14 cents of inam land in the possession of second defendant and as to the other moveable property with proportionate costs. In appeal No. 148 of 1891 first defendant must pay plaintiff’s costs. In appeal No. 183 of 1891 plaintiff must pay second defendant’s costs. Appeal No. 20 of 1892 is dismissed with costs.

16 M. 405.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

AMMUNNI (Plaintiff), Appellant v. KRISHNA (Defendant No. 1), Respondent.* [3rd and 4th October, 1892.]

Succession Certificate Act—Act XXVII of 1860—Suit to set aside certificate granted by the Resident at Cochin.

Defendant No. 1, who was domiciled in the Native State of Cochin, obtained from the Resident a certificate to collect the debts of the deceased karnavan of the plaintiff’s tarwad. The plaintiff, whose domicile was the same as that of defendant No. 1, now sued in British Cochin for a declaration of his right to receive the interest accrued due on certain Government promissory notes, being the property of his deceased karnavan:

Held, that the suit did not lie, and that the appellant should either have established his representative right by suit in the Court of Native Cochin and then applied to the Resident for a certificate, or have brought his action against the Government of India, joining defendant No. 1 as a party to such action.

SECOND appeal against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 951 of 1890, reversing the decree of B. M. D’Cruz, Subordinate Judge of Cochin, in original suit No. 51 of 1889.

Suit to establish the plaintiff’s right to recover a certain sum, being the interest due on certain Government promissory notes, the property of Raman Menon deceased, the late karnavan of his tarwad.

The plaintiff alleged that defendant No. 1 had obtained from the British Resident at Cochin a certificate under Act XXVII of 1860 to enable him to recover the debts due to Raman Menon. The plaintiff and defendant No. 1 were both domiciled in Native Cochin. Defendant No. 2 was the agent of the Bank of Madras, who had been called upon by the plaintiff to pay to him the interest of the Government promissory notes in question. He pleaded that he had been unnecessarily joined in the suit, inasmuch as he had no power to pay the interest sued for without the authority from the District Treasury Officer.

* Second Appeal No. 1817 of 1891.
The Subordinate Judge passed a decree whereby it was ordered as follows, viz., "that the plaintiff is entitled to recover the interest sued "for." On an appeal preferred by defendant No. 1, to which the plaintiff was the only other party, the District Judge reversed the decree on the ground that the Subordinate Judge of British Cochin had no jurisdiction to try the suit.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar, for appellant.

Sankaran Nayar and Sundara Ayyar, for respondent.

JUDGMENT.

The second defendant has not been made a party to this appeal, nor was he a party to the appeal to the District Court, and the question which we have to decide is one arising between the plaintiff and the first defendant. The suit is virtually one to obtain a declaration as against the respondent that plaintiff is the legal representative of the deceased Raman Menon, and, as such, entitled, in preference to the respondent, to the certificate issued by the British Resident under Act XXVII of 1860 and to receive the interest due on the Government securities. It is conceded that both parties are domiciled in Native Cochin. There can be no doubt that, if the respondent had collected any money due as interest on the Government securities, a suit for money had and received would lie only in the Courts of Native Cochin, though the money had been received in British territory. The question as to who is the legal representative of the deceased Raman Menon is a question which, as between appellant and respondent, can only be tried in the Courts of Native Cochin. The suit was, to all intents and purposes, a suit to set aside a certificate of heirship granted by the Political Resident of Cochin, and the Secretary of State was a necessary party to such a suit, and the appeal in its present form cannot be supported. Two courses were open to the appellant, either to establish his representative right in the Courts of Native Cochin and then to apply to the Resident for the [407] issue of a certificate in his name, or to sue the Government of India, making the respondent a party to the suit. We observe that under order XI, rule 1, clause (g) of the Judicature Act this is the course which would be obligatory in England. He has pursued neither of these courses. The second appeal cannot be supported and is dismissed with costs.

16 M. 407 = 3 M.L.J. 135.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

RAMANADHAN (Defendant No. 6), Appellant v. ZEMINDAR OF RAMNAD AND OTHERS (Plaintiffs Nos. 1 and 2 and Defendants Nos. 1, 3 and 4), Respondents.* [21st and 22nd February, 1893.]

Specific Relief Act—Act I of 1877, Section 54, Clauses (b) and (c)—Perpetual injunction—Injury to interest in immovable property—Inapplicability of remedy by compensation—Landlord and tenant—Erection of dwelling house on agricultural land—Ameliorating waste.

A zemindar sued for an injunction to compel the defendant who held agricultural lands comprised in the zemindari with occupancy rights, to demolish

* Second Appeal No. 737 of 1892.
a dwelling house which he had erected thereon for purposes not connected with agriculture, and to restrain him from altering the character of the land:

Held, that the plaintiff was entitled to the injunction sued for.

SECOND appeal against the decree of T. Weir, District Judge of Madura, in appeal suit No. 404 of 1891, confirming the decree of T. T. Rangachariar, District Munsif of Paramagudi, in original suit No. 566 of 1890.

Suit for an injunction compelling the plaintiff to remove a certain building erected by him on land which he held from the plaintiff as an agricultural holding and to restrain him from altering the character of the land. It appeared that the defendant had occupancy rights in the land in question, which formed part of the plaintiff’s zemindari, and that the land had been used for agricultural purposes merely up to recent date, when the defendants erected a building which was in no way connected with agricultural purposes, but was intended to be used either as a dwelling house [408] or as a pleasure house. The District Munsif referred to Jugut Chunder Roy Chowdhry v. Eshan Chunder Banerjee (1), Tarint Charan Bose v. Debnarayan Mistri (2), Lal Sahoo v. Deo Narain Singh (3), Bhola v. The Rajah of Bansi (4), Madho Lal v. Sheo Prasad Misir (5), Lakshmana v. Ramachandra (6), Kunhammed v. Narayanana Mussad (7), and he passed a decree as prayed. On an appeal preferred by the defendant, the District Judge overruled the contention that Specific Relief Act, Section 54, Clauses (b) and (c) precluded the relief sought, and distinguishing Jones v. Chappell (8) and Doherty v. Allman (9) on the ground that the ameliorating waste there in question involved no departure from the original purpose of the letting, he affirmed the decree of the District Munsif.

The defendant preferred this second appeal.

Mr. R. F. Grant and R. Subramanya Ayyar, for appellant.
Subramanya Ayyar and Desikachariar, for respondent.

JUDGMENT.

It is first urged on the appellant's behalf that the Courts below have failed to determine the real point in dispute, namely, whether appellant is or is not the owner of the land in question. In their written statements defendants contended that the zemindar was only entitled to the revenue or the tirwah and that he had no other right. The first issue raised for determination was whether defendants were tenants with occupancy right or tenants from year to year. There is no allusion in the judgments of the Lower Courts to the contention that the appellant was the owner of the soil. Moreover, this point was not taken in the petitions of appeal either in this Court or in the Lower Appellate Court. There is reason to think that the terms tirwah and revenue were used in the written statements as equivalent to rent payable to the zemindar. The contention now raised in second appeal appears to us to be inconsistent with the case set up in the Courts below; and we do not consider that we ought to allow the appellant to vary it in second appeal.

(1) 24 W.R. 220.   (2) 8 B.L.R. App. 69.   (3) 3 C. 781.
The next contention is that the appellant is entitled to erect the chowk in dispute. It is admitted that appellant has occupancy right. It is a settled rule of law that no tenant, whether he has an occupancy right or not, is at liberty to erect houses upon agricultural holdings for other than agricultural purposes and thereby to alter the character of the holding. Every such tenant is under an implied obligation to do no act which is not consistent with the purpose for which the land was originally let for cultivation. That this was the law administered in this country is also clear from the cases cited by the District Munsif and from the decisions of this Court. It is argued by appellant’s pleader that the cases referred to relate to tenancies from year to year or for a term of years and not to tenants who have occupancy rights. The principle on which those cases were decided is that in an agricultural holding the tenant is under an obligation not to alter the character of the holding and that the landlord is entitled to insist upon the tenant abstaining from doing anything inconsistent with the purpose for which the land was originally let. The appellant’s pleader draws our attention to Jones v. Chappell (1) and to Doherty v. Allman (2). These are cases relating to leases of houses and not to agricultural holdings, and they are therefore not in point. On the other hand Meux v. Cobley (3) is the case in point as illustrating the principle which regulates the rights of tenants having agricultural holdings. It is there distinctly laid down that the question on which the decision should rest in such a case as this is whether the act done by the tenant is consistent with the purpose for which the land was demised. The pleader for the appellant also relies on the decisions in Nyamutoollah Ostagur v. Gobind Churn Dutt (4) and Hedayatoonissa Begum v. Shib Dyal Singh (5). These decisions, however, have not been followed in later cases, nor do we see our way to reconcile them with the principle that where a right of property is infringed it is a sufficient injury to entitle a person to sue without alleging or proving special damage. Another contention is that no specific relief or injunction ought to have been granted in this case, and that the injury, if any, caused by the tenants’ act may be adequately compensated for by an award of damages. The right in question is an interest in immovable property, and the zemindar is, therefore, entitled to such specific relief as may be necessary to vindicate his right. As pointed out by the District Judge there is also no definite standard by which the compensation that ought to be awarded for prospective injury can be measured, the rent payable to the zemindar depending on a number of circumstances which it is not possible to foresee. We may also observe that by the appellant altering cultivation lands into a pleasure house, the zemindar is placed in a position worse than that which he would otherwise occupy as regards the several rights created in his favour by Act VIII of 1865. We are not, therefore, prepared to accede to this contention.

As regards the particular land in dispute the admission that appellant is a tenant with occupancy right is now made without any reservation, although the District Munsif refers to a reservation in paragraph 15 of his judgment.

The decision of the Courts below is correct and we dismiss this second appeal with costs.

1892
JULY 14.

APPEL-
LATE
CRIMINAL.

16 M. 410 = 2 Weir 14.


The accused was tried on a charge under Indian Penal Code, Section 352, by a bench of Magistrates, consisting of a pensioned District Munsif who had been appointed Chairman of the bench and one Special Magistrate. The Magistrates differed in opinion, but the Chairman gave his casting vote for conviction, and the accused was convicted and sentenced:

"Held, that the Court was not legally constituted under the rules of the Government of Madras, and the conviction should be set aside.

CASE stated for the orders of the High Court under Criminal Procedure Code, Section 438, by T. Weir, Sessions Judge of Madura.

The case was stated as follows:

"The bench consisted of two Special Magistrates. One of them is a pensioned District Munsif, that is a Magistrate of experience, and had been duly constituted Chairman under the [411] notification of Government, dated 30th July 1890, which authorizes the Dindigul bench to try summarily certain offences under the Indian Penal Code, of which an offence under Section 352 is one.

"The Joint Magistrate reversed the conviction on the ground that the bench of two differed in their opinion, and that the Court was not properly constituted and the presiding Magistrate should not have availed himself of the casting vote in a Court of two.

"I am of opinion that the Joint Magistrate has erred in reversing the conviction.

"Section 15 of the Criminal Procedure Code authorizes the constitution of a bench of two Magistrates, and the rules framed by Government for the guidance of benches of Magistrates under the provisions of Section 16 of the Code, as embodied in the latest Government order on the subject, viz., G. O., dated 27th August 1891, No. 1713, Judicial, clearly give the Chairman of the bench a casting vote in cases of difference of opinion arising between the members of the bench.

"The Joint Magistrate has himself since admitted, in reply to the query from this Court, that he was not aware that the Chairman in a bench of two Magistrates thus constituted could use his casting vote and pass a judgment against the opinion of the other Magistrate.

"In the circumstances stated the reversal by the Joint Magistrate of the conviction by the Dindigul bench, which had been legally constituted and duly empowered as aforesaid, was clearly erroneous.

Counsel were not instructed.

JUDGMENT.

By Section 15 of the Code of Criminal Procedure the Local Government is empowered to "direct any two or more Magistrates in any place outside the presidency towns to sit together on a bench" and to "invest such bench with any of the powers conferred or conferrable by or under

* Criminal Revision Case No. 133 of 1892.
"this code on a Magistrate of the first, second or third class, and direct
"it to exercise such powers in such cases or such classes of cases only
"and within such local limits as the Local Government thinks fit."

Under Section 16 of the same Code the Local Government may, or,
"subject to the control of the Local Government, the District Magistrate
"may, from time to time, make rules consistent [412] with this Code for
"the guidance of Magistrates' benches in any district respecting the follow-
"ing subjects:

"(a) The classes of cases to be tried.
"(b) The times and places of sitting.
"(c) The constitution of the bench for conducting trials.
"(d) The mode of settling differences of opinion which may arise
"between the Magistrates in session."

On the 5th April 1889, the Local Government adopted the following
(among other) rules on the subject:

"One or more Special Magistrates appointed for any local area may
"sit as a bench, together with any salaried Magistrate whom the District
"Magistrate shall, from time to time, nominate for that purpose. The
"salaried Magistrate shall be the Chairman of the bench so constituted
"and the bench is hereby invested with the powers of a Magistrate of the
"third class (i) to try summarily offences against the Indian Penal Code,
"Sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336,
"341, and 352; (ii) to try summarily offences against Municipal Acts and
"the conservancy clauses of Police Acts, punishable only with fine or with
"imprisonment for a term not exceeding one month; (iii) to try, in accord-
"ance with Chapter XX of the Code of Criminal Procedure, other offences
"against Section 48 of the Police Act XXIV of 1859, provided that, with the
"approval of the District Magistrate, any two or more Special Magistrates,
"of whom one is a pensioned Magistrate of experience, may sit together
"as a bench and exercise the powers of a Magistrate of the third class in
"respect of the offences specified in Clauses (2) and (3) above. The pension-
"ed Magistrate shall, if no salaried Magistrate is present, be Chairman
"of such bench."

Paragraph 2 has reference to the "times and places of sitting" and
paragraph 3 directs that differences of opinion "shall be settled by the
"votes of the majority of the Magistrates present, the Chairman having
"the casting vote."

On the 18th July 1889 the above rules were altered by substituting
the words "any three or more" for the words "any two or more"
in the proviso to paragraph 1, and by adding the words "or specially
designated by the District Magistrate" after the words "pensioned
Magistrate of experience" in the same proviso; and by further adding to
the proviso the following words "and [413] with the sanction of Govern-
ment in respect of the offences specified in Clause (1)."

The proviso thus altered is as follows:

Provided that, with the approval of the District Magistrate, any three
or more Special Magistrates, of whom one is a pensioned Magistrate of
experience or specially designated by the District Magistrate, may sit
together as a bench and shall exercise the powers of a Magistrate of the
third class in respect of the offences specified in Clauses (2) and (3) above
and with the sanction of Government in respect of the offences specified
in Clause (1).
The second clause of the proviso was also altered at the same time by the addition of the words "or persons specially designated as aforesaid" and consequently became as follows: "the pensioned Magistrate or person specially designated as aforesaid shall, if no salaried Magistrate is present, be Chairman of such bench."

Clause (3) of paragraph 1 was cancelled and the alteration thereby necessitated in the proviso also made by notification, dated 7th November 1859. As, however, the present reference is no way affected by Clause (3), it is not necessary to notice that alteration further than to observe that even that clause has been subsequently restored and the present rules as embodied in Government Order, dated 27th August 1891, are identical in every respect with the rules on the subject as they stood as altered by Government Order, dated 18th July 1889.

The only other Government Order requiring notice for the purpose of the present case is that dated 30th July 1890, by which the benches of Magistrates at Madura and Dindigul were empowered to exercise the powers of a Magistrate of the third class in respect of the offences specified in Clause (1), paragraph 1 of the rules mentioned above. Saiyed Mustapa Sabe being appointed at the same time President of the bench at Dindigul when exercising the powers thus conferred upon it.

The accused in the present case was tried by a bench consisting of the said Saiyed Mustapa Sabe and another Special Magistrate for an offence punishable under Section 352 of the Penal Code. The two Magistrates differed as to the guilt of the accused, Mr. Saiyed Mustapa Sabe of opinion that the accused was guilty, while the other Magistrate thought him not guilty. He was, however, convicted by the Chairman, availing himself of his right to a casting vote, and fined Rs. 3. On appeal the Acting Joint Magistrate set aside the conviction, giving as his reason that the Court was not properly constituted and the presiding Magistrate should not have availed himself of the casting vote in a court of two.

The Sessions Judge has referred the case on the ground that the acquittal is erroneous (i) because the Court was legally constituted, being a bench of two Special Magistrates, one of whom was a pensioned District Munsif, "that is, a Magistrate of experience" and duly constituted "Chairman under the notification of Government, dated 30th July 1890, and (ii) because the rules framed by Government for the guidance of "benches of Magistrates as embodied in the latest Government Order on the subject, viz., G. O., dated 27th August 1891, No. 1713, Judicial, "clearly give the Chairman of the bench a casting vote in cases of difference of opinion arising between the members of the bench." The Judge has overlooked the fact that the trial in question took place in April 1891, i.e., some four months prior to the notification referred to by him. However, as already pointed out, the rules as contained in this notification are, so far as they affect the case now under consideration, i.e., a case under Clause (1) of paragraph 1 of the notification, in no way different from the rules in force since July 1889, and if the Court was legally constituted, the Chairman clearly had, under the rules, power to decide the case by his casting vote.

But was the Court legally constituted? This question must be answered in the negative. It is clear in reading the whole of paragraph 1 (including the proviso) of the rules as amended by Government Order, dated 18th July 1889, that in the absence of a salaried Magistrate the bench could not consist of less than three members. Government Order, dated 30th July 1890, merely empowered the benches of Magistrates at
Madura and Dindigul to try, even in the absence of a salaried Magistrate, the offences under the Penal Code specified in Clause (1) of paragraph 1 of the rules a class of offences which was theretofore triable by them only in conjunction with a salaried Magistrate, and it appointed specially-designated presidents for the trial of such cases, but the power was given and the Chairman appointed subject to the rule contained in the proviso to paragraph 1. The Joint Magistrate was, therefore, right in setting aside the conviction in this case on the ground that the Court was not legally constituted.

16 M. 415.

[416] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

RAMA VARMA RAJAH (Plaintiff), Appellant v. KADAR AND OTHERS (Defendants), Respondents.* [22nd December, 1893.]

Court-Fees Act—Act VII of 1870. Section 17—Redemption suit—Claim by mortgagor for rent in same suit—Court fee on appeal.

A suit to redeem a mortgage for Rs. 3,500 and to recover a certain sum on account of rent was dismissed as far as the prayer for redemption was concerned, and also part of the claim for rent was disallowed. It did not appear that the arrears of rent were intended to be set off against the mortgage debt. The plaintiff appealed: Held, that the Court-fee should be computed on the principal amount of the mortgage debt and on the claim which had been disallowed on account of rent.

[R., 17 Ind. Cas. 442 (444) = 12 M.L.T. 493; 7 O.C. 151; 23 T.L.R. 123.]

CASE referred for the orders of the High Court under Civil Procedure Code, Section 617, by R. S. Benson, District Judge of South Malabar.

The case was stated as follows:—

"Under Section 617, Civil Procedure Code, and following the precedent of the reference in Venkappa v. Narasimha (1), I have the honour to refer the following question for the orders of the High Court:—

"In an appeal now pending before me, the plaintiff sued to redeem a mortgage of Rs. 3,500 with arrears of rent amounting to Rs. 1,917. Court-fee was levied in the Lower Court on the principal sum secured by the instrument of mortgage, viz., on Rs. 3,500, and the Court, holding that the deed of mortgage conferred a perpetual tenure, dismissed plaintiff's claim for redemption, but allowed him Rs. 672 on account of arrears of rent. Plaintiff appeals (1) against the decree dismissing his claim for redemption, and (2) as regards the disallowed portion of the rent. He has valued the memorandum of appeal on the mortgage amount, viz., Rs. 3,500, and has paid Court-fee calculated on that amount. The question is whether the appeal has been correctly stamped.

"[416] The appellant argues that the stamp is sufficient and he relies on the rulings in Zamorin of Calicut v. Narayana (2), Subramanya v. Kannan (3), and Reference under Court-Fees Act, Section 5, (4). None of these cases, however, appears to me to decide the exact question raised in the present appeal.

"In Zamorin of Calicut v. Narayana (2) the plaintiff sued to redeem a mortgage agreeing to pay to the defendants whatever sum was found

* Referred Case No. 38 of 1892.

(1) 10 M 197.
(2) 5 M. 4.
(3) C.R.P. No. of 1899, unreported.
(4) 14 M. 450.
by the Court to be due for their improvements. The determination of
the value of improvements was not a relief which the plaintiff sought,
but was one which the Court had to consider in deciding as to the
conditions under which the relief claimed by the plaintiff, namely the
recovery of the property, was to be granted. Further, the question of
improvements, of which the value was unascertained at the time of suit,
was one which the Court had not to decide until the right to redeem
was established. Under these circumstances, it was ruled that it was
not necessary to take this unascertained value of improvement into
account in valuing the suit for the purpose of jurisdiction. The dictum
was one purely on a question of jurisdiction, and relating to a relief
claimed by the defendant in the suit.

The second case of Subramanya v. Kannan (1), was also on a
question of jurisdiction. The plaintiff in that case sought to redeem a
kanom of Rs. 2,000, with arrears of rent amounting to Rs. 900, and it
was held that though microman may be payable every year by the
mortgagee to the mortgagor, yet when it is allowed to remain in arrear
and to accumulate until a suit is brought to redeem, it becomes a matter
of account to be taken between the mortgagor and mortgagee, and it was
decided that the suit was cognizable by a District Munsiff.

The facts in the third case Reference under Court Fees Act, Section 5,
(2) were very similar to those in the present case; but the questions there
decided, to quote the words of the judgment, were "whether in a suit for
the redemption of a kanom, institution fee ought to be paid on the kanom
debt as it originally stood or on so much of it as was actually due at the
date of the suit after setting off against it arrears of rent." It was
decided that the institution fee must be computed on the kanom debt as
the suit originally stood. The question whether the arrears of rent
claimed should be separately charged was not considered and decided.

All the above cases proceeded upon the assumption that suits by
landlords in Malabar to recover property from their kanom tenants
are purely and technically redemption suits. Whether a kanom is a
lease or a mortgage has to be decided by the Court according to the cir-
cumstances of each particular case. Silapani v. Ashtamurti Nambudri (3).
It will be observed that in every kanom document there are two distinct
contracts by the tenant (1) to surrender the property to the landlord
after a stated period, and (2) to pay a stipulated rent to the landlord
annually. The landlord is thus at liberty to seek a relief on either
of these stipulations. He can sue for rent alone when it falls due,
Shaikh Raitan v. Kadangot Shupan (4), or he can sue for the recovery of
the property when the stipulated time arrives, in which latter case he
can enforce the two remedies together (Section 44, Civil Procedure Code).
That he is enabled to sue for the rent alone shows that the claim for
rent is a distinct cause of action independent of the claim for redemption;
otherwise a jenmi, who brings a suit for rent alone, would be
precluded from afterwards bringing a suit for redemption (Section 43 Civil
Procedure Code). If, then, the two reliefs are distinct, the one can still
be maintained if the other fails, so that, if the right to redeem fails on
the ground either that the claim is premature, or that the grant is per-
petual, the right to recover the arrears of microman still enures and can
be enforced.

(1) C. R. P. No. 387 of 1889, unreported. (2) 14 M. 480. (3) 3 M. 382.
(4) 1 M.H.C.R. 112.
"If, therefore, the two reliefs, are separate and embrace two distinct
subjects, they must, it would seem, under Section 17 of the Court-Fees
Act, be separately charged. Otherwise there arises this anomaly:
Suppose the mortgage sought to be redeemed is Rs. 1,000 and the arrear
of rent claimed is Rs. 3,000 (such cases are not rare in this district).
Suppose, also, that the right to redeem is disallowed by the Court, as in
the present case, but that the claim for rent is found in favour of the
mortgagor. Can the Court give a decree for rent of Rs. 3,000 when
[418] the suit is valued as a redemption suit and the Court-fee is paid
on Rs. 1,000 only?

No doubt micharom becomes a matter of account under certain
circumstances, e.g., when it is allowed to remain in arrear and redemption
is decreed in favour of the mortgagor. The Court has then to see what
sum is due by the mortgagor to the mortgagee, and has, with this object,
to take into account the sum due by the mortgagee to the mortgagor;
but this happens only when the mortgagor succeeds in his claim for
redemption, and the suit is framed purely and technically as a redemption
suit. Where, however, as in the present case, a relief in respect
of rent is sought independently of the claim for redemption, the former
should, it is submitted, be treated as a separate money claim and Court-
fee should be levied separately on such claim under Section 17 of the
Court-Fees Act. Otherwise it makes an anomalous distinction between
suits where rent is disputed, and suits where the value of improvements is
disputed. In the latter, the mortgagor is required to pay, when he
appeals, Court-fee on the value of improvements which he disputes.
For these reasons, I doubt the correctness of the present practice of
levying Court-fee in all cases on the amount secured by the kanom
instrument without reference to the amount of arrears of rent sought to
be recovered in the same suit. I am, however, unwilling to alter the
practice without a direct ruling of the High Court. It is a question of
considerable fiscal importance in this district."

Plaintiff was not represented.

Sankara Menon, for defendant No. 2.

JUDGMENT.

The claim to arrears of rent and the right to redeem are two distinct
causes of action. It does not appear that the arrears were intended to be
set off against the mortgage debt and rendered items of account to be taken
between the mortgagor and mortgagee.

The District Judge is right in holding that the Court-fee ought to be
computed on the principal amount of the panayom debt and on the amount of
arrears of rent disallowed by the Subordinate Judge and claimed in
appeal.
[419] FULL BENCH—APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Wilkinson.

REFERENCE UNDER STAMP ACT, SECTION 49.*
[9th August, 1892.]

Madras Regulation 11 of 1826, Section 4—Ad valorem stamp duty.

An instrument, dated 1853 which purported to be a transfer by the executant of the property inherited by her from her husband subject to the payment of his debts, and in which a provision was made for the maintenance of the executant and for the retransfer of the property in case she gave birth to a son:

Held not to be liable to stamp duty.

Case referred under Stamp Act, Section 49, by T. Sami Ayyar, Acting District Munisif of Ariyalur.

The case was referred as follows:—

"In original suit No. 30 of 1892, on this Court's file, a certain document drawn up in Tamil has been filed for the defendant, which, together with a copy thereof, is enclosed and a translation subjoined. The document purports to be a gift or devise relating to certain immovable properties of which, however, the value is not specified. It bears date the 23rd September 1853, and the stamp law then in force was Madras Regulation II of 1825. In that enactment, as well as in those preceding it, provision is made for the levy of prescribed stamp duties on instruments of the description under reference according to the value borne by them.

"The table annexed to Section 11 of Regulation XIII of 1816 prescribes various scales of duty ranging from 2 annas to 150 rupees, and it is enacted by Section 4 of Regulation II of 1825 that instruments not exceeding 64 rupees in value shall not require a stamp, thereby fixing the minimum limit of taxation at 4 annas. But it is nowhere to be found in the enactments relating to the stamp law including the one now in force, what the procedure is in the case of instruments in which the value of the subject-matter is not specified, though it may be presumed that it would come within the taxable limit. In this case [420] there is no doubt that the value of the properties comprised in the deed is much more than 64 rupees which is the minimum limit for taxation as above pointed out, because one of the numerous items of immovable properties thereby alleged to be conveyed is, according to the evidence in this case, worth Rs. 50. I am, however, aware of no provision of law or any ruling which defines the process by which the actual value in such matters is to be ascertained.

"The consideration, for the transfer of which the present document would be evidence, is the payment of certain debts by the claimant on account of the executant. If the amount of such debts at least had been specified that would, under the provision contained in Section 24 of the present Act, afford a standard for the determination of the stamp duty. In the absence of any tangible means prescribed for determining the question, I respectfully beg to refer the same for orders. In my opinion it would be equitable to levy the minimum rate, if not to ascertain the actual value of the properties at the date of the instrument by

"judicial investigation and thereupon to fix the duty payable on the
instrument. As I am able to find no authoritative ruling on the question,
I have been under the necessity of making this reference."

The document to which it relates was as follows:

"Deed of settlement, dated 9 Parattasi, Piramathicha, corresponding
to 23rd September 1853, executed to Chidambaram Pillai, son of
Ambia Pillai, residing at Mallarasur, by his elder brother's daughter-in-
law, Valiammi, wife of Arunachalam Pillai, residing at the said place.
The terms being: After the division and enjoyment of the property,
land, house, &c., among the three persons, viz., my husband,
Arunachalam Pillai and Muthusami Pillai, as my husband died this
year and as I have no other person to look after my estate, you are at
liberty to enjoy the immovable properties that fell to the share of my
husband, viz., house, house-site, lands, well, garden, cattle-shed, there
being no other property to me besides for my maintenance, you
should plough and sow for me ½ cawni of Kambai Kollai land;
I shall manure the field myself. You should pay off the Govern-
ment kist with the exception of this; you may enjoy all the other
properties and clear all the debts of my husband. As I am now
bearing, if I am blessed with a son and if he is spared and he
attains his majority, you should give back to me the properties
that have fallen to my share, and I and my son will pay you back,
without interest, the debts discharged by you. In the event of my not
being delivered of a male issue, you at liberty to enjoy the whole of
the properties and cultivate for me the aforesaid ½ cawni of land
during the rest of my lifetime. This deed of settlement I execute with
my free will and consent. In case I act contrary to the provisions
stipulated herein, I am entitled only to the ½ cawni set apart to me."

Counsel were not instructed.

JUDGMENT.

The deed is not an instrument of gift but purports to transfer to
Chidambaram Pillai the property of the executant's husband, subject to
the payment of his debts. It also purports to reserve ½ cawni for the
maintenance of the executant and provides for the re-transfer of the property
in case she should give birth to a son. There is nothing to show
that the value of the interest transferred exceeded Rs. 64. The value
of the property cannot be taken as the value of the interest actually
transferred. We are unable to hold that the document is liable to stamp
duty.
APPPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

QUEEN-EMPRESS v. ALAGU KONE.*
[21st September and 5th October, 1892.]

A Magistrate, acting under Criminal Procedure Code, Section 164, has power to administer an oath, and a charge of perjury can be framed with regard to statements made before him on oath when he is so acting.

[F., 29 M. 89 (90) = 3 Cr.L.J. 370 ; 8 Bom.L.R. 589 (598) = 4 Cr.L.J. 183 ; R., 14 Bom. L.R. 753 = 13 Cr.L.J. 709 (710) = 16 Ind. Cas. 517 ; D., 12 Cr.L.J. 33 (35) = 13 Ind. Cas. 273 = 5 S.L.R. 174.]

APPEAL by Government against a judgment of acquittal by H. S. Wynne, Additional Sessions Judge of Madura.

[422] The accused was charged under Penal Code, Section 193.

The charge was framed in the alternative, and it appeared that during a police investigation the accused had made a statement on solemn affirmation before a Magistrate, who recorded it, to the effect that he had been an eye-witness of a murder. The persons implicated by the statement having been put on their trial, he withdrew his statement alleging it to have been made through fear of the police and that he knew nothing at all about the occurrence, and these were the statements in respect of which the offence of perjury was charged to have been committed.

The Sessions Judge was of opinion that the Magistrate, before whom the first of those statements was made, had no power to administer a solemn affirmation in holding an inquiry under Criminal Procedure Code, Section 159, and recording statements under Section 164. He accordingly held that the charge was not substantiated and acquitted the accused.

The present appeal was preferred by Government.

The Acting Government Pleader and Public Prosecutor (Subramanya Ayyar), for the Crown.

The accused was not represented.

JUDGMENT.

We have no doubt that the statement A was really taken under the provisions of Section 164 of the Code of Criminal Procedure and the only question is whether the Magistrate acting under that section had power to administer an oath.

The Additional Sessions Judge has distinguished this case from that of Empress v. Malka(1) on the ground that, under Act X of 1872, the Magistrate was empowered by law (Section 331) to administer an oath. That section was not re-enacted in the present Code, since under the Indian Oaths Act X of 1873, all Courts are authorized to administer oaths (Section 4), while Section 14 of the same Act imposes the obligation to

* Criminal Appeal No. 295 of 1892.
(1) 2 B. 643.
state the truth. The term "Court" includes all Magistrates (Section 3 of the Indian Evidence Act).

The direction in Section 164 that the statement shall be recorded in one of the manners prescribed for recording evidence is merely a direction as to procedure. The statement itself was one which the law (Section 164, Criminal Procedure Code, permitted to be made before the Court by a witness, and is therefore evidence within the definition of Section 3 of the Indian Evidence Act. The person making it was a witness within the meaning of Section 5 of the Oaths Act, and therefore one to whom an oath or affirmation might be administered.

The case referred to Queen-Empress v. Bharm (1) does not apply, as the ground of decision there was that the Third-class Magistrate, who took the statement, had not authority to carry on the preliminary inquiry. Here the statement was taken by the Committing Magistrate in a stage of an inquiry which he was authorized to conduct under the Code of Criminal Procedure.

We must reverse the acquittal and direct that the case be re-tried.

18 M. 423 = 1 Weir 723.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

QUEEN-EMpress v. KHajarBoy. (15th December, 1892.)


No process fee is leviable on complaints made by Municipal officers and the accused are not liable to refund sums illegally levied from the complainants as process fees.

Cases referred for the order of the High Court under Criminal Procedure Code, Section 438, by C. Kough, District Magistrate of Kurnool.

Process fees were levied on complaints brought by the officers of the Municipality against various persons who were convicted by the Bench of Magistrates of Kurnool and were directed to refund the sums levied as process fees. The District Magistrate referring to a notification, dated 15th January 1890, published in the Fort St. George Gazette of the 20th idem, page 54, expressed the opinion that this order was illegal and accordingly reported the cases as above.

[424] Counsel were not instructed.

JUDGMENT.

Section 31 of the Court Fees Act must be read with Section 19. No process fee is leviable under Section 19 on complaints made by Municipal officers and we do not think that the accused were liable to refund, under Section 31, what was illegally levied from the complainants.

The orders, so far as they direct the accused to pay the process fees, are set aside.

* Criminal Revision Cases Nos. 613 to 632 of 1892. See also G. O., No. 1471 dated 26th August 1889.

(1) 11 B. 702.
APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

NARAYANASAMI (Plaintiff), Appellant v. NATESA (Defendant No. 2), Respondent.*

[25th, 28th March and 12th April, 1892.]


The holder of a decree passed in a suit on a hypothecation bond, applied under Civil Procedure Code, Section 206, to have the decree amended by bringing the description of the land contained therein into accordance with that contained in the hypothecation bond and the Court made an order accordingly. On a revision petition preferred under Civil Procedure Code, Section 622, by the decree-holder:

Held, but on different reasoning by the two learned Judges constituting the Court, that the High Court had no power to interfere on revision.

[R., 31 B. 447; 31 M. 411 = 4 Ind. Cas. 1130 = 5 M. L.T. 221; D., 11 O.C. 908.]

Petition under Civil Procedure Code, Section 622, praying the High Court to revise the order of N.R. Narasimah, District Munsif of Tiruvalur, dated 20th day of December 1889, made on miscellaneous petition No. 1509 of 1889.

Petition by a decree holder for the amendment of a decree passed in a suit on a hypothecation bond by bringing the description of the hypothecated property contained in the decree into conformity with that contained in the hypothecation bond.

The District Munsif made an order as prayed and the defendant preferred this petition under Civil Procedure Code, Section 622, which came on for disposal before PARKER, J., who delivered judgment as follows:

[425] PARKER, J.—I am of opinion that the District Munsif acted without jurisdiction in disposing of the application under Section 206, Civil Procedure Code. The decree was in conformity with the judgment, and on the plaintiff’s own showing it was the judgment that was wrong, the schedule attached thereto being at variance with the description of the property in the hypothecation deed. The proper course therefore was to apply for a review of judgment. It is objected that there is an appeal, and hence that Section 622, Civil Procedure Code, does not apply. I do not think there is an appeal from an order under Section 206, but the effect of the order passed is really a decree on review from which an appeal would lie.

I set aside the order under Section 206, Civil Procedure Code, as made without jurisdiction. Petitioner is entitled to his costs in this Court and in the Court below.

The decree-holder preferred an appeal from the judgment of PARKER, J., under Letters Patent, Section 15.

Parthasaradhi Ayyangar, for appellant.

Ramachandra Ayyar, for respondent.

JUDGMENT.

BEST, J.—This is an appeal against an order of Mr. Justice Parker, which sets aside an order passed by the District Munsif of Tiruvalur amending a decree under Section 206 of the Code of Civil Procedure.

It is urged on behalf of the appellant that the learned Judge acted without jurisdiction (1) because an order passed under Section 206 of the Code is appealable, and, therefore, not open to revision under section 622, and (2) because, even if such an order is not appealable, the Munsif had jurisdiction to amend the decree under Section 206 and the mere fact of his having acted illegally (assuming such to be the case) would not give this Court jurisdiction to interfere under Section 622, and it is contended finally that the Munsif's order was correct, as he merely brought the decree into conformity with the judgment.

As to the first of these objections it is contended that, though an order passed under Section 206 is not appealable as an order under Section 588, the decree, as amended, is appealable. This was the opinion of Oldfield, J., in Surta v. Ganga (1), but Mahmood, J., was of different opinion in the same case, and on appeal [426] the Full Bench concurred with the latter, Surta v. Ganga (2), and this view appears to have been adopted by this Court also. This first objection must, therefore, be disallowed.

The next objection, viz., that, as the District Munsif had jurisdiction, the mere fact of his having acted wrongly in the exercise of that jurisdiction (assuming such to have been the case) was no ground for interference under Section 622, must, I think, be allowed to be valid. It was held by their Lordships of the Privy Council in Rajah Amir Hassan, Khan v. Sheo Baksh Singh (3) that, if a Court has jurisdiction to decide a question and decides it, the mere fact of the decision being wrong is not sufficient to bring the case within the scope of Section 622 as amended by Act XII of 1879, and there can be no question as to the District Munsif's jurisdiction to entertain the application under Section 206 and give a decision thereon.

But even on the merits of the case, I am of opinion that the District Munsif's order was correct. The judgment expressly directs that the "hypothecated property" be brought to sale if the money decreed be not paid within the time fixed for the payment. The error that was corrected by the order in question is thus described by the Munsif: "In the document the hypothecation bond the properties are described as follows: "There is a heading given with the words east, west, south, north, name of field and extent, and the particulars are entered in the appropriate columns. In describing the lands in the plaint, this arrangement was not followed, but the boundaries of each have been separately given, the "words east, west, &c., being added after each boundary," and in so doing "what ought to be the eastern boundary is placed as the western "boundary and vice versa, but the names and extents of the fields are "correct." It is thus seen that the alteration ordered was necessary to rectify a palpable error, without which correction the decree was unexecuteable. The error is in fact in the plaint, but it is so palpable that to disallow its correction would be simply to put an obstacle in the way of plaintiff's executing his decree.

The learned Judge is mistaken in supposing that "it was the judg-ment that was wrong, the schedule attached thereto being at variance

(1) 7 A. 411.  
(2) 7 A. 875.  
(3) 11 I.A. 237.
with the description of the property in the hypothecation deed."
There is no schedule attached to the judgment. The judgment merely
directs that "the hypothecated property" be held liable for the debt and
sold if necessary. Consequently, the suggestion that the plaintiff's proper
course was to apply for a review of judgment is open to the objection
that there is in the judgment nothing that requires correction. Whereas
the application to correct the decree so as to make it accord with the
judgment is literally within the wording of Section 206, as it is "the
hypothecated property" which is by the judgment expressly made liable
for the debt, and in the peculiar circumstances of this case the District
Munsif was, I am of opinion, justified in correcting the palpable errors in
the schedule attached to the decree by a reference to the hypothecation
bond.

I would, therefore, set aside the order of the learned Judge, and
restore that of the District Munsif and direct respondent to pay appellant's
costs both of the petition under Section 632 and of this appeal.

MUTTUSAMI AYyAR, J.—In this case, I agree with Mr. Justice
Parker that, on the true construction of the District Munsif's judgment
there was no variance between it and the decree to justify the amendment
of the latter under Section 206 of the Code of Civil Procedure.

In construing a judgment as to the relief intended to be awarded,
regard should, I think, be always had to the relief claimed in the plaint,
as it is not competent to a Court to award any relief not so claimed, and
the proper construction of the words in the judgment "the property
hypothecated" is the property described in the plaint as hypothecated. But
the facts of this case are that owing to a misdescription of boundaries in
the plaint, the property described therein as hypothecated is not the
property described in the hypothecation deed or really hypothecated.
The appropriate remedy available to the plaintiff seems to me to consist in an application for review for the correction of an obvious
error in the judgment and the decree in consequence of an error
in the plaint and not for amendment of a decree under Section 206 when
there is no real variance between it and the judgment.

I concur, however, after some hesitation, in the order proposed by
my learned colleague for two reasons. The District Munsif had inherent
jurisdiction to amend the plaint and the decree, but [428] he erred
in the exercise of that jurisdiction by proceeding under one section of the
Code of Civil Procedure instead of another. He did not, therefore,
assume a jurisdiction which he did not possess, but irregularly proceeded
under one section, whilst he ought to have acted under another, and it is
not, therefore, a proper case for interference under Section 632. According
to the Full Bench decision, the error of procedure must be such as
to have led to the assumption of a jurisdiction which did not exist in
law, and not merely to an erroneous action in law in respect of a
matter over which he had jurisdiction to interfere under the Code of
Civil Procedure.

Another reason is the observation of the Privy Council in Biscessur
Lal Sahoo v. Maharajah Luchmessur Singh (1) to the effect that in execu-
tion proceedings the Court will look at the substance of the transaction
and will not be disposed to set aside an execution upon mere technical
grounds when they find that it is substantially right. It seems to me that
this principle may be kept in view in the exercise of the discretionary power

(1) 6 I.A. 233.
enforced upon the High Court by Section 622, especially when the order
revised corrected the plaint only so far as it confounded the boundaries of
the hypothecated property and placed the western boundary at the east
and the eastern boundary at the west and vice versa and thereby rendered
the decree which would otherwise be incapable of execution capable of
execution.

On these grounds, I concur in the order proposed by my learned
colleague.

16 M. 429.

[429] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

PALANIAPPA (Plaintiff), Appellant v. LAKSHMANAN AND OTHERS
(Defendants), Respondents.*

[4th October, 1892 and 9th January, 1893.]

Equitable assignment—Proceeds of an intended appeal—Property substituted by agree-
ment between decree-holder and third parties for such proceeds—Right to follow such
proceeds in hands of such third parties—Notice

A judgment-debtor paid into Court the sum due under a decree passed
against him on appeal. The expenses of the appeal had been advanced by the
present plaintiff under an agreement signed by the appellants, which provided
as follows: "you should first take out of the amount which may be collected
from the defendants the whole of the amount incurred on account of the said
costs." Persons holding a decree against the successful appellants sought to
enforce it against the money in Court having notice of the above agreement.
Their application was first resisted by the successful appellants on the ground
that the money was charity property, but subsequently it was consented to, and
the money was paid out to them on their substituting certain other property for
the purposes of the charity. The present plaintiff having obtained a decree on
the above agreement, now sought to execute it against the money which had
been so paid out:

Held, that the above agreement constituted a valid charge on the funds
realized under the appellate decree, which charge was binding on the parties
of the money and the plaintiff was not bound to proceed against the property
substituted by them for the purposes of the charity.

9 Ind. Cas. 255 = 21 M. L. J. 413 (420) = 9 M. L. T. 276; 17 M. L. J. 391 = 2
M. L. T. 197.]

APPEAL against the decree of C. Venkobachariar, Subordinate Judge
of Madura (West), in original suit No. 40 of 1890.

The present defendants Nos. 4 to 6 brought a suit in 1885 against
Reverend Father Labertoro and one Adimulam Pillai and his sons to
recover the principal and interest due on a hypothecation bond and
obtained, in the first instance, a decree against the last named defendants
only. On appeal, a decree was passed against Reverend Father Laberthere
also, in satisfaction of which he paid into Court Rs. 44, 763-12-8. The
question for determination in this suit related to the rights in respect of
this fund of various persons who claimed to share in it.

The present defendants Nos. 1 to 3 first claimed to execute against
it a decree for Rs. 36,000 obtained by them against the [430] present
defendants Nos. 4 to 6. The latter then asserted that most of the money
in Court represented charity property, of which they were trustees, and was
accordingly not available for distribution in execution. But subsequently (before the institution of the present suit) those parties entered into an agreement in pursuance of which the charity-fund, to the amount of Rs. 28,600, was paid on 29th of April 1889 to the present defendants Nos. 1 to 3, who furnished certain other property in substitution for it for the charity.

The plaintiff claimed to share in the fund in Court as holder of a decree passed against defendants Nos. 4 to 6 in a suit of 1887, and also under two agreements entered into between him and them, of both of which defendants Nos. 1 to 3 had notice at the date of the payment to them above referred to. The first of these agreements was entered into at the time of the institution of the suit of 1885 by the present defendants Nos. 4 to 6, and they thereby assigned to the present plaintiff a two-fifteenths share of their interest in the hypothecation bond to which that suit related, and he agreed to advance (and it was found that he did advance) the funds necessary for the litigation. The second of these agreements related to the costs of the appeal for which the present plaintiff advanced Rs. 3,000: under this agreement (filed as Exhibit B) that sum was to be repaid out of moneys which might be realized in execution of the decree that might be passed on the appeal. The present plaintiff brought a suit on the latter of these two agreements and obtained a decree for Rs. 4,702-13-0 in July 1889.

He now sued to establish his charge in respect of the amount due under the last-mentioned decree on the sum of Rs. 28,600 received by defendants Nos. 1 to 3 and to compel payment by them of the amount due under his decree.

The Subordinate Judge dismissed the suit holding that the plaintiff should have proceeded against the property that had been furnished by defendants Nos. 1 to 3 in substitution for the money paid to them under the above-mentioned arrangement of April 1889.

The plaintiff preferred this appeal.

Bhashyam Ayyangar and Sivasami Ayyar, for appellant.

Sundara Ayyar, for respondent No. 1

JUDGMENT.

This was a suit brought by the appellant to compel the first, second and third respondents to refund Rs. 5,630, [431] with interest thereon at 9 per cent. per annum, from Rs. 28,600 drawn by them out of the amount paid to the credit of original suit No. 7 of 1885, on the file of the Subordinate Court of Madura. The facts which have given rise to this claim may be briefly stated as follows: In 1885, respondents 4 to 6 desired to sue Adimulam Pillai and his sons, who owed them a large sum of money, upon a hypothecation bond for Rs. 43,000, but had no funds at their disposal to pay the expenses of the suit which they had to institute. They assigned to the appellant two-fifteenths of their interest in the hypothecation bond, and in return he advanced the funds necessary for the prosecution of their claim. The result was the institution of original suit No. 7 of 1885 by respondents 4 to 6 against Adimulam Pillai and his sons and against Father Labethere. Although the decree passed therein was in their favor, yet it exonerated Father Labethere the fourth defendant in that suit from all liability for respondents' claim. Adimulam and his sons not being solvent, the said respondents preferred an appeal to the High Court (No. 84 of 1886) against so much of the decree as absolved Father Labethere. They again borrowed from the appellant
Rs. 3,000 to prosecute the appeal and secured its re-payment by document B. That document purports to be an agreement executed by them in appellant's favor on the 21st July 1886, and, after reciting the advance, charged it upon the costs, if any, which the High Court might award on appeal and, if no costs were awarded upon the thirteen-fifteenths or the respondents' share of the debt that might be decreed. On the 17th January 1888, the High Court decided that Father Laberthere was liable to the extent of about Rs. 45,000 and ordered him to pay that amount, but directed each party to bear his or their costs.

Father Laberthere paid into Court Rs. 41,000 and odd on the 13th October 1888 and Rs. 3,000 and odd on a subsequent date in satisfaction of the appeal-decree. At this time there were several decrees and claims outstanding against respondents 4 to 6. The first, second and third respondents had a decree against them for Rs. 36,000 and odd in original suit No. 12 of 1882 on the file of the Subordinate Court. The appellant himself had three distinct claims against the money in deposit. He had a decree for more than Rs. 7,000 in original suit No. 14 of 1887, and he was also entitled to two-fifteenths of the amount in deposit by virtue of the assignment already mentioned. He claimed further a charge upon it for the amount due under agreement B-1, which formed the subject of original suit No. 48 of 1888, then pending. The fourth to sixth respondents urged that a thirty-two forty-thirds share of the amount in deposit represented certain properties which had been dedicated to a charity, and should be paid out to them in their capacity as trustees of that charity without being applied in liquidation of their private debts. Again, one Subramaniyam Chetty had two decrees to be satisfied by respondents 4 to 6, one in original suit No. 13 of 1887 and the other in original suit No. 546 of 1888. Each of these persons claimed payment from the amount in deposit, and on the 13th March 1889, the Subordinate Judge, by his order, Exhibit C-2, distributed it in the following manner:

<table>
<thead>
<tr>
<th>Amount in deposit</th>
<th>...</th>
<th>...</th>
<th>44,763</th>
<th>12</th>
<th>8</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thirty-two forty-thirds of the amount which is charity money</td>
<td>...</td>
<td>...</td>
<td>33,312</td>
<td>9</td>
<td>7</td>
</tr>
<tr>
<td>Amount available for distribution among creditors</td>
<td>...</td>
<td>...</td>
<td>11,451</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Amount set apart on account of the claim of the appellant as the fourth plaintiff in original suit No. 7 of 1885</td>
<td>...</td>
<td>...</td>
<td>1,526</td>
<td>13</td>
<td>2</td>
</tr>
<tr>
<td>Amount due to do, as decree-holder in original suit No. 14 of 1887</td>
<td>...</td>
<td>...</td>
<td>7,801</td>
<td>15</td>
<td>7</td>
</tr>
<tr>
<td>Balance available for decree-holder in original suit No. 13 of 1887</td>
<td>...</td>
<td>...</td>
<td>2,122</td>
<td>6</td>
<td>4</td>
</tr>
</tbody>
</table>

Exhibit C-2 shows that the claim made by respondents 1 to 3 as decree-holders in original suit No. 12 of 1882 and so much of the appellant's claim as rested on agreement B-1 were excluded from the distribution. On the 27th April 1889, however, respondents 1 to 3 entered into a compromise with respondents 4 to 6 whereby the latter agreed, inter alia, that Rs. 28,600 which was excluded from the distribution on the ground that it was charity-fund should be paid to the former, and the Subordinate Judge accepted the compromise and paid Rs. 28,600 to the first three respondents on the 29th April. On the 8th July 1889, original suit No. 48 of 1888, instituted by appellant against respondents
4 to 6 upon agreement B-1, was decreed in his favour, and on the 3rd October 1890 appellant brought the present suit. His case was that he had a first charge for the amount due under document B-1 on the sum [433] of Rs. 28,600 drawn by the first three respondents. The Subordinate Judge held that the charge could not be enforced against Rs. 28,600 paid to the respondents 1 to 3 and that the appellant ought to proceed against the property substituted for it by Exhibit II; and on this ground he dismissed the suit. Hence this appeal.

The appellant's claim rests on agreement B-1, and there is no dispute as to its genuineness. The Subordinate Judge finds that Rs. 3,000 was, as stated therein, advanced by the appellant to respondents 4 to 6. The former and his two witnesses deposed to the advance and there is no evidence to the contrary. It is clear from Exhibit B-1, that the amount due thereunder was agreed to be paid first out of monies which might be realized in execution of the final decree in original suit No. 7 of 1885. The material words in the document are, "you should first take out of "the amount that may be first collected from the defendants (in original "suit No. 7 of 1885) towards thirteen-fifteenths share of the decree-debt "due to us, the whole of the amount incurred (spent) on account of the "said costs."

It was urged in the Court below, and is reiterated on appeal, on behalf of respondents 1 to 3 that the document did not create a charge; that, if it did, it did not perfect; that even if there was a completed charge, it was invalid; and that it was not enforceable either against respondents 1 to 3 or against Rs. 28,600 paid to them on account of their decree in original suit No. 12 of 1882.

The Subordinate Judge was of opinion that a complete charge was created and that it was valid as against the respondents, and we concur in that opinion. The transaction evidenced by document B-1 was substantially a contract by respondents 4 to 6 to appropriate what they might realize under the final decree in original suit No. 7 of 1885 for their thirteen-fifteenths share first to repayment of the money advanced by the appellant under B-1. Though, at the date of the document, the fund out of which the advance was to be re-paid had not come into existence, and though it might possibly never have come into existence afterwards, yet that circumstance is not sufficient to prevent the charge taking effect against the fund when it subsequently came into the existence. In Collyer v. Isaacs (1) the Master of the Rolls, Sir George Jessel, observed as follows: "The creditor had a mortgage security on "[434] existing chattels and also the benefits of what was in form an "assignment of non-existing chattels which might be afterwards brought "on to the premises. That assignment, in fact, constituted only a contract "to give him the after-acquired chattels. A man cannot in equity, any "more than at law, assign what has no existence. A man can contract to "assign property which is to come into existence in the future, and when "it has come into existence, equity, treating as done that which ought to "be done, fastens upon that property, and the contract to assign thus be "comes a complete assignment." As for the contention that such assign-ment is recognized neither by the Transfer of Property Act nor by the Contract Act, the transaction is not invalidated by either of those enact-ments, and it falls under the rule of Equity which the Courts have to administer in this country. This is also the view taken by the High

---

(1) L.R. 19 Ch. D. 342.
Palaniappa v. Lakshmanan 16 Mad. 435

Courts at Calcutta and Allahabad, Misri Lall v. Mozhar Hossain (1) and Bansi Dhar v. Sauri Lal (2). It is, therefore, sufficient to observe that when Father Laberthore paid into Court Rs. 44,000 and odd, the fund indicated by the agreement B-1 came into existence and the charge created by it became enforceable as against respondents 4 to 6.

As observed by the Subordinate Judge, respondents 1 to 3 had notice of appellant’s claim under Exhibits C and L and the charge created by B-1 became, therefore, enforceable against them also when they took Rs. 28,600. Though they claimed a priority by reason of attachment, the Subordinate Judge adhered to the opinion which he expressed in C-2, viz., that they had no proper lien, and his decision on this point is not seriously questioned before us. The Subordinate Judge considers, however, that Rs. 28,600 represented a charity-fund, and that it was not open to the respondent to question its transfer to respondents 1 to 3 by respondents 4 to 6, the trustees of that fund, and that after such transfer, he could only proceed against the property substituted for it by the compromise II. To this compromise the appellant was not a party, and it was made against his will and to his prejudice. Such being the case, the Subordinate Judge is clearly in error in holding that the transfer is binding on the appellant and defeats his prior charge on the amount in deposit. The Subordinate Judge observes further that Rs. 28,600 was judicially recognized as charity money. There was no specific issue raised on this point, and if we considered it necessary to determine that question for the purposes of this suit, we would omit an issue for trial. But we are of opinion that even assuming that Rs. 28,600, represented a charity-fund, the charge created by document B-1 is not inoperative. The Subordinate Judge himself considers that but for the advance made under B-1 by the appellant and the prosecution of appeal No. 94 of 1886, Father Laberthore would not have had to pay into Court Rs. 44,000 and odd and that the fund out of which Rs. 28,600 was paid out for charity could not have come into existence. He, therefore, holds that the appellant might have had a lien by analogy to salvage lien, but refuses to enforce it on the ground that the appellant made his advance as a matter of speculation and had no interest in making it and that his claim was restricted to the property substituted for it under Exhibit II. In his order C-2, he discussed the question whether agreement B-1 was champertous and came to the conclusion that it was not, and to that conclusion he adheres in his judgment in the present suit. This being so, we do not consider that he is warranted in holding that the transaction is inoperative for the purpose of creating a lien on a fund which might never have been recovered but for that transaction. Neither do we see our way to support his conclusion, that the property substituted for Rs. 28,600 by Exhibit II is the one against which the appellant ought to have proceeded. The appellant was no party to that document; it was entered into with the knowledge of his claim against his will and to his prejudice, and it cannot, therefore, defeat any prior claim which he had on Rs. 28,600 and transfer it to some other property. There is nothing to show that the one third share in the Achampatthu village which respondents 4 to 6 released from the charge they had upon it for the amount of the decree in their favour in original suit No. 12 of 1892 was as good a security as the fund in Court. It was not a bona fide investment of the trust fund for the benefit of the charity but it was the appropriation of a charity-fund to the payment of the private debts of

(1) 13 C. 292 (264).
(2) 10 A. 133 (136).
respondents 4 to 6. There is no analogy between such appropriation and the investment of a charity fund in a bank. The appellant's claim to a charge upon the fund paid into Court by Father Laberthore and paid out to the first three respondents at the instance of the others, must be upheld.

For the respondents it is next contended that out of the amount paid into Court by Father Laberthore, the appellant himself was paid Rs. 3,000 and that he is not entitled to charge the whole of the balance due under B-1 upon Rs. 28,600. This contention appears to us to be entitled to weight. Under Exhibit B-1, the amount due under it was a first charge upon the thirteen-fifteenth share of the amount paid into Court by Father Laberthore. Out of that amount Rs. 28,600 was paid to respondents 1 to 3, Rs. 7,000 and odd to the appellant himself and Rs. 2,000 and odd to the decree-holder in original suit No. 13 of 1887, and the appellant is entitled to a refund of what was due to him under B-1 from each of those who shared in the amount deposited in Court in proportion to the amount drawn by them. The fund, on which the appellant had a charge, was intercepted by them all, and each is liable to replace it only in proportion to the extent to which he intercepted it.

The appellant is, therefore, entitled to a decree for refund of Rs. 1,938-13-6 and four fifths of the costs incurred in the Lower Court and in this Court, the respondent being entitled to one-fifth the costs. The decree of the Subordinate Judge will be set aside, and a decree will be passed in appellant's favour for the amount indicated above with interest at 6 per cent. per annum from date of this decree, inclusive of costs.

16 M. 438 = 3 M.L.J. 216.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Best.

VIGNESWARA (Plaintiff No. 2), Appellant v. BAPAYYA AND ANOTHER (Defendants), Respondents.* [6th December, 1892 and 5th April and 4th May, 1893].

Limitation Act—Act XV of 1877, Sections 7, 8—Disability of one of two joint claimants—Transfer of Property Act—Act IV of 1882, Section 99—Usufructuary mortgage.

In a suit by the two sons of a usufructuary mortgagee (deceased) to set aside the sale of the mortgage premises, which had taken place in execution of a money decree obtained by the mortgagee, it appeared that the suit if brought by the first [437] plaintiff alone, would have been barred by limitation, but that it would not have been so barred if it had been brought by second plaintiff alone, who had not attained his majority three years before the suit:

Held, that the sale in execution sought to be set aside was illegal under Transfer of Property Act, Section 99, but that the suit to set it aside was barred by limitation.

[Appr., 25 M. 431; R., 31 A. 156 = 6 A.L.J. 62; 22 C. 859; 35 C. 61 = 11 C.W.N. 1011 = 6 C.L.J. 320; 17 M. 159; 18 M. 39; 22 M. 372; 25 M. 26 (39); 6 Bom. L.R. 925 (393); 6 C.L.J. 393 (393); 6 C.W.N. 345; 7 Ind. Cas. 267 = 8 M.L.T. 71; 21 M.L.J. 1041 (1044) = 10 M.L.T. 418 = (1911) 2 M.W.N. 450; 24 M.L.J. 333 = 13 M.L.T. 269 = (1913) M.W.N. 328 (330); D., 18 A. 325 (328).]

* Second Appeal No. 335 of 1892.
SECOND appeal against the decree of C. Sury Ayyar, Subordinate
Judge of Coconada, in appeal suit No. 163 of 1890, reversing the decree of
O. V. Nanjundayya, Acting District Munsif of Coconada, in original suit
No. 434 of 1889.

The father of plaintiffs executed in favour of the first defendant a
usufructuary mortgage, dated 14th March 1878, which contained no coven-
ant for repayment of mortgage money, and put the mortgage in possession
under it. Subsequently, in 1884, the mortgagee obtained a money
decree against the mortgagor, and in execution attached and brought to
sale the mortgage premises, which were purchased by defendant No. 2,
his undivided son. The plaintiff now sued to have the sale set aside. The
District Munsif passed a decree as prayed, holding the sale to be invalid
under Transfer of Property Act, Section 99. With reference to a plea of
limitation, the District Munsif said that an action by the first plaintiff
alone would have been time-barred, but that the suit of his brother,
plaintiff No. 2, was within the period of limitation; and consequently he
overruled the plea. The Subordinate Judge reversed this decree on the
grounds that the Transfer of Property Act was not applicable to a mort-
gage of 1878, and further that Section 99 of that Act could not be applied
to usufructuary mortgages, because a usufructuary mortgagee is not
entitled to sue under Section 67.

Plaintiff No. 2 preferred this second appeal.

Subramanya Ayyar, for appellant.

Ramachandra Rau Sahib, for respondents.

ORDER—Section 99 of the Transfer of Property Act is wide enough
to include all mortgages. Section 67 only prohibits a suit for sale by a
usufructuary mortgagee "as such." The suit contemplated by Section 99
is not by a usufructuary mortgagee as such, but by a decree-holder, who
also happens to be a mortgagee. The sale must, therefore, be held to have
been illegal under Section 99. It is contended, however, on behalf of the
respondents (defendants) that the suit is barred under the Limitation Act.
There is no finding by the Lower Appellate Court on this point.

[438] The Subordinate Judge will be asked to submit a finding on
the issue "Is the suit barred by time?" The return to this order will be
submitted within four weeks from date of its receipt, and seven days after
the posting of the same in this Court will be allowed for filing objections.

[In compliance with the above order, the Subordinate Judge sub-
mitted his finding, which was in the negative.]

Bajajopala Ayyar, for appellant.

Ramachandra Rau Sahib, for respondents.

JUDGMENT.

The issue sent for trial by our order of 6th December last was "Is the
suit barred by time?"

The Subordinate Judge has found on this issue in the negative, being
of opinion that the suit is saved by the latter part of Section 8 of the
Limitation Act. That section is as follows. "When one of several joint-
creditors or claimants is under any such disability (i.e., a minor or
"insane or an idiot at the time from which the period of limitation is to be
"reckoned—see Section 7) and when a discharge can be given without the
"concurrency of such person, time will run against them all; but when
"no such discharge can be given, time will not run as against any of them
1893
MAY 4.

16 M. 439 = 3 M.L.J. 216.

As has been observed in Anando Kishore Dass Bakshi v. Anando Kishore Bose (1), the latter part of this section applies only to a case of all the joint-creditors or claimants being under a legal disability. The present is not such a case, for it is admitted that first plaintiff was not under any such disability. Then the question resolves itself into this—whether, notwithstanding the fact of one of two brothers of a Hindu family being capable of instituting a suit to set aside a sale and his omission to do so within the time allowed by the law of limitations, the fact of the other brother's minority is sufficient to save the suit from being barred, if instituted within the time allowed by Section 7 after minority has ceased.

If the Calcutta case above referred to is to be followed in its entirety, this question would have to be answered in the affirmative, for it was there held that Section 7 of the Limitation Act saved the suit from being barred as against the applicant who had but recently emerged from minority and that the remedy as against him was not barred, and he being one of the two joint decree-holders should be allowed to execute the whole decree, because as against the other joint decree-holder it was the remedy only that was barred, but his right was not extinguished. It has, however, been held by a Bench of this Court (Muttusami Ayyar and Parker JJ.) in Seshan v. Rajagopalai (2) that Section 7 of the Limitation Act applies only to "cases in which there is either one decree-holder and he is a "minor, or in which all the joint decree-holders are minors or labour under "some other disability, but that it does not seem to be intended to apply "to cases in which the minor's interest can be protected by joint decree-"holders who are also interested in the subject-matter of the decree."

Such was also the construction placed on the corresponding section of the English Statute by Lord Kenyon in Perry v. Jackson (3), and that such was the intention of the framers of the Indian Act is apparent on reading Sections 7 and 8 together. Section 7 having dealt with the case of the person or persons (all of them) entitled to sue or make an application being under a legal disability, Section 8 provides (i) that Section 7 will not be applicable where there are joint-creditors or claimants capable of giving a valid discharge and (ii) where all being originally incapable, any one of them becomes capable of giving such discharge.

Section 7 of the Limitation Act is, therefore, not applicable to the present case nor is the latter part of Section 8. There remains then only the first part of Section 8. For the appellant the words "when a discharge can be given without the concurrence of such person" are referred to as taking the case out of this section. It is contended that if appellant's brother had instituted a suit during appellant's minority, he could not have compromised the same so as to bind the minor and that consequently the case is one in which discharge could not have been given without the minor's concurrence. This contention is not of much force. The elder brother could have sued, making his younger brother a co-plaintiff, when any compromise (if any there were) could only have been made with the leave of the Court obtained under Section 462 of the Code of Civil Procedure. The present case is analogous to Surju Prasad Singh v. Kishanlal Ali (4), in which the suit was held to be barred. To hold otherwise would be to allow first plaintiff to get done for himself indirectly

---

(1) 14 C. 50 (53). (2) 18 M. 236. (3) 4 T. R. 519. (4) 4 A. 612.
through the second plaintiff that which the Limitation Act forbids first plaintiff from doing directly.

We think, therefore, that the suit must be held to be time-barred, and on this ground we affirm the Lower Appellate Court's decree, dismissing the suit, and direct the appellant to pay the respondents' costs of this appeal.

16 M. 440 = 3 M.L.J. 107.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

RANASAMI (Plaintiff), Appellant v. VENKATESAM AND OTHERS (Defendants), Respondents.* [18th October and 10th November, 1892.]

Hindu law—Succession—Divided brothers of the full blood—Son of a reunited half-brother.

In 1872 a partition took place between the members of a joint Hindu family, being three brothers of the full and three of the half blood. Two of the brothers, being the sons of different mothers, subsequently reunited. The elder took the plaintiff in adoption and died, during the infancy of the plaintiff. The reunited half-brother retained possession of their joint property till his death when the present suit was instituted to recover his share in the property. The two uterine brothers of the deceased resisted the plaintiff's claim:

* Held, that the plaintiff was entitled to a one-third share.


SECOND appeal against the decree of H. G. Joseph, Acting District Judge of Ganjam, in appeal suit No. 290 of 1890, reversing the decree of P. Gopala Rao, Acting District Munsif of Chicacole, in original suit No. 350 of 1890.

The plaintiff sued to recover certain land with mesne profits, claiming to be the sole surviving member of a joint Hindu family constituted by his adoptive father and one Narayana Doss, both deceased. The adoptive father of the plaintiff was the brother of defendant No. 1 and the half-brother of defendants Nos. 2 and 3 [441] and of Narayana Doss. It appeared that a division had taken place in the family about 1872, after which Narayana Doss had reunited with the plaintiff's adoptive father, who predeceased him, and the property in question in the suit was the property left by Narayana Doss. The suit was defended by defendants Nos. 2 and 3 on the ground that, being divided brothers of the full blood, they were entitled in preference to the son of a reunited half-brother. The District Munsif overruled this plea, holding that defendant No. 1, as being a separated half-brother, was not entitled to share in the estate, and that the plaintiff was entitled to share equally with the other defendants. He passed a decree accordingly. On an appeal by defendants Nos. 2 and 3, the District Judge reversed his decree, holding that the plaintiff was entitled to no share. With reference to the date of the plaintiff's adoption, the District Judge recorded no finding, but the District Munsif found that it had taken place about 1877.

The plaintiff preferred this second appeal.

* Second Appeal No. 1926 of 1891.
One Kurmi Naidu had six sons—three by his first wife, namely, (i) Latchem, (ii) Venkatesam (first defendant) (iii) Thammi—and three by his second wife, namely, (iv) Apranna (second defendant), (v) Ramanna (third defendant) and (vi) Narayana Doss. The six brothers divided in 1872 or 1873. Plaintiff is the natural son of Latchem, and alleges that he was adopted by Thammi. His case is that Thammi and Narayana Doss reunited after the division; that Thammi died during his minority and Narayana Doss managed their joint property till his death. Plaintiff now sues for the share of Narayana Doss, on the ground that he is the only surviving member of the joint coparcenary.

The adoption was disputed, but on this point both Courts found in plaintiff's favour. The District Munisif held that plaintiff was entitled to only one-third of Narayana Doss' property on the ground that when reunion takes place among half-brothers, the divided full brothers of the deceased take equal shares with the reunited half-brother. He held that plaintiff represented the reunited half-brother, while defendants Nos. 2 and 3 were separated full brothers, and first defendant being a separated half brother was not entitled to anything.

[442] The plaintiff accepted this decision, but defendants Nos. 2 and 3 appealed, urging that Thammi and Narayana Doss had not legally reunited, and that even if they had, the plaintiff was not entitled to any share.

The District Judge held there had been no legal reunion, but in any case the living brothers excluded the son of a deceased brother, and hence plaintiff had no claim.

It is conceded that the Judge was in error in allowing the question of reunion to be raised. It was not raised by the parties in the Court of first instance, nor was any issue taken upon it. On the contrary the defendants in their written statement admitted that on the death of Thammi his share devolved on Narayana Doss.

The question then is whether defendants Nos. 2 and 3, being divided brothers of the full blood, exclude plaintiff, who is the son of a reunited half-brother. No cases have been cited on the subject, and we must admit that, according to the ordinary principles of Mitakshara law, we should have supposed that the reunited nephew in coparcenership would have excluded the separated brother. But the texts that have been quoted show that a different view has been taken in Hindu works of authority and that separated brothers of the whole blood share equally with reunited brothers of the half blood. Reunion is possible between certain relations only, namely, with a father, brother, or paternal uncle. If a reunited brother dies leaving no male issue, and there exists a whole brother not reunited, as well as a half-brother associated with the deceased, both shall take equally. See Stokes' Hindu Law Books; Mitakshara, Chapter II, Section IX, 3-7. The reason is explained in Sarasvati Vilasa (Foulkes' edition page 148), Sloka 769. The rule is founded in a mixed conception. The primary idea is that reunion is a ground of preference. It furnishes the rule of decision when the surviving brothers are either of the whole or of the half blood. When there is a competition between uterine and non-uterine brothers, another idea influences the decision, namely, the superior efficacy of the funeral obligations offered by the uterine brother.
That furnishes a ground of preference in his favour. If the reunited
carciner is a brother of the whole blood both cases of succession concur.
They conflict when there is a competition between a reunited brother of the
half blood and a separated brother of the whole blood. The rule [443] of
equal division is the outcome of the desire to give effect to both principles.
See also Vyavahara Mayukha, Chapter IV, Section IX, verse 13, to the
same effect, and Mayne, fourth edition, paragraphs 542, 543.

In the present case the plaintiff was himself competent to reunite
with his paternal uncle, and as Thammi's adopted son he has inherited
the status and rights of his adoptive father. (Smriti Chandrika, Chapter
XII, 7.) The decision of the District Munsif decreeing him one-third was,
therefore, right.

We must reverse the decree of the District Judge and restore that of
the District Munsif. The plaintiff is entitled to his costs in this and in
the Lower Appellate Court.

16 M. 443 = 3 M.L.J. 201 = 1 Weir 862.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar.

QUEEN-EMpress v. HARI SHENOY AND ANOTHER.*
[2nd March and 21st and 24th July, 1893.]

Printing Presses and Newspapers Act—Act XXV of 1867, Section 3—Name of printer
and publisher.

A newspaper was printed and published bearing the following words:
"Printed and published at Cochin for the Malabar Economic Company at the
Company's Goobree Vileem Press:"

Held, that these words did not satisfy the requirements of Act XXV of 1867,
Section 3.

PETITION under Criminal Procedure Code, Sections 435 and 439,
praying the High Court to revise the proceedings of R.S. Benson, Sessions
Judge of South Malabar, in criminal appeals Nos. 32 and 33 of 1892,
upholding the conviction of petitioners by B.M. D'Cruz, Deputy Magistrate
of Cochin, in calendar case No. 22 of 1892.

The facts of this case appear sufficiently for the purposes of this report
from the judgment of the Chief Justice.

This petition was preferred by the accused.

[444] Mr. J. G. Smith, for petitioners.

The Acting Government Pleader and Public Prosecutor (Subramanya
Ayyar), for the Crown.

COLLINS, C. J.—The petitioners were convicted under Sections 3 and
15 of Act XXV of 1867, the "Printing Presses and "Newspapers Act."
They were charged with printing and publishing a newspaper without
printing the name of the printer and publisher of such newspaper.

The facts are as follows.—In April 1892 Joseph Nunes, the registered
printer and publisher of the paper in question "The Kerala Nandini," who
had made the prescribed declaration under Section 5 of the Act, had been
convicted of defamation and was sentenced to imprisonment. The news-
paper is owned by persons who call themselves "The Malabar Economic
Society," and they have a printing press which they call the Goobree

* Criminal Revision Case No. 6 of 1893.
Vilasam Press, and the petitioners are the Manager of the Society and the
Superintendent of the Press respectively, and are admitted to have
published and printed the newspapers. The only question for the Court to
decide is—have the petitioners complied with the provisions of Section 3?

That section is as follows:—"Every book or paper printed within British
India shall have printed legibly on or the name of the printer and the
place of printing, and (if the book or paper be published) of the publisher,
and the place of publication." Section 5 enacted that no printed
periodical work, containing public news or comments on public news,
shall be published in British India, unless the printer and the publisher
of every such periodical shall make a declaration that they are the printer
and publisher of such periodical work.

Section 12 provides a penalty for printing or publishing any paper
otherwise than in conformity with the rule contained in Section 3. Section
15 does not apply to this case. The petitioners during the time Nunes,
the registered printer and publisher, was in prison, published the newspaper
with the following words: "Printed and published at Cochin for the
'Malabar Economic Company at the said Company's Goshree Vilasam
Press.'"

I do not think the provisions of Section 3 have been sufficiently
complied with. It is essential that the name of the printer and in this case
the publisher be printed on the paper—an appearance clear by the form of
declaration given in Section 5. In the case [445] before me, the only
information given is that it was printed and published at a place, for a
Company, at such Company's Press.

In appears to me that Section 3 is intended to inform the public who
are the responsible printers and publishers of newspapers, and if the plain
words of the section are to be departed from, the printers and publishers
of newspapers might, under an assumed name or by using the name of an
unregistered Company, effectually prevent their identity from being estab-
lished, and that was the evil the section is intended to prevent.

I would confirm the conviction under Section 3, and, as the fine is a
nominal one, the sentence.

SHEPHERD, J.—The petitioners were charged with an offence under
the Printing Presses and Newspapers Act. The charge refers to Sections 3
and 15. In substance the charge is that they have printed and published
a newspaper without printing legibly on it the name of the printer and
publisher. The reference to Section 15 is erroneous, because that section
deals with "any such periodical work as is hereinbefore described" and
the description of such work and the rules with regard thereto are to be
found in Section 5 and not in Section 3. The petitioners however do not
appear to have been prejudiced by the mistake. Section 3 clearly covers
the case of a newspaper and an omission to print legibly on it the name of
the printer is, by Section 12, made a penal offence.

Are the defendants guilty of printing or publishing a paper "otherwise
than in conformity with the rule contained in Section 3?" Admittedly
they have printed and published a paper on which there are printed the
following words:—"Printed and published at Cochin for the Malabar
'Economic Company at the Company's Goshree Vilasam Press." It is
said that there is no compliance with the rule in Section 3, because the
name of the printer is not given. It is said that the actual name of the
printer should be given and that it should be stated that the paper was
printed by him. If the actual name is essential, clearly the conviction is
right, but I do not think this can be maintained and indeed the point was
given up in argument. So long as a name or style which sufficiently designates the printer is given, it does not matter that it is not the actual name of the man. It is sufficient that it is the name under which he chooses to do business and is generally known.

[446] Then is it essential that the paper should announce in terms that it is printed by the person named? What is required by the section is that the name of the printer should be printed on it legibly. If without more, it had given the name of the printer and publisher and the place of publication, clearly that would have been sufficient if only the names appeared on the page in such a manner as to convey the required information. Here, the announcement is that the printing is done for a certain Company at their own press. This is not the clearest way of expressing what is required, and it is suggested that the printing might, in fact, be done by a third person. But this is putting a very strict construction on the words. Unless we can say that the words do not convey to an ordinary reader the information required by the Act, the conviction cannot be supported. There is no reason to doubt that the accused intended to convey that information, and I cannot say their intention has not been carried into effect in a manner sufficient to satisfy the statute. I would set aside the conviction and direct the fine, if paid, to be refunded.

This case having been laid before Muttusami Ayyar, J., with reference to the provisions of Sections 429 and 439 of the Code of Criminal Procedure, his Lordship, upon perusing the petition and the records of the case and upon hearing the arguments of Mr. J. G. Smith, Counsel for the petitioners, and of the Acting Public Prosecutor in support of the conviction, delivered the following judgment:

JUDGMENT.

Muttusami Ayyar, J.—This case comes on before me under Sections 429 and 439 of the Code of Criminal Procedure. The question on which the learned Judges, who first heard the case, differed is, whether the accused complied with the provisions of Section 3 of Act XXV of 1867. That section provides that "Every book or paper printed within British India shall have printed legibly on it the name of the printer and the place of "printing and (if the book or paper be published) of the publisher, and the "place of publication." The words with which the accused published the "newspaper called Kerala Nandini are "Printed and published at Cochin for "the Malabar Economic Company at the said Company’s Goshree Vilasam "Press." They only mention the place of publication and of the press in which the paper was printed and state that it was on account or for the benefit of an unregistered association called Economic Society. But they [447] do not name the printer as required by the Act and to this extent there is a departure from its provisions. The intention was to inform the public who the responsible printer was and to convey that information on the face of the paper, and I cannot say that words, which contain no such information, amount to a sufficient compliance with the requirements of Section 3. It is urged that the object was to provide to the public facilities towards the discovery of the responsible printer, and that any person might easily discover who the printer was on reference to the Economic Society. The intention was not simply to provide some facility or other, but to provide a specific facility on the face of the paper. It is possible that a person may not be able without considerable inconvenience to discover who the members of the Economic Society are, and that some
1893
JULY 24.

member may refuse to give or evade giving information regarding the responsible printer.

We are not at liberty, I think, to speculate as to the object of the legislature and to substitute a mode of discovering the responsible printer for that prescribed by the legislature as most conducive to public convenience and protection.

I agree, therefore, with the learned Chief Justice that we must decline to interfere with the conviction and the sentence.

Ordered accordingly.

16 M. 447 = 3 M.L.J. 126.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

KRISHNAN (Petitioner), Appellant v. ARUNACHALAM AND OTHERS (Counter-petitioners), Respondents.*

[2nd and 14th December, 1892.]

Civil Procedure Code—Act XIV of 1882, Sections 244, 311—Execution of decree—Parties to suit—Purchaser of land sold in execution—Confirmation of sale—Objection of unsaleability.

A judgment-debtor having died before the decree was executed, his sons were brought on to the record as his representatives. Ancestral property of the judgment-debtor was then brought to sale in execution and purchased by the decree-holder, and the sale to him was confirmed. Subsequently the judgment-debtor's sons objected under Civil Procedure Code, Section 244, that the property which had been brought to sale was not liable to be sold in execution:

_Held, that the objection was rightly made under Section 244, and a separate suit was not necessary for the purpose of an adjudication on it._

[R., 12 Bom.L.R. 539 (542); 163 P.L.R. 1901.]

APPEAL against the order of T. Weir, District Judge of Madura, in appeal against order No. 37 of 1890, confirming the order of S. Dorasami Ayyangar, District Munisif of Sivaganga, in miscellaneous petition No. 441 of 1890.

The decree-holder preferred this appeal.

The facts of this case are stated above sufficiently for the purposes of this report.

_Sundara Ayyar, for appellant._

_Respondents were not represented._

JUDGMENT.

The appellant obtained a money decree against respondents' father in original suit No. 295 of 1877 on the file of Sivaganga Munisif. Prior to its execution the judgment-debtor died and his sons, the respondents, were made parties to the execution proceedings as his legal representatives. The appellant then attached some land, which was their ancestral property, brought it to sale, and himself bought it. The sale was confirmed under Section 314 of the Code of Civil Procedure, and respondents objected subsequently to its validity, on the ground that the property attached and sold was not that of the judgment-debtor, and not liable to be sold as such in execution. For the appellant it was contended that non-saleability was

* Apel against Appellate Order No. 51 of 1891.
not an objection, which could be raised after the sale had been confirmed, except by a separate suit and that the sale was valid.

The Courts below held that the objection ought to be dealt with under Section 244 of the Code of Civil Procedure, and that the sale was not valid and accordingly set it aside. To this order three objections are taken, viz., (i) that the application was barred by limitation, (ii) that the matter was res judicata, (iii) and that the objection could not be entertained under Section 244.

The plea of res judicata was not pressed in the Courts below, nor can the plea of limitation be supported, the attachment being made with reference to a pending application for execution which had been filed in time. The substantial question for decision is whether the question raised as to the property not being liable to be sold is one which falls under Section 244 of the Code of Civil Procedure. The parties to this proceeding were the plaintiff and the representatives of the defendant in suit, and the question whether the sale is valid is a question whether a proceeding had in execution should be set aside and falls under Section 244. This was the ground on which the case of Viraraghava v. Venkata (1) was decided. As pointed out in that case the contention that it is an accident, that the purchaser is also a party to the suit, and, therefore, he is not a party within the meaning of Section 244 is clearly not tenable, the intention being to prevent, as far as possible, one suit growing out of another and to render all questions between the parties to the suit and relating to the execution, discharge or the satisfaction of the decree liable to be dealt with in execution. It is then said that the matter which may be inquired into must be taken to be restricted to irregularities mentioned in Section 311, but we cannot accede to this contention. The ground on which the sale was sought to be set aside in Viraraghava v. Venkata (1) was fraud. If the proceeding sought to be set aside is one which relates to execution, and if the contest as to its validity is between the parties to the suit, the specific ground on which the proceeding is impeached is not material within the meaning of Section 244.

The appeal fails and is dismissed.

1892
DEC. 14.

APPENDANT

CIVIL.

16 M. 447—
3 M.L.J. 126.

16 M. 449.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Best.

RAMAN (Plaintiff), Appellant, v. SRIDHARAN AND ANOTHER
(Defendants), Respondents. * [1st December, 1892.]

Civil Procedure Code—Act XIV of 1889, Section 43—Res judicata—Decree against three of four uralas of a devasam—Suit to declare the decree binding on the fourth.

The holder of a bond executed by two uralas of a Malabar devasam obtained a decree, declaring the devasam property was liable for the secured debt, against the executors of the bond and one other urala: the fourth uralas intervened in execution of the decree, and objected that the devasam property was not liable [450] to be attached. His objection was upheld, and the plaintiff now brought a suit against him for a declaration that the debt was binding on him and on the devasam property:

Held, that the suit was not barred under Civil Procedure Code, Section 43.

* Second Appeal No. 309 of 1892.
(1) 5 M. 217.

1019
SECOND appeal against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 177 of 1891, reversing the decree of B. Cammaren Nair, District Munsif of Chowghat, in original suit No. 520 of 1890.

In 1886 two of the four urualars of a Malabar devasom executed a bond for Rs. 721 in favor of the present plaintiff. In 1889 the plaintiff sued three of the urualars and obtained a decree on the bond, which declared the property of the devasom to be liable for the amount. In execution of that decree devasom properties were attached and the fourth urulan intervened under Section 278 of the Civil Procedure Code. His objection was upheld, and this suit was now brought for a declaration that the judgment-debt was binding on the devasom and upon the urulan who was not a party to the previous suit.

The District Munsif held that the action was maintainable and be passed a decree for the plaintiff. The Subordinate Judge reversed this decree, holding that the suit was barred by Civil Procedure Code, Section 48.

The plaintiff preferred this second appeal.

Sankaran Nayar, for appellant.
Sundara Ayyar, for respondent No. 2.

JUDGMENT.

The only point for consideration in this appeal is whether the suit is barred by Section 43 of the Code of Civil Procedure. We are of opinion that it is not, for the reasons stated in Nabin Chandra Roy v. Magantara Dossya (1).

We set aside the decree and remand the appeal for disposal according to law.

The costs will abide and follow the result.

16 M. 451.

[451] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

APPENDAI AND ANOTHER (Counter-petitioners), Appellants v. SRIHARI JOISHI (Petitioner), Respondent.* [8th April, 1892.]

Civil Procedure Code—Act XIV of 1852. Section 622—Rent Recovery Act—Act VII of 1865, Section 76—Revision by the High Court.

The defendant in a suit under Rent Recovery Act was evicted in pursuance of an order made under Section 10. That order having been reversed on appeal, he applied to be replaced in possession, but the Sub-Collector dismissed that application:

* Held, that the High Court could not interfere in revision under Civil Procedure Code, Section 622.

[F. 17 M. 298; R. 22 M. 68.]

APPEAL under Letters Patent, Section 15, against the judgment of Mr. Justice SHEPPARD, on civil revision petition No. 99 of 1890.

That was a petition under Civil Procedure Code, Section 622, praying the High Court to revise the order of C. M. Mullaly, Sub-Collector of

(1) 10 C. 924 (928-9).
Chingleput, in summary suit No. 485 of 1888. The petitioner before the Sub-Collector had been ejected from certain land in accordance with an order made by the Sub-Collector under Madras Rent Recovery Act, Section 10, which had since been reversed on appeal and he prayed to be replaced in possession. The Sub-Collector dismissed the petition, saying
"I do not see how I can review the order already passed and carried out for ejectment."

The petitioner preferred the above petition to the High Court under Civil Procedure Code, Section 623.

The case came on for disposal before Mr. Justice Shepherd who reversed the order of Sub-Collector, expressing the opinion that that officer had jurisdiction to undo what he had wrongly done, and to restore defendant to the possession in which he was before the earlier order had been made.

The respondents preferred this present appeal under Letters Patent, Section 15.

Sriranga Chariar, for appellants.
Ramachandra Rau Saheb, for respondent.

JUDGMENT.

[452] It has been held in Velli Periya Mira v. Moidin Padsha (1) that Section 623 of the Code of Civil Procedure is not applicable to orders passed under Act VIII of 1865 (Madras). Moreover Section 76 of that Act expressly provides that no judgment of a Collector and no order passed by him after decree and relating to execution thereof shall be open to revision otherwise than by appeal. The order of the learned Judge must, therefore, be set aside. But under the circumstances there will be no order as to the costs.

16 M. 452.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

KERALA VARMA VALIYA RAJAH (Counter-petitioner), Appellant,
v. SHANGARAM (Petitioner), Respondent.*

[29th March, 1892.]

Limitation Act—Act XP of 1877, Schedule II, Article 179—Step in aid of execution—Malabar law—The Valiya Rajah of a kovalamom sued as such—Liability of kovalamom properties.

A decree was passed in 1884 against the Valiya Rajah of Chirakal Kovalamom, since deceased. In 1890 the decree holder made an application in execution for the attachment of a judgment debt, but he did not pay the process charges; and the application was dismissed on that ground.

Held, that that application was a step in aid of execution within the meaning of Limitation Act, Schedule II, Article 179.

Semble: that a decree passed against the Valiya Rajah of a kovalamom is prima facie binding upon his successor and his kovalamom.


APPEAL against the order of J. P. Fiddian, Acting District Judge of North Malabar, in miscellaneous appeal No. 442 of 1890, confirming

* Appeal against Appellate Order No. 25 of 1891.

(1) 9 M. 392.
an order of the District Munsif of Kavai made on miscellaneous petitions Nos. 742 and 1347 of 1890.

This was an application for execution of a decree for costs, in which the judgment-debtor since deceased was described as the Valiya Rajah of Chirakal Kovilagom, by attachment and sale of properties belonging to the kovilagom. The decree was passed on 25th April 1884.

In bar of limitation the decree-holder relied upon the following circumstances, viz., that on the 1st November 1886, he had made an application in execution for the payment of Rs. 326 recovered by the attachment of a judgment-debt, which application was rejected on 19th November, as no batta had been paid for issue of notice to the judgment-debtor, and that on the 23rd November 1886 he had made another application for the payment of the same amount, which application was also rejected for the same reason. The Lower Courts held the present application was not barred by limitation and that kovilagom property was liable for the judgment-debt and passed orders accordingly.

The Valiya Rajah of the Chirakal Kovilagom preferred this appeal.

Sankaran Nayar and Iyru Nambiar, for appellant.

Respondent was not represented.

JUDGMENT.

The application of 23rd November 1886 for payment of money realized by attachment was in our opinion a step in aid of execution within the meaning of Article 179. This was the view taken in Venkatarayalu v. Narasimha (1) and also Paran Singh v. Jawahir Singh (2).

As to the objection that the decree against the late Valiya Rajah was only personal, and not binding as against the present Valiya Rajah or his kovilagom, it appears from the execution petition that the plaint described him as "Valiya Rajah of Chirakal Kovilagom," and the expression Valiya Rajah is the one by which the representative of a kovilagom is ordinarily known. The appellant has not produced either the decree or the judgment, nor has he pointed out to us anything in the record which shows that the Valiya Rajah did not sue as head of the kovilagom.

We dismiss the appeal. No costs, as respondent has not appeared.

16 M. 454.

[454] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

KAMMATHI (Petitioner), Appellant, v. MANGAPPA AND ANOTHER (Counter-petitioners), Respondents.* [25th March, 1892.]


One applied for leave to sue in forma pauperis to recover assets forming part of the estate of a deceased person. His application was dismissed on the ground that he produced no certificate under Act VII of 1899:

* Letters Patent Appeal No. 4 of 1891.

(1) 2 M. 174. (2) 6 A. 366.
APPEAL under Letters Patent, Section 15, against the judgment of Mr. Justice SHEPHERD made on civil revision petition No. 1 of 1890.

That was a petition under Civil Procedure Code, Section 622, praying the High Court to revise the order of C. Gopalan Nayar, Subordinate Judge of North Malabar, dismissing an application for leave to sue in forma pauperis to recover properties forming the assets of certain persons deceased on the ground that the applicant had obtained no succession certificate under Act VII of 1889.

The petition came on for disposal before SHEPHERD, J., who delivered the following judgment:

"SHEPHERD, J.—The Subordinate Judge’s reason for dismissing the application to sue in forma pauperis is in my opinion unsound. Act VII of 1889 does not require the production of a certificate as a condition precedent to the maintenance of a suit. The question, however, arises whether the matter is one of such a nature as to make the provisions of Section 622 applicable. Can it be said that the Subordinate Judge acted with material irregularity or illegally? Adopting the construction put upon these words by MUTTUSAMI AYYAR, J., in MANISHA ERADI v. SIYALI KOYA (1) I think I must answer this question in the negative. The point on which the decision of the Subordinate Judge turned had nothing to do with any question of jurisdiction. There is another reason for declining to interfere in this case, and that it is open to the petitioner to make a fresh application to the Subordinate Judge.

"I must dismiss this petition with costs."

The petitioner preferred the present appeal under Letters Patent, Section 15.

Sankara Menon, for appellant.

Respondents were not represented.

JUDGMENT.

The Subordinate Judge declined to entertain the application which he had jurisdiction to entertain by reason of his erroneously supposing that a certificate was necessary before the application could be entertained. The case is within the principle enunciated by the Full Bench in MANISHA ERADI v. SIYALI KOYA (1) as warranting the interference of this Court under Section 622 of the Code of Civil Procedure. We set aside the order of the learned Judge and also that of the Subordinate Judge and direct the latter to receive the application and deal with it according to law.

Respondents will pay appellant’s costs in this Court.

(1) 11 M. 220.
APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Wilkinson.

RATINAMMAL, Petitioner v. MANIKKAM AND ANOTHER, Respondents.* [13th October, 1891 and 9th August, 1892.]

Divorce Act—Act VI of 1869—Evidence of marriage.

The bare assertion of a petitioner under Divorce Act, 1869, is not sufficient proof of her marriage to satisfy the requirements of that Act.

CASE referred under the Indian Divorce Act IV of 1869, Section 17, by T. Weir, District Judge of Madura.

[456] The parties were not represented.

This reference having come on for disposal, the Court made the following order:

ORDER.—"There is no legal proof that the marriage was performed according to the rites of the Christian religion. We must send back the ease to the District Judge and direct him to take proof of the marriage of the parties if possible. The mere bare assertion of the petitioner that she married the respondent is insufficient. Strict proof of the marriage is required."

The evidence of the clergyman who solemnized the marriage between the parties was then taken by the District Judge and an extract from the marriage register was filed. This evidence having been sent to the High Court, judgment was delivered as follows:

JUDGMENT.

The proof of the marriage has now been given. We confirm the decree for the dissolution of the marriage.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

SANKARAN (Plaintiff). Appellant v. KRISHNA (Defendant), Respondent.† [9th and 10th February, 1893.]

Limitation Act—Act XV of 1877, Section 10, Schedule II, Article 120, 144—Suit by a uralsam against an agent of a deasam—Repudiation of agency—Civil Procedure Code—Act XIV of 1882, Section 13—Res judicata—Court of competent jurisdiction.

In 1873 a predecessor of the plaintiff claiming to be the uralsam of a deasam brought a suit in a District Munsif’s Court against the present defendant, whom he alleged to be an agent of the deasam, and the defendant disputed the uralsam right of the plaintiff and denied that he had been appointed agent as alleged. Issues as to both of these matters were decided in favour of the defendant and the suit was dismissed in 1874.

A suit was now brought in 1880 for a declaration of the plaintiff’s title as uralsam and to recover from the defendant as such agent, property of a value which exceeded the pecuniary limits of the jurisdiction of a District Munsif, the suit being therefore instituted in the Subordinate Judge’s Court:

* Referred case No. 12 of 1891.
† Appeal No. 17 of 1892.
Held, that the suit was barred by limitation.

[457] Semple: the decision in the prior suit did not constitute a bar to the present suit on the ground of res judicata.

[R., 18 M. 342 (347).]

APPEAL against the decree of V. P. deRozario, Subordinate Judge of South Malabar, in original suit No. 26 of 1890.

The plaintiff claimed to be the uralan of a Malabar devasom and now sued the defendant, alleged by him to be the pattamali or rent collector of the devasom appointed by the plaintiff’s predecessor in 1862, and prayed in the plaint for a declaration of his title as uralan and his authority to dismiss the defendant, and for a decree that the defendant should render accounts to him and pay such balance as might be found due and also deliver up the property of the devasom into his possession.

It appeared that in 1873 the predecessor of the plaintiff had brought a suit in which the present defendant was joined to have set aside a kanom granted by him; and it was then alleged that he was a pattamali of the devasom. The defendant then denied his appointment by the plaintiff’s predecessor and disputed the urasima right on which the suit was based. That suit was finally determined in favour of the defendant on the 14th September 1874. The present suit was instituted in September 1890, and the Subordinate Judge held that it was barred by limitation, and he referred to Balwant Rao Bisshwant Chandra Chor v. Purun Mal Chaube (1) and Nilakandan v. Padmanabha (2). He overruled an argument that the Limitation Act, Section 10 applied to the case, as to which he cited Kherodmoney Dosshee v. Doorgamoney Dosshee (3). It was also contended in bar of limitation that the agency of the defendant had not terminated at any rate before the plaintiff demanded an account in September 1890, but the Subordinate Judge held on the authority of Kally Churn Shaw v. Dukhee Bibee (4) that the agency must be considered to have terminated when the agent denied the title of the principal, and consequently that the plaintiff’s demand for an account had not been made during the continuance of the agency and did not avail to meet plea of limitation. He accordingly dismissed the suit.

The plaintiff preferred this appeal.

Sankaran Nayar, for appellant.

Ramachandra Rao Saheb and Desika Charyar, for respondent.

JUDGMENT.

[458] The only question which it is necessary to consider in this appeal is whether appellant’s claim is barred by limitation. He alleged that, as the holder of Alayam Mutha Nair’s stanum, he was the uralan of the Parakat Bhabaathi devasom, that in 1861-62 his predecessor in the stanum appointed respondent as pattamali (agent) and that respondent was managing the affairs of the temple as his pattamali, and was therefore liable to render an account of his management and to be dismissed from his office by appellant. The respondent denied appellant’s urasima right, and impugned the document of 1861-62 as invalid. He also pleaded, inter alia, limitation in bar of the claim. The appellant’s predecessor in the stanum had instituted original suit No. 269 of 1873 against respondent to set aside a demise of devasom property on kanom on the ground that the urasima right was vested in him, that he appointed respondent as pattamali in 1861-62, and that the latter had no authority to grant the

(1) 10 I.A. 90. (2) 14 M. 163. (3) 4 C. 455. (4) 5 O. 692.
kanom. In that suit respondant denied the uraima right set up by appellant's predecessor and repudiated the document of 1861-62 as invalid. In appeal suit No. 483 of 1873, which arose from that suit, it was finally decided that the Alayam Mutha Nair was not the uralan of the institution and that the document of 1861-62 was not binding on respondent. As more than twelve years had elapsed when the present suit was brought on 23rd September 1890, the Subordinate Judge held that it was barred by limitation; hence this appeal. We think the decision of the Subordinate Judge is correct. Appellant's claim rests on his status as uralan of the temple and on respondent's relation to him as pattamali or agent under the document of 1861-62, and respondents had repudiated both grounds of claim when they were urged by appellant's predecessor in the previous suit. The right to sue to establish them accrued, therefore, in 1874, whilst the present suit was brought only in September 1890. It is urged by appellant's pleader that original suit No. 269 of 1873 was instituted in the Court of a District Munsif, who has no jurisdiction to entertain the present suit, and that the decision in appeal suit No. 483 of 1873 does not render the present claim res judicata. This is true, but time began to run against the claim from the date on which respondent denied the uraima right set up by appellant's predecessor and respondent's relation to him as pattamali, and no suit was brought within twelve years from the date of such denial. Assuming that for the purpose of dealing with the question of limitation the claim would not be res judicata if we were at liberty to enter on the merits we must still hold that it is barred by limitation on the ground that the right to sue had accrued more than twelve years before the present suit and during the lifetime of appellant's predecessor in the stanom. Another contention on appellant's behalf is that, as respondent did not state in the previous suit who was the uralan of the devasom, or that he was himself the uralan, the claim cannot be barred. We are unable to accede to this contention. It is not necessary that respondent should have either claimed the uraima right or stated in whom it was vested, and it is sufficient that he then denied that appellant's predecessor in the stanom was the uralan or that the relation of uralan and pattamali subsisted between them. It is then argued that Article 124 of the second schedule of the Act of Limitation could not apply unless respondent stated who the real uralan was. But we do not think that that article is applicable, the suit being based on the alleged relation of uralan and pattamali between appellant and respondent. The suit is clearly barred either by Article 120 or 144, and as more than twelve years had elapsed before suit, it is unnecessary to decide which article applies. The present case is similar to the one in Balwant Rao Bishwani Chandra Chor v. Purun Mal Chaube (1). The appeal must fail, and we dismiss it with costs.

(1) 10 I. A. 90.
REFERENCE UNDER STAMP ACT, S. 46

16 M. 459 (F.B.) = 2 M.L.J 181.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Parker and Mr. Justice Wilkinson.

REFERENCE UNDER STAMP ACT, SECTION 46.*

[9th August, 1892.]

Stamp Act—Act I of 1879, Section 51 (d), (6).

A mortgage-deed, which provided for the transfer of possession of the mortgage premises, was executed to secure the re-payment of money to be advanced for the discharge of certain debts owing by the executors. The instrument was stamped but not registered; and on its appearing that the amount of the debts in question exceeded the sum named, the intended mortgagee refused to carry out the transaction, and the executors executed a deed of conditional sale of the same premises in favor of another:

Held, that the stamp duty paid on the mortgage could be refunded under Stamp Act, I of 1879, Section 51 (d), (6).

CASE referred for the decision of the High Court under Stamp Act, 1879, Section 46 by the Board of Revenue.

The case was stated as follows:

"On 11th August 1891, one Chinnu and seventeen others of Manthradi village, Mangalore taluk, executed a document on three stamp papers of the aggregate value of Rs. 15 in favour of one Raju Chetti, mortgaging two lands assessed at Rs. 80-6-0 for Rs. 1,500. But before the document was produced for registration, the consideration of the mortgage bond having been found inadequate to meet all the demands of their creditors, and the said Raju Shetti who had not paid the Rs. 1,500 having refused to lend more money on the security of the same property, a conditional deed of sale of the same property for Rs. 2,665 was executed and registered on 4th November last in favor of one Ravi Prabhu. The said Chinnu now claims a refund of the value of the stamps used for the mortgage bond on the ground that that bond has been cancelled, and that the transaction intended to be effected thereby has been effected by the fresh document mentioned above. As the mortgage (with possession) originally intended in this case does not differ much from the subsequent conditional sale (subject to redemption within a given period of years), the refund applied for may, it seems, be granted under Clause (d), (6), Section 51, of the Stamp Act which does not expressly require that the parties to both transactions must be the same as is laid down in the next Clause (d), (7) of the same section; but as the Board in its Proceedings, dated 24th October 1881, No. 2476, seems to have held that the parties to the two instruments should be the same under both the clauses quoted above, I request that I may be favored with orders on the subject."

The letter of reference of the Board of Revenue after stating the facts proceeded as follows:

"A somewhat similar question came before this Board in 1881, and in its Proceedings, dated 24th October 1881, No. 2476, it was held that to establish the continuity of a transaction so as to bring it under the terms of Clause (6), Section 51 (d) of the [461] Act, it must be between the same parties. The Board, however, as now constituted

* Referred Case No. 23 of 1892.

1037
doubts the correctness of this view. The omission of the words
"between the same parties," which occur in Clause (7), from Clause (6)
"seems to show that the intention of the legislature was that Clause
"(6) should be construed in a sense sufficiently wide to admit of a case
"like the present in which, though one of the parties has been altered,
"and the new document is technically of a somewhat different nature,
"the transaction evidenced by both instruments is practically the same,
"viz., the pledging of certain land against repayment of a loan received.
"Clause (6), Section 51 (d) of the Act, is apparently the only provision
"of the Act under which refund could be made in this case. Clauses (3)
"and (4) do not apply, for all the parties seem to have executed the
"document, nor does Clause (5) apply, for the refusal to advance money
"was merely in respect of an additional amount which was not originally
"provided for owing to a mistake."

The Acting Government Pleader (Subramanya Ayyar), for the Board
of Revenue.

JUDGMENT.

We are of opinion that the view of the Board of Revenue is correct,
and that refund may be given under Section 51 (d), (6) of the Stamp
Act.

16 M. 461—2 Weir 580.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Best.

QUEEN-EMPRESS v. NAGAPPA.* [28th March, 1893.]

Criminal Procedure Code—Act X of 1882, Section 476—The nearest, Magistrate of the
first class— Jurisdiction of such Magistrate.

A Head Assistant Magistrate sanctioned a prosecution under Criminal Pro-
cedure Code, Section 195, on the charge of preferring a false complaint and for-
warded his [463] proceedings to the Deputy Magistrate of another division of
the division under the Head Assistant Magistrate;

 Held, that the Deputy Magistrate had jurisdiction to try the charge.

CASE referred for the orders of the High Court under Criminal
Procedure Code, Section 438, by M.R. Weld, Sessions Judge of Kurnool.

The case was stated as follows: —

"I have the honour to refer under Section 438 of the Criminal Pro-
cedure Code for the orders of the High Court the proceedings of the
Head Assistant Magistrate of this district under which, having sanc-
tioned the prosecution of a K. Nagappa for preferring a false complaint
under Section 195, he forwarded his proceedings, giving the sanction to
the Deputy Magistrate of the Cumbum division.

"In this letter of the 18th August 1892, No. 164, he professes to do
this under Section 476 of the Criminal Procedure Code.

"This section says that when a Court is of opinion that there is
ground for inquiry into any offence referred to in Section 195 committed
before it, it may send the case to the nearest Magistrate of the first
class, and, as the Magistrate of the Cumbum division is probably the
"nearest Magistrate of the first class to Nandyal, other than the Head Assistant Magistrate himself, that officer sent the case to him.

"But the Deputy Magistrate of Cumbum has no jurisdiction to try offences committed in Nandyal, and so it appears to me that the sending of the case to him by the Head Assistant Magistrate is erroneous.

"It seems to me that the reference of the case by the Head Assistant Magistrate to the Deputy Magistrate and the proceedings of the Deputy Magistrate of Cumbum are utterly illegal and must be set aside."

The parties were not represented.

JUDGMENT.

Best, J.—Section 476 says that the Court before which the offence is committed may send the case for inquiry or trial to the nearest Magistrate of the first class. The words "having jurisdiction to try such offence" are not to be found in the section. Such being the case, it is to be assumed that the order making the transfer is of itself sufficient to confer jurisdiction.

The second clause of Section 476 authorizes the first-class Magistrate, to whom a case is thus sent, to "transfer the inquiry or trial to some other competent Magistrate." I fail to see anything illegal in those proceedings.

Shephard, J.—The substitution of the description "nearest" "for having power to try" is significant. I agree that the transfer was not illegal.

16 M. 463 = 1 Weir 86.

APPELLATE CRIMINAL.

Before Mr. Justice Mutthusami Ayyar and Mr. Justice Shephard.

QUEEN-EMPRESS v. PARANGA.* [29th March, 1893.]

Penal Code—Act XLV of 1860, Section 174—Disobedience to a summons

It is not an offence under Penal Code, Section 174, to disobey a summons issued by a British Magistrate directing the person summoned to appear before him at a place outside British territory.

CASE referred for the orders of the High Court under Section 438 of the Criminal Procedure Code by H. Bradley, Acting District Magistrate of Malabar.

It appeared from the letter of reference that a conviction of an offence under Penal Code, Section 174, had proceeded on proof that the accused had disobeyed his summons to appear before a British Magistrate at a place situated in the State of Cochin. The referring officer expressed the opinion that the conviction was bad.

The parties were not represented.

ORDER.

We do not think the accused was bound to appear before the Magistrate at a place outside British territory. The Indian Penal Code applies only to criminal acts done in India under Section 2, except in the special cases mentioned in Section 3. If the Magistrate had ordinarily power to summon witnesses to attend at a place outside British India,

* Criminal Revision Case No. 51 of 1893.
the act of disobedience would then be done in foreign territory and amount to an offence over which he would have no jurisdiction. The proper construc[464]tion of Section 174 is that the place where a witness is summoned to attend must be in British India. We direct that the conviction and sentence be set aside, and the fine levied be refunded.

---

16 M. 464.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

PAPIREDDI AND OTHERS (Plaintiffs), Appellants v. NARASAREDDI (Defendant), Respondent. [19th August, 1892.]

Transfer of Property Act—Act IV of 1882, Section 54—Oral sale with possession—Land worth more than Rs. 100.

The plaintiff entered into an oral contract to sell certain land to the defendant for Rs. 2,500, and he put him into possession. The defendant made default in payment of the purchase money. The plaintiff, having professed to cancel the sale on the ground of this default, now sued to recover possession of the land with mesne profits:

Held, that the sale was not complete, and the plaintiff was entitled to the relift sought by him.


APPEAL against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in original suit No. 17 of 1890.

This is a suit to recover possession of certain land with mesne profits accrued thereon.

It was averred in the plaint that plaintiff No. 1 had sold the land in question to the defendant on the 16th October 1887 for Rs. 2,500 payable in eight days, and had put the defendant in possession, and that defendant had paid Rs. 150 only, and that plaintiff No. 1 had subsequently cancelled the sale by reason of the non-payment of the balance. The District Judge held that time was not of the essence of a contract, and he also expressed the opinion that, although the value of the land exceeded Rs. 100, the sale accompanied by a transfer of possession was as complete as if it had been evidenced by a registered conveyance executed before consideration passed. In this view he held that the plaintiffs were entitled to a decree for the unpaid purchase money and [465]damages and not for possession of the land. In this connection he referred to Trimulrao Raghavenara v. The Municipal Commissioners of Hubli (1), Moidin v. Aaaran (2), Shib Lal v. Bhagwan Das (3), and he passed a decree in accordance with the above ruling.

The plaintiffs preferred this appeal.

Pattabhirama Ayyar, for appellants.

Rama Rau, for respondent.

JUDGMENT.

It is argued that the decision of the Lower Court is contrary to the provisions of Section 54 of the Transfer of Property Act, by which it is

* Appeal No. 119 of 1891.

(1) 3 E. 173.
(2) 11 M. 263.
(3) 11 A. 244.
enacted that the transfer of immoveable property above Rs. 100 in value can be made only by registered instrument. In this case the value of the property, which was the subject of the contract, was upwards of Rs. 2,000. All that has been found is that there was an oral contract for sale, possession given to defendant, and part-payment of the purchase money Rs. 150. We cannot concede that possession can take the place of the registered deed required by Section 54. Moreover possession was only given pending the completion of the contract for sale. It did not amount to any transfer of the property. The cases referred to by the District Judge were decided prior to the Transfer of Property Act and have therefore no application. The decision relied on by Mr. Rama Rau in Janki v. Girjadal (1) is not on all fours with this case, and the decision of the majority of the Full Bench proceeded on the ground that the vendor and vendee had colluded to defraud the persons who had the right of pre-emption. Another point urged upon us is that defendant is entitled to claim specific performance, and that so long as he has such right, he cannot be dispossessed. We observe that a suit for specific performance was pending at the time when defendant put in his written statement, and we understand that it was dismissed on the ground that the contract, specific performance of which defendant sought, was different from the actual contract. The decree of the Court of First Instance was confirmed in appeal. It is very doubtful whether defendant can maintain a second suit for specific performance of the contract of sale and for execution of a registered deed, but, assuming that it can be done, we do not see how he can resist the present suit, as the property has not passed to him and cannot vest in him until he is in possession of a registered deed. We reverse the decree of the Lower Court and give plaintiffs a decree for possession and mesne profits from 15th October 1887 to the date on which possession is given to plaintiffs to be ascertained in execution. Credit must be given to defendant for the Rs. 150 paid to plaintiffs as part-payment. Plaintiffs are entitled to their costs throughout.

16 M. 466 = 3 M.L.J. 305.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RAMASAMI AND OTHERS (Defendants Nos. 2 to 4 and 7 to 9),
Appellants v. PAPAYYA AND ANOTHER (Plaintiffs), Respondents.*
[17th March, 1893.]

Hindu Law—Gift of land to a daughter—Presumption as to interest taken by donee.

In a suit to recover possession of certain land, the plaintiff claimed title under a gift made to his mother, deceased, by her father, whose sons and grandsons, the defendants, had entered into possession on the death of the donee, which took place less than three years before suit. The deed of gift was not produced, and it did not appear that the donee, who had been placed in possession of the land and had retained it for thirty-seven years, was a widow at the time of the gift:

Held, that the plaintiffs were entitled to a decree, there being no ground to presume that a life-interest merely was intended to pass under the gift.

[F. 33 C. 947 = 3 C.L.J. 502 = 10 C.W.N. 695; 9 C.P.L.R. 95 (100).]

* Second Appeal No. 1070 of 1892.
(1) 7 A. 482.

1081
SECOND appeal against the decree of H. G. Joseph, Acting District Judge of Ganjam, in appeal suit No. 44 of 1892, confirming the decree of N. Somayajulu Pantulu, Acting District Munsif of Sompet, in original suit No. 243 of 1891.

The plaintiffs sued for possession of certain land claiming title under a gift made to Gangammal, the late mother of plaintiff No. 1, from her father. The defendants were the son and grandsons of the donor, and had entered into possession on the death of Gangammal. The defendants pleaded that Gangammal had taken only a life-interest. The deed of gift was not produced. [467] The District Munsif passed a decree as prayed, which was affirmed on appeal by the District Judge.

The defendants preferred this second appeal.

Ramachandra Rao Saheb, for appellants.

Ananda Charlu, for respondents.

JUDGMENT.

It is conceded that Gangammal obtained the land in dispute as a gift from her father some forty years ago, and that she was in possession from that time till her death three years ago. The plaintiffs are her son and grandson, and defendants are her brothers and brother's sons. Both the Courts below have held that the plaintiffs are entitled to the land and not the defendants. The contention, on appeal, is that under Hindu law it must be presumed that a gift to a female is only for her life, and reference is made to Mahomed Shumsool v. Shewukram (1) and Bhujanga v. Ramayamma (2).

It is no doubt remarked by the Lords of the Privy Council in Mahomed Shumsool v. Shewukram (1) that it may be assumed that a Hindu knows that, as a general rule at all events, women do not take absolute estates of inheritance which they are enabled to alienate, and that in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. That case was decided on the construction of the will. The above case was considered by the Calcutta High Court in Mussumut Kollany Kooer v. Luchmee Pershad (3), and it was held that women are not, by reason of their sex, debarred from taking an absolute estate when such estate appears to have been intended by the testator. In Bhujanga v. Ramayamma (2) it was held on construction of the document that the property was given as stridhanam. In the present case the deed of gift is not produced, nor is it shown that Gangammal was a widow when her father gave the property to her. She has left sons surviving her. Under these circumstances there is no foundation for the presumption that the donee's sons were intended to be displaced those of the donor.

Such is not the ordinary intention of a Hindu when he makes a gift to his daughter under coverture.

The presumption relied on by the appellant being inapplicable, we dismiss this appeal with costs.

(1) 2 I.A. 7.  (2) 7 M. 397.  (3) 24 W.R. 395.
QUEEN-EMPERESS v. SAMAVIER. [8th and 14th March, 1893.]


An order by the Board of Revenue sanctioning the prosecution of a Deputy Tahsildar by the Collector of the District for "bribery or such of the charges set forth in the Deputy Collector's report as he thinks likely to stand investigation by a Criminal Court" is not a legal sanction within the meaning of the Criminal Procedure Code Section 197, and a commitment on any of such charges should be quashed.

[F., 2 Weir 221; R., 27 M. 54 (56) = 2 Weir 227; 13 C.W.N. 1062 = 10 Cr L.J. 463 = 4 Ind. Cas. 13 (15); 7 Ind. Cas. 752 (754) = 8 M.L.T. 205; D., 12 Cr. L.J. 217 = 10 Ind. Cas. 165—11 P.R. 1911 (Cr.) = 146 P.L.R. 1911.]

CASE referred for the orders of the High Court under Criminal Procedure Code, Section 438, by J. W. F. Dumergue, Acting Sessions Judge of Madura.

The case was stated as follows:

"Under Section 215, Criminal Procedure Code, I have the honour to submit the following case for the orders of the High Court—

"In a letter, dated 12th August 1892, the Deputy Collector and Magistrate in charge of the Melur Division of this district reported to the Collector and District Magistrate the result of an inquiry he had been directed to make into certain accusations preferred against Samavier, the Deputy Tahsildar and Second-class Magistrate of Tiruppattur.

"In the fifth paragraph of his letter, the Deputy Collector writes as follows:—"Several instances of receipt of bribes or illegal gratification by the Sub-Magistrate have been mentioned by the witnesses. The evidence regarding some of the instances is hearsay, but as regards two or three cases, the evidence, so far as it is available, is direct and satisfactory, and there is sufficient ground to hold that the allegations are true."

"In the succeeding three paragraphs the Deputy Collector formulates three charges against the Deputy Tahsildar in his capacity as a Magistrate. The ninth paragraph contains a recommendation that the Deputy Tahsildar should be suspended in order that further inquiries in respect of these cases, as well as in respect of the other cases which are mentioned by the witnesses, but in which the evidence is not so satisfactory, may be made. The remainder of the letter is occupied with statements regarding the general reputation of the Sub-Magistrate and his unfitness for the post he holds."

"This report was forwarded by the Collector to the Board of Revenue with an endorsement, dated 16th August 1892, in which it is requested that necessary sanction may be accorded to prosecute M.R. Ry. M. Samavier, Deputy Tahsildar and Second-class Magistrate of Tiruppattur, for bribery under the Indian Penal Code."

"Thereupon the Board of Revenue, in the Department of Land Revenue, passed the following Resolution, dated 24th August 1892:—

* Criminal Revision Case No. 55 of 1893.
The Collector may prosecute M. Samavier, Deputy Tahsildar and Sub-Magistrate of Tiruppattur for bribery or such of the charges set forth in the Deputy Collector’s report as he thinks likely to stand investigation by a Criminal Court. The complaint should be lodged before the Head Assistant Magistrate as proposed.

This resolution was communicated by the Collector to the Deputy Collector who was requested to place the papers in the hands of the Public Prosecutor, Madura, with necessary instruction in view to M. Samavier, Deputy Tahsildar and Second-class Magistrate of Tiruppattur being prosecuted for bribery before the Head Assistant Magistrate at a very early date.

The Sub-Magistrate was accordingly prosecuted in three separate cases. In one case he was discharged, but in the other two cases he has been committed to this Court for trial under Sections 161 and 165 of the Indian Penal Code. The question is whether the resolution passed by the Board of Revenue is the legal sanction required by Section 197, Criminal Procedure Code, and whether the proceedings finally instituted against the accused are protected by legal sanction.

The first objection which has been raised on behalf of the accused does not present any real difficulty. It has been argued that as the accused is prosecuted in his judicial capacity, the Board of Revenue is incompetent to grant sanction and cannot [470] be considered an officer empowered by Government. But under Section 197, Criminal Procedure Code, sanction may be granted by the ‘Court or other authority’ to which a Judge or public servant is subordinate and whose power to give such sanction has not been limited by Government. Then in the case of Raghoobur Sahoy v. Kokil Singh alias Gopal Singh (1), it was held that the word ‘Court’ used in Section 195, Criminal Procedure Code, includes a tribunal empowered to deal with a particular matter and authorized to receive evidence bearing on that matter, in order to enable it to arrive at a determination. The same interpretation must, I think, be applied to the word ‘Court’ used in Section 197, Criminal Procedure Code, and, although the Board of Revenue is not the authority to which the accused is subordinate as a Judge, nevertheless the Government in its Order, dated 26th March 1891, Mis. No. 582, Judicial, expressly authorized the Board of Revenue to sanction the prosecution of Tahsildars, Deputy Tahsildars and Taluk Sheristadars in their magisterial capacity.

Under these circumstances I overruled this objection and held that the Board of Revenue was competent to grant sanction in this case.

It was then argued that sanction ought not to have been conveyed in the vague terms used by the Board of Revenue; that it was the duty of the Board itself to arrive at a determination regarding the particular offences for which the accused was liable to prosecution; that in failing to do this and leaving the Collector to decide what offence or offences should be chosen as the subject of prosecution, the Board of Revenue practically delegated its power of sanction to the Collector; that this course is opposed to the rule of law delegatus non potest delegare and that consequently there has been no legal sanction. These arguments have, in my opinion, considerable force.

It appears to me that the principle which is enunciated in Section 195, Criminal Procedure Code, and which requires all practicable definiteness in respect of the offence for which prosecution is sanctioned...
must be held to apply at least equally to cases falling under Section 197, Criminal Procedure Code. I am inclined to think that this principle must be held to apply with even greater force to cases under the latter section, because under Section 537, Criminal Procedure Code, irregularity with regard to the sanction required by Section 195 can be remedied within certain limits, but no such provision is made with regard to Section 197, and any failure to comply with its requirements must therefore be absolutely fatal to a prosecution. In the present case the utmost precision in respect of the offences for which the accused was to be prosecuted was practicable, but nothing could be more indefinite than the terms in which sanction to prosecute was granted.

It is true that in Regina v. Vinayak Divakar(1), the Government sanctioned the prosecution of a magistrate 'on such charges as Mr. C. may be prepared to prefer against him,' and that no disapproval of these terms was expressed by the Bombay High Court. But between that case and the present one there is, I submit, a marked difference. In the former case the Government, in giving sanction ordered that, before the commencement of the proceedings the accused Magistrate should be furnished with copies of charges and lists of the witnesses by whom they will be supported and allowed full opportunity for the preparation of his defence. The accused therefore was definitely informed before proceedings commenced, what the charges against him were, and Westropp, C.J., observed that Government was careful that the prisoner should have fair play. But in the present case the accused was denied access to material papers until after he had been committed for trial, when copies were furnished from this Court. No explanation was taken from him before he was prosecuted, and altogether, therefore, he had no opportunity of knowing, until proceedings actually commenced, what charges he was called upon to answer.

Moreover, in a case with reference to the section corresponding to Section 195 of the present Code of Criminal Procedure, a 'so-called sanction' in the following terms: 'If the petitioner thinks there is sufficient evidence against Annada Prasad Sircar, I have no objection to give same sanction asked for herein, was held insufficient.' In the present case the sanction given by the Board of Revenue was certainly limited to the cases reported on by the Deputy Magistrate, but it was left to the Collector to prosecute the accused 'for bribery or such other charges as he thinks likely to stand investigation by a Criminal Court.'

Here it must be noted that according to the Deputy Magistrate himself the three specific cases as well as the others required 'further inquiries.' The Madras High Court Vythiyathu Aiyar v. Vythiyathu Aiyar (2) and Queen Empress v. Natchi (3) have, with reference to Section 195, Criminal Procedure Code, laid down the rule that 'it is not enough that a case is alleged which requires investigation, that sanction should not be given by any Court without first examining the evidence and that the object of giving the power to sanction is to secure, as far as possible, that no man shall be prosecuted unless the Court hearing the case or a superior Court is satisfied that it is a proper case to put the party on his trial. The same rule is implied in the Calcutta case to which I have alluded in paragraph 9 of this letter, and

---

(1) 8 B.H.C.R. (Cr.C.) 32. (2) Weir's Criminal Rulings, 3rd Ed. 852. (3) Id. p. 857.
1893  
MARCH 14.  
APPELLATE  
CRIMINAL.  
16 M. 458—  
3 M.L.J. 227 =2 weir 220.  
"this rule does not appear to have been followed in the present case.  
"Unless the evidence is to be examined and the definite decision arrived  
at by the authority empowered to grant sanction, whether under  
"Section 195 or Section 197, Criminal Procedure Code, there would be no  
necessity for previous sanction.  
"On these considerations it appears to me that the Board of Revenue  
did delegate its power of sanction to the District Magistrate, and it  
"further appears that the District Magistrate then delegated it to the  
"Deputy Magistrate who was directed generally to instruct the Public  
"Prosecutor 'in view to M. Samavier being prosecuted for bribery.'  
"Hence the offences, in respect of which the accused was prosecuted,  
"were selected by the Deputy Magistrate. Even if, under the authority  
of Regina v. Vinayak Dwakar (1), the Board of Revenue, standing in  
the place of Government, could confide the duty of preferring charges to  
a particular officer, still under the same authority that duty cannot  
legally be delegated by that officer to any one else.  
"Under all these circumstances I am of opinion that no such sanction  
as is required by law has been given in the present case and that  
"the commitment of the accused for trial is illegal.  
"On my expressing this opinion it was contended that the commit-  
ment ought to be quashed and the accused discharged by [473] this  
"Court under Section 532, Criminal Procedure Code. But in this case there  
"was no question as to the competency of the Head Assistant Magistrate  
to commit for trial, and objection was made on behalf of the accused as  
soon as the Head Assistant Magistrate commenced the inquiry. More-  
over, the section quoted does not authorize this Court to discharge the  
accused in cases falling under it, but to order a fresh inquiry by a com-  
petent Magistrate. If the sanction under which the inquiry was under-  
taken is invalid, no magistrate is competent to make a fresh inquiry. I  
rulled therefore that the section was inapplicable, that the case is  
governed by Section 215, Criminal Procedure Code, and that the accused  
must be held to bail, pending the orders of the High Court."  
Mr. P. A. D'Rosario and Sundara Ayyar, for the accused.  
The Acting Government Pledger and Public Prosecutor (Subramanya  
Ayyar) for the Crown.  

JUDGMENT.  
It is not now contested that the Board of Revenue is the authority  
that has been empowered by the Local Government to grant the requisite  
sanction under Section 197, Criminal Procedure Code, and we agree with  
the Acting Sessions Judge that the Resolution of the Board, dated 24th  
August 1892, is not a legal sanction.  
The sanction required under Section 197, Criminal Procedure Code,  
must be granted with reference to some specific offence with which the  
accused is charged in his capacity as a public servant, and the intention  
of the legislature clearly was that the authority empowered to grant the  
sanction should take the responsibility of deciding there were reasonable  
grounds for prosecuting such public servant for such offence.  
In the Resolution of 24th August 1892, the Board does not sanction  
the prosecution of the accused for any offence designated by itself, but  
merely delegates to the Collector the power of selecting, out of several,  
such charges as he thinks likely to stand investigation.  

(1) 8 B.H.C.R. (C. C.), 32.
The Board has no legal power so to delegate its discretion, and irregularity in a sanction granted under Section 197, Criminal Procedure Code, is not cured by the provisions of Section 537.

The omission to re-enact in Section 197 the permission given in Section 195 to grant a sanction in general terms—as also the exclusion of a sanction (irregularly) granted under Section 197 from [474] the operation of Section 537—point to a deliberate intention on the part of the legislature to throw upon the authority empowered to grant the sanction, the duty of designating the offence for which leave to prosecute is given, and this duty cannot be delegated.

On the ground that no legal sanction has been given we must quash the commitment under Section 215, Criminal Procedure Code.

16 M. 474=3 M.L.J. 124.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

Srinivasas ( Plaintiff). Appellant v. Rathnasabapathi (Defendant). Respondent. [5th and 14th December, 1892.]

District Municipalities Act (Madras)—At IV of 1884, Section 261—Limitation—Contract Act—Act IX of 1872, Section 74—Penalty.

The council of a municipality, under Madras Act IV of 1884, entered into a contract for the lighting of the town whereby it was provided that the deposit made by the contractor should be forfeited on any default made by him in carrying out the terms of the contract. One holding a decree against the contractor attached the amount of the deposit in the hands of the municipal council, but the council subsequently passed a resolution in July 1888 declaring that the amount of the deposit had been forfeited. The decree-holder having purchased from the contractor his right to the money in question now sued in 1890 to recover it from the municipality:

Held, (1) that the suit was not barred by the rule of limitation in Madras District Municipalities Act, Section 261;
(2) that the provision for forfeiture in the contract was penal and unenforceable and consequently that the resolution of July 1888 was ultra vires.


Petition under Provincial Small Cause Courts Act, Section 25, praying the High Court to revise the proceedings of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in Small Cause suit No. 914 of 1890.

In 1887 one Harithirthayyan entered into a contract with the Municipal Council at Negapatam for the lighting of that town, and under the terms of the contract he deposited Rs. 500 which it was provided should be forfeited on any default made by him in carrying out his contract. The contractor failed to perform his [475] contract and the Municipal Council passed a resolution on 25th July 1888 forfeiting the deposit. The plaintiff was the holder of a decree passed against the contractor in execution of which the above-mentioned sum was attached on 16th January 1888. On the 18th of July the Municipal Council resolved that Rs. 424 only were due to the contractor and should accordingly be remitted to Court. This resolution having been cancelled by that of 25th July above
1892
16 M. 476
3 M. L. J. 124.

referred to, the plaintiff purchased from the contractor his right to the
money in the hands of Municipal Council and he now sued in 1890
to recover the amount. The Subordinate Judge held the suit was barred
under the Madras District Municipalities Act, Section 261, and he
accordingly dismissed the suit.
The plaintiff preferred this petition.
Rama Rau, for appellant.
Pattabhirama Ayyar, for respondent.

JUDGMENT.

We are of opinion that the Subordinate Judge is in error in holding
that the suit is barred under Section 261, Madras Act IV of 1884. The
cases contemplated in that section are suits for compensation and for
damages, and the principle is to allow public bodies time for tender of
amends to the parties so as to avoid litigation—see President of the Taluk
Board, Sivaganga v. Narayanan (1) and cases quoted therein: also Chunder
Sikur Banopadhyay v. Obhoy Churn Bagchi(2) and Joharmal v. The
Municipality of Ahmednagar (3). Upon the second point we are of
opinion that the penalty prescribed by the muchalka of 22nd March 1887
is one which cannot be enforced since the contract renders the penalty alto-
gether irrespective of the importance of the breach—see Soper v. Arnold(4)
and Lachman Das v. Chater(5). The contract does not fall within the
exception to Section 71 of the Indian Contract Act, since the bond was
not given under the provisions of any law for the performance of any public
duty or act in which the public are interested. No doubt the public are
in a sense interested in the proper lighting of the municipal town, but
the contract is not one for which any special provision is made in the
Municipal Act and cannot be placed in a different category to a contract
made with any private individual.

[476] The resolution of the Municipal Council of 25th July 1888 was,
therefore, ultra vires. We must set aside the decree of the Subordinate
Judge and decree in plaintiff’s favour for Rs. 424-2-5 with costs in both
Courts.

16 M. 476.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SUBLARADU (Petitioner), Appellant v. PEDDA SUBBARAZU
(Counter-petitioner), Respondent.* [29th March, 1892.]

Civil Procedure Code—Act XIV of 1882, Sections 311, 623—Application to set aside
execution sale—Remedy of one claiming adversely to the judgment-debtor—Revision
petition—Jurisdiction.

One alleging himself to be the undivided brother and, as such, the legal
representative of a deceased judgment-debtor applied to have set aside a sale of certain
property alleged by him to be joint family property, which had taken place in
execution of the decree. He did not make the purchaser a party to such
application. The Court of First Instance dismissed the application. On appeal,
the Appellate Court made the purchaser a party to the proceedings, and holding
that there was irregularity in conducting the sale reversed the order of the Court
of First Instance:

(1) 16 M. 317. (2) 6 C. 8. (3) 6 B. 580.
SUBBARAYADU v. PEDDA SUBBARAZU

16 Mad. 478

Held (1) that the Appellate Court was wrong in so holding upon evidence recorded by the Court of first instance when the purchaser was not a party to the proceedings:

(2) that the proper remedy of the applicant was a regular suit and not a proceeding under Civil Procedure Code, 311.

[Appr., 23 B. 450; R., 19 M. 167.]

APPEAL under Letters Patent, Section 15, against the order of Mr. Justice PARKER made on civil revision petition No. 199 of 1890. By that petition the petitioner prayed the High Court to revise the order of C. A. Bird, District Judge of Godavari, in appeal suit No. 72 of 1889, reversing the order of R. Hanumanta Rau, District Munsif of Tanuku, made on miscellaneous petition No 1338 of 1888.

The petitioner, before the District Munsif, prayed for the cancellation of the sale of certain land which had taken place in execution of a decree passed against his undivided brother Subba-[477] razu (since deceased). The widow of the deceased judgment-debtor had been brought on to the record in execution proceedings as his representative. This was objected to as an irregularity, and further irregularities in the publication of the proclamation of sale and in the conduct of the sale were alleged, as well as consequent injury to the petitioner. The District Munsif held that neither the irregularities nor the injuries were proved, and accordingly dismissed the petition.

On appeal the District Judge first joined the execution-purchaser as a party to the present proceedings, and subsequently made an order, by which he directed the petitioner to be brought on to the record as the representative of the deceased judgment-debtor and set aside the order confirming the sale. The execution-purchaser preferred the above petition under Civil Procedure Code, Section 622.

The petition came on for hearing before Mr. Justice PARKER who dismissed it on the grounds stated in the following judgment of the High Court. The petitioner preferred this appeal under Letters Patent Section 15.

Sripana Chariyar, for appellant.
Mr. W. S. Gantz, for respondent.

JUDGMENT.

In small cause suit No. 1032 of 1886 on the file of the Sub-Court at Ellore, plaintiff obtained a decree against petitioner's brother Subbarazu, and upon his death made his widow a party to execution proceedings. He then attached certain property and brought it to sale, at which petitioner, before us, became purchaser. Thereupon the brother of the judgment-debtor applied for the sale being set aside and stated that as undivided brother he was the judgment-debtor's legal representative; that the property sold in execution was joint family property, and that there was material irregularity in conducting and publishing the sale. He did not, however, make the purchaser a party to his application, and the District Munsif held that no material irregularity was proved, and dismissed the application. On appeal, the Judge made the purchaser a party to the proceedings, and, being of opinion, that there was irregularity in publishing the sale, cancelled the order refusing to make the appellant representative of the judgment-debtor and the order confirming the sale. The purchaser applied to this Court for the order being set aside under Section 622, Civil Procedure Code. Mr. Justice [478] Parker rejected his
application on the ground that the Judge did not set aside the sale though he intended to do so, and that, as the purchaser was in possession, he was not prejudiced. Hence this appeal under the Letters Patent.

The District Judge recorded no finding that by reason of the irregularity in publishing the sale any loss was sustained, and in the absence of such finding, it was not competent to him to set aside the sale. Although the purchaser was made a party on appeal, the Judge was in error in finding that there was irregularity in publishing the sale upon evidence recorded by the District Munsif when the purchaser was not a party to the proceedings, without giving him an opportunity to test the evidence by cross-examination and to cite rebutting evidence, if any. Again, the application shows that if the property attached and sold was joint as stated therein, it must have survived to the applicant on the death of his brother and thereby become his exclusive property. When a person seeks to set aside a sale by reason of a title adverse to that of the judgment-debtor at the date of attachment, his proper remedy as observed in Asmutunnissa Begum v. Ashruf Ali (1) is a regular suit and not a proceeding under Section 311. If the property was, on the other hand, the separate estate of the deceased judgment-debtor, his widow was his legal representative. We do not see our way to confirm the order of the District Judge or of the learned Judge who upheld it. We set aside the order of the District Court and restore that of the District Munsif. The respondent will pay appellant's costs in this Court and in the Lower Appellate Court.

16 M. 479—3 M.L.J. 47.

[479] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SARANGAPANI AND OTHERS (Defendants Nos. 1, 3, and 4),
Appellants v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (Plaintiff), Respondent. (2) [10th and 11th January, 1893.]


Certain land was put under attachment for arrears of revenue under Madras Abkari Act, Section 29; the same land was subsequently attached in execution of a money decree against the defaulter and the defendant purchased it at the Court sale. The Collector of the district intervened in execution and objected to the sale of the land in question, but his objection was rejected. A suit was now brought in the name of the Secretary of State for a declaration that the land was liable for the arrears of revenue in respect of which the attachment under Abkari Act had been made:

Held, that the plaintiff was entitled to the declaration asked for.

SECOND appeal against the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in appeal suit No. 377 of 1891, affirming the decree of A. Kuppusami Ayyangar, District Munsif of Kumbakonam, in original suit No. 81 of 1890.

The facts of the case are stated above sufficiently for the purposes of this report.

* Second Appeal No. 659 of 1892.

N.B. For arguments of the Counsel, see 3 M.L.J. 47.—ED.

(1) 15 C. 488.
The defendants preferred this second appeal.

* Rama Rau, for appellants.

The Acting Government Pleader (Subramanya Ayyar), for respondent.

JUDGMENT.

In this case the Collector made the prior attachment under the provisions of the Madras Abkari Act I of 1836, Section 28. The lands were subsequently attached by a private creditor and sold in execution. The question is whether the property passed to the purchaser subject to the liability to be sold under the attachment previously made by the Collector.

[480] The learned Pleader contends that the terms of Section 28 of the Abkari Act do not extend the provision of Section 42, Madras Act II of 1864, to sales for arrears of Abkari revenue, and that since the Revenue Recovery Act does not prohibit alienation after attachment, the attachment made by the Collector is absolutely void either against a private alienation or against a subsequent attachment in execution of a Court decree. If this contention be valid, it would follow that the Crown would be in a worse position than any private creditor, even though making the first attachment, since it could not even claim rateable distribution under Section 295, Code of Civil Procedure, because the attachment made by it, though made under the provisions of the law, was not made in execution of a decree for money.

We cannot accede to the contention. The attachment made by the Collector did undoubtedly render the property subject to be sold under Section 28 of the Abkari Act, and the creditors who subsequently attached in execution of a Court-decree could not attach a larger interest than that belonged to his judgment debtor. That interest was subject to the liability which had been legally imposed in due course of law and the purchaser could take no more. The principle of the decision in Subramanya v. Rajaram (1) applies. This is not a case of competition between different decree-holders under the Civil Procedure Code.

In this view it is not necessary to consider the wider question as to whether as a Crown debt the Collector's claim would have precedence.

The second appeal is dismissed with costs.

16 M. 461.

[481] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Handley.

NARASINGA RAU (Plaintiff), Appellant v. VENKATANARAYANA AND OTHERS (Defendants), Respondents.*

[20th and 26th October, 1892.]

-Civil Procedure Code—Act XIV of 1882, Sections 13 and 43—Res judicata—Suit by mortgagee for personal remedy in one Court—Subsequent suit against mortgaged property in another Court—Latter suit not within jurisdiction of former Court—Transfer of Property Act, Section 99.

A bond, whereby certain immovable property was hypothecated as security for a debt, was executed at the place of residence of the obligor, which was within the jurisdiction of a Court other than that within the jurisdiction of which the property hypothecated was situate. The obligor brought a suit in the former

* Second Appeal No. 1584 of 1889.

(1) 8 M. 573.
Court to recover the principal and interest due on the bond against the obligor personally, on the covenant to pay contained in the bond, and prayed also for sale of the property hypothecated. That Court dismissed that suit so far as it related to the property, and also so far as the claim for principal was concerned, but awarded the plaintiff the interest claimed against the defendant personally. Subsequently the obligee brought a suit in the Court within the jurisdiction of which the property was situate for recovery of the principal money due on the bond by sale of the hypothecated property:

Beld, that the latter suit was not barred by reason of the former suit, either under Section 13 or under Section 43, Civil Procedure Code.

Second appeal against the decree of J. Kelsall, District Judge of Vizagapatam, in appeal suit No. 40 of 1889, confirming the decree of K. Ramalinga Sastri, Principal District Munisif of Vizagapatam, in original suit No. 109 of 1888.

The facts of the case appear sufficiently for the purposes of the report from the following judgment of the High Court.

Mr. Michell, for appellant.

None of the lands comprised in the mortgage are situate within the jurisdiction of the Court of the District Munisif of Vizianagram in which the former suit No. 116 of 1884 was brought, and therefore that Court was not a Court of jurisdiction competent [482] to "try" the present suit, within the meaning of Section 13, Civil Procedure Code, at all events so far as the present suit is a suit to enforce the mortgage against the mortgaged property (compare Misir Bakhobirdal v. Sheo Baksh Singh (1)). Nor is the present suit barred under Section 43, Civil Procedure Code. It was impossible for the plaintiff to obtain relief by way of enforcing his security in the former suit, because the Vizianagram Court had no jurisdiction to grant such relief, and he was therefore not bound to include in that suit a claim for such relief along with his claim for relief against the defendant personally. It is true that he did, as a matter of fact, ask for a decree against the property as well as against the defendant personally in that former suit; but the fact that he so prayed for relief which the Court had no jurisdiction to grant cannot bar him from afterwards suing for such relief in a competent Court. Nor would it have been possible for him to have included both claims, that for relief against the property and that for relief against the person, by bringing his suit in the Vizagapatam District Munisif's Court, because, though that Court had jurisdiction in respect of the claim against the land, it had no jurisdiction in respect of the claim against the defendant personally, inasmuch as the defendant resided in Vizianagram and the mortgage was executed there. Therefore this is a much stronger case than the cases where it has been held that a person who could, by obtaining the leave of the Court, have brought a single suit in one Court in respect of lands situate in the jurisdiction of different Courts, but instead of doing so has brought a suit only in respect of the land situate in the jurisdiction of the Court in which such suit was brought, is not barred from afterwards suing in respect of the lands situate in the jurisdiction of another Court or other Courts—Subba Rau v. Rama Rau(2), Pattaray Mudali v. Audumula Mudali (3), Bungsee Singh v. Soodist Lall(4). But, further, the mortgagee (plaintiff) is exempted from the operation of Section 43 of the Code by Section 99 of the Transfer of Property Act, and entitled to obtain a money decree against the mortgagor on his personal liability, and afterwards to sue for a decree against the mortgaged property.

(1) 9 C. 441.
(2) 3 M. H.C. R. 376.
(3) 5 M.H.C.R. 419.
(4) 7 C. 739.
Section 99 of the Transfer of Property Act does apply to this case, because, although [483] the mortgage was executed in 1879, the decree in the former suit (original suit No. 116 of 1884) was subsequent in date to the date of the coming into force of that Act, and the question whether Section 99 of that Act applies or not depends not on the date of the mortgage, but the date of the decree in the former suit, _Kaveri v. Ananthayya_ (1).

The Advocate-General (Hon. Mr. Spring Branson), for respondent.

_Kaveri v. Ananthayya_ (1) is distinguishable from the present case. In that case the holder of a decree for arrears of interest due on a mortgage executed before the passing of the Transfer of Property Act applied to have the mortgaged property attached and sold in satisfaction of the decree which was obtained after the passing of that Act. The High Court held that the mode of enforcing the decree was a matter of procedure, and that that procedure was governed by the Transfer of Property Act. Therefore Section 99 of that Act excluded the operation of Section 43 of the Code of Civil Procedure. In the present case the plaintiff sues on the cause of action, and to obtain the relief which formed the foundation of and the object sought in suit No. 116 of 1884. He does not seek to enforce the decree for interest which he obtained. Therefore Section 99 of the Transfer of Property Act does not apply, and the operation of Section 43 of the Code of Civil Procedure is not excluded. With regard to Section 43 the test is that laid down in _Moonshee Buzool Ruseem v. Shunsoonissa Begum_ (2).

The District Munsif had no jurisdiction in suit No. 116 of 1884 over the mortgaged property. It was open to the plaintiff to withdraw that suit with the leave of the Court, or for the Court to dismiss the suit as framed on the ground of want of jurisdiction. In either case plaintiff could have filed his suit on the mortgage in a Court competent to try it. He elected to abandon his right as a mortgagee in order to obtain the decree for money which the Court could give him. Section 43 of the Civil Procedure Code precludes a suit based on the abandoned right—_Gumani v. Ram Paderath Lal_ (3), _Ukha v. Daya_ (4).

If the Court had power to give the plaintiff a decree for principal and interest, and gave him a decree for interest alone, the [484] plaintiff should have appealed if he was dissatisfied with the decree. He cannot now seek to rectify the mistake, if it was a mistake, by filing another suit on the mortgage. The decree for interest alone appears to have been agreed to by the plaintiff's vakil, who apparently abandoned the other claims made in the plaint in that suit. Section 43 of the Code of Civil Procedure was intended to prevent multiplicity of suits, that is to prevent the very course which the plaintiff has chosen to take.

If the question of hardship were open to discussion, it might fairly be urged for the second defendant that it would be unfair to deprive him of the benefits of a purchase made possibly on the strength of the plaintiff's abandonment of his rights as mortgagee in suit No. 116 of 1884.

Mr. Michell, in reply.

If in execution of his decree in original suit No. 116 of 1884, the plaintiff had attempted to bring the mortgaged property to sale, he could have been met with the objection under Section 99, Transfer of Property Act, that he could only do so by instituting such a suit as the present suit, and that he was entitled to do so, notwithstanding Section 43, Civil Procedure Code.

(1) 10 M. 129.
(2) 11 M.I.A. 551 (605.)
(3) 2 A. 699.
(4) 7 B. 182.
If the plaintiff had withdrawn his suit in the Vizianagaram District Munsif's Court in order to bring a suit in the Vizagapatam Court, he would not have been able to sue on his personal remedy in the latter Court, which had no jurisdiction in respect of that remedy; while, on the other hand, the former Court had no jurisdiction in respect of his remedy against the property. He was not bound to give up his personal remedy.

Whether the plaintiff could have appealed or not against the decree in the Vizianagaram Munsif's Court, is a question which is not, it is submitted, material in the present suit, for such appeal could only have been in respect of the personal claim, which alone was open to him in the suit in that Court, but the present claim is against the property only.

The cases cited on behalf of the respondent do not apply, because they were not cases in which the Court which decided the former of the two suits had not jurisdiction to try the subsequent suit.

JUDGMENT.

In 1879 first defendant hypothecated to plaintiff the lands in question in this suit by registered deed (Exhibit A) for Rs. 1,000. In default of payment within four years the deed [485] provides that plaintiff "shall take possession and enjoy the lands, this very bond being taken as a sale-deed." The deed contains a direct covenant by first defendant for payment of the mortgage-debt, principal and interest. Plaintiff sued first defendant in original suit No. 116 of 1884 in the Vizianagaram Munsif's Court for recovery of the mortgage-debt from first defendant personally and by means of the mortgage property. It is admitted that none of the mortgaged lands are within the territorial jurisdiction of the Vizianagaram Munsif. As against the land, therefore, plaintiff could have obtained no relief in that suit, and the District Munsif accordingly dismissed his suit so far as it related to the lands mortgaged. He also dismissed the suit for the principal of the mortgage debt, apparently on the ground that the mortgage was one by conditional sale and therefore no suit would be for the mortgage-debt, but he gave plaintiff a personal decree for the interest due on the ground that the bond expressly provided for it. He appears to have overlooked the fact that the bond contained an express covenant for payment of principal as well as interest.

In the present suit plaintiff prays in the alternative for possession of the mortgaged lands or for recovery of the principal of the mortgage-debt Rs. 1,000 by sale of the mortgaged property. Second defendant is in possession of part of the mortgaged property under an alienation by first defendant. Defendants 3 and 4 are in possession of other parts of the lands claimed. Third defendant sets up a title to the lands in his possession as belonging to his Karnam's mirasi. Fourth defendant disclaims all interest in the plaint lands and asks for costs. Both the Lower Courts agree in dismissing the suit on the preliminary ground that it is barred by Sections 13 and 43 of the Civil Procedure Code. Plaintiff appeals.

In our opinion the Lower Courts are in error in throwing out the suit on this preliminary ground. Clearly the matter is not res judicata within the meaning of Section 13 of the Code, for the Districts Munsif's Court of Vizianagaram was not a Court of jurisdiction competent to try the suit so far as it relates to the mortgaged lands. Neither do we think does Section 43 bar the present suit. It is pressed on us by the learned Advocate-General for second defendant that plaintiff must be taken to have intentionally relinquished that portion of his claim relating to the [486]
lands, so as to get the personal decree, which alone the Munsif could give
him. But it appears to us that the facts as to plaintiff's conduct in the
former suit cannot bear that construction. So far from relinquishing that
part of his claim relating to the land he sued for enforcement of the mortgage
by sale of the mortgaged lands, and persisted in his claim until the hearing
when it was disallowed. He had a right to sue the mortgagor for the mort-
gage debt in the Court within whose jurisdiction the mortgagor resided,
and the fact that he erroneously claimed in that suit relief against the lands
which that Court had no jurisdiction to give him does not, in our opinion,
bring him within the bar of Section 43 of the Code.

We must reverse the decrees of the Lower Courts and remand the
suit to the Court of First Instance for disposal on the issues which have
not been tried. Respondent must pay appellant's costs of this second
appeal and the Lower Appellate Court. Costs in the Court of First
Instance to be dealt with in the revised decree.

1892

16 M. 486 = 2 M.L J. 272.

APPEL- 16 M. 481.

LATE

CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

TIRUGNANA SAMBANDA PANDARA SANNADHI AND OTHERS
(Defendants, Nos. 1 3, and 5—7), Appellants v. NALLATAMBI
AND OTHERS (Plaintiffs Nos. 1, 2, 4 and 5), Respondents.*
[31st August and 7th September, 1892.]


In 1885 the plaintiffs mortgaged certain land to the defendants, and placed
them in possession under a mortgage-deed, which provided that the profits of the
land should be taken towards the discharge of the mortgage-debt, and that when
it was so discharged, possession should be surrendered to the mortgagor. In a
suit in which the plaintiffs asked for an account and for a decree for redemption
on payment by them of the balance that might be found due on the mortgage, it
appeared, on accounts being taken of the proceeds of the land, that the principal
and interest had not been discharged thereby:

[487] Held, that the right to redeem had not accrued to the plaintiffs, and
that the suit should be dismissed.

[Rel. on., 8 Ind. Cas. 707 (708); R., 20 B. 677 (684); 39 C. 826 = 17 C.W.N. 149 (150) =
15 Ind. Cas. 287; 23 M. 38; 11 C.P.L.R. 103; 6 Ind. Cas. 997 (999) = 13 O.C. 126; D., 16 C.P.L.R. 50.]

SECOND appeal against the decree of S. Gopalachariar, Subordinate
Judge of Madura (East) in appeal suits Nos. 468, 207 and 446 of 1890, modifying the decree of T. Sadarasa Ayyar, District Munisif of Madura, in original suit No. 490 of 1887.

Suit to redeem a mortgage, dated 5th May 1885, executed by the
plaintiffs in favour of a temple committee, of which defendants were
members, to secure a sum of Rs. 356-5-5. The provisions of the mortgage
relating to the discharge of the debt were as follows:—

"As this sum of Rupees three hundred and fifty-six, annas five and
"pices five are, under particulars mentioned above, received from the
"temple as loan, with a mind to pay up the said sum, and interest there-
"for at 6 per cent. per mensem from this day, the said two villages are

* Second Appeals Nos. 1461 to 1483 of 1891.
left under the management of the temple. Collect money, &c.; pay out of funds of the said village the amount which may be spent therefor, the Government poruppus and road cess of the said villages and obtain receipt. Deducting this sum if there were a sum of remainder, pay to us in each month at Rs. 57-1-0 for salaries of ourselves and others of the establishment and for establishment appointed by us for the remaining 10 pangu and obtain receipt. Moreover, for the remaining sum, settle account of receipts, &c., and disbursements with us. Thereupon give credit towards the sum of debt abovenamed due from us to the said temple and interest therefor. After discharging the said debt in full, deliver the said villages in our possession, pay to us if there were any sum remaining, and obtain receipt. We have executed this with our consent, agreeing that we shall make good as mentioned above from the funds of the said village all expenses which may be incurred in respect of the said villages."

The plaintiffs asked that an account be taken of the net income derived from the mortgage premises and that it be ascertained what sum, if any, remain payable by them to the mortgagees, and for a decree for redemption on payment of such sum. The District Munsif took the account for which the plaintiffs asked, whereby it appeared that the sum of Rs. 676-9-4, inclusive of the principal, was then due on the mortgage, and he made a declaration accordingly, in other respects he dismissed the suit on the view that the mortgage could be redeemed by the usufruct of the land only, and that the mortgagees were entitled to retain possession until the mortgage debt had been discharged in that manner.

On appeal the Subordinate Judge held that the plaintiffs were entitled to redeem on payment by them of the amount due upon the mortgage, and he passed a decree accordingly,

Defendants preferred this second appeal.

Sundara Ayyar, for appellants.

Bashyam Ayyangar and Krishnasami Ayyar for respondents.

JUDGMENT.

It is urged that upon the finding that the mortgage debt was not wholly satisfied from rents and profits, the suit should have been dismissed on the ground that no right of redemption had accrued at the date of the suit, and that no decree for redemption ought to have been made. In support of this contention, reliance is placed on Section 62, clause (a) of Act IV of 1882. That clause is in these terms: "Where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property, the mortgagor has a right to recover possession of the property when such money is paid." The real question is whether the words "when the money is paid," mean when the money is paid from rents and profits, or include a payment by the mortgagor. The context lends weight to the contention that the payment is contemplated to be made in the mode indicated by the contract; Clause (b) also supports this contention. It premises a case in which the mortgagee is authorized to pay himself from rents and profits the interest of the principal money and provides for redemption when the term if any, prescribed for payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in Court. Again Section 60 declares that the mortgagor is entitled to redeem, after the principal money has become payable under the contract of mortgage. These provisions of the law point to the conclusion that
the right of redemption accrues, when, according to the contract of the parties, the mortgage-money has become payable, and is paid or tendered, or when it is satisfied from rents and profits when such is the mode of the payment indicated by the contract. Prior to the date when Act IV of 1882 came into force, it was held in several cases in this Presidency that when a day [489] is fixed for the payment of the debt by a contract of mortgage, and nothing more appears, the presumption is that the day is fixed for the convenience of the debtor, and that the mortgagor may pay the debt at an earlier date, see Dorappa v. Mallikanjunudu (1), Keshava v. Keshava (2), and Mashook Ameen Suzza v. Marem Reddy (3). On the other hand, it was held by the Bombay High Court in Vadju v. Vadju (4), and in the cases cited therein, that the general principle as to redemption and foreclosure is that, in the absence of any stipulation, express or implied to the contrary, the right to redeem and the right to foreclose are co-extensive, and that, where there is a stipulation to pay a mortgage debt in ten years, the mortgagor could not redeem at an earlier date. The English Law on the subject is explained in Fisher on mortgages, vol. II, 3rd Edition, page 729. The observations of the Privy Council in Pramnath Roy Chowdry v. Booken Begum (5) are to the same effect. In Brown v. Cole (6) it was laid down that a person could not redeem before the time appointed in the mortgage-deed, although he tenders to the mortgagee both the principal and interest due up to that time. Having regard to Section 60 and Section 62 of the Transfer of Property Act, the Legislature appears to have adopted the principle that in the absence of a stipulation to the contrary, the presumption is that the right to redeem and the right to foreclose arise at the same time, and that, when a date is fixed for payment of the mortgage debt and the mortgagee cannot foreclose earlier, the mortgagor also cannot redeem before the appointed time.

Looking to the terms of the instrument of mortgage in the case before us, they provide for the mortgagee paying himself the debt from the rents and profits of the estate and for the surrender of possession when the debt is so paid off. The event on which the obligation to surrender is made by the parties to depend, is the realization of the principal money and interest by the mortgagees themselves from the rents and profits of the mortgaged property and the possession by the mortgagees until that event occurs is of the essence of the transaction. The transaction then is a _vivum vadum_ in which no time is fixed for [490] redemption, but the party is left to pay himself the sum for which the estate is pledged out of the rents and profits of the estate. The result is that upon the facts found no right to eject or redeem had accrued at the date of the suit.

The decrees of the Subordinate Judge must be reversed and that of the District Munsif restored. The respondents will pay appellants' cost in this and the Lower Appellate Court.

(1) 3 M. H. C.R. 363. (2) 2 M. 45. (3) 8 M. C.H. R. 31
(4) 5 B. 22. (5) 7 M. I. A. 823. (6) 14 Sim. 427.
RAMALINGAM PILLAI (Plaintiff) v. VYTHILINGAM PILLAI (Defendant). [21st June and 15th July, 1893.]

Law applicable to religious institutions—Succession to the office of dharmakarta—Act XX of 1863—Religious endowments—Custom and usage.

On a question of the right of succession to the office of dharmakarta of a devasthanam or temple at Rameswaram in Madura, and in such cases the only law applicable is the custom and practice, which are to be proved by evidence.

Both the Courts below found that, according to the established usage, the succession was provided for by each successive dharmakarta initiating a pandaram; and whilst in office, appointing him as his successor. It followed that the appointment of a dharmakarta by one who had already ceased to hold the office (having been removed under Act XX of 1863, Section 14) was not in accordance with usage, and was therefore invalid.

The person whom the displaced dharmakarta had attempted to appoint was head of the mutt from which succeeding dharmakartas, as it appeared, had been taken. Besides the above cause of invalidity in the appointment in question, the evidence supported the finding that the displaced dharmakarta made his attempt to appoint the head of the mutt to succeed him in office in furtherance of his own interests, and did not bona fide exercise his powers, if any. This finding invalidated the whole appointment and applied to the headship of the mutt as well as to the office of dharmakarta.

APPEAL from a decree (8th November 1888), affirming a decree (10th September 1886) of the Subordinate Judge of East Madura.

This appeal arose out of a suit brought by the appellant against two defendants to obtain a declaration that he was the [491] lawful dharmakarta or manager, duly appointed by the late one, of the ancient devasthanam at Rameswaram in the Madura district. The claim was valued at Rs. 20,00,000. According to the usage of this institution the dharmakarta was necessarily a pandaram of the Vellala order, of whom there was a mutt at the same place, and the head of the mutt had been appointed dharmakarta. The late dharmakarta was one Sanamada Pillai, during whose management more than Rs. 10,000 had been misappropriated of the money belonging to the trust. In proceedings instituted under Section 14 of the Religious Endowments Act XX of 1863, the District Judge, on the 2nd March 1883, directed his removal from the trusteeship, and the High Court confirmed this decision on the 30th January 1884. He had, since then, on this account, been convicted of criminal breach of trust, and had been sentenced to a term of imprisonment. The District Judge had also appointed a receiver, under whose management he placed the endowment until a trustee should be lawfully appointed. On the 30th January 1884, as stated in the plaint, the late dharmakarta, Ramalingam Pillai, appointed the plaintiff as his successor to the office, with power to act at once independently of him. This he purported to do by the document which is set forth in their Lordships' judgment, where also are stated all the facts of this case.
In October 1884 the appellant brought his having been appointed as dharmakarta to the notice of the District Judge and applied for official recognition of his right and title to manage the endowment.

In November 1884 the first defendant resisted his claim and contended that he had a better title to the office by virtue of prior appointment. The District Judge directed that the rival claimants should establish their right to the office of dharmakarta in a regular suit, and that the receiver should meanwhile continue in management. The plaintiff then brought this suit and the first defendant brought original suit No. 48 of 1885. Both suits were tried together, and the evidence was, by consent, recorded in this suit. The Subordinate Judge dismissed both with costs, and the plaintiff and the first defendant appealed from his decision. Both appeals were heard together: the first defendant's appeal was dismissed, and this appeal stood over for consideration, and is dealt with in this judgment.

[492] In the High Court both appeals were heard together on the 2nd July 1888. The first defendant's appeal against the dismissal of his suit failed at once. The appeal in the present plaintiff's suit was afterwards, on the 8th November 1888, dismissed by the judgment which is the subject of this appeal.

In the present suit the Subordinate Judge decided that the appointment was invalid for the following reasons: first, that the late dharmakarta had ceased to hold office before he made the appointment; secondly, that the document purporting to appoint made a present transfer of the trusteeship, the custom only authorizing such nomination to operate on the vacancy by death; thirdly, that the transaction was not bona fide for the sole benefit of the institution, but to secure specified advantages for Ramalingam Pillai; and fourthly, that there had been a failure to prove the contention that the office of dharmakarta of the devasthanam followed the right of headship of the mutt at Rameswaram, this contention being, in fact, an after-thought.

The High Court (Muttusami Ayyar and Wilkinson, JJ.) taking up each of the above grounds, concurred in the opinion that there were reasons for dismissing the suit. As to the usage of the institution in regard to the appointment of a dharmakarta, they found that the evidence proved that there were six cases during the last forty years in which the predecessor admitted the successor shortly before his death to the order of pandarams and appointed him as his heir. This was in accordance with the mode of succession mentioned by the Judicial Committee, with reference to this institution, in Rajah Muttu Ramalinga Setupati v. Perianayagum Pillai (1). As to Venkatachelam's succession in 1816, it was held by that committee to rest upon nomination by his predecessor. Adverting to the succession of Ramanadha in 1793, that committee refused to accept the interference of the Zemindar of Ramnad in connection with it as an indication of the usage of the institution. There was no evidence before the High Court as to any case of prior succession. They agreed, therefore, with the Subordinate Judge that, according to the established usage of the religious foundation, each dharmakarta initiated a Vellala, making him an ascetic, and thereafter appointed him as his successor whilst in office and shortly before his death.

(1) 1 I.A. 209.
1893

[493] The Judges added with reference to the second of the
Subordinate Judge’s grounds that there was, in one sense, a present
transfer of trusteeship, and that there was no similar instance in the usage
of the temple. Upon the fact of Ramalingam Pillai having been deprived
of his office before he made the appointment, they said:

"In the absence of a special usage, the right of nominating a successor
must be taken to be an incident of the preceding pandaram’s status as
dharmakarta, and to cease with the loss of that status. The late trustee,
it must be borne in mind, was removed from dharmakartaship on 2nd
March 1883, whilst the appellant was appointed by him on the 30th
January 1884. It would be unreasonable to say that a person who forfeits
by his misconduct his claim to a fiduciary position is entitled to select a
successor for that position, or, in other words, that power depending on
the existence of a special status survives that status. We are referred to
no such appointment either in the history of the institution concerned
in this case or of any similar institution. It may be that when a
dharmakarta nominates a successor bona fide whilst in office, but is
subsequently removed from dharmakartaship for misconduct to which
the successor is not a party, his right of succession is not open to
question, but that is not the case before us. The pre-requisites of a valid
appointment would exist in the one, while they do not exist in the other."

As to the absence of bona fides they said:

"According to the appellant’s own evidence, it was arranged that he
should protect the dismissed trustee during his life and it is his intention
to pay for his use Rs. 5,000 when the temple is placed in his posses-
sion. He stated further during his cross-examination that he paid the
late pandaram’s travelling expenses and vakil’s fees and other charges in
connection with the Sessions case brought against the latter. Though
document A provides for appellant’s management, his evidence shows
that it was Kumarasamy Pillai who managed, though apparently under
his orders. The result was not only a partial diversion of the matum
income to provide for the exiguities of the late pandaram, but also the
alienation of the matum village of Aiyamputtoo, which the appellant
was unscrupulous enough to say belonged to Kumarasamy, while it
really belonged to the [494] matum. Further, the correspondence
referred to by the Subordinate Judge shows that the late pandaram had
facilities to influence the management of the devasthanam through the
appellant. With these facts before us, we cannot say that the Subor-
dinate Judge was not warranted in finding that the appellant’s appoint-
ment was made by the former pandaram in furtherance of his own
interests and that it was not a bona fide exercise of his power, if any.

As to the contention that succession to dharmakartaship is appur-
tenant to the right of succession to the mutt, the Subordinate Judge
observes that it is an after-thought. There is no averment in the plaint
to that effect, nor is there any trace of it in the issues framed or in the
evidence produced by the appellant. The usage of the institution
shows only that the chiefship of the mutt and the dharmakartaship
were held by one and the same person, and discloses no instance in
which the two offices were held by different persons. Documents filed
in the suit in which the right of succession was the subject of contro-
versy between the then pandaram and the Zemindar of Ramnad, and
the statements they contain as to the origin of the right of management
are no legal evidence under Section 22 of Act I of 1872 and prove nothing
more than that the devasthanam and the mutt were ancient institutions
and that the heads of the mutt became hereditary dharmakartas on account of the interest they took in the temple and of endowments they obtained for it from zemindars and rajahs and of contributions made by them when the temple was dilapidated and needed pecuniary help. They explain how the dharmakartaship came to be united with the chiefship of the mutt, but by no means indicate that in no event, can the former be severed from the latter or that the dharmakartaship became appurtenant to the chiefship of the mutt. It is explained in the case of the Giyana Sambandha Pandara Savadhi v. Kandusami Tambiran(1) that ascetics in charge of mutts were enabled to assume management of some of the important devasthanams in Southern India by reason of their devoted devotion to spiritual matters and to religious charities. Though ascetics became trustees of temples, yet they were responsible, in common with laymen who were trustees, for breach of trust and both were liable to be dismissed for breach of trust, misfeasance or neglect of duty under Section 14 of Act XX of 1863. It follows that when an ascetic in charge of a mutt is dismissed from the office of dharmakarta of a public temple, there is a statutory disannulment of the two offices in the interests of the last-mentioned institution, and that the ascetic trustee and those who claim under him are in no higher position than a dismissed lay trustee. We do not desire to be understood as holding that if the right of succession to the dharmakartaship had prior to the dismissal vested in some one else, or if the right of nominating to the vacancy in trusteeship belonged to some independent body of persons, that right would cease with dismissal of the dharmakarta for the time being. It is pointed out by the Court below that the plaintiff and two of his witnesses deposed that appointment of pandarams was made for both offices at one and the same time and not for the mutt alone. We must, therefore, overrule the contention that the dharmakartaship is an incident to the right of succession to the mutt. The High Court dismissed the appeal with costs.

On this appeal Mr. J. D. Mayne, for the appellant, contended that the High Court had overlooked the argument arising out of the fact proved that the nominated dharmakarta, who was a pandaram belonging to the ancient mutt connected with the devasthanam and head of that mutt, was qualified by his position, and was the person proper to be appointed with regard to the custom. The succession to the office of dharmakarts to the devasthanam had been shown to go according to the custom to the head of the mutt. The plaintiff’s succession to the latter and his control of its property were undisputed. The succession of such a pandaram was valid in consequence of the connection between the mutt and the devasthanam and the appointment was not invalidated by reason of its having been made by the displaced dharmakarta. The High Court was wrong in holding that the appointment was invalid on principle and opposed to the usage of the temple; wrong, also, in holding that the appointment was invalid, because it was a transfer; wrong, again, in holding that a personal motive by entering into the transaction could render the appointment invalid. The succession to the office of dharmakarta should not have been held to be separable from the headship of the mutt; and there was nothing in the conduct of the case to prevent the appellant from availing himself of that contention. As to the four grounds upon which the judgments

(1) 10 M. 375.
below had proceeded:—upon the first, the removal of a trustee under
Act XX of 1863, Section 14, only operated for the benefit of the endowment
and could not have the effect of rendering inoperative the appointment of
a new trustee in his place, in the only manner in which the constitution of
the endowment directed that the appointment should be made. Upon the
second ground, it was submitted that the present was not a case of trans-
fer, but in reality one of succession. As to the third ground, there was
nothing to show that the mutt had been merged in the devasthanam, as
the original Court seemed to infer, but was an institution to which
the other had itself become an accretion; with this, that no person
would, by usage, become the head of the devasthanam who was not
head of the mutt. As to the fourth ground, it was submitted that the
plaintiff was not implicated in the improper motives of the late trustee,
and that the important question was, not what were the motives
actuating the maker of the appointment, but whether the appointment
was in itself a proper one. In regard to this, the evidence as to the
custom showed it to have been, not only a proper appointment, but the only
one for which there was the authority of custom; and as to the propriety
of the choice, if choice there was, there was the opinion of the Subordinate
Judge that the plaintiff, as between the two claimants, was by far the
preferable one.

The respondent did not appear.

Afterwards, on the 15th July, their Lordships' judgment was deli-
vered by Sir Richard Couch.

JUDGMENT.

The question in this appeal is whether the appellant is the lawful
dharmakarta or trustee of the ancient temple at Rameswaram in the
district of Madura. The temple is one of the class of religious
institutions described in Section 4 of Act XX of 1863, and, according
to inmemorial usage, the dharmakarta should be a "Vellala pandaram"
or ascetic of the Vellala caste. The last lawful dharmakarta was one
Saminada Pillai alias Setu Ramanada Pandaram. In 1882 a suit was
brought in the District Court of Madura against him and three other per-
sons who were said to be agents and managers under him, alleging an
embezzlement of Rs. 13,681 of money belonging to the temple by him
[497] and his agents. By the judgment given in that suit on the 2nd
March 1883 it was found that he, Ramanada Pandaram, was responsible
for the whole sum found to be embezzled, viz., Rs. 14,855-10-0, and a
decree was given against him for that sum with interest under Section 14
of Act XX of 1863. He was also directed to be removed from the
trusteeship of the temple under the provisions of the same section. On
the same day an order was made by the District Court appointing a
manager to be in charge of the temple until a new pandaram was appointed
according to law. The judgment of the 2nd March 1883 was confirmed
on appeal by the High Court of Madras on the 30th January 1884.
Subsequently to the 2nd March 1883 and before January 1884, Ramanada
Pandaram was charged with criminal breach of trust, and was afterwards
convicted of it and sentenced to suffer simple imprisonment.

On the 30th January 1884, the day on which the High Court con-
firmed the order of removal, and whilst he was under the charge of criminal
breach of trust, Ramanada Pandaram executed a deed of appointment of
the appellant in the following terms:
In holding the office of dharmakarta of Rameswaram devasthanam, mutt, &c., we have had to conduct the management of the said devasthanam through other persons, being ourself quite ignorant of reading, writing and arithmetic, and the consequence has been that some mistakes were committed which resulted in loss to the devasthanam and trouble to us. Having in view the interests of the said devasthanam, mutt, athinam, &c., and considering that you are a relation of ours by blood and a descendant of the same ancestry as ourself and that you are a man of learning and good character, we have this day and according to the established custom invested you with kashaya (dyed cloths), imparted the upadesam (spiritual instruction) appertaining to the asramam stage of life, given you the appellation of Sethu Ramanadha Pandaram and appointed you as dharmakarta of the said devasthanam, mutt, &c. You are to be our successor from this day with the right and privilege of appointing your successor, &c., and to manage and conduct all the business of the said devasthanam, mutt, at all times and independent of us.

It has been laid down by this committee that the only law applicable to such an appointment as this professes to be is to be found in custom and practice, which are to be proved by testimony. Both Courts have found that, according to the established usage of the religious foundation, each dharmakarta initiated a Vellala layman and made him an ascetic, and therupon appointed him as his successor whilst in office and shortly before his death. It is clear from what has been stated that the appointment of the appellant was not in accordance with the usage. It was made by a person who had ceased to be the dharmakarta.

The contention of the learned counsel for the appellant that the temple and the mutt are inseparable institutions, the mutt being the original institution, and that the head of the mutt must be the head of the temple, is not supported by any evidence. The headship of the mutt and of the dharmakartaship appear to have been held by the same person, but in the case in which there is evidence in the record of an appointment it is to be the dharmakarta, and this appears to be the principal office. Priority is given to it in the statement in the plaint of the usage and in the appointment of the appellant. The Subordinate Judge says that the trusteeship being the more important of the two offices almost absorbed the headship of the mutt, so much so that the distinct existence of the mutt was very nearly forgotten and the succession came to be regarded as for the trusteeship alone. This is in their Lordships’ opinion proved by the evidence referred to in his judgment.

Another objection to the appointment of the appellant is that both Courts have found that it was not made bona fide. The Subordinate Judge, referring to the circumstances which had been proved, says:—” All these convince me that the appointment of the plaintiff was not made bona fide in the interests of the institution, but was for the personal interests of the late trustees.” The Judges of the High Court, also referring to the proved facts, say:—” With these facts before us, we cannot say that the Subordinate Judge was not warranted in finding that the appellant’s appointment was made by the former pandaram in furtherance of his own interests and that it was not a bona fide exercise of his power, if any.” This finding of both Courts invalidates the whole appointment. It applies to the headship of the mutt as well as to the office of dharmakarta.
1893
JULY 15.
—-
PRIVY COUNCIL.
—-
16 M. 490
(P.C.) =
20 I A. 150 =
6 Sar. P.C.J. =
351 = 17
Ind. Jur. =
578.

On both the grounds which have been stated, their Lordships are of opinion that the appeal was rightly dismissed by the High Court and they will humbly advise Her Majesty to affirm its decree and to dismiss this appeal.

Appeal dismissed.
Solicitor for the appellant—Mr. R. T. Tasker.

16 M. 499.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

II. W. Brown and Another (Creditors), Appellants v. T. J. Ferguson (Judgment-debtor), Respondent.

[22nd and 23rd March, and 7th April, 1893.]

Civil Procedure Code—Act XIV of 1882, Section 351—Insolvency—Mortgage to secure a barred debt since renewed—Fraudulent preference—Voluntary transfer.

On 1st January 1886 a partnership there to fore existing between A and B was dissolved and the deed of dissolution provided, inter alia, for the execution by B, on demand, of a mortgage on the Plantation house (then subject to a subsisting mortgage in favour of the Agra Bank) to secure the repayment of a debt due by the firm to the trustees of A's marriage settlement. A suit against the firm was pending at the date of the deed of dissolution, and it was dismissed by the Court of first instance and an appeal was preferred to the High Court. Before the appeal came on for hearing the debt to A's trustees was barred by limitation, but A by a letter consented to pay it, and the trustees demanded the execution of the mortgage as agreed on and offered to pay off the Bank. Shortly afterwards, viz., in December 1888, the appeal came on in the High Court, which held that the appellant's claim was valid and called on the Court of first instance for a further finding. On 2nd January 1889, B executed a mortgage of the Plantation house in pursuance of the above agreement, and in June the trustees paid off the Bank. In April the High Court in the above appeal passed a decree for the appellant. In consequence of this decree B became involved in pecuniary difficulties; in October he found himself insolvent and ceased to carry on business, and in February 1890 he applied under Civil Procedure Code, Section 344, to be declared an insolvent. His application was opposed by the holders of the High Court decree on the ground that the mortgage of 2nd January 1889 had been executed with the object of defeating their claim:

Held, that the execution of the mortgage of January 1889 afforded no reason for rejecting the application under Civil Procedure Code, Section 351, since it was supported by consideration and did not amount to an act of fraudulent preference, not being a voluntary transfer.

Butcher v. Steed, L.R., 7 Eng. and Ir. App. 839, followed.

[500] Appeal against the order of A. Thompson, Acting District Judge of South Malabar, on insolvency petition No. 97 of 1890.

The petition was preferred under Civil Procedure Code, Section 344, by one of the judgment-debtors in original suit No. 67 of 1885 on the file of the District Court of South Malabar and the prayer was that the petitioner be declared an insolvent under Civil Procedure Code, Section 351. The petition was opposed by the decree-holders under the circumstances stated in the judgment of the High Court.

The District Judge granted the application, and the opposing creditors presented this appeal against his order.

Mr. W. S. Gantz, for appellants.

Wilson and King, Attorneys, for respondent.
JUDGMENT.

In appeal No. 82 of 1887 on the file of the High Court Mr. Tomlinson's representatives obtained a decree against Messrs. Hinde and Ferguson on 26th April 1889 for Rs. 17,349-0-5 with interest at 12 per cent. per annum from 29th April 1882 to date of the decree, and with further interest at 6 per cent. per annum till date of payment. He obtained also a declaration that he was entitled to one-fourth of the future profits which might be derived from certain mining rights called the Aliel Concession. In execution of the decree Tomlinson's representatives attached certain moveable properties by civil miscellaneous petition No. 16 of 1890, and on the 28th February 1890, Mr. Ferguson applied under Section 344 of the Code of Civil Procedure to be declared an insolvent. He fixed his liabilities at Rs. 3,20,390-1-11 and his assets at Rs. 2,19,679-7-6 up to the 11th February 1890. Three of his creditors, viz., Mr. Tomlinson's representative, Mr. Brown, Messrs. Oakes and Company, and Messrs. Vest and Company opposed his application. The District Judge, after considering their objections, made an order under Section 351 declaring Mr. Ferguson to be an insolvent. Hence this appeal.

In the Court below appellants relied in support of their appeal on three grounds of objection. viz., (i) that the balance sheet prepared for the year ending 30th June 1889 as compared with respondent's statement of liabilities and assets annexed to his petition disclosed a discrepancy to the extent of one lakh of rupees, (ii) that undue preference was shown to Messrs. Arthunout and Company by paying them Rs. 10,599-11-2 subsequently [501] to June 1889, (iii) that respondent executed a mortgage jointly with his partner and co-defendant Mr. Hinde in favour of the trustees of the wife of the latter over the Plantation house property, which is part of his assets, after the result of the appeal to the High Court had been ascertained and in order to defeat the judgment-creditors.

As regards the first objection, the Judge considered respondent's explanation unsatisfactory, but he was satisfied that the statements made in his petition were substantially true. As for the second objection the Judge accepted respondent's explanation as sufficient, and as for the third objection, he held that the mortgage was executed bona fide, though subsequent to the decree in pursuance of previous negotiations and that the mortgage was not liable to be treated as a transaction designed to defraud or delay the judgment-creditors.

As regards the first objection, we are of opinion that the Judge is right in declining to attach weight to it. As observed by him, respondent is only bound under Section 351 to show that the statements contained in his application are substantially true and we are referred to no specific evidence indicating that such is not the case. Appellants' counsel draws our attention to the discrepancy between the balance-sheet ending 30th June 1889 and the statement of assets and liabilities contained in his petition. But the Judge has noticed this discrepancy, and after considering the explanations given by the insolvent and after investigating the accounts, he has come to the conclusion that the statements in his petition are substantially true. The discrepancy is only material for the purpose of testing the correctness of those statements and not otherwise. As regards the contention that, in view of the discrepancy, respondent's accounts should be carefully scrutinized, again, no grounds are.

1893:
APRIL 7.
APPEL.
LATE
CIVIL.
16 M. 499.
shown for considering the scrutiny instituted by the Lower Court to be defective.

The second ground of objection is that undue preference was shown to Messrs. Arbuthnot and Company. It rests on the ground that in the balance-sheet A ending 30th June 1889 a sum of Rs. 10,599-11-2 is entered as due to Messrs. Arbuthnot and Company, whereas it does not appear as a liability in respondent's present schedule. His explanation is that on June 29th two bills on England, amounting to £950, were forwarded to Messrs. Arbuthnot and Company, that the payment was, however, not entered in the books until July 2nd, as the exact equivalent in Indian money had to be ascertained from Arbuthnot and Company, and that the payment left a balance of Rs. 1,099-11-2 which is accounted for by several extracts from the account D. The Judge accepted the explanation as satisfactory and we see no reason to come to a different conclusion.

The next ground of objection is that the mortgage executed in favour of the trustees of Mrs. Hinde in respect of the Plantation house is fraudulent, and the facts from which this contention arises are shortly these:—Respondent and one Mr. Hinde carried on business as merchants in co-partnership in London and in this Presidency under the style of Hinde and Company. It was agreed between them in July 1883 that the partnership was to continue for a period of seven years, but that it might be dissolved by either partner giving six months' notice to that effect. It appears from Exhibit XII that Mr. Hinde gave notice on 21st November 1884 of his intention to determine the partnership as from 30th June 1885, that the firm was then indebted to the trustees of the marriage settlement of Mr. Hinde in the sum of Rs. 47,539-11-11 with interest thereon at 9 per cent. per annum, and to the sisters of Mr. Hinde in the sum of £800 together with interest thereon, and that these two sums had been invested or otherwise employed in the Indian business of the partnership. With reference to this debt, the deed of dissolution bearing date 1st January 1886 provided, inter alia, for the execution by Ferguson, if required, of a mortgage of the Plantation house in favour of Richard Hinde to secure its repayment. This property had already been mortgaged to the Agra Bank (Limited), which had thereon a lien for a sum not exceeding Rs. 30,000. Mr. Ferguson executed a mortgage in favour of the trustees of Mrs. Hinde as a security for the debt due to them on the 2nd January 1889 and the trustees paid off the Agra Bank and obtained an assignment of the prior mortgage on 8th June 1889. It is stated by Mr. Ferguson that he found himself in October 1889 to be insolvent and ceased from that date to carry on business except such as was necessary for the upkeep of the several estates with which he was concerned. We may here refer to original suit No. 67 of 1885 instituted by Tomlinson against Hinde and Ferguson on a contract by the latter to give the former 25 per cent. of the profits that might be made from the exercise of mining rights over the properties of one Aliel Nair called the Aliel [503] Concession, which rights Tomlinson alleged he had secured to them.

In June 1885 a disagreement arose between Tomlinson and the firm of Hinde and Company. In September 1885 Tomlinson brought his suit, and on 8th October 1886 the District Court of South Malabar dismissed it with costs. From this decision Tomlinson preferred an appeal and the High Court considered his claim to be valid and called for a finding on 18th December 1888, and finally decreed it, as stated already, on the 26th April 1889. This decree was, according to Ferguson, the cause of his
insolvency, as he could, after that, get no accommodation from other firms and consequently could not raise money to carry him over that year. He admits that he telegraphed the result of the appeal to Mr. Hinde a day or two after it had been ascertained in December 1888.

Turning to the correspondence that passed between Ferguson and Mr. Hinde, it appears that the trustees of Mrs. Hinde had asked him to execute a mortgage and offered to pay the prior mortgage in favour of the Agra Bank (Limited). Exhibit XVI contains extracts from Mr. Ferguson’s letters, which convey the impression that between July and December 1888 there was a demand on the part of the trustees for the execution of a mortgage, that they offered to pay off the Agra Bank, and that a draft deed was also forwarded by them. In his letter of 10th December 1888 Ferguson stated that a conveyance of the Plantation house was necessary from Mr. Hinde to complete the mortgage. The mortgage was executed by Mr. Hinde on 28th December 1888 and by Mr. Ferguson on 2nd January 1889, and on the 8th June 1889 the Agra Bank executed an assignment of their mortgage. Upon these facts it is urged by appellants’ counsel that the mortgage was executed for a barred debt and by way of fraudulent preference.

We see no reason to think that the mortgage was not executed for value. The mortgage right under the deed of assignment B was admitted in the Court below, nor was it denied in the Court below that money was originally advanced upon the four promissory notes each for Rs. 8,000 dated 17th May 1879 and upon another note of 19th August 1887, which made up the mortgage debt of December 1888. Exhibits VI, VII, VIII and IX, which are the four promissory notes, are endorsed as having been paid. Again, when Tomlinson’s representatives attached in execution certain moveable property, the trustees preferred a claim on the mortgage in their favour, which was upheld on the 6th February 1891. In the order on the claim petition the District Judge recognised their claim to a valid charge on the Plantation house property for Rs. 43,146-2-2 and Mr. Tomlinson’s representatives have not sued to set aside the order, though more than one year has elapsed since it was passed.

It is then argued on appellants’ behalf that the mortgage was granted as a security for a barred debt. This is so, for, the first four promissory notes which are payable on demand are dated May 1879, whereas the mortgage was executed by Mr. Ferguson in January 1889. Two letters were produced as containing acknowledgments, but the Judge rejected them as unstamped and therefore inadmissible in evidence. If, as urged by respondent’s pleader, they are admissible for the purpose of repelling the fraud imputed to him, they do certainly show that the promissory notes were acknowledged in 1882 and in 1885 before Tomlinson instituted his suit and when insolvency was not in contemplation. The letter, which was accepted by the Judge as evidencing a contract on the part of the respondent to pay the barred debt, is that of the 17th August 1888, which was duly stamped, and there is nothing to show that insolvency was contemplated either at that time. It is true there was no legal obligation to arrange for paying a barred debt, but there is nothing dishonest in doing so if it was a real debt. As for Tomlinson’s suit, it had then been decided against him, though an appeal was pending from the decision. Another contention on appellants’ behalf is that the execution of the mortgage of January 1889 was an act of fraudulent preference. In order to constitute such preference, the disposition must be voluntary and not one made under pressure. Pressure legalizes the disposition, because it rebuts the
presumption of an intention on the part of the debtor to act in fraud of the Bankruptcy law, which provides for the equal distribution of his assets among all his creditors. In the case before us the deed of dissolution (Exhibit XII) dated 1st January 1886 provided for the execution of a mortgage if required, and no act of bankruptcy had then been committed nor was bankruptcy then in contemplation as probable. Further, the extracts from Ferguson’s letters marked XVI show that a mortgage had been demanded and negotiations had been in progress as to the satisfaction of the prior [905] mortgage in favour of the Agra Bank previous to the decision of the High Court. It is sufficient to constitute pressure if there is a demand by a creditor with an immediate power of enforcing it by taking legal steps. In Mogg v. Baker (1) Lord Abinger says, if a demand is made by a creditor bona fide, and a transfer takes place in pursuance of that demand, that takes it out of the case of voluntary transfer contemplated by the Insolvent Act. Again, in Butcher v. Stead (2) Lord Hatherly says, “I think the Legislature intended to say “that if you, the debtor, for the purpose of evading the operation of the “bankruptcy laws and in order to give a fraudulent preference make this “payment or his charge, it shall be wholly done away with except in cases “where the person you have favoured is wholly ignorant of your intention “to favour him and receives payment simply for valuable consider-“ation and without notice of any intention on your part to favour one “creditor above another.” In this case an obligation to give a mortgage was created on 1st January 1886 long before there was reason to apprehend insolvency and the trustees of Mrs. Hinde took the mortgage in fulfilment of this obligation, which negates a belief on their part that any fraud was committed upon the policy of the Law of Bankruptcy. In Dadapa v. Vishnudas (3), where the Bombay High Court followed the principle laid down by Lord Hatherley there was no antecedent obligation to execute a mortgage in favour of Gokuldas the creditor. Beyond the bare possibility of Tomlinson’s appeal succeeding and the original judgment being reversed, there was no tangible foundation for questioning the transaction of 1886, and such possibility is not a sufficient ground for holding the transaction of 1886 and the mortgage since executed in consequence of it were fraudulent.

It was certainly irregular on the part of the Judge to have received in evidence extracts from Mr. Ferguson’s letters instead of calling for the letters themselves, but it does not appear that objection was taken to their admission as evidence in the Court below. Moreover, the irregularity is not material, there having been an antecedent obligation to execute a mortgage on demand.

The appeal fails and is dismissed with costs.

(1) 4 M. & W. 350. (2) 7 Eng. and Ir. App. 849. (3) 12 B. 424.
GENERAL INDEX.

Act of State.

Inam Commission—Regulation IV of 1891 (Madras)—Act IV of 1862 (Madras)
—Resumption of inam—East India Company’s jaghire—Monaival lands
—Mirasi rights, evidence of—Secondary evidence of lost grant by
Government—See INAM COMMISSION, 14 M. 491.

I.—Imperial Acts.

Act XXXV of 1858 (Lunacy).

See LUNATICS, 14 M. 289.

Act XIII of 1859 (Workman’s Breach of Contract).

S. 2—Limitation of civil claim—Order by the Magistrate for repayment of
advances.—In a prosecution for breach of contract under Act XIII of
1859, it appeared that the complainant had advanced certain sums of
money to the accused, but that a suit to recover the same was barred by
limitation; and the Magistrate thereupon dismissed the charge:—Held,
that there was no reason why the Magistrate should not have ordered
repayment to be made by the accused under s. 2. QUEEN-EMPRESS v.
KONDA, 16 M. 347 = 3 M.L.J. 180 = 1 Wair 673 949

Act XXVII of 1860 (Succession Certificate).

(1) Suit to set aside certificate granted by the Resident at Cochin.—Defendant
No. 1, who was domiciled in the Native State of Cochin, obtained
from the Resident a certificate to collect the debts of the deceased karna-
vam of the plaintiff’s tarawd. The plaintiff, whose domicile was the same
as that of defendant No. 1, now sued in British Cochin for a declaration
of his right to receive the interest accrued due on certain Government
promissory notes, being the property of his deceased karnavan:—Held,
that the suit did not lie, and that the applicant should either have estab-
lished his representative right by suit in the Court of Native Cochin
and then applied to the Resident for a certificate, or have brought his
action against the Government of India, joining defendant No. 1 as a
party to such action. AMMUNI v. KRISHNA, 16 M. 405 998

(2) S. 5—Security bond—Suit by the heir of the deceased.—On the issue to
defendant No. 1 of a certificate under Act XXVII of 1860, defendant
No. 2 executed to the District Court a security bond. The plaintiff, who
had established his right to the monies collected under the certificate,
now brought his suit on the security bond to recover the amount so
collected:—Held, that the plaintiff not having obtained an assignment of
the indemnity bond from the District Court was not entitled to sue the
surety. MAYAN v. CHATHAPPAN, 14 M. 473 380

Act XX of 1863 (Religious Endowments).

(1) Ss. 3, 4—Civ. Pro. Code, s. 31—Misjoinder of causes of action—Hereditary
trusteeship—Suspension from trusteeship and right of puja—Maintenance
in office on terms.—Suit by certain Dikshadars or hereditary trustees of the
Chitambaram temple against others of the Dikshadars praying for their
removal from office and for a money decree, alleging that they had been
jointly guilty of misconduct in respect of temple property in their custody
and had obstructed the repair of certain shrines. The District Judge passed
a decree suspending some of the defendants from the office of the trustee
and the right of puja for a period which was not defined, he also passed a
decree for the money claimed:—Held, (1) that the suit was not bad for
misjoinder of causes of action; (2) that the operation of Act XX of 1863
was not excluded by the admission that the trusteeship was hereditary in

1059
Act XX of 1863 (Religious Endowments)—(Concluded).

(9) that the Districts Judge had jurisdiction under Act XX of 1863 to deprive the defendants of the right of puja. Held further, on the evidence, that the defendants merited the punishment which had been inflicted on them. Decreed that the suspension of the defendants be withdrawn on the terms that they file an undertaking with two sureties that they would restore certain property belonging to the temple now missing, and that they would duly conform to the decision of the majority of Dikshadars as to the management of temple affairs, &c. NATESA v. GANAPATI, 14 M. 103


Act XIV of 1866 (Post Office).


Act XXV of 1867 (Press and Registration of Books).

S. 3—Name of printer and publisher.—A newspaper was printed and published bearing the following words: "Printed and published at Cochin for the Malabar Economic Company at its company's Goshree Vilasam Press":—Held, that these words did not satisfy the requirements of Act XXV of 1867, s. 3. QUEEN-EMPRESS v. HARI SHENOY, 16 M. 443 3 M. L.J. 401 = 1 Weir 582

Act XVI of 1870 (Hindu Wills).


Act XV of 1872 (Christian Marriage).

Ss. 5, 68—Marriage solemnized by an unauthorized person "knowingly"—Presence of a Marriage Registrar.—The lay trustee of a church in which the banns of marriage between Christians had been published, solemnized a marriage between them according to the rites of the Church of England. The Marriage Registrar attended the ceremony in a private and unofficial capacity. The person who solemnized the marriage was not of any of the classes of persons authorized to solemnize a marriage in the absence of a Marriage Registrar and he was convicted of an offence under Act XV of 1872, s. 75:—Held, that the conviction was right. QUEEN-EMPRESS v. FISCHER, 14 M. 343 (F.B.) = 1 M. L.J. 453 = 1 Weir 502

Act III of 1873 (Madras Civil Courts).

(1) S. 12—Declaration of Membership of a tarwad—Valuation for the purposes of jurisdiction.—The plaintiff, alleging that he was dryavam of the defendant's tarwad, sued in a Subordinate Court for a declaration that he was a member of it, adding no prayer for consequential relief. It appeared that the tarwad property amounted to Rs. 20,000 in value, but that the proportionate share of each member, computed as on an equal division, was less than Rs. 500. The Subordinate Judge held that the suit was within the jurisdiction of a District Munsal and rejected the plaint:—Held, that the suit was not maintainable. IBHAYAN KUNHI v. KOMAMUTTI KOYA, 10 M. 501 = 2 M.L.J. 295

(2) S. 12—Jurisdiction—Valuation of relief—Suit for partition.—In an appeal against a decree of a Subordinate Judge dismissing a suit brought by the members of the Namboodiri ilam against the members of another for partition and delivery of a moiety of the property of an extinct ilam, it appeared, that the value of the share claimed was less than Rs. 5,000:—Held, that the appeal lay to the District Court. NARAYANAN v. NARAYANAN, 15 M. 69

(3) S. 12—Jurisdiction—Valuation of relief—Suits Valuation Act—Act VII of 1887, s. 11—Suit by a Court purchaser for partition.—The purchaser at a Court-sale of eight pongsus out of an estate of 221/2 pongsus sold them to the plaintiff. The whole estate was worth more than Rs. 2,500, but the eight pongsus sold
to the plaintiff were worthless than that sum. The plaintiff brought this suit in a Subordinate Court against his vendor and certain persons, who were in possession of and claimed to be entitled by right of purchase to the whole estate, for partition and possession of his eight pangus. It was found that the plaintiff was entitled to the eight pangus purchased by him as against the defendants.—Held, (1) that the suit was within the pecuniary limits of the jurisdiction of a District Munisif; (2) that since the disposal of the suit had not been prejudicially affected Suits Valuation Act. s. 11 was applicable and the decree of the Subordinate Court should be confirmed.

Quere:—Whether the Subordinate Court has not concurrent jurisdiction with a District Munisif in suits less than Rs. 2,500 in value.

Krishnasami v. Kanakasabai, 14 M. 183 = 1 M.I.J. 294

(4) S. 13—Court Fees Act—Act VII of 1870, s. 7, cl. 9—Suits Valuation Act—Act VII of 1887, s. 11—Valuation of mortgage suit—Appeal—See COURT FEES ACT (VII OF 1870), 16 M. 326.

(5) S. 13—Malabar Law—Suit to remove a karnavan for mismanagement as de facto karnavan—Minor members of tarwad not joined—Valuation of suit.—A suit was brought to remove the karnavan of a Malabar tarwad from office on the grounds of mismanagement of tarwad property to the extent of more than Rs. 2,500. The acts of mismanagement complained of were really done by the present defendant No. 1 as karnavan de facto. The above suit was withdrawn with leave to sue again. The defendant therein died and was succeeded by defendant No. 1, against whom the plaintiffs brought the present suit in a Court of a District Munisif (to which all the adult, but none of the minor members of the tarwad were made parties), to obtain his removal from the office of karnavan alleging against him the acts of mismanagement above referred to.—Held, (1) that the suit was not barred by the previous suit and was within the jurisdiction of the District Munisif; (2) that the minor members of the tarwad were sufficiently represented on the record; (3) that the ground alleged supported the action.

Kunhan v. Sankara, 14 M. 79

(6) S. 13 (2)—Appeal from a Subordinate Court—Proceeding to be adopted when a District Court erroneously returns an appeal petition for presentation in High Court.—Civ. Pro. Code, s. 87.—Certain members of a Moplah family sued the others in a Subordinate Court to recover their distributive share under Muhammadan law. The property to be divided was more than Rs. 5,000 in value, but the share claimed by the plaintiffs was less. The Subordinate Judge passed a decree, against which an appeal was preferred to the District Court, but the District Judge returned the appeal for presentation in the High Court. The appellants preferred a second appeal to the High Court against the decision of the District Judge, and also presented a petition praying for the revision of his proceedings under Civ. Pro. Code, s. 692;—Held, (1) that the District Court had jurisdiction to entertain the appeal; (2) neither a second appeal nor a petition under Civ. Pro. Code, s. 692, was the appropriate proceeding to be adopted by the appellants, but an appeal as from an order made under Civ. Pro. Code, s. 57, 592. The error of the appellants being one of form merely, the Court amended the second appeal as an appeal from an order of the District Court and directed the District Judge to receive and dispose of the appeal from the Subordinate Court.

Kunhikutti v. Achotti, 14 M. 462

(7) S. 14—Evidences Act—Act I of 1872, s. 114—Stoppen.—Transfer of Property Act—Act IV of 1882, s. 60—Partial redemption—Indissolubility of mortgage.—See EVIDENCE ACT (I OF 1872), 16 M. 328.

Act X of 1873 (Oaths).

(1) ss 4, 14—Crim. Pro. Code—Act X of 1882, s. 164.—A Magistrate, acting under Crim. Pro. Code, s. 164, has power to administer an oath, and a charge of perjury can be framed with regard to statements made before him on oath when he is so acting. Queen-Empress v. Alagu Kones, 16 M. 421 = 1 Weir 175

(2) ss. 5, 6, 7, 13—Examination as witness of a child of tender years—Intentional omission to administer affirmation.—A child, aged about six years.
Act X of 1873 (Oaths)—(Concluded).
was called as a witness in a Sessions Court. The Judge satisfied himself of his intellectual capacity to give evidence, but intentionally omitted to administer an affirmation on the ground that he was of too tender years to render any attempt to bind his conscience expedient or practically operative. The Judge did not examine the child for the purpose of eliciting whether he knew it was wrong not to tell the truth, or whether he knew the difference between right and wrong, but he told him to tell the truth and permitted him to be examined as a witness: — Held, that the child should have been affirmed. Quære: Whether the omission to affirm the child having been intentional on the part of the Judge, the case came within the provisions of Oaths Act, s. 13. QUEEN-EMPRESS v. VIRA-
PERUMAL, 16 M. 105—1 Weir 823

Act XIV of 1874 (Scheduled Districts).
Notification under—Crim. Pro. Code, s. 2—Letters Patent, s. 28—Agency tracts, jurisdiction of High Court over—Agency Rules—Act XXIV of 1839 (Madras), s. 3—See CRIM. PRO. CODE (ACT X OF 1882), 14 M. 121.

Act XVIII of 1879 (Legal Practitioners).
(1) S. 28—Agreement between pleader and person retaining him—Promissory note not filed—'Quantum meruit.'—The defendants' brother engaged a vakil (since deceased) to defend certain suits on their behalf and made and delivered to him a promissory note for an agreed sum in respect of his fee. The note was not filed in Court and it exceeded in amount the vakil's regulation fee. The defendants subsequently made a promissory note in substitution for the above and the vakil's representatives now brought a suit upon the last-mentioned note: — Held, (1) that the agreement with the defendants' brother was invalid by reason of Legal Practitioners' Act, s. 28, and the plaintiffs were not entitled to recover the amount of the note; (2) that the plaintiffs were entitled to recover in this action the amount due to the vakil independently of that agreement. ANANTAYYA v. PADMAYYA, 16 M. 278—2 M.L.J. 247

(2) Ss. 28, 29—Promissory note made by a party in favour of his pleader in respect of his agreed fee—Agreement not certified—Suit on promissory note.—A party to a suit made and delivered to his pleader in respect of his agreed fee a promissory note which was not filed in Court in that suit. In a suit by the pleader upon his promissory note: — Held, that the promissory note was invalid and that the plaintiff was entitled to recover only the amount to which he was found to be entitled for his labour. KRISHNASAMI v. KESAVA, 14 M. 63

Act V of 1881 (Probate and Administration).
(1) Ss. 45, 82—Administration de bonis non—Will relating to self-acquired property—Suit by testator's son.—A Hindu by his will bequeathed certain land, his self-acquired property, to his infant son. On his death, his widow, who was the executrix named in the will, took out probate, but she died intestate before she had fully administered the estate. The son now sued by his next friend to recover arrears of rent which had accrued due on the land, which had been leased to the defendants by the testator: — Held, that letters of administration de bonis non should have been taken out, and that since the plaintiff did not represent the estate of the testator, he was not competent to maintain the suit. NARASIMMULU v. GULAM HUSSAIN SAIT, 16 M. 71


Act XV of 1882 (Presidency Small Cause Courts).
Ss. 37, 69—Application to Full Bench for retrial—Case stated.—The Full Bench of a Presidency Court of Small Causes cannot state a case for the opinion of the High Court on an application for a new trial made under Act XV of 1882, s. 37. OAKSHOTT v. THE BRITISH INDIA STEAM NAVI-
GATION COMPANY, 15 M. 179

1062
GENERAL INDEX.

Act VII of 1887 (Suits Valuation).

S. 11—Jurisdiction—Civil Courts Act (Madras)—Act III of 1873, s. 12—Valuation of relief—Suit by a Court purchaser for partition—See ACT III OF 1873 (MADRAS CIVIL COURTS), 14 M. 183 = 1 M.L.J. 234

Act IX of 1887 (Provincial Small Cause Courts).

(1) S. 15, sch. II, art. 41.—The plaintiff sued to recover from the defendant Rs. 397, being his share of the cost of repairing a channel, which was the property of the plaintiff and defendant;—Held, the suit was cognizable by a Court of Small Causes. FISHER v. COLLECTOR OF MADURA, 15 M. 155


(4) Sch. II, cl. 31—Suit for profits of land—Civ. Pro. Code, s. 586.—The plaintiff sued on the Small Cause side of a Subordinate Court before the Small Cause Courts Act, 1887, came into operation, to recover with interest from the date of suit Rs. 500, the value of crops alleged to have been illegally carried away by the defendant, while the plaintiff was in possession. The defendant raised a plea to the jurisdiction of the Court, and the Judge, without recording any decision on its validity, directed that the plaint be presented on the regular side of the Court for the reason that it raised questions of complexity. It was so presented after the above Act had come into operation. The plaintiff obtained a decree which was reversed on appeal. A petition of second appeal was presented by the plaintiff. The defendant objected that no second appeal lay under Civ. Pro. Code, s. 586;—Held, that the objection should prevail since the suit was not excepted from the jurisdiction of the Small Cause Court under the Provincial Small Cause Courts Act of 1887. ANNAMALAI v. SUBRAMANYAN, 15 M. 298

Act VII of 1889 (Succession Certificate).

(1) S. 4—Civ. Pro. Code—Act XIV of 1892, s. 622—Revision—Jurisdiction.—One applied for leave to sue in forma pauperis to recover assets forming part of the estate of a deceased person. His application was dismissed on the ground that he produced no certificate under Act VII of 1889;—Held, (1) that the application was wrongly dismissed; (2) that the High Court had jurisdiction to interfere on revision under Civ. Pro. Code, s. 622. KAMMATRI v. MANGAPPA, 16 M. 454

(2) S. 4—Suit by undivided son of deceased creditor.—A Hindu is not entitled to sue on a bond executed in favour of his undivided father, deceased, without the production of a certificate under Act VII of 1889, unless it appears on the face of the bond that the debt claimed was due to the joint family, consisting of the father and the son. VENKATARAMANNA v. VENKAYYA, 14 M. 377

(3) S. 4(b)—Application for execution.—Act VII of 1889, s. 4, cl. (b) does not apply to applications to execute decrees which were pending at the date of the passing of the Act, but it refers to applications made after the Act came into force. RAMA RAU v. CHELLAYAMMA, 14 M. 458 = 1 M.L.J. 602

(4) Ss. 4, 6—Suit by assignee of a debt due to a deceased creditor.—One Suppammal lent a sum of money to the defendant and died, leaving an adopted son, who assigned the debt to the plaintiff. Neither the plaintiff nor the assignor obtained a certificate under Act VII of 1889. The plaintiff now sued to recover the amount of the assigned debt;—Held, that the plaintiff was not entitled to recover, no certificate having been obtained under Act VII of 1889. KARUPPASAMI v. PICHU, 15 M. 419 = 2 M.L.J. 116
II.—Madras Acts.

Act XXIV of 1839 (Ganjam and Vizagapatam).

Act XXIV of 1859 (Madras District Police).
See CRIM. PRO. CODE (ACT X OF 1832), 15 M. 132.

Act IV of 1862 (Madras Enfranchised Inams).
See INAM COMMISSION, 14 M. 431.

Act II of 1864 (Revenue Recovery, Madras).
(1) S. 8.—Removal of crop under attachment—Theft—Dishonest intention.—Certain crops which had been distrained for arrears of revenue were harvested and removed by the owners and occupiers of land, who were thereupon charged with theft. The accused were not the defaulters, the demand having been made upon certain other persons in whose name the pattas stood, as the registered proprietors. The accused were acquitted:—

Held, that the acquittal was wrong in the absence of a finding whether or not the accused were aware of the distrain, and dishonestly removed the crops with such knowledge. QUEEN-EMPRESS V. RAMASAMI, 15 M. 364 =8 M.L.J. 178 =1 Weir 492

(2) Ss. 32, 42.—Encumbrance—Permanent lease at a low rent.—One of the villages in a mitta was demised by the mittaadar to A on a permanent lease, at a rate below both the faisal assessment and the proportion of revenue payable upon it. The lessee’s interest was brought to sale in execution of a decree and purchased by B, and ultimately was sold in 1884 to the plaintiff who now sued the tenant in possession to enforce an exchange of patta and muchalka. In the interval, viz., in 1883, the village was sold for arrears of revenue under Madras Act II of 1864 to C, and the defendant claimed to hold the land from C:—Held, that the permanent lease was an encumbrance under Revenue Recovery Act, 1864, s. 42, and was voidable by the purchaser at the revenue sale, although it had not been declared to be invalid by the Collector. NARASIMMA V. SURIANARAYANA, 16 M. 144 = 2 M.L.J. 153

(3) S. 52.—Karnam in a permanently-settled zamindari.—The karnam in a permanently-settled zamindari is a village servant employed in revenue duties within the meaning of the Revenue Recovery Act, s. 52. COLLECTOR OF NORTH ARCOT V. NAGI REDDI, 15 M. 35 = 1 M.L.J. 746

(4) S. 59.—Abkari notification referring to that Act—Sale to recover sum due from an abkari renter.—Limitation for suits to recover land so sold.—The right of selling land at certain prices was put up to sale by the Collector under a notification which required that payments should be made at fixed periods and that the purchaser should take out licenses as therein provided, failing which the lands conveyed might be resold and any loss accruing to Government recovered under the Revenue Recovery Act, Madras. The plaintiff bid at the auction and his bid was accepted. He sought to withdraw from the contract, but the sale to him was confirmed, and on his failure to make the payments above referred to the rights purchased by him were resold at a lower price, and his house was attached and sold as under the Revenue Recovery Act, to realize the loss occasioned to Government by the resale. In a suit, in 1898, to recover the house from the defendant who had purchased it and been placed in possession in June 1896:—Held, (1) that the suit was not barred as having been brought more than six months after the date of the sale; (2) that the sale was ultra vires; (3) that the plaintiff having brought his suit within the twelve years’ period of limitation was entitled to recover. RAN V. CHANDAN, 15 M. 219

1064
Act III of 1864 (Madras Abkari).

S. 6—Rights of renter of Abkari farm—Right of Collector to close shops included in the renter's contract—Collector's orders modified by Board of Revenue—Suit for damages.—The plaintiff rented from Government an Abkari farm, on terms which reserved certain powers of control to the Collector, and obtained a license under the Abkari Act. He did not manage the shops in the contract area himself nor obtain separate licenses for their management by others. The Collector made orders which were subsequently modified by the Board of Revenue, directing the closing of certain shops which the plaintiff had sub-let and directing that others should not be opened. It was found that the Collector's orders were not in excess of the powers reserved to him under the contract, and that they had not been issued arbitrarily or otherwise than in good faith. In a suit for damages occasioned to the plaintiff by these orders:—Held, the plaintiff was not entitled to recover. 

SECRETARY OF STATE FOR INDIA v. CHOYI, 14 M. 82

Page 59

Act VII of 1865 (Madras Irrigation).

S. 4—Rent Recovery Act—Act VIII of 1865 (Madras), s. 9—Lands irrigated from Kistna anicut—Rate of rent—Restriction to felling trees—Implied contract.—A zamindar holding lands irrigated by the Kistna anicut, from whom no extra piece of bush is on that account levied by Government, is not entitled to impose on his tenants a "wet" rate of rent without the permission of the Collector. The fact that the tenants have paid rent at such a rate for six years is not sufficient to establish an implied covenant to continue to do so. It is allowable for a landlord to insert in his pattas a term to the effect that the tenant shall not fell trees without his consent.

APPARAU v. NARASANNA, 15 M. 47

Page 392

Act VIII of 1865 (Rent Recovery, Madras).

(1) S. 3—Registered zamindar—Zamindari held in coparcenary.—A registered holder of a zamindari sued, under the Rent Recovery Act to enforce the acceptance of a patta and execution of a muchalika by the defendant, a tenant on the estate. It was pleaded, in defence, that the zamindari was the undivided property of the plaintiff and his co-parceners, in whose name a patta and muchalika had already been exchanged:—Held, that the plaintiff, as being the registered zamindar, was entitled to maintain the suit alone. AYYAPPA v. VENKATAKRISHNAMARAZU, 15 M. 484 = 2 M. L.J. 219

Page 689

(2) Ss. 3, 4, 7, 9, 87—Suit to enforce exchange of patta and muchalika.—Amendment of patta.—Held by Collins, C.J., Muttusami Ayyar and Parker, J.J. (Shepherd, J., dis.) that an ordinary Civil Court has jurisdiction to entertain a suit to enforce acceptance of a patta and execution of a muchalika:—Held further, that if the pattas which have been tendered is found not to be a proper one, such a Court cannot amend it and direct the tenant to execute a muchalika corresponding with it as amended, but can, in a suit properly framed for that purpose, pass a decree declaring what is a proper patta.

RAMANYVAR v. VEDACHALLA, 14 M. 441 (F.B.) = 1 M.L.J. 661

Page 309

(3) Ss. 3, 12—Mulgeni holding—Right of tenant to relinquish his lease.—It is not competent to a Mulgeni tenant in South Canara to relinquish his lease and free himself from his obligation for rent without the consent of the landlord. Quere: Whether a Mulgar is within the class of landholders defined in Rent Recovery Act, s. 3. KRISHNA v. LAKSHMINARANAPPAPA, 15 M. 67 = 2 M.L.J. 13

Page 320


(5) Ss. 8, 9, 10—Suit for a patta—Denial of tenancy by landlord.—In a summary suit brought under Rent Recovery Act (Madras) to compel the defendant to give a patta to the plaintiff for certain land which plaintiff claimed to hold from him, the defendant denied that the plaintiff was his tenant: Held, that the Collector was bound to try the question so raised and not
Act VIII of 1865 (Rent Recovery, Madras)—(Concluded).

to refer the parties to a regular suit for its determination. NARAYANACHARIAR v. RANGA AYYANGAR, 15 M. 223 ...

(6) S. 9—Lands irrigated from Kistna anicut—Act VII of 1865 (Madras), s. 4 —Rate of rent—Restriction as to felling trees—Implied contract—See ACT VII OF 1865 (MADRAS IRRIGATION), 15 M. 47.

(7) Ss. 9, 11—Form of patta—Form of rent determined by implied contract—Variation in amount of rent.—In a landlord’s suit to enforce acceptance of a patta and execution of a muchbalka by the defendants, it appeared that the predecessor in title of the defendants had accepted from the predecessor in title of the plaintiff in 1849 a cowle for 11 years, which provided for payments in kind, but since the expiry of that period the rent had always been paid in money, though the amount varied. The tenant was described in the cowle as a sukavasi raiyat, and the defendants also claimed to be sukavasi tenants: Held, that it was unnecessary to determine the cause of the variations in the amount of rent, and that an agreement that the rent should continue to be paid in money should be implied, and the landlord accordingly was not entitled to impose a patta providing for payment of rent in kind. POLU v. RAGAVAMMAL, 14 M. 52 ...

(8) S. 11—Implied contract as to rent—Land irrigated under Kistna anicut—Collector’s sanction to increase of rent.—Land in a zamindari in the Kistna delta was newly irrigated from anicut channels. The zamindar tendered pattas at wet rates: Held, (1) that the zamindar was not entitled to levy increased rates without the Collector’s sanction under s. 11 of Act VIII of 1865, although he had expended money on the channels; (2) that payment for five years of such wet rates under a five years’ lease did not imply a contract to continue such payments; (3) that a stipulation in the previous lease binding the tenants to pay such increased rates in case of future irrigation did not bind the tenants after the term of that lease expired. NARASIMHA v. RAMASAMI, 14 M. 14 ...

(9) S. 12—Ejection—Occupancy rights—‘Onus probandi.’—A zamindar having given to the defendant, who was a cultivating raiyat in the zamindari, a notice to quit, now sued to eject him from his holding. The defendant pleaded that he and his ancestors had been jirayati raiyats from time immemorial and it was found that their holding had lasted at least 150 years. The defendant had executed and delivered to the plaintiff a muchbalka for one year, and he had made no default in payment of rent: Held, that the plaintiff having failed to prove that the defendant’s tenancy had commenced under her or her ancestors, the suit should be dismissed. VENCATA MAHALAKSHAMMA v. RAMAJOGI, 16 M. 271 ...

(10) S. 13—Inamdar—Tenant—Right of distraint.—A zamindar, holding his estate under a sanad, which included, among the assets of the zamindari, the jodi payable by an inamdar, proceeded under the Rent Recovery Act to recover arrears of jodi by distraint. In a suit by the inamdar to release the distraint, it appeared that the plaintiff had sublet the land, and that the rate, at which the jodi was claimed, exceeded that entered in the Imam Commissioner’s patta: Held, (1) that the inamdar was a tenant of the zamindar within the meaning of the Rent Recovery Act; (2) that the fact that the inamdar had sublet the land did not confer on him a higher status than that of a tenant; (3) that the zamindar accordingly had a right to proceed under the Rent Recovery Act, and that his claim was not limited to the amount of jodi entered in the Imam Commissioner’s patta. SURYANARAYANA v. APPA RAU, 16 M. 40 = 2 M.L.J. 249 ...

(11) S. 49—Suit for restoration of specific moveable property.—A raiyat brought a suit in the Court of a Deputy Collector as under the Rent Recovery Act, praying for the release from attachment and the restoration to him of certain moveable property, and for some other subsidiary relief: Held, that the Deputy Collector had no jurisdiction to entertain the suit under Rent Recovery Act, s. 49. RAJAH OF VENKATAGIRI V. YERRA REDDI, 16 M. 323 = 3 M.L.J. 181 ...

GENERAL INDEX.

Act I of 1866 (Madras Abkari).

S. 28—Attachment for arrears of revenue—Subsequent attachment in execution of decree—Priorities.—Certain land was put under attachment for arrears of revenue under Madras Abkari Act, s. 28; the same land was subsequently attached in execution of a money decree against the defaulter and the defendant purchased it at the Court sale. The Collector of the district intervened in execution and objected to the sale of the land in question, but his objection was rejected. A suit was now brought in the name of the Secretary of State for a declaration that the land was liable for the arrears of revenue in respect of which the attachment under Abkari Act has been made:—Held, that the plaintiff was entitled to the declaration asked for.

SARANGAPANI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 16 M. 479—3 M.L.J. 47

Act III of 1871 (Madras Towns’ Improvements).

S. 51—See ACT III OF 1881 (MADRAS DISTRICT MUNICIPALITIES), 14 M. 467.

Act V of 1882 (Madras Forest).

(1) Ss. 2, 3, 4, 6, 8, 9, 50.—The accused, who were servants of the shrotiemdar of an agraharam, destroyed a cairn erected by the Forest Department on the shrotiem land along the boundary line of a proposed forest reserve. No notice under Forest Act, s. 6, was proved to have been served on the shrotiemdar, and it did not appear whether the land in question was comprised in the boundaries specified in the notification published under s. 4. The accused were convicted under s. 50 (d):—Held, (1) that the provisions of the Act did not apply to the shrotiem land; (2) that the right of a forest officer to enter upon and demarcate land under s. 9 is limited to the purpose of the inquiry directed by s. 8; (3) that the conviction was wrong.

QUEEN-EMPRESS v. JANGAM REDDI, 14 M. 247—1 Weir 770...

(2) S. 6—Burden of proof—Long possession—Presumption of title.—Certain land was notified under Madras Forest Act, 1882, to be constituted a reserved forest. One, alleging that the jom title had been in his family for six or seven centuries, claimed to be the owner of the land. His claim was contested by Government on the allegation that the land had belonged to another family and had been escheated. The claimant admitted that he had not been in possession for six years before the date of the notification, Government having objected to his interfering with the land. It was found that his family had been in possession for the previous sixty years at least, and that the alleged escheat was not proved:—Held, that the claim should be allowed. Observations on the burden of proof and on the presumption of title arising out of possession.

SECRETARY OF STATE FOR INDIA v. BAVOTTI HAJI, 15 M. 315—2 M.L.J. 160...

(3) S. 21 (d)—Grazing cattle in a forest reserve.—The owner of cattle found grazing in a forest reserve cannot be convicted under Madras Forest Act, s. 21 (d), in the absence of evidence that he either pastured the cattle or permitted them to trespass in the reserve.

QUEEN-EMPRESS v. KRISHNAYYAN, 15 M. 166—1 Weir 768...

Act I of 1884 (City of Madras Municipal Act).

(1) Ss. 103, 109, 192—Profession tax—Liability of members of a firm—Extent of appeal allowed against decision of President of Municipality.—A member of a firm in Madras, another member of which was absent, was assessed under the Madras Municipality Act to pay a certain sum for the tax on arts, professions, trades and callings as agent in charge of the business of the absent member of the firm. He complained to the President against the assessment under ss. 104, 190 of the Act on the ground that he was not liable to pay any tax as agent, etc., but the assessment was confirmed. He thereupon preferred an appeal to the Magistrates:—Held, (1) that the Magistrates had jurisdiction under Madras Municipal Act, s. 192, to decide the question of the liability of the appellant to be taxed under s. 103; (2) that, although the absent partner might be called upon through the appellant as his agent to pay the tax due by the firm upon the appellant as his agent to pay the tax due by the firm, he was not otherwise chargeable with any tax in respect of the business carried on by him.

DAVIES v. PRESIDENT OF THE MADRAS MUNICIPAL COMMISSION, 14 M. 140...

1040

174

571

458

99
Act I of 1884 (City of Madras Municipal Act) — (Concluded).

(2) S. 433 — Statement of cause of action — Address of intending plaintiff. — In a suit against the Municipal Commissioners of the City of Madras for damages sustained by the plaintiff by reason of an accident occasioned to his horses through the ill-repair of a road within the limits of the Municipality, it appeared that at the close of a correspondence between the plaintiff and the President of the Municipality, the plaintiff in a letter headed "Madras," stated that he had directed auctioneers to sell the horses, and that he would "proceed against you by law to recover such loss or damage as I may have sustained," and added "kindly consider this as notice of claim under s. 433 of Municipal Act No. I of 1884," and that the plaintiff's attorneys, in a subsequent letter, demanded payment of Rs. 1.000, "being the damages sustained by our client by reason of the neglect to keep in proper repair that portion of the road, &c.," stated that if the sum claimed were not paid, the plaintiff would "be compelled to have recourse to law to recover the same without further notice": Held, (1) that the two letters should be read together; (2) that the cause of action was stated sufficiently in the second of the above letters; (3) that the plaintiff's address was sufficiently given in the first of the above letters. BALESH v. MUNICIPAL COMMISSIONERS OF MADRAS, 14 M. 346

Act IV of 1884 (Madras District Municipalities).

(1) Ss. 55, 56, 60, 262, cl. (2) — Profession tax. — The Bank of Madras carried on business at (among other places) Negapatam and Tellicherry, in both of which places the Madras District Municipalities Act was in force. The Bank paid profession tax under that Act to the Municipality of Negapatam two days before it was due. The Municipality of Tellicherry subsequently, and with knowledge of the above facts, assessed the Bank to the same tax for the same period and levied the amount which was paid under protest: Held, that the Bank was entitled to recover the amount so paid, from the Municipality of Tellicherry. SEMBLE: The aggregate income derived by the Bank from the exercise of its business in the separate municipalities would regulate the class under which it would be liable to taxation. MUNICIPAL COUNCIL OF TELlicherry v. BANK OF MADRAS, 15 M. 153

(2) Ss. 102, 103, 110 — Towns' Improvement Act — Act III of 1871 (Madras), s. 51 — Distress notice. — A Municipal Council under the District Municipalities Act has, under s. 110, the power to distraint after due notice, besides that given by s. 103, but the property distraint must be that of the defaulter, and the doors of a house cannot be removed in execution of a warrant of distress. The notice which an owner of property must give in order to entitle himself to a remission of the house-tax is an annual notice. PURUSHOTTAMA v. MUNICIPAL COUNCIL OF BELLARY, 14 M. 467

(3) S. 169 — Suit for declaration of title against a Municipality — Parties — See PARTIES, 15 M. 292.

(4) Ss. 180, 263, 264 — Municipal building license — Building in excess of license — Requisition to demolish building. — A landowner in a Municipality, subject to Act IV of 1884 (Madras), applied for a building license under s. 180 of the Act. The Municipality having resolved that a portion of the land was required for widening a public lane, ordered the applicant to abstain from building on it, and granted a license for a building to be erected on the remaining portion. The landowner, however, erected a building upon the whole of the land. The Municipal Council then called upon her to demolish the building erected on the portion of the land which had not been licensed. This notice was not complied with. The landowner was then prosecuted and convicted under s. 180, 263 and 264 of the Act. Held, that neither of the above-mentioned orders of Municipal Council were legal and consequently that no offence had been committed by the landowner: SEMBLE. ACT IV OF 1884, S. 264, does not empower a Magistrate to impose a fine prospectively in respect of the period during which one convicted of the offense of omitting to comply with a notice to execute any work, may continue to leave such work unexecuted. QUEEN-EMpress v. VEERAMMAL, 16 M. 290 = 1 Weir 733
GENERAL INDEX.

Act IV of 1884 (Madras District Municipalities)—(Concluded).

(5) S. 222—Nuisance—Sewage water.—An occupier of a building who allows sewage water to run into a street within the limits of a Municipality, governed by the District Municipalities Act, Madras, commits an offence under s. 222 of that Act, although the Municipality may have supplied no side drains in the street in question. Queen-Empress v. Sevudaiappayya, 15 M. 91 = 1 Weir 747.


Act V of 1884 (Local Boards, Madras).

(1) Ss. 27, 128, 156—Suit against Taluk Board—Suit framed erroneously—Error persisted in—Things done under the Act—Special period of limitation.—In a suit brought against, among others, the President of a Taluk Board constituted under Local Boards Act, 1884 (Madras), to recover land on which the Panchayat of a Union within the taluk had erected a public latrine, it was pleaded that the suit, as against the above-mentioned defendant was wrongly framed and also that it was barred by the special rule of limitation contained in s. 156 of that Act. The plaintiff asked for no amendment, but proceeded to trial: Held, that the suit was not maintainable under Local Boards Act (Madras), 1884, s. 27, on the ground that it was not brought against the Taluk Board. Quaere: Whether s. 156 is applicable to suits other than suits for compensation for wrongful acts committed under colour of the Act. Syed Amer Ali Sahib v. Venkatarama, 16 M. 296.

(2) Ss. 27, 156—Notice of action—Form of suit—Injunction against Taluk Board.—The plaintiff built a wall on his land situated within the limits of the Sivaganga Taluk Board. The Local Board called upon him to remove the wall as constituting an obstruction, and gave him notice that in default of his doing it would be demolished by the authorities. The plaintiff now brought a suit against the President of the Taluk Board and the Chairman of the Union, within the limits of which the land was situated, for an injunction restraining the defendants from interfering with the wall. No notice of action was given under Local Boards Act, s. 156. In the Court of First Instance and first appeal no objection was taken to the frame of the suit with reference to the provisions of s. 27: Held, (1) that the defendants should not be permitted on second appeal to raise such objection to the frame of the suit; (2) that previous notice of action under s. 156 was not necessary. President, Taluk Board, Sivaganga v. Narayanan, 16 M. 317 = 3 M.L.J. 12.

Act III of 1888 (Madras Police).

S. 71, cl. XI and XV—Crowd collected by music—Obstruction of street—Music performed in private place.—Members of the Salvation Army were found by the Magistrate to have played tambourines and sung "at the angle" of a street in Madras, and thereby collected a crowd which thronged the street, and they were convicted of offences under the City of Madras Police Act, s. 71, cl. xi and xv: Held, on revision, that, since the intention of the accused was to collect a crowd in the street, the conviction under cl. xi was right, whether or not the place, where the accused played and sang, was a private place; but that if it was a private place, the conviction under cl. xv was wrong. Queen-Empress v. Sukha Singh, 14 M. 223 = 1 Weir 848.

Administration de bonis non.

See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 16 M. 71.

Adverse Possession.

(1) See LIMITATION, 14 M. 38.

(2) See LIMITATION ACT (XV OF 1877), 14 M. 96.

Agency.

See LIMITATION ACT (XV OF 1877), 16 M. 456.

1069
GENERAL INDEX.

Agency Rules.

(1) (Ganjam and Visagapatam), 18 and 20—Agent to the Governor at Visagapatam.
—IThe Agent to the Governor at Visagapatam dismissed an appeal under the Agency Rules, No. 18. The appellant preferred a petition to the High Court against the order of the Agent. Held, that the High Court had no power to interfere. JAGANNADHA v. GOPANNA, 16 M. 229

(2) See CRIM. PRO. CODE (ACT X OF 1882), 14 M. 121.

Agency Tracts.

Jurisdiction of High Court over—Criminal Procedure Code, s. 2—Letters Patent, s. 28—Scheduled Districts Act—Act XIV of 1874, notifications under—Agency Rules—Act XXIV of 1839 (Madras), s. 9—See CRIM. PRO. CODE (ACT X OF 1882), 14 M. 121.

Alimony.

See LETTERS PATENT, 1865, 14 M. 89.

Allyasantana Law.

(1) Inheritance—Uncongenital insanity—Suit by an unadjudged lunatic by the Agent of the Court of Wards as guardian—Authority of the Court of Wards—Regulation V of 1804—Estates of lunatics subject to Mofussil Courts—Act XXXV of 1858—Code of Civil Procedure, s. 464.—A Jain, who was subject to the Allyasantana law, made a will, whereby he disposed of the property of his family in favour of certain persons, and died. The plaintiff, a female, was the sole surviving member of the testator’s family, but it was admitted that she was, and for more than fifty years had been, a lunatic, though she had not been declared to be so under Act XXXV of 1858; it appeared that her lunacy was not congenital. She sued, by the Collector of South Canara, the agent for the Court of Wards: Held, (1) that the plaintiff was not excluded from inheritance by reason of lunacy under Allyasantana law, and the will, in favour of the defendants, was invalid; (2) that the Court of Wards had power to take cognizance of the plaintiff’s case under Regulation V of 1804; (3) that although the Court of Wards should ordinarily obtain a declaration under Act XXXV of 1858 in cases where the lunacy of a ward is open to question, their failure to do so in the present case was not fatal to the suit; (4) that Civ. Pro. Code, s. 464, was accordingly applicable to the case; (5) that the appointment of the Collector, as guardian to the plaintiff, was legal and valid. In deciding what was the extent of the property which the plaintiff was entitled to inherit under the above rulings, certain documents adduced as evidencing partition of the family property were held to evidence merely arrangements for separate enjoyment. SANKU v. PUTTAMMA, 14 M. 289

(2) Specific Relief Act—Act I of 1877, s. 42—Declaratory relief—Limitation Act—Act XV of 1877, sched. II, arts. 127, 144.—In a suit in which the plaintiffs sought declaration that they were members of an undivided Allyasantana family with the defendants, that certain property belonged to the family, and that plaintiff No. 1, the senior member of the family, was entitled to have the lands registered in his name, the defendants denied the allegations in the plaint, and pleaded that the suit for declarations only was not maintainable, and that it was barred by limitation. It was found that the plaintiffs had separated themselves from the defendants, and had for more than twelve years been excluded to their own knowledge from the joint family property: Held, that, if, as alleged by the plaintiffs, plaintiff No. 1 was the de jure ejsamain of the family, he was entitled to the possession and management of the family property, and a suit for a mere declaration of his right would not lie.—Per cur.—“We are of opinion that art. 127 applies to this case, and that the plaintiffs, having separated themselves from the defendants, have for more than twelve years been to their own knowledge excluded from the joint family property, and that their suit to enforce a right to share therein is barred.” MUTTANKE v. THIMMAPPA, 15 M. 186

(3) Unjustified alienation of family property by a member of undivided family—Limitation—Adverse possession—See LIMITATION, 14 M. 38.

1070
Ameliorating Waste.

See LANDLORD AND TENANT, 16 M. 407.

Amendment.

(1) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 14 M. 441.
(2) See CIV. PRO. CODE (ACT XIV OF 1882), 14 M. 150; 15 M. 403; 16 M. 319, 424.
(3) See LIMITATION ACT (XV OF 1877), 15 M. 417.
(4) See SPECIFIC RELIEF ACT (I OF 1877), 15 M. 15, 255.

Appeal.

(1) — GENERAL.
(2) — SECOND APPEAL.
(3) — TO PRIVY COUNCIL.

——— 1. — General.

(2) See COURT FEES ACT (VII OF 1870), 14 M. 169; 16 M. 310, 326, 415.
(3) See CRIM. PRO. CODE (ACT X OF 1882), 14 M. 36, 363; 15 M. 137.
(4) See EQUITABLE ASSIGNMENT, 16 M. 420.
(5) See HINDU LAW—SUCCESSION, 15 M. 503.
(6) See INSOLVENT ACT 11 AND 12 VIC., C. 21, 14 M. 404.
(7) See LIMITATION ACT (XV OF 1877), 14 M. 81; 15 M. 78.
(8) See TRANSFER OF PROPERTY ACT (IV OF 1882), 15 M. 170.

——— 2. — Second Appeal.

(1) See ACT III OF 1873 (MADRAS CIVIL COURTS), 14 M. 462.
(2) See CIV. PRO. CODE (ACT XIV OF 1882), 15 M. 474.
(3) See TRANSFER OF PROPERTY ACT (IV OF 1882), 15 M. 54.

——— 3. — To Privy Council

See CIV. PRO. CODE (ACT XIV OF 1882), 14 M. 391; 15 M. 169, 237.

Apportionment.

See LIMITATION ACT (XV OF 1877), 15 M. 492.

Approver.

See CRIM. PRO. CODE (ACT X OF 1882), 15 M. 352.

Assignment.

See LIMITATION ACT (XV OF 1877), 14 M. 252.

Attachment.

See ACT I OF 1866 (MADRAS ABKARI), 16 M. 479.

Award.

See CIV. PRO. CODE (ACT XIV OF 1882), 15 M. 99, 348, 384, 474.

Bankruptcy.

See REGISTRATION ACT (III OF 1877), 16 M. 85.
GENERAL INDEX.

Benamidar.

Civ. Pro. Code, s. 13—"Res judicata."—In a suit to recover a parcel of land, the plaintiff's case was that it had been purchased by him benami in the name of his brother, who had sued the present defendants to obtain possession in 1887, but had been negligent in the conduct of the suit which was consequently dismissed. It was found that there had been no negligence in the conduct of the suit, and that it had been instituted with the plaintiff's knowledge:—Held, that the plaintiff was bound by the decree in the former suit, and could not recover on his secret title. SHANGARA v. KRISHNAN, 15 M. 267 = 2 N.L.J. 93 537

Bench of Magistrates.

See CRIM. PRO. CODE (ACT X OF 1882), 16 M. 410.

Board of Revenue.

See ACT III OF 1864 (MADRAS AHBARI), 14 M. 82.

Burden of Proof.

(1) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 16 M. 371.
(2) See ACT V OF 1882 (MADRAS FOREST), 15 M. 315.
(3) See LANDLORD AND TENANT, 15 M. 95.
(4) See LIMITATION ACT (XV OF 1877), 14 M. 96.


(1) S. 294, amended by Act XII of 1879—Practice—Non-joinder—Purchase at a Court-sale on behalf of a judgment-creditor without permission of the Court.
—Under Civ. Pro. Code of 1877, as amended by Act XII of 1879, a purchase made at a Court-sale on behalf of a judgment-creditor was not invalid for want of permission of the Court. Where a suit is brought by one member of an undivided Hindu family to recover land, the property of the family, and no objection is taken at the hearing on the ground of the non-joinder of the plaintiff's co-parceners, it is not open to an unsuccessful defendant to raise such objection on appeal. PARAMASIVA v. KRISHNA, 14 M. 498 = 1 M.L.J. 752 318

(2) S. 333—See CIV. PRO. CODE (ACT XIV OF 1882), 15 M. 494.


(1) Ss. 2, 244, 255, 388—Appeal against an order under s. 258.—Semble.—An appeal lies against an order dismissing an application made under Civ. Pro. Code, s. 258, that the adjustment of a decree be recorded as certified. LINGAYYA v. NARASIMHA, 14 M. 99 71

(2) Ss. 2, 541, 582—Order rejecting an appeal—Vakalatnama executed in favour of two vakils accepted by only one—Presentation of appeal under such vakalat.—An intending appellant executed a vakalatnama in favour of two vakils; it was accepted by only one of the vakils and he presented the appeal. The appeal was placed on the file by the District Judge, but on its coming on for disposal before the Subordinate Judge, he held that it had not been duly presented and made an order rejecting it:—Held, (1) that an appeal lay against the above-mentioned order; (2) that the appeal had been duly presented. AYANNA v. NAGABHOOSHANAM, 16 M. 285, 905

(3) S. 11—Civil suit—Religious usages of Muhammadans—Kutbah.—Certain Moplahs, described as "the Moktessor and Jamats" of a mosque, sued certain other Muhammadans, described as "members of the Puslar caste," alleging that the custom was for the defendants to attend the plaintiffs' mosque on Friday at the reading of the kutbah, and that the defendants had recently built another mosque a short distance off, and had "for two months been attempting to read the kutbah there." It was further alleged in the plaint that such reading of the kutbah was "quite contrary to the Muhammadan religion" and that the defendants nevertheless proposed to have the kutbah read, "wherby the kutbah or adoration conducted in our mosque will, according to religion, be fruitless." The prayer of the plaint was for an injunction, restraining the defendants from reading the kutbah in their mosque:—Held, that the plaint disclosed no cause of action. MAINE MOLIAH v. ISLAM AMANATH, 15 M. 355 600

1072
GENERAL INDEX.


(4) S. 13—Malabar Law—Adoption by the last member of a Nambudri illom—Limitation Act—Act XV of 1877, sched. II, arts. 91, 120—"Res judicata."
—In a suit for a declaration that the members of the Nambudri illom to which the plaintiffs belonged were the sole heirs and successors of an illom known as Kiluvapura, of which the natural line had become extinct, and for possession of certain land which had formed part of its property, the defendants were the karnavan and manager of the plaintiffs' illom and the members of another illom. It was found on the evidence that the plaintiffs' karnavan had been adopted unto the Kiluvapura illom, and that subsequently that illom and the plaintiffs' had been amalgamated under a karar executed by, among others, the wife of the last male member of the Kiluvapura illom, and that she had died less than twelve years before this suit. The defendants, other than the karnavan and manager of the plaintiffs' illom, asserted a right to a moiety of the property of the Kiluvapura illom with which, however, it was now found on the evidence that they were less closely connected than the plaintiffs, and it appeared that that right had been similarly asserted in suits brought after the date of the karar above referred to, by a member of the defendants' illom against the karnavan and manager of the plaintiffs' illom, and that decrees had been passed therein negative the title now set up by the plaintiffs and that part of the property now claimed was held under one of those decrees. The plaintiffs did not ask that those decrees should be set aside.—Held, (1) that the suit was not barred by limitation; (2) that it was unnecessary for the plaintiffs to prove malafides against their karnavan in respect of his conduct in the former suits or to seek that the decrees passed therein be set aside, and that those decrees did not constitute the present claim res judicata, as the karnavan was not then impeded in his capacity as such; (3) that the adoption of the plaintiffs' karnavan was valid even assuming that no datta homam was performed, and the last male member of the Kiluvapura illom had died after merely indicating him as his heir and the widow adopted him in the Dwayanushyayana form; (4) that the plaintiffs were entitled to a decree as prayed. SHANKARAN v. KESAVAN, 15 M. 6

354

(5) S. 13—"Res judicata" between defendants.—The plaintiff, a junior member of a Malabar tarwad, alleged that her karnavan had assigned to her his kuikanom right over certain land, and that she had obtained a fresh demise from the jenni and placed a tenant in possession. The tenant was dispossessed by the present karnavan, and in 1886 sued him and the plaintiff to recover possession of part of the land. That suit was dismissed on the ground that the above allegations of the plaintiff were unfounded. She now sued the present karnavan for possession of the entire land.—Held, that the claim of the plaintiff was res judicata as far as it related to the land in question in the former suit, but not as to the rest. MADHAVI v. KELU, 15 M. 264

535

(6) S. 13—"Res judicata."—Court of competent jurisdiction—Act X of 1877, s. 433—Suit against a Sovereign Prince.—A suit for a declaration of the title of the plaintiffs' tarwad to certain land was filed in a District Court against the Maharaja of Cochin and others, including the trustees of a devasom. It appeared that the same land was the subject of a suit instituted in a Subordinate Court on the 6th August 1877, to which the representatives of both the plaintiffs' tarwad and the devasom were parties, and that the land was then found to be the property of the devasom and a decree was passed accordingly. It was contended that the present claim was not res judicata by reason of that decree, because, under the provision of Act X of 1877, s. 440, which came into operation during the provision of Act X of 1877, s. 440, which came into operation during the

1073

M V—135
cognizance of the Subordinate Judge and was adjudicated on by him.
KUNJII AMMA v. RAMAN MENON, 15 M. 494 = 2 M.I.J. 262 ... 696

(7) S. 13—"Res judicata"—Court of competent jurisdiction—Hindu law—Power of guardian to alienate land—Compromise of litigation.—In 1882, the daughter of a deceased Hindu brought a suit in the Court of a District Munisif for a declaration that the defendant was not the adopted son of her father (deceased) as he claimed to be. It was found that the alleged adoption was valid and the suit was dismissed. The then defendant now brought, in 1889, a suit in the same Court to recover possession of land from the then plaintiff, alleging that it had been wrongfully transferred to her by way of gift by his adoptive mother. The defendant denied the adoption and asserted that the transfer was valid as having taken place in accordance with an arrangement made by her father in his lifetime. It was admitted that the value of the whole property, to which the plaintiff was entitled by virtue of her adoption, if it was a valid adoption, exceeded Rs. 2,500. The Court of First Appeal held that the question of the adoption was not res judicata, and observed that the transfer to the defendant was apparently made to induce her to abandon her litigation as to the adoption:—Held, (1) that the defendant was not at liberty to question the plaintiff's adoption: (2) that the Court should try whether the transfer was made bona fide by the plaintiff's mother as his guardian for his benefit. VENKATARAGHAVA v. RANGAMMA, 16 M. 498 ... 699

(8) S. 13—"Res judicata"—Court of competent jurisdiction—Limitation Act—Act XV of 1877, s. 10, sch. II, arts. 130, 144—Suit by a uralan against an agent of a devasom—Reudication of agency—See LIMITATION ACT (XV OF 1877), 16 M. 456.

(9) S. 13—"Res judicata"—Evidence Act—Act I of 1872, s. 41—Judgment in rem—Judgment in personam—Guardians and Wards Act—Act VIII of 1890, s. 48—Probate and Administration Act—Act V of 1881, s. 62.—On an application for probate of a will under the Probate and Administration Act, 1881, which was opposed by the widow of the alleged testator and her father, it appeared that an application had previously been made under the Guardians and Wards Act, 1890, on behalf of the widow for a declaration that she was the guardian of the person and the property of the infant son of the alleged testator, and that that application had been opposed by the present petitioners who claimed to be testametary guardians of the propery appointed by the will now proposed, and that the will had then been found to be a forgery:—Held, that the question of the genuineness of the will was not res judicata for the purpose of the proceedings under the Probate and Administration Act. CHINNASAMI v. HARIHARABADRA, 16 M. 380 = 3 M.I.J. 121 ... 971

(10) S. 13—Res judicata—Limitation—Creditor of a devasom placed in possession as samudayam.—In a suit brought by the Uralers of a devasom in Malabar to recover certain land in the possession of the defendant, it appeared that the defendant held under an instrument, dated 1741, whereby his predecessor in title was appointed samudayam and was authorized to appropriate part of the rents of the devasom properties to the interest on a loan made by him to the Uralers. Two of these Uralers had brought a previous suit against the defendant for an account of the rents received by him and for an injunction; that suit was dismissed on second appeal when the High Court described the defendant as a mortgagee in possession, but the question whether or not he was a mortgagee with or without possession was not then directly and substantially in issue:—Held, (1) that the status of the defendant was not res judicata, by reason of the judgment in the previous suit; (2) that the Court having held, following Krishnan v. Veloo (14 M. 301), that the defendant was not a mortgagee in possession under the instrument of 1741, the suit was not barred by limitation. RAMAN v. SHATHANATHAN, 14 M. 812 ... 218

(11) S. 13—Res judicata—Mortgage—Transfer of interest—Appointment of a creditor as agent to collect rents and appropriate part towards the debt.—In a suit to redeem a kanom on certain land, the jenn of a devasom in Malabar, it appeared that the plaintiff held a melkanom in respect of the
same land executed to him (subsequently to the date of the kanom sought to be redeemed) by defendant No. 3, the samudayam of the devasom. Defendant No. 3 represented one Chitambaram, in whose favour the Uralers had, in 1741, executed a document appointing him samudayam and stating that they had received from him a kanom of 18,000 fanams on the devasom properties and providing that he should appropriate part of the rents towards the loan. It appeared that, in a suit to eject tenants, the Uralers sued as co-plaintiffs with samudayam; in subsequent suits, however, two of the Uralers had sued other tenants for rent, and the samudayam for an account; both of these suits were dismissed on second appeal, and in the judgments of the High Court the samudayam was described as a mortgagee in possession:— Held, (1) on its appearing that no opinion was expressed in the former suit as to the construction of the document of 1741 that the former decisions had not the force of res judicata; (2) in view of the conduct of the parties and the terms of the document of 1741 that the samudayam was not thereby constituted a mortgagee in possession and the malkanom set up by the plaintiff was invalid.

KRISHNAN v. VELOO, 14 M. 301 (F.B.)

... 211

(12) S. 13—"Res judicata"—Suit by benamidar—See BENAMIDAR, 13 M. 297.

(13) S. 13, Explanation V—Res judicata—Suit for possession of a share in the property of a Muhammadan family.—In a suit in 1882 between the members of a family following the Muhammadan law of inheritance, in which the plaintiffs sued as sharers for the recovery of their share in certain property, one of the defendants pleaded that a paramba, part of the property in dispute, was not subject to division, but this plea was unsuccessful, and a decree was passed for the plaintiffs. The present suit was brought by a mortgagee from one of the defendants in the former suit (who had been ex parte) to recover his share of the above-mentioned paramba, the subject matter of his mortgage; the mortgagee was joined as defendant, among others, including the defendant who had raised the plea above stated. This plea was repeated by the same person: Held, (1) on the ground that the parties were governed by the Muhammadan law of inheritance, that the suit was maintainable; (2) that the claim that the paramba was not subject to division was res judicata by virtue of Civ. Pro. Code, s. 13, explanation. CHANDU v. KUNHAMED, 14 M. 324 = 1 M.L.J. 339

... 227


... 255

(15) Ss. 13, 43—Hindu Law—Impartible zamindari—Obstructed inheritance—Interest of holders of—Inheritance by daughter's son—Res judicata.—In a suit to recover possession of the impartible zamindari of Shivaganga, it appeared that the Istimdar zamindar died in 1839, and that after an interval of wrongful possession by his brother and his descendants, his daughter established her title to succeed him and was placed in possession in 1864. She died in 1877 leaving the present plaintiff, her son, and three daughters her surviving. A suit was then brought by the father of the present defendant, who was the son of her elder sister (deceased), against the present plaintiff and the daughters of the late Rance for possession of the zamindari to which he claimed to be entitled by right of inheritance. A decree was passed for the plaintiff in that suit, under which he obtained possession of the zamindari and retained it until his death in 1893, when he was succeeded by the present defendant. The plaintiff now sued as above, claiming that the right to the zamindari must devolve on him and not on the defendant on the death of the plaintiff in the former suit:— Held, (1) that the defendant's father had not succeeded to a qualified heritage nor to a mere right of management of joint family property in which the plaintiff had a right of survivorship, but that he had succeeded to the estate as full owner and had therefore become a fresh stock of descent; (2) that accordingly, nearness or remoteness of relationship to the Istimdar zamindar was immaterial, and the defendant's right of succession was not affected by the fact that the whole class of the Istimdar zamindar's daughters' sons had not been
exhausted.— Held also, that the plaintiff was not precluded from raising the contentions to which the above rulings relate by reason of their not having been raised by way of defence to the suit brought against him by the defendant's father. MUTHUVADEGANATHA TEVAR v. PERIASAMI, 10 M. 11—2 M.L.J. 265

(16) Ss. 13, 43—" Res judicata "—Registration Act—Act III of 1877, ss. 17, 49—Instrument affecting moveable and immovable property.—The widow, daughter and divided brother of a deceased Hindu, executed an instrument which provided for the distribution of his property, both moveable and immovable, as to which they had disputed. The document was not registered. The widow set up a will made by the deceased in her favour: the brother sued the widow for a declaration that the will was a forgery, but the Court held that it was genuine. He now sued the widow and daughter on the above instrument to recover his apper share of the moveable property of the deceased. The widow set up the will, which the plaintiff averred was invalid according to the custom governing the family:— Held, (1) that the plaintiff was not precluded by the decree in the former suit from impugning the validity of the will; (2) that the unregistered instrument was admissible as evidence in support of the plaintiff's claim for the moveable property. THANDAVAN v. VALLIAMMA, 15 M. 336 = 2 M.L.J. 130

(17) Ss. 13 and 43—" Res judicata "—Suit by mortgagee for personal remedy in one Court—Subsequent suit against mortgaged property in another Court—Latter suit not within jurisdiction of former Court—Transfer of Property Act, s. 99.—A bond, whereby certain immovable property was hypothecated as security for a debt, was executed at the place of residence of the obligor, which was within the jurisdiction of a Court other than that within the jurisdiction of which the property hypothecated was situate. The obligor brought a suit in the former Court to recover the principal and interest due on the bond against the obligor personally, on the covenant to pay contained in the bond, and prayed also for sale of the property hypothecated. That Court dismissed that suit so far as it related to the property, and also so far as the claim for principal was concerned, but awarded the plaintiff the interest claimed against the defendant personally. Subsequently the obligee brought a suit in the Court within the jurisdiction of which the property was situate for recovery of the principal money due on the bond by sale of the hypothecated property:— Held, that the latter suit was not barred by reason of the former suit, either under s. 13 or under s. 43, Civ. Pro. Code. NARASINGA RAU v. VENKATA-NARAYANA, 15 M. 481

(18) Ss. 13, 43, 589—Mutt—Religious Endowments Act—Act XX of 1863, ss. 14, 18—Want of asceticism of paradesi—Removal of paradesi—Form of decree—Res judicata—Charity.—The plaintiff, the zamindar of Sivagunga, sued in a Subordinate Court to remove the defendant from the office of head of a mutt. The defendant was a married man living with his wives and children, whom he maintained with the produce of the property of the mutt, and it appeared that he had failed to perform the ceremonies of the institution. The mutt in question came into existence under a deed of endowment or "charity grant," whereby the first zamindar of Sivagunga granted land to his guru for the erection and maintenance of a mutt and the performance of certain religious exercises in perpetuity, and provided that the head of the mutt should be of the line of disciples of the original grantee whose spiritual family he desired to perpetuate. In 1867 a predecessor in title of the plaintiff had sued unsuccessfully to recover certain property of the mutt from the defendant, alleging another cause of action than his status as a married man and his misappropriation of the mutt property; and in that suit it was established that the head of the mutt for the time being had the right to appoint his successor and that such appointment was not subject to confirmation by the zamindar. No sanction had been obtained for the institution of the present suit. It appeared that the trusts of the mutt had been violated and the income misapplied, and that there was no qualified disciple in whom the right of succession had vested, and that the members of the plaintiff's family were
the only persons interested in the appointment:—Held, (1) that the jurisdiction of the Subordinate Court was not ousted by Act XX of 1863 since the trusts of the institution were in the nature of private trusts; (2) that sanction under s. 539 of the Civ. Pro. Code was not a pre-requisite of the suit for the same reason; (3) that the suit was not barred by limitation, its object being to prevent a specific endowment from being diverted from its legitimate object and to re-attach it to that object; (4) that the suit was not barred under s. 13 or s. 43 of the Civ. Pro. Code; (5) that the proper decree was (1) to declare the plaintiff's right to appoint a qualified person with the concurrence of the rest of his family, (2) to direct him to do so within a given time, failing which the suit should stand dismissed with costs. If such appointment was made, notice should be given to the other members of the plaintiff's family before it was confirmed; if such appointment were confirmed, the property should be directed to be delivered to the person appointed to be administered in accordance with the trusts and usage of the mutt. Simeb: that the padresi or head of the mutt must be a married man, provided he had been duly initiated. SATHAPPAYYAR v. PICHASAMI, 14 M. 1

(19) St. 13, 98, 103—“Res judicata”—“Court of competent jurisdiction”—Landlord and tenant—Quiet enjoyment, covenant for—Parties—Suit for damages against lessor, including costs—Joiner of one of two co-lessees as defendant—Suit dismissed against such lessee:—In 1883, A, the trustees of a certain charity, executed in favour of X and Y an agricultural lease for nine years and delivered over possession of the lands comprised in it, being part of the trust property. The lease contained a provision that it should be cancelled on default being made in payment of the rent and kist, and it contained no express covenant for quiet enjoyment. In 1887 default was made in payment of the rent and kist. A thereupon cancelled the lease and sued X and Y in a Subordinate Court and obtained a decree for the arrear, the total amount of his claim being Rs. 2,807. In that suit X alleged that Y was merely a name-lender for A, who desired to benefit himself at the expense of the charity, and also that certain raiyats setting up a false claim had evicted X from the lands demised at the instigation of A, who had subsequently sought unsuccessfully to obtain further advantage for himself. The Subordinate Judge framed an issue on each of these allegations and recorded findings in the negative. In the same year X filed a suit for damages for breach of contracts against A and Y in the High Court, repeating in his plaint the above allegations. When that suit came on for hearing, it was dismissed for default, Y being the only party who appeared. X now sued A again on the same cause of action, making the same allegations. Y was subsequently brought on to the record as being a necessary party to the suit, being joined as second defendant, but he applied to be held and was struck off the record on the ground that the dismissal of the former suit in the High Court was final as against him:—Held, (1) that the suit was not bad for the non-joinder of the co-lessee as a defendant, nor for the reason that the plaintiff could not prosecute the suit against him; (2) that the matters put in issue in the Subordinate Court were not res judicata by reason of the decision of that Court; (3) that the plaintiff disclosed a good cause of action against the lessor; (4) that even if the plaintiff had substantiated his allegations against his lessor, he would not have been entitled to recover the cost of civil and criminal proceedings against the raiyats who had evicted him. VITHILINGA PADAYACHI v. VITHILINGA MUDALI, 15 M. 111

(20) St. 13, 206—“Res judicata”—Amendment of decree—Subsequent execution.—In a suit for money against the karnavan and two anandranvas of a Malabar tarwad, the judgment directed a “deed for the plaintiffs as prayed,” but the decree ordered payment by one anandranvan only. Property of the tarwad was attached and sold. The decree was then amended and brought into conformity with the judgment. Other members of the tarwad sought to have the sale set aside, but it was found that the judgment debt had been contracted for proper tarwad purposes, and that suit was dismissed. Application was now made for the attachment of other property of the tarwad in further execution of the amended decree:—Held,
that the members of the tawrad were not entitled to contend that the decree was not binding on them, that matter being res judicata. Quaera.

Whethera the rule in Sundara v. Subbanas (I.L.R. 9 Mad., 364) as to the amendment of decrees is correct. CHATHAPPAN v. PYDELL, 15 M. 403 = 1 M.L.J. 535

(21) Ss. 13, 211, 214—Res judicata—Claim as to which judgment is silent—Mesne profits subsequent to suit. In a suit for the partition of a zamindari, the plaintiffs asked, inter alia, for "ten years' past profits and for subsequent profits." The Judge passed a decree for partition in which mesne profits for three years prior to the suit were decreed to the plaintiffs, but his judgment and decree were silent with regard to the subsequent profits claimed in the plaint. The defendant appealed against this decree, and the plaintiffs preferred a memorandum of objections against part of it, but did not object to it so far as it omitted to provide for subsequent mesne profits. The plaintiffs instituted the present suit to recover from the defendant mesne profits from the date of the above suit:—Held, that the plaintiffs' claim so far as concerned mesne profits accrued since the decree in the former suit was not res judicata, and the suit to that extent was not precluded by Civ. Pro. Code, s. 13. RAMABHADRA v. JAGANNATHA, 14 M. 328 = 1 M.L.J. 171

(22) Ss. 13, 272—Execution proceedings—'Res judicata'—Matter which ought to have been raised as a ground of defence. A and B obtained a decree against X and Y, on which about Rs. 9,000 was due. Z obtained a decree against A and B, on which about Rs. 6,400 was due, and in execution attached the first-mentioned decree. A and B alleged in the matter of the execution of their decree for the first time that the suit against them had been instituted really by X though in the name of his son Z, and consequently contended that the decree granted by the Court was invalid. The plaintiffs paid the amount, which they paid into Court, was the property of Y and so liable to satisfy their claim. The above allegation was substantiated and Z's claim on the money was not precluded from asserting their claim to the money in Court by reason of the above allegation not having been made by way of defence to the suit of Z; (2) that A and B were entitled to enforce any claim, which may be enforced, for the purpose of satisfying their decree, and accordingly that Z's claim on the money in Court was rightly disallowed. ATCHAYA v. BANGARAYA, 16 M. 117.

(23) Ss. 13, 279, 280, 282—Party to proceedings in execution—Order in execution—Estoppel—"Res judicata." A claim in execution to a house which had been attached was dismissed, and the claimant sued the decree-holder to establish her title to it. It appeared that the house had been previously attached in execution of another decree obtained against the same judgment-debtor and his father (since deceased); that the present plaintiff had then preferred a claim, which was allowed; that the judgment-debtor had taken no steps to have the order allowing the claim set aside; and that a suit filed by the decree-holder with that object had been dismissed:—Held, that the order allowing the plaintiff's claim in the former suit did not constitute it res judicata and created no estoppel in the present suit. GNANAMAL v. PARVATHI, 15 M. 477 = 2 M.L.J. 212.

(24) S. 14—Foreign judgment, suit on—Procedure—Waiver of objection to jurisdiction. In a suit upon the judgment of a Court at Bastar, it appeared that in the suit in which the judgment was pronounced, the defendant took no objection as to the jurisdiction of the Court, and that he carried on business by his agent in the Bastar territory, and that a decree was passed for the plaintiff after evidence adduced on both sides in the ordinary way:—Held, (1) that the defendant was not entitled to have the case re-heard; (2) that the defendant was entitled to take objection to the jurisdiction of the Bastar Court. FAZAL SHAU KHAN v. GAFAR KHAN, 15 M. 82.

(25) Ss. 15, 539—Evidence Act, ss. 57, 87—Public charitable trust—District Court, jurisdiction of—Books of history—See EVIDENCE ACT (I OF 1872), 15 M. 241.
(26) S. 30—Representation of numerous plaintiffs—Advertisement—Community of interest—Decree for management of a Hindu temple—Application for execution by person interested.—In a suit by certain Tengalai Brabmans for declarations as to the mode of electing dharmakartas of a certain pagoda, &c., an order was made for a proclamation inviting "all persons interested to come in and be made parties, or see that others by whom they are content to be represented are made parties," and a decree was passed comprising a scheme to be carried out for such election, &c. A person not on the record and not a member of the Tengalai community, but claiming certain rights under the decree now applied to compel the observance of the scheme:—
 Held, that the above order did not invest the suit with a representative character, and the applicant had no right to apply.
RAGAVA v. RAJARATNAM, 14 M. 57

(27) S. 31—Misjoinder of causes of action—Religious Endowments Act—Act XX of 1863, ss. 3, 4—Hereditary trusteeship—Suspension from trusteeship and right of puja—Maintenance in office on terms—See Act XX of 1863 (RELIGIOUS ENDOWMENTS), 14 M. 103.

(28) S. 39—Plender retained by a Collector as Agent of Court of Wards—Validity of vakalat after the Collector’s death.—The Collector of a district, who was agent for the Court of Wards, filed a suit on behalf of a ward of the Court of Wards and executed a vakalatnama to a Plender whom he retained to conduct it. The Collector died before the suit was determined:—
 Held, that it was not necessary for a new vakalatnama to be executed to enable the pleader to proceed with the conduct of the suit.
KRISHNA VIdaya FUCHAYA NAUKER v. MARUDANAYAGAM PILLAI, 15 M. 135.

(29) S. 43—“Distinct cause of action”—Suit for possession after cancellation of Court sale.—In execution of a decree the defendant, who was sued as the representative of her deceased brother, objected, under s. 246 of the Code of Civil Procedure, to the attachment of certain lands to which she set up independent title. The objection was disallowed and the land was sold. She then sued the execution purchaser to set aside the Court sale and obtained a decree against which no appeal was preferred. She now sued for possession, and it was found that at the date of the previous suit she was not aware that the execution purchaser had obtained possession:—
 Held, that the suit was not barred by Civ. Pro. Code, s. 43.
AMBUL v. KSTM.DAMMA, 14 M. 23 = 1 M.L J. 28

(30) S. 43—“Res judicata”—Decree against three of four uralars of a devasom—Suit to declare the decree binding on the fourth.—The holder of a bond executed by two uralars of a Malabar devasom obtained a decree, declaring the devasom property liable for the secured debt, against the executors of the bond and one other uralar; the fourth uralar intervened in execution of the decree, and objected that the devasom property was not liable to be attached. His objection was upheld, and the plaintiff now brought a suit against him for a declaration that the debt was binding on him and on the devasom property:—
 Held, that the suit was not barred under Civ. Pro. Code, s. 43.
RAMAN v. SRIDHARAN, 16 M. 449

(31) S. 43—“Res judicata”—Omit to sue.—The plaintiff, having previously obtained against his brother, defendant No. 1, who had been the managing member of their family, a decree for partition of the family property including certain debts scheduled in the plaint, now sued to recover his share of certain other family debts collected by defendant No. 1 without the plaintiff’s knowledge:—
 Held, that the claim was not barred by Civ. Pro. Code, s. 43.
MARIATHODI v. ALPU, 15 M. 296

(32) Ss. 44, 45—Joinder of causes of action—Res judicata.—A suit for recovery of a mortgage debt, with an alternative prayer for sale of the mortgaged property, is not a suit for the recovery of immovable property within the meaning of s. 44 of the Civ. Pro. Code. A suit seeking to enforce liability under a mortgage bond is not barred by a previous decree obtained against certain members of the family for the same debt.
GOVINDA v. MANA VIJRAMAN, 14 M. 284

(33) S. 53—Amendment of plaint—Substitution of legal representative for deceased defendant.—A suit was brought to recover arrears of rent. The persons whose names were entered on the record as defendants were, in fact, dead when the suit was instituted. The suit was dismissed. The plaintiff appealed, and sought leave to amend the plaint by substituting for the names of the dead men those of their legal representatives, as against whom the suit would then have been barred by limitation: Held, that the amendment should not be allowed. MALLIKARJUNA v. PULLAYYA, 16 M. 319

(34) S. 53—Specific Relief Act—Act I of 1877, s. 42—Declaration—Consequential relief—Amendment of plaint—See SPECIFIC RELIEF ACT I OF 1877, 15 M. 253

(35) S. 53—Specific Relief Act—Act I of 1877, ss. 42, 56—Consequential relief—Amendment of plaint—See SPECIFIC RELIEF ACT I OF 1877, 15 M. 15.

(36) S. 57—Civil Courts Act—Act III of 1873 (Madras), s. 13(2)—Appeal from Subordinate Court—Proceeding to be adopted when a District Court erroneously returns an appeal petition for presentation in High Court—See ACT III OF 1873 (MADRAS CIVIL COURTS), 14 M. 462.

(37) S. 111—Set-off—Character in which claim is made—Court Fees Act—Act VII of 1870, ss. 6, 29—Levy of stamp due.—In a suit in which the plaintiff sued, as son of a deceased vakil, to recover the amount of a promissory note and bond executed by the defendant to his deceased father, the defendant alleged in his written statement that the plaintiff’s father had collected funds belonging to him, as his vakil, exceeding the amount due on the promissory note and bond and asked for a decree for the difference. Held, (1) that the written statement must be regarded as a plaint in regard to the set-off and should have been stamped accordingly; (2) that if the plaintiff claimed as the heir and representative of his father the set-off was rightly pleaded; (3) that when a memorandum of appeal is insufficiently stamped the deficient stamp duty should be levied by the Appellate Court. CHENNAPPA v. RAGHUNATHA, 15 M. 29 = t. M.L.J. 593

(38) S. 111—Transfer of Property Act—Act IV of 1882, ss. 2, 76—Waste by mortgagee in possession—Possession after date fixed for payment—Interest—See TRANSFER OF PROPERTY ACT (IV OF 1882), 15 M. 290.

(39) S. 154—Fraud—Suit to set aside decree on ground of fraud and collusion.—A Judge cannot dispose of a suit at the first hearing if a party appears and objects to the adoption of that procedure. Decrees having been passed against the present plaintiff’s father and his agent respectively, property claimed by the present plaintiff was attached. He filed two suits by his next friend to have the attachments set aside, but these suits were dismissed. He now sued to have set aside the decrees dismissing these suits, alleging that his father’s agent, defendant No. 2, had colluded with the decree-holder, defendant No. 1, and had given false evidence and that the decrees had been obtained thereby: Held, that the plaint disclosed a good cause of action. KRISHNABRUPATI v. RAMAMURTI, 16 M. 198...

(40) S. 156—Divorce Act—Act IV of 1869, s. 36—Alimony pendente lite—Net income—Allowable deductions—Change of circumstances—Letters Patent, s. 15—Order fixing date of hearing—See LETTERS PATENT, 1865, 14 M. 88.

(41) S. 206—Amendment of decree after execution.—In a suit for money against the karnavan and two anandranin of a Malabar tarwad, the judgment directed a “decree for the plaintiff as prayed,” but the decree ordered payment by one anandranin only. Land belonging to the tarwad was attached and sold in execution, an objection by the other members of the tarwad having been overruled. After the sale, the decree was amended and brought into conformity with the judgment. In a suit brought by other members of the tarwad against the karnavan, the decree-holder and the execution-purchaser, it was found that the judgment debt had been contracted for proper tarwad purposes, and that the land had been sold for its proper value: Held, that the sale was binding on the plaintiffs. PYDEL v. CHATHAPPAN, 14 M. 150

1080

(42) Ss. 206, 629—Amendment of decree—Appeal—Revision—Review—Exercise of jurisdiction.—The holder of a decree passed in a suit on a hypothecation bond, applied under Civ. Pro. Code, s. 206, to have the decree amended by bringing the description of the land contained therein into accordance with that contained in the hypothecation bond and the Court made an order accordingly. On a revision petition preferred under Civ. Pro. Code, s. 622, by the decree-holder:—Held, but on the different reasoning by the two learned Judges constituting the Court, that the High Court had no power to interfere on revision, NARAYANASAMI v. NATESA, 16 M. 494. 1002

(43) Ss. 211, 258, 318, 610—Construction of order giving effect to judgment of Privy Council—Mesne profits—Cost of management—Interest—Sureties for execution of decree.—Land was put up for sale and purchased in execution of a decree. The sale was confirmed, and the purchaser was put into possession. On appeal against the order confirming the sale, the High Court held that the sale had been vitiated by certain irregularities and set it aside. The purchaser preferred an appeal to the Privy Council against the judgment of High Court. While the appeal was pending, the person was compelled to deliver up possession of the land, but security was furnished under an order of the Court to persons not being parties to the suit for its redelivery to him, and for the payment of mesne profits, in the event of his appeal being successful. Meanwhile, the land in question was placed in charge of a receiver on the motion of other persons holding decrees against the judgment-debtors. On appeal the Privy Council reversed the order of the High Court. The purchaser was accordingly replaced in possession of the land; and he applied for execution in respect of the mesne profits against the respondents in the Privy Council and the sureties. The Court of First Instance dismissed the application as against the sureties and limited the applicant’s claim against the others to the not income of the land, less the cost of management by the receiver, and allowed him no interest:—Held, (1) the order must be taken to have been made under Civ. Pro. Code, s. 610, and an appeal lay therefrom; (2) although the appeal to the Privy Council, the Privy Council related to the order confirming the sale and not to that by which possession was awarded, and the order of Council did not direct payment of mesne profits, yet such payment was within its purview as being a benefit by way of restitution fairly and reasonably consequential upon it; (3) the application was rightly dismissed against the sureties; (4) the charges involved by the appointment of the receiver should not have been allowed against the petitioner, since they were not necessary in the ordinary course of prudent management; (5) interest at 6 per cent. should have been allowed to the petitioner on the mesne profits for each year from the end of the year to the date of payment. ARUNACHELLAM v. ARUNACHELLAM, 15 M. 203 = 2 M.L.J. 1 492

(44) Ss. 223, 295—Execution—Rateable distribution—Transfer of decree for execution.—Two decrees were passed against the same defendant in the Court of a District Munsif and on the Small Cause side of a Subordinate Court in the same district, respectively. The holder of the decree in the Small Cause suit attached and brought to sale the judgment-debtor’s interest in a benefit fund. The other decree-holder applied for rateable distribution of the decree, his decree having been transferred for execution to the Subordinate Court directly and not through the District Court:—Held, (1) that the direct transfer of the decree of the District Munsif was not illegal; (2) that the Subordinate Judge had inherent jurisdiction to execute the decree of the District Munsif; (3) that the order for rateable distribution was right. KELU V. VIKRISHA, 15 M. 345 = 1 M.L.J. 592 592


(46) Ss. 231, 259—Joint decree—Execution, application for—Uncertified payment to one decree-holder.—One of two holders of a joint decree applied for execution of the decree to the full amount. It appeared that the other 1081
decree-holder had received a certain sum from the judgment-debtor on account of the decree out of Court, but this payment had not been certified—\textit{Held}, that the payment was valid only to the extent of the share to which the payee was entitled, and that this share having been ascertained and credit given for it, the decree should be executed in favour of the present applicant for the balance. \textit{Sultan Moideen v. Savalayammal}, 15 M. 343 = 2 M.L.J. 50 ... 591

\textit{Ss. 232, 462—Sale of decree-holder's interest under a decree—Right of vendee when execution is refused.}—The assignee for value of a decree obtained by two persons, of whom one was a minor, applied for execution of the decree, but his application was refused under Civ. Pro. Code, s. 232. He now sued to recover from his assignor the sum paid by him for the assignment—\textit{Held}, that the plaintiff was entitled to recover. \textit{Ramamami v. Basavappa}, 16 M. 325 ... 933

\textit{Ss. 284, 368—Execution of decree—Death of judgment debtor after attachment and before sale—Representatives not joined.}—A decree-holder attached land of the judgment-debtor in execution of his decree and a sale proclamation was made; the judgment-debtor died and his legal representatives were not brought on to the record, but the execution proceeded to sale—\textit{Held}, that the sale should be set aside. \textit{Krishnayya v. Unnissa Begam}, 15 M. 399 ... 630

\textit{S. 285—Limitation Act—Act XV of 1877, ch. II, art. 179—Formal defect in application for execution—See Limitation Act (Act XV of 1877), 16 M. 142.} ... 630

\textit{S. 237—Evidence Act—Act I of 1872, s. 115—Estoppel—Prior encumbrance—Notice to executing decree-holder.}—A hypothecation bond executed in 1878 by the husband (deceased) of defendant No. 1 to secure a debt due by him to a partner of the plaintiff was assigned to the latter in 1888. In 1882 the plaintiff, who was aware of the existence of this instrument, brought the land comprised in it to sale in execution of a money decree obtained by him against the executant, and defendant No. 3 became the purchaser. At the time of the sale the plaintiff gave no notice of the existence of the encumbrance. In a suit to recover the principal and interest due on the hypothecation bond—\textit{Held}, that the plaintiff was estopped from recovering the secured debt against the land. \textit{Kasturi v. Venkatachalapathi}, 15 M. 412 ... 689

\textit{S. 244—Execution of decree—Assignee of decree—Regular suit.}—The assignee of a decree applied for execution; his application was dismissed and he was never brought on to the record as decree-holder. He now sued for the cancellation of the order refusing execution and for a declaration of his right to execution—\textit{Held}, that the suit was not precluded by Civ. Pro. Code, s. 244. \textit{Raman v. Muppil Nayar}, 14 M. 478 ... 334

\textit{S. 244—"Parties to the suit"—Questions relating to execution—Separate suit.}—A plaintiff, alleging that her husband (deceased) had advanced money on the security of land belonging to a family of four Hindus, sued them to enforce his lien and obtained a decree. The representatives of one of the defendants only appealed, and the decree was reversed as regarded them. The decree was executed as against the other defendants by the attachment and sale of their shares of the land, and the plaintiff became the purchaser. The successful appellants obstructed her in her attempts to obtain possession, and she now sued them for partition of the three-quarters share purchased by her—\textit{Held}, that the suit was not precluded by Civ. Pro. Code, s. 244. \textit{Nagamuthu v. Savaramuthu}, 15 M. 226 = 2 M.L.J. 109 ... 508

\textit{Ss. 244, 258—Suit for declaration of satisfaction of a decree—Satisfaction of decree out of Court.}—A judgment-debtor, alleging that he had entered into an agreement with the decree-holder in satisfaction of his decree, and that the latter had, in breach of such agreement, procured the issue of a warrant of attachment, now sued for a declaration that the decree had been ... 1082

satisfied, and prayed also for the cancellation of the warrant of attachment:— Held, that the suit was not maintainable. Bairagolu v. Balaanna, 15 M. 304 = 2 M.L.J. 112

(54) Ss. 244, 394—Order cancelling an execution—Sale of land—Subsequent suit for possession brought by judgment-debtor.—A decree-holder attached land of his judgment-debtor and brought it to sale and himself became the purchaser in execution of his decree. The purchase having been made without the permission of the Court, the sale was set aside on the application of the judgment-debtor, who now sued to recover possession of the land:— Held, that the suit was not maintainable under Civ. Pro. Code, s. 324. Viraraghava v. Venkatu, 16 M. 287 = 3 M.L.J. 25

(55) Ss. 244, 294, 308, 622—Sale in execution—Purchase-money and judgment-debt set off against each other—Representative of decree-holder—Appeal—Revision.—One who had attached a decree and obtained leave to bid at the sale of land ordered to be sold in execution, and to have the purchase-money and the amount due under the decree set off against each other, became the purchaser for a sum less than the amount due under the decree. The Court made an order under Civ. Pro. Code, s. 308, cancelling the sale and ordering a re-sale on the ground the purchaser had not paid the full amount due on his purchase within the time limited. The purchaser preferred a revision petition under Civ. Pro. Code, s. 622:—Held, (1) that the petitioner was the representative of the decree-holder within the meaning of Civ. Pro. Code, s. 244, and might have preferred an appeal against the order sought to be revised; (2) that the petition for revision was accordingly not maintainable, although, under the circumstances above stated, the Court had no jurisdiction to make an order under Civ. Pro. Code, s. 308. Sah man Mull v. Kanagasabapati, 16 M. 20 ...

(56) Ss. 244, 311—Execution of decree—Parties to suit—Purchaser of land sold in execution—Confirmation of sale—Objection of unsaleability.—A judgment-debtor having died before the decree was executed, his sons were brought on to the record as his representatives. Ancestral property of the judgment-debtor was then brought to sale in execution and purchased by the decree-holder, and the sale to him was confirmed. Subsequently the judgment-debtor's sons objected under Civ. Pro. Code, s. 244, that the property which had been brought to sale was not liable to be sold in execution:—Held, that the objection was rightly made under s. 244, and a separate suit was not necessary for the purpose of an adjudication on it. Krishnan v. Arnachalam, 16 M. 447 = 3 M.L.J. 126

(57) Ss. 264, 328, 331—Obstruction to execution of decree—Obstruction offered by a tenant—Dismissal of decree-holder's petition—Appeal.—Obstruction was offered to the execution of a decree for partition of certain property, by one claiming to be entitled to occupy part of the land in question as a mulgunt tenant. The decree-holder presented a petition to the Court under Civ. Pro. Code, s. 328; this petition was rejected and the claim was not numbered and registered as a suit:—Held, (1) that an appeal lay against the order rejecting the petition; (2) that the decree for partition was a decree for possession of property within the meaning of Civ. Pro. Code, s. 328; (3) that that section was not rendered inapplicable by the fact that the obstructor claimed to be a mulgunt tenant. Gopala v. Fernandes, 16 M. 127

(58) Ss. 276, 305.—Section 305 of the Civ. Pro. Code contemplates a mortgage or lease or private sale only where "the amount of the decree" can be thus provided for. A Court executing a decree can neither grant a certificate under this section, nor confirm a mortgage or other alienation of property, unless it appears that by such alienation the decree will be satisfied in full. It is not sufficient that after grant of certificate, a mortgage by the judgment-debtor is, as between him and his mortgagees, bona fide, nor can it affect the lien acquired by the judgment-creditor under s. 276. Gurusami v. Venkatarami, 14 M. 277 = 1 M.L.J. 220

(59) S. 283—Specific Relief Act—Act I of 1877, s. 42—Suit for declaration of title by an objector in execution proceedings—Consequential relief.—See Specific Relief Act (I of 1877), 16 M. 140.
GENERAL INDEX.


(60) S. 290—Court action—Withdrawal of bid.—It is competent to a bidder at a Court auction-sale to withdraw his bid. AGRA BANK v. HAMLIN, 14 M. 235

(61) Ss. 292, 311—Suit to set aside Court sale—Duty of vakil purchasing at Court sale—Fraud—Parties—Assignment of religious trusteeship.—A hereditary dharmakarta of a temple, who had assigned his office to a seminadark and consented to a decree being passed on the footing of such assignment, was competent nevertheless to bring a suit to set aside a Court sale of temple lands, treating such assignment as null. A mortgagee, having obtained a decree on her mortgage, brought the mortgage property to sale; and her vakil bid through an agent at the Court sale and became the purchaser. It appeared that the vakil had not informed his client that he intended to bid nor obtained the sanction of the Court, but he had been instructed by his client and had obtained the permission of the Court to bid on her account, and he was found to have acted in an underhand manner towards her. In a suit to set aside the sale, brought by the mortgage, who had sought unsuccessfully to obtain the same relief by means of a petition under s. 311 in which fraud was not alleged against the purchaser.—Held, (on its appearing that the vakil had not discharged the burden which lay on him of proving that the transaction was free from suspicion) that the sale should be set aside. SUBBARAYUDU v. KOTAYYA, 15 M. 389

(62) Ss. 395, 622—Rateable distribution—Vesting order in insolvency.—A debtor against whom several decrees had been passed, filed his petition in the Insolvent Court at Madras, and the usual vesting order was made. One of the decree-holders had already attached property of the insolvent and had obtained an order for sale in a District Court, and now another decree-holder applied to the same Court in execution of his decree for the attachment of other property, and for rateable distribution of the proceeds of the sale to be held in execution of the attachment already made. The District Judge held that the vesting order was a bar to both of these applications:—Held, (1) that the order rejecting the application for fresh attachments was right; (2) that the order rejecting the application for rateable distribution was wrong, and that the High Court had power to set it aside on revision under Civ. Pro. Code, s.4622. VIRARAGHA V. PARASURAMA, 15 M. 372

(63) S. 306—Court sale—Material irregularity: Per Cur. We do not consider that the commencement of a Court sale, prior the expiry of the thirtieth day or any delay in making the deposit required by s. 306 or the adjournment of the sale from time to time without sufficient ground, is more than a mere irregularity. VENKATA v. SAMA, 14 M. 297

(64) Ss. 311, 622—Application to set aside execution sale—Remedy of one claiming adversely to the judgment-debtor—Revision petition—Jurisdiction.—One alleging himself to be the undivided brother and, as such, the legal representative of a deceased judgment-debtor applied to have set aside a sale of certain property alleged by him to be joint-family property, which had taken place in execution of the decree. He did not make the purchaser a party to such application. The Court of First Instance dismissed the application. On appeal the Appellate Court made the purchaser a party to the proceedings, and holding that there was irregularity in conducting the sale reversed the order of the Court of First Instance.—Held, (1) that the Appellate Court was wrong in so holding upon evidence recorded by the Court of First Instance when the purchaser was not a party to the proceedings; (2) that the proper remedy of the applicant was a regular suit and not a proceeding under Civ. Pro. Code, s. 311. SUBBARAYUDU v. PEDDA SUBBARA, 16 M. 476

(65) S. 315—Saleable interest—Limitation Act—Act XV of 1877, sch. II, arts. 62, 120—Suit by the purchaser in execution sale to recover the purchase money—See LIMITATION ACT (XV OF 1877), 16 M. 361.

(66) S. 317—Fraud—Benessee purchase at execution-sale for judgment-debtor—Remedy of subsequent purchaser for value.—In a suit to redeem a kanom brought by the plaintiff who had purchased the land in execution of a
devise against the jenni, it appeared that the land had previously been purchased in the name of one who was joined as a supplementary defendant, with the funds of the jenni's taqwat, and with the object of defrauding the creditors of that taqwat. A decree for redemption was passed, which was reversed on appeals filed by the supplementary defendant and the kanomdar respectively. The plaintiff preferred a second appeal against the decree in the first-mentioned appeal, joining the kanomdar as respondent. But it was held that the plaintiffs could not succeed, as the kanomdar was not a party to the appeal against which the second appeal was preferred. Semple: Apart from the above objection, the plaintiff was not entitled to a declaration that the purchase by a supplementary defendant was benami for the taqwat of the original jenni and consequently invalid as against the plaintiff. RAMA KURUP V. SRIDEVI, 16 M. 290 = 2 M.L.J. 173

909

(67) S. 351—Insolvency—Mortgage to secure a barred debt since renewed—Fraudulent preference—Voluntary transfer.—On 1st January 1886 a partnership thenceforth existing between A and B was dissolved and the deed of dissolution provided, inter alia, for the execution by B, on demand, of a mortgage on the Plantation house then subject to a subsisting mortgage in favor of the Agra Bank to secure the re-payment of a debt due by the firm to the trustees of A’s marriage settlement. A suit against the firm was pending at the date of the deed of dissolution, and it was dismissed by the Court of First Instance and an appeal was preferred to the High Court. Before the appeal came on for hearing the debt to A’s trustees was barred by limitation, but A by a letter consigned to pay it, and the trustees demanded the execution of the mortgage as agreed on and offered to pay off the Bank. Shortly afterwards, viz., in December 1888, the appeal came on in the High Court, which held that the appellant’s claim was valid and called on the Court of First Instance for a further finding. On 2nd January 1889 B, executed a mortgage of the Plantation house in pursuance of the above agreement, and in June the trustees paid off the Bank. In April the High Court in the above appeal passed a decree for the appellant. In consequence of this decree B became involved in pecuniary difficulties; in October he found himself insolvent and ceased to carry on business, and in February 1890 he applied under Civ. Pro. Code, s. 341, to be declared an insolvent. His application was opposed by the holders of the High Court decree on the ground that the mortgage of 2nd January 1889 had been executed with the object of defeating their claim: Held, that the execution of the mortgage of January 1889 afforded no reason for rejecting the application under Civ. Pro. Code, s. 351, since it was supported by consideration and did not amount to an act of fraudulent preference, not being a voluntary transfer. BROWN V. FERGUSON, 16 M. 499

1054

(68) S. 356—Insolvency proceedings—Receiver, commission of, how computed.—A receiver appointed in insolvency proceedings under the Civ. Pro. Code is entitled to a lien for the amount of his commission on the net assets remaining after payment of the charges specified in Civ. Pro. Code, s. 356 (b), (c) and (d). MAHADIVE V. KUPPUSAMI, 15 M. 293

513

(69) Ss. 373, 647—Application for execution struck off for non-payment of process fees—Subsequent application.—A decree-holder having applied for execution of his decree, notice was issued to the judgment-debtors, and their property was attached, but the applicant failed to pay the process fees, and the application was struck off, and no leave to make a fresh application was obtained under Civ. Pro. Code, s. 373. Held, that the decree-holder was entitled to apply again for execution of his decree. LAKSHMI NARASIMMA V. ATCHANNA, 15 M. 240 = 1 M.L.J. 750

518

(70) S. 392—Reference to a Commissioner—Local inquiry.—The local investigation referred to in Civ. Pro. Code, s. 392, presupposes the existence on the record of independent evidence which requires to be elucidated, and that section does not authorize a Court to delegate to a Commissioner the trial of any material issue which it is bound to try. SANGILI V. MOOKAN, 16 M. 350 = 3 M.L.J. 137

951

1085
GENERAL INDEX.

(Civ. Pro. Code (Act XIV of 1882) — (Continued).)

(71) S. 411—Stamp duty on a pauper’s plaint — Decree for less than the amount of claim — Disreputable defence. — A pauper sued his sister for the partition of property valued at a large sum. The parties belonged to the Bogam caste, residing in the Godavari district. The defendant pleaded that the property had been acquired by her as a prostitute, and denied the plaintiff’s claim to it. The plaintiff obtained a decree for Rs. 100, being a moiety of the property found to have been left by their mother: — Held, (1) that the evidence as to the local custom of the caste that the decree was right; (2) that the defendant was liable to pay Court-fees only on the sum decreed. CHANDRAREKA v. SECRETARY OF STATE FOR INDIA, 14 M. 163. 116

(72) S. 443—Defence of minority — Procedure on trial of preliminary issue. — When minority is pleaded as defence to an action, a guardian should be appointed for the defendant and a preliminary issue should be framed and tried as to whether defendant is or is not a minor. KASI DOSS v. KASSIM SAIIT, 16 M. 344 = 2 M.L.J. 215 947

(73) S. 464—Aiyasanta Law — Inheritance — Uncoongenital insanity — Suit by an unadjudged lunatic by the Agent of the Court of Wards as Guardian — Authority of the Court of Wards — Reg. V of 1804 — Estates of lunatics subject to Mufassal Courts — Act XXXV of 1858 — See AILYASANTANA LAW, 14 M. 289. 620

(74) Ss. 514, 521—Enlargement of time for award. — A suit was referred to an arbitrator, who did not make his award within the period limited for that purpose. After that period had expired, an application was made for its extension, both parties consenting; the application was granted and the award was made within the time so extended, and a decree was passed in its terms: — Held, that the order extending the time was not illegal, and the party dissatisfied with the decree was not entitled to have the award and the decree made upon it set aside. LAKSHMINARASIMHAM v. SOMASUNDARAM, 15 M. 394 = 2 M.L.J. 45 650

(75) S. 522—Decree on an award — Appeal. — After issues had been framed in a suit to wind up a partnership, the matter was referred to an arbitrator, who made his award, and with regard to certain property, not part of the partnership property, he refereed the parties to a separate suit. A decree was passed in accordance with the award: — Held, that an appeal lies against a decree passed on an award, on the ground that the award was not legal; but that the award was not illegal by reason of its comprising the reference of the parties to a separate suit. VENKAYYA v. VENKA-TAPPAYYA, 15 M. 318 594

(76) S. 525—Suit on an award — Alternative claim on original consideration— Withdrawal of claim on award. — The plaintiff lent money to two of the defendants, who were partners with the third defendant, for the purposes of the partnership and obtained promissory notes from them. Disputes which arose between them were referred to arbitrators, who made an award. An application by the plaintiff to have the award made a rule of Court was opposed by defendant No. 1, and the plaintiff was referred to a regular suit. He now brought his suit in the alternative on the award and on the promissory notes. The award was found to be unenforceable. The plaintiff then declared himself satisfied to withdraw his suit as far as the award was concerned, and the Court passed a decree for plaintiff on the merits. Defendant No. 3 alone having appealed, the Court of first appeal held that the plaintiff must succeed or fail on the award, and that the withdrawal of the prayer for a decree on the award altered the nature of the suit, and finding that there was no evidence of misconduct on the part of the arbitrators, he passed a decree in the terms of the award. On a second appeal preferred by defendant No. 1: — Held, that this procedure was right. NARASAYYA v. RAMABADRA, 16 M. 474 682

(77) S. 525—Suit on award maintainable — Secondary evidence. — Where an award cannot be filed and a decree obtained upon it under Civ. Pro. Code, s. 525, a party is not precluded from suing upon it. Secondary evidence of the contents of the award is admissible on proof of its being lost. GOPI REDDI v. MAHANANDI REDDI, 15 M. 395 = 1 M.L.J. 591 418

1086
GENERAL INDEX


(78) S. 539—Suit to eject one claiming to be the Jbeer of a mutt—Specific Relief Act—Act I of 1877, s. 42—Consequential relief—See SPECIFIC RELIEF ACT (I OF 1877), 16 M. 31.

(79) Ss. 539, 575—Removal of trustee—Jurisdiction of District Court—Composition of Bench on hearing referred appeal.—In a suit under Civ. Pro. Code, s. 539, in the District Court to remove the hereditary trustee of a public trust for breach of trust, the District Judge held that he had no jurisdiction to pass the decree prayed for. The plaintiff appealed and the appeal came on before two Judges, who differed in opinion. The appeal was thereupon referred under Civ. Pro. Code, s. 575, and was heard by a Bench of three Judges, including the Judges who first heard the appeal:—Held, by Best and Weir, J.J. (Murtsami Aggar, J., dissentient) that the District Judge had jurisdiction to remove the trustee hostilely for breach of trust in a suit under Civ. Pro. Code, s. 539. SUBBAYYA v. KRISHNA, 14 M. 186=1 M.L.J. 95

... 132

(80) S. 540—Powers of an Appellate Court to remand for decision upon evidence—Adherence to the Code.—The sections in Chapters XLI and XLII, Civ. Pro. Code, relating to the hearing of appeals, provide the only powers that can be exercised by an Appellate Court in remanding a suit for the consideration of evidence by the Court from which the appeal is preferred. VENKATA VARATHA THATHA CHARIAR v. ANATHA CHARIAR, 16 M. 299 (P.C.)=2 M.L.J. 180=3 Sar. P.C.J. 364

... 916

(81) S. 544—Appeal by two persons—Withdrawal of one appellant from appeal—Reversal of decree on appeal.—A decree was passed for the plaintiff in a suit to redeem a kanom brought against various persons most of whom disclaimed all interest. An appeal was preferred by one of the defendants who claimed to be the jeezum of the premises comprised in the kanom and another who held a kanom from him. The first-mentioned appellant withdrew from the appeal which, however, was prosecuted by the other and the Appellate Court reversed the decree. Held, that since the appellants were the only substantial defendants the Appellate Court was right in allowing the appeal to proceed. SHIMANA VIKRAMAN v. RAYAN, 16 M. 293

... 911

(82) —S. 559—Parties—Joinder of respondents on appeal—Collusive discharge by one of two creditors—Mortgage.—In 1877 the plaintiff executed a deed of hypothecation to one of two partners to secure a loan obtained from them jointly. In 1881 the plaintiff sold, inter alia, the hypothecated property to defendants Nos. 2 to 4, and it was arranged that the secured debt should be paid off by the vendees. They failed to do this, but in 1882 they executed a mortgage for the amount due in favour of the other of the two partners, and he thereupon gave a written discharge to the plaintiff, who was not a party to the hypothecation. The latter brought a suit in 1885 upon the hypothecation bond and obtained a personal decree against the present plaintiff who was ex parte, the amount of the decree being declared to be charged on the land in the possession of defendant No. 2 to 4. Meanwhile, defendant No. 1, who was the assignee of the mortgage of 1882, had obtained a decree upon that defendant No. 4. This decree not having been executed, he subsequently sued upon the mortgage again and obtained a decree against defendants Nos. 2 to 4. The plaintiff now sued to have the last-mentioned decree set aside and recover the balance of the purchase-money from defendants Nos. 2 to 4. The Court of First Instance passed a decree for the amount claimed by the plaintiff and directed the Court of First Appeal to pass a decree for the amount prayed for. KANAGAPPA v. SOKKALINGA, 15 M. 962=2 M.L.J. 175

... 605

1087
GENERAL INDEX.


(83) S. 562—Act VII of 1898, s. 49—Power of Appellate Court to remand suit—Preliminary point—Report of Select Committee referred to.—It is competent for an Appellate Court to remand a case when the Court of First Instance records evidence on all the issues, and at the final hearing decides the suit erroneously on some particular point without expressing any opinion on the other issues. A statement in a sale certificate, granted by a Court, that the purchase is subject to a charge, is not conclusive evidence against the purchaser, when it is sought to enforce the charge by suit. RAMACHANDRA JOISHI v. HAJI KASSIM, 16 M. 207

(84) S. 556—Provincial Small Cause Courts Act—Act IX of 1897, s. 23—Suit transferred to regular side.—A suit of a nature cognizable by a Small Cause Court does not cease to be so within the meaning of Civ. Pro. Code, s. 556, because the Court in which it was instituted as a small cause suit returned the plaint to be filed on the regular side under Provincial Small Cause Courts Act, s. 23, on the ground that the suit involved questions of title. MUTHUKARUPPAN v. SELLEN, 15 M. 98


(86) S. 556, cl. 17—Provincial Small Cause Courts Act—Act IX of 1897, s. 24—Insolvency petition in execution of decree in small cause suit—Appeal.—In proceedings in execution of a decree passed in a small cause suit by a District Munsif who had been invested with insolvency jurisdiction, the judgment-debtors filed a petition under s. 344 of the Civ. Pro. Code, praying that they might be declared insolvents. Their petition was dismissed by the District Munsif: —Held, an appeal lay to the District Court against the order dismissing the petition. VAIKUNTA PRABHU v. MOIDIN SAHEB, 15 M. 89

(87) S. 596—“Value of the subject matter of the suit”—Civil Courts Act (Madras)—Act III of 1873, s. 14.—Civil Courts Act (Madras) III of 1873 does not control the construction of Civ. Pro. Code, s. 596, and under that section the real market value of the matter in dispute is the test as to whether or not an appeal lies to the Privy Council. PICHAYEE v. SIVAGAMI, 15 M. 237 (P.C.)

(88) S. 598—Application for certificate for appeal to Privy Council—Limitation Act—Act XV of 1877, s. 12, sched. II, art. 177.—In computing the period of limitation for an application for a certificate admitting an appeal to Her Majesty in Council, the time occupied in obtaining copies of the decree and judgment sought to be appealed against cannot be excluded. ANDERSON v. PERIASAMI, 15 M. 169

(89) Ss. 600, 602—Appeal to Privy Council—Enlargement of time for making deposit.—The Court may enlarge the time for making the deposit required by Civ. Pro. Code, s. 602, for cogent reasons under the rule in 11 I.A. 7 = 10 C. 557, but those reasons must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from doing so not owing to absence and the difficulty of getting funds, but owing to some circumstances accidental or otherwise over which he had no control or owing to mistake which the Court would consider not unreasonable or caused by negligence. RANGASAYI v. MAHALAKSHMAMMA, 14 M. 391

(90) S. 622—Letters Patent, s. 15—Judgment—Landlord and tenant—Suit for rent—See LETTERS PATENT, 1865, 14 M. 406.

(91) S. 622—Rent Recovery Act—Act VIII of 1865, s. 76—Revision by the High Court.—The defendant in a suit under Rent Recovery Act was evicted in pursuance of an order made under s. 10. That order having been reversed on appeal, he applied to be repossessed in possession, but the Sub-Collector dismissed that application :—Held, that the High Court could not interfere in revision under Civ. Pro. Code, s. 622. APPANDAI v. SRIHARI JOISHI, 16 M. 451
**GENERAL INDEX.**

**Civ. Pro. Code (Act XIV of 1882)—(Concluded).**

(92) S. 622—Revision—Jurisdiction—Succession Certificate Act—Act VII of 1889, s. 4—See **SUCESSION CERTIFICATE ACT (VII OF 1869)**, 16 M. 454.

**Club.**

*Goods supplied to a member—Suit on behalf of club—Parties.*—An action to recover the price of goods supplied to a member of a non-proprietary club, or on his responsibility cannot be brought in the name of the secretary of the club.  **MICHAEL v. BRIGGS,** 14 M. 362 ... 252

**Commission.**

(1) See **CIV. PRO. CODE (ACT XIV OF 1882)**, 15 M. 233.

(2) See **INSOLVENCY ACT (11 AND 12 VIC., C. 21)**, 14 M. 183.

**Company.**

See **COMPANIES ACT (VI OF 1882)**, 15 M. 97.

**Companies (Act VI of 1882).**

*S. 177—Voluntary liquidation—Liability to be sued.*—Where a Company has gone into a voluntary liquidation it can still be sued for debts due by it incurred prior to liquidation, although the fact that there are liquidators may be material if execution of the decree is sought.  **KOTHANDAPAN v. SOMASUNDARAM,** 15 M. 97 ... 416

**Compensation.**

(1) See **LAND ACQUISITION ACT (X OF 1870)**, 16 M. 309.

(2) See **LANDLORD AND TENANT,** 16 M. 407.

**Composition Deed.**

Registration Act III of 1877, s. 17 (e)—Foreign Court—Bankruptcy in Mauritius—Right of suit by trustee under foreign composition-deed in British India—Stamp Act I of 1879, s. 31—See **REGISTRATION ACT (III OF 1877),** 16 M. 33 = 2 M. L.J. 30 ... 707

**Conditional Pardon.**

See **CRIM. PRO. CODE (ACT X OF 1883)**, 15 M. 352.

**Construction.**

See **CIV. PRO. CODE (ACT XIV OF 1882)**, 15 M. 203.

**Contract.**

(1) To pay interest—Construction.—In reference to a debt carrying interest at a certain rate, the debtor gave to the creditor, on the approach of the date when the debt would have been barred by limitation, an acknowledgment to prevent that from occurring.  **Held,** that the acknowledgment, being intended only for the purpose of eliding the law of limitation, had not, by any novation of the contract, given to the creditor a right, in the absence of special stipulation to the contrary, to claim interest at a rate higher than that which the debt had borne down to the date when the acknowledgment was made.  **TANJORE RAMACHANDRA RAU v. VELAKUYIL ANANDAN PONNUSAMI,** 14 M. 258 (P.C.) = 181 A. 97 = 6 Sar. P.C.J. 30 = 15 Ind. Jur. 224 ... 181

(2) See **ACT III OF 1864** (MADRAS, ABKARI), 14 M. 82.

(3) See **ACT VII OF 1865** (MADRAS IRRIGATION), 15 M. 47.

**Contract Act (IX of 1872).**

(1) S. 2—Proposal—Promissory note—Stamp.—A letter, extorting a request for a loan, calling on the addressee to pay the amount to the bearer of the letter, and continuing *"this sum I shall repay with interest* ... *"and get back this letter: I request you will not neglect to pay the amount on the strength of this letter,"* is a promissory note and not a mere proposal for a loan.  **CHANNAMMA v. AYYANNA,** 16 M. 293 ... 904
GENERAL INDEX.

Contract Act (IX of 1872)—(Concluded).

(2) S. 27—Restraint of trade.—One having a license for the manufacture of salt entered into a contract with a firm of merchants, whereby it was provided that he should not manufacture salt in excess of the quantity which the firm, at the commencement of each manufacturing season, should require him to manufacture; and that all salt manufactured by him should be sold to the firm for a fixed price. The agreement was to be in force for a period of five years. In a suit by the merchants for an injunction restraining the licensees from selling his salt to others and for damages: Held, that whether or not the first of these clauses was invalid under s. 27 of the Contract Act, it was separable from the second clause which was not bad as being in restraint of trade. Sadagopa Ramanjiah v. Mackenzie, 15 M. 79

Page 404

(3) S. 39—Stamp Act—Act I of 1879, s. 3, cl. 4—Bond—Specific Relief Act—Act I of 1877, ss. 20, 54, 57—Contract for personal service—Contract for more than three years—Interim injunction.—The defendant signed an agreement in England with a railway company, whereby he contracted to serve the company exclusively for four years in India under a penalty of £100. The defendant having come to India at the expense of the company and served it for two years, left its service for that of another employer, alleging that he had not been fairly treated by a locomotive superintendent:— Held, (1) that the instrument executed by the defendant was an agreement merely and did not require to be stamped as a bond; (2) that the defendant had no right to rescind the agreement and the plaintiff company was entitled to an interlocutory injunction restraining defendant from serving others on the terms that the plaintiff company should consent to retain him in its employ. Madras Railway Company v. Rust, 14 M. 18...

Page 18

(4) S. 74—Penalty—District Municipalities Act (Madras)—Act IV of 1884, s. 261—Limitation.—The Council of a Municipality, under Madras Act IV of 1884, entered into a contract for the lighting of the town whereby it was provided that the deposit made by the contractor should be forfeited on any default made by him in carrying out the terms of the contract. One holding a decree against the contractor attached the amount of the deposit in the hands of the Municipal Council, but the Council subsequently passed a resolution in July 1888 declaring that the amount of the deposit had been forfeited. The decree-holder having purchased from the contractor his right to the money in question now sued in 1890 to recover it from the Municipality:— Held, (1) that the suit was not barred by the rule of limitation in Madras District Municipalities Act, s. 261; (2) that the provision for forfeiture in the contract was penal and unenforceable and consequently that the resolution of July 1888 was ultra vires. Srinivasa v. Rathanasabapathi, 16 M. 474 = 3 M.L.J. 134

Page 1037

(5) Ss. 215, 215—Principal and Agent—Unauthorised profits of agent—Evidence Act—Act I of 1872, s. 92—Contemporaneous oral agreement—Account sales—See Evidence Act (I of 1872), 16 M. 238.

Contribution.

See Limitation Act (XV of 1877), 15 M. 258.

Costs.

Of Government Solicitor—Taxation of, against unsuccessful litigant.—The Government Solicitor, who receives a monthly salary as such, receives no further payment from Government in respect of any costs of litigation to which Government is a party, except "out fees" or actual payments made by him on behalf of Government, and pays no fees when he instructs the Advocate-General; but, under his arrangement with Government, he is entitled to retain the costs decreed to Government, if recovered, and he then pays to the Advocate General the fees of counsel allowed by the taxing officer:— Held, that when a suit against Government is dismissed with costs, costs should be taxed in the usual way, and the taxing officer cannot enquire into the arrangement as to remuneration of its law officers by Government. Azimulla Sahib v. Secretary of State for India, 15 M. 405

Page 684
Court Fees Act (VII of 1870).

(1) Ss. 6, 28—Civ. Pro. Code, s. 111—Set-off—Character in which claim is made—Lavv of stamp due—See CIV. PRO. CODE (ACT XIV OF 1882), 15 M. 29.

(2) S. 7—Decree for ejectment and mesne profits—Court fee on memorandum of appeal.—A memorandum of appeal from a decree directing ejectment and awarding mesne profits is chargeable with Court fees calculated both on the land and on the mesne profits. BRAHMAYYA v. LAKSHMINARAYANASIMHAN, 16 M. 310 ...

(3) S. 7—Suit on a mortgage—Institution fee.—In a suit for the redemption of a kanom the institution fee must be computed on the kanom debt as it originally stood. REFERENCE UNDER COURT FEES ACT, s. 8, 14 M. 480 ...

(4) S. 7, cl. 9—Civil Courts Act—Act III of 1873 (Madras), s. 13—Suits Valuation Act—Act VII of 1897, s. 11—Valuation of mortgage suit—Appeal.—In a suit in the Court of a Subordinate Judge to redeem certain land on payment of Rs. 1,625, being a quarter of a debt for which it had been mortgaged together with other land, a decree was passed for redemption of part of the land, but the Court held that the plaintiff had not established his right to the rest. The plaintiff appealed to the High Court paying ad valorem Court fees computed on the value of the land exonerated only;—Held, (1) that the ad valorem Court fees should be computed on one-fourth of the mortgage debt; (2) that the appeal lay to the District Court, and since Act VII of 1897, s. 11, did not apply to the case, the petition of appeal should be returned for presentation in that Court. VASUDEV v. MADHAVA, 16 M. 336 ...

(5) Ss. 7, 12—Suit to cancel an instrument affecting land—Partial interest of plaintiff in the land—Appeal against an order for payment of additional Court Fees.—In a suit in a Subordinate Court by members of a Malabar tarwad to set aside an instrument affecting the whole of the tarwad property, the Subordinate Judge held that Court-fees were leviable, assessed on the value of the property, and accordingly ordered an additional payment to be paid by the plaintiffs. The plaintiffs failed to make the payment, and the Subordinate Judge dismissed the suit;—Held, (1) that the order was erroneous since the plaintiffs would not be gainers to the extent of the value of the property if they obtained a decree; (2) that the Court was not precluded by Court Fees Act, s. 12, from revising it, and reversing the decree. KANARAN v. KOMAPPAN, 14 M. 169 ...

(6) S. 10, cl. ii, s. 12, cl. ii.—The plaintiff sued four persons to recover, with interest of rent, possession of three parcels of land and obtained a decree in the Court of a District Munsif. The suit was valued at Rs. 453-8-0. Defendant No. 4, who claimed to be entitled as jemini to one of the parcels, preferred an appeal. The District Judge held that the suit should have been valued at Rs. 1,164-8-0, and he made an order that additional Court fees should be paid accordingly; the order not having been complied with, he made an order "original suit rejected." He subsequently referred the appeal for disposal to a Subordinate Judge, who accordingly passed a decree, allowing the appeal of defendant No. 4 with costs. On appeal against the above order and decree:—Held, that the order of the District Judge was irregular and the appeal should be restored to the file of the Subordinate Judge to be disposed of according to law. KERALA VARMA v. CHADAYAN RUTTI, 15 M. 181 ...

(7) S. 10, cl. ii, s. 12, cl. ii, sched. II, art. 17, cl. vi—Order in appeal by defendant for payment of fee by plaintiff.—Notice.—The plaintiffs, having raised a claim to a kanom attached in execution of a decree against the plaintiff's undivided brother, which was allowed in part, now sued for a declaration of their title to four-fifths of the kanom amount, affixing to the plaint a Rs. 10 stamp. The plaintiffs obtained a decree, against which the defendant appealed to the District Court. While the appeal was pending the District Judge, holding that the Court fee paid on the plaint was insufficient, ordered that the plaintiffs should pay the balance due on an ad valorem computation of the fee, and, in default, that the suit should stand dismissed. The plaintiffs first became aware of this order on the 26th
Court Fees Act (VII of 1870)—(Concluded).

March; the balance was not paid within the time fixed by the District Judge for the payment to be made, and on the 28th March he accordingly made an order dismissing the suit:—Held, that the plaint was insufficiently stumped, and that, in any case, the order dismissing the suit while the appeal was still pending was irregular. KAMMATHI v. KUNHAMED, 15 M. 298

(9) S. 17—Redemption suit—Claim by mortgagor for rent in same suit—Court fee on appeal.—A suit to redeem a mortgage for Rs. 3,500 and to recover a certain sum on account of rent was dismissed so far as the prayer for redemption was contested, and also part of the claim for rent was disallowed. It did not appear that the arrears of rent were intended to be set off against the mortgage debt. The plaintiff appealed:—Held, that the Court fee should be computed on the principal amount of the mortgage debt and on the claim which had been disallowed on account of rent. RAMA VAEMA RAJAH v. KADAR, 16 M. 416

(9) Ss. 19, 31—Complaints made by Municipal officers—Process fees.—No process fee is leviable on complaints made by Municipal officers, and the accused are not liable to refund sums illegally levied from the complainants as process fees. QUEEN-EMPRESS v. KHARAJHOY, 16 M. 423 = 1 Weir 723

(10) Sched. I., art. 1—Cancellation of an agreement to sell—Ad valorem fee.—The plaintiff had executed an agreement to sell certain property in discharge of mortgages executed on his behalf during his minority. He now brought a suit alleging that the agreement had been extorted from him, and praying for a declaration that the agreement was not binding on him and for any other relief "which the Court considers to be reasonable":—Held, that the plaint was bound to pay Court fees upon the value of his interest in the document sought to be invalidated. PARA-THAY v. SANKUMANI, 15 M. 294

Court of Wards.

See ALIYASANTANA LAW, 14 M., 269.

Criminal Procedure Code (Act X of 1882).

(1) Ss. 1, 195, 460—Penal Code, s. 228—Insulting a Magistrate—Village Munisif.—The accused intentionally insulted a Village Munisif in the discharge of his magisterial duties; the Village Munisif did not prefer a complaint or sanction a prosecution, but a Second-class Magistrate charged the accused under Penal Code, s. 228, on a police report and convicted him:—Held, (1) that Crim. Pro. Code, ss. 460—482, do not apply to Village Munisifs; (2) that the Second-class Magistrate was competent to try the plaint, and the conviction was right. QUEEN-EMPRESS v. VENKATASAMI, 15 M. 131 = 2 Weir 605

(2) S. 2—Letters Patent, s. 29—Scheduled Districts Act—Act XIV of 1874, notifications under—Agency tracts, jurisdiction of High Court over—Agency Rules—Act XXIV of 1839 (Madras); s. 3.—The High Court set aside a conviction by the Agent to the Governor in Vizagapatam on a charge of culpable homicide not amounting to murder, and directed that the accused be tried in the Sessions Court at Vizagapatam on a charge of murder. The accused was tried accordingly, and was convicted of murder, and he appealed to the High Court. The Agency tract of Vizagapatam is a scheduled district under Act XIV of 1874, and the Governor in Council extended the operation of the Crim. Pro. Code of 1861 to it by a notification made under that Act in 1863. In 1868 the Governor in Council, by a notification under Madras Act XXIV of 1839, constituted the Agent a Sessions Judge under the Crim. Pro. Code:—Held, that the High Court had jurisdiction to direct that the accused be tried by the Sessions Judge under the provisions both of the Letters Patent and of the Crim. Pro. Code. QUEEN-EMPRESS v. BUDARA JANNI, 14 M. 121 = 2 Weir 7

(3) Ss. 15, 16—Bench of Magistrates—Constitution of the Bench under the rules of the Government of Madras.—The accused was tried on a charge under
GENERAL INDEX.

Criminal Procedure Code (Act X of 1882)—(Continued).

Indian Penal Code, s. 352, by a Bench of Magistrates, consisting of a pensioned District Munisif who had been appointed Chairman of the Bench and one Special Magistrate. The Magistrates differed in opinion, but the Chairman gave his casting vote for conviction, and the accused was convicted and sentenced:—Held, that the Court was not legally constituted under the rules of the Government of Madras, and the conviction should be set aside. QUEEN EMPIRESS v. MUTHIA, 16 M. 410 =_p_ 22 Weir 14 992

(4) Ss. 17, 528—A Magistrate, who is an subordinate to Sub-Division Magistrate, is also subordinate to the District Magistrate within the meaning of Crim. Pro. Code, s. 528. THAMAN CHETTI v. ALAGIRI CHETTI, 14 M. 399 =_p_ 2 Weir 688 280

(5) S. 40—Transfer of a Sub-Registrar invested with powers of a Special Magistrate—Act XXIV of 1859 (Madras), s. 48.—A Sub-Registrar having been invested with magisterial powers with reference to offences under Act XXIV of 1859 was transferred from the place where he was officiating at the time he was so invested to another place, and there took on to his file and tried certain cases. The District Magistrate having reported the cases for the orders of the High Court, the Court declined to quash his proceedings. QUEEN-EMPIRESS v. VIRA NAYA, 15 M. 132 =_p_ 2 Weir 605 440

(6) S. 164—Oaths Act—Act X of 1873, ss. 4, 14.—See ACT X OF 1873 (OATHS), 16 M. 421.

(7) Ss. 139, 297, 288, 339, 319—Conditional pardon to prisoner—Approver, trial of—Proof of confessional statements of accused.—Several persons were charged with dacoity. While the case was pending, two of the accused made confessional statements: afterwards a conditional pardon was tendered to them, and they were examined as witnesses by the Magistrate and subsequently on behalf of the prosecution in the Sessions Court, to which the other accused were committed for trial. They there denied that they had been taken as approvers, whereupon the Sessions Judge placed them in the dock, called on them to plead, and permitted the depositions made by them before the Magistrate, but not their confessional statements to be read to the jury:—Held, that the trial of the two persons, who had not been committed to the Sessions Court, was ultra vires. Per cur: The Sessions Judge committed an irregularity in refusing to place on the record the confessional statements of persons whom he treated as accused. It is unfair to put an approver whose conditional pardon has been cancelled on trial, along with other prisoners, in the course of whose trial such approver has given evidence. QUEEN-EMPIRESS v. RAMA TEVAN, 15 M. 392 =_p_ 2 Weir 153, 376 and 394 598

(8) S. 195—Registration Act—Act III of 1877, ss. 72-75—" Court "—Sanction prosecution for perjury.—A Registrar, acting under Registration Act, ss. 72-75, is a Court for the purposes of Crim. Pro. Code, s. 195. ATCHAYYA v. GANGAYYA, 15 M. 138 (F.B.) =_p_ 2 Weir 468 444

(9) Ss. 195, 435, 478—Forged documents filed in Court—Prosecution ordered by Court.—Certain documents having been put into Court in a suit pending before a District Munisif, but not given in evidence, the District Munisif made an order for the prosecution of the parties who so put them in, on the ground that the documents were forgeries:—Held, (1) that the High Court had power to revise the proceedings of the District Munisif; (2) that the District Munisif was competent to go beyond the record; (3) that the order was wrong and should be set aside. ABDUL KADAR v. MEERA SABER, 15 M. 221 =_p_ 2 M.L.J. 149 =_p_ 2 Weir 174 507

(10) S. 197—Prosecution of public servants—Necessary sanction—Indeterminateness of sanction.—An order by the Board of Revenue sanctioning the prosecution of a Deputy Tahsildar by the Collector of the district for " bribery " or such of the charges set forth in the Deputy Collector's report as he " thinks likely to stand investigation by a Criminal Court " is not a legal sanction within the meaning of the Crim. Pro. Code, s. 197, and a commitment on any of such charges should be quashed. QUEEN-EMPIRESS v. SAMAVISIR, 16 M. 469 =_p_ 3 M.L.J. 227 =_p_ 2 Weir 220 1089

1093
Criminal Procedure Code (Act X of 1882)—(Continued).

(11) Ss. 198, 315—Defamation of a wife—Complaint by husband.—When a married woman is defamed by the imputation of unchastity, her husband is a person aggrieved, upon whose complaint the Magistrate may take cognizance of a complaint under Crim. Pro. Code, s. 198. CHEL- LAM NAIDU v. RAMASAMI, 14 M. 379 = 1 M.L.J. 242 = 2 Weir 230 265

(12) S. 260—Summary procedure—Bias of Magistrate.—A Deputy Magistrate, being also the Chairman of a Municipality, without issuing process, or making a record of the proceedings, or dismounting from a pony on which he was riding, convicted and fined an inhabitant of the town, who admitted that he had raised the level of a road within the limits of the Municipality which was considered by the Magistrate to amount to the offence of causing an obstruction in a public way:— Held, the Magistrate's procedure was illegal, and the conviction should be set aside. QUEEN-EMPRESS v. ERUGADU, 15 M. 83 = 2 Weir 326 407

(13) Ss. 307, 418—Verdict of jury—Perversity of verdict—Procedure when Sessions Judge disagrees with verdict—Appeal against conviction.—A jury returned a verdict of guilty against the accused in a trial for dacoity. The Sessions Judge accepted the verdict, although he said he did not agree with it and had charged the jury for an acquittal; he observed that he could not refer the verdict as perverse since there was evidence against the accused which it was open to the jury to believe. The accused appealed to the High Court on the ground (inter alia) that the Sessions Judge ought to have referred the case to the High Court under Crim. Pro. Code, s. 307:— Held, that since there had been no misdirection by the Sessions Judge, and there was some evidence to support the verdict, the High Court had no power to interfere, however absurd the verdict might be considered. QUEEN-EMPRESS v. CHINNA TEVAN, 14 M. 36 = 2 Weir 390 26

(14) S. 419—Petition of appeal, presentation of.—A petition of appeal sent by post is not presented to the Court within the meaning of Crim. Pro. Code, s. 419. QUEEN-EMPRESS v. ARLAPPAD, 15 M. 137 = 2 Weir 458 444

(15) Ss. 435, 439, 440—Petition to revise a judgment of acquittal.—An appeal against an acquittal by way of revision is not contemplated by the Code, and it should, on public grounds, be discouraged. THANDAVAN v. PERRIYANDA, 14 M. 363 = 2 Weir 571 253

(16) Ss. 436, 437—Further inquiry—Power of District Magistrate to suggest a committal.—A District Magistrate who refers a case to a Sub-Magistrate for further inquiry has no authority to fetter him in the exercise of his judicial discretion as to the question whether the case should or should not be committed to the Court of Sessions. QUEEN-EMPRESS v. MUNISAMY, 15 M. 39 = 2 Weir 255 = 2 Weir 542 377

(17) S. 437—Further enquiry—Revisional jurisdiction.—It is competent to a Sessions Judge acting under Crim. Pro. Code, s. 437, to direct further enquiry to be held where additional evidence is not forthcoming. QUEEN-EMPRESS v. BALASINNATAMBI, 14 M. 334 (F.B) = 1 M.L.J. 343 = 2 Weir 557 234

(18) S. 454—European British subject—Relinquishment of right to be dealt with as such British subject—Trial by Second-class Magistrate.—A European British subject was prosecuted in the Court of a Second-class Magistrate, who was a Hindu, on a charge of mischief. The accused appeared and did not plead to the jurisdiction of the Magistrate, who proceeded with and disposed of the case:—Held, that the Magistrate had not acted ultra vires since the accused had relinquished his right to be dealt with as a European British subject. QUEEN-EMPRESS v. BARTLETT, 16 M. 308 = 2 Weir 579 922

(19) S. 466—Act X of 1882, s. 197—Government orders as to tribunal for trial of officials.—In 1890 the Collector of Ganjam reported to the Board of Revenue a charge of bribery, &c., against a Sub-Magistrate and received directions to send the case for trial to some Magistrate other than himself,
GENERAL INDEX.

Criminal Procedure Code (Act X of 1882)—(Concluded).

or the Principal Assistant Magistrate. He accordingly sent it to the Senior Assistant Magistrate of Berhampore; the accused was convicted, but he appealed to the Sessions Judge, who reversed the conviction on the merits. The Government did not appeal against the acquittal of the accused, but the District Magistrate referred to the High Court the question whether the Magistrate had jurisdiction:—Held, on the reference, that it was not a case for the interference of the High Court, because (1) it was not shown that the Magistrate had acted without jurisdiction; (2) Government had not appealed against the acquittal by the Sessions Judge who had tried and determined the question of jurisdiction. QUEEN-EMpress v. RANGA RAU, 15 M. 36 = 2 Weir 218

375

(20) S. 476—The nearest Magistrate of the first class—Jurisdiction of such Magistrate.—A Head Assistant Magistrate sanctioned a prosecution under Crim. Pro. Code, s. 195, on the charge of preferring a false complaint, and forwarded his proceedings to the Deputy Magistrate of another division of the district who ordinarily had no jurisdiction to try offences committed in the division under the Head Assistant Magistrate:—Held, that the Deputy Magistrate had jurisdiction to try the charge. QUEEN-EMpress v. NAGAPPAPA, 16 M. 461 = 2 Weir 590

1028

(21) S. 488—Maintenance case—Failure to pay process fees.—An application for maintenance under Crim. Pro. Code, s. 488, should not be dismissed on the failure on the part of the applicant to comply with an order for payment of process fees. Ponnamal, in re, 16 M. 294 = 2 Weir 252

870

(22) S. 489—Maintenance.—A Magistrate has no power under Crim. Pro. Code, s. 489, to make an order for maintenance at a progressively increasing rate, but the fact that the child has grown older might constitute a change in the circumstances calling for a variation in the rate. Ramayee, in re, 14 M. 398 = 2 Weir 651

279

(23) S. 523—Village Munisif.—A Village Munisif not being a Magistrate under Crim. Pro. Code, a Joint Magistrate has no power under Crim. Pro. Code, s. 523, to withdraw a case from a Village Munisif and transfer it for disposal to a Second-class Magistrate. Madavarayachar v. Suhba RAU, 15 M. 94 = 2 Weir 692

414

Custom of Trade.

Notoriety and definiteness of custom—Requirements of a binding custom of trade.—Suit for damages for breach of a contract to let horses on hire. The plaintiff hired a pair of horses at Ootacamund from the defendant for a period of six months and on one occasion drove them beyond the Municipal limits of the station; on their return the defendant took away the horses from the plaintiff, which was the breach complained of. The defendant pleaded that the plaintiff’s use of the horses as above was contrary to the local custom of the trade—Held, that since the alleged custom was not shown to be either certain or invariable or so notorious that persons should be held to enter into agreements with reference to it, it formed no defence to the action. Price v. Browne, 14 M. 420 = 1 M.L.J. 540

294

Damages.

(1) See Act III of 1864 (Madras Abkari), 14 M. 82.
(3) See Custom of Trade, 14 M. 420.

Declaratory Decree.

(1) Withdrawing portion of claim—Specific Relief Act, s. 42—See Specific Relief Act (I of 1877), 14 M. 207.

(2) See Specific Relief Act (I of 1877), 14 M. 26.

Declaratory Relief.

See Alivyasantana Law, 15 M. 186.

1095
Declaratory Suit.
(1) See ACT III OF 1873 (MADRAS CIVIL COURTS), 15 M. 501.
(2) See CIV. PRO. CODE (ACT XIV OF 1882), 15 M. 302.

Decree.
(2) See CIV. PRO. CODE (ACT XIV OF 1882), 15 M. 345.

Defamation.
(1) Privilege—Communication by a servant of a company to one of his subordinate as to another subordinate.—In an action for damages for defamation brought by a brewer recently employed by a brewery company against the local manager of the company, the defamatory statements complained of were contained in letters written by the defendant to the directors of the company, and also in a letter written to another brewer in the employ of the company, in which he said that the plaintiff "had failed most utterly, and I have been compelled to inform him that you will take the position of senior brewer at the brewery."—Held, that all these statements were in the nature of privileged communications. LEISHMAN v. HOLLAND, 14 M. 51
(2) See CRIM. PRO. CODE (ACT X OF 1882), 14 M. 379.

Divorce Act (IV of 1869).
(1) Evidence of marriage.—The bare assertion of a petitioner under Divorce Act, 1869, is not sufficient proof of her marriage to satisfy the requirements of that Act. RATHNAMMAL v. MANIKKAM, 16 M. 455 (F.B.)
(2) Native Christian—Hindu convert to Christianity.—A parish, who had been converted to Christianity, presented a petition of divorce under Act IV of 1869 on the ground of adultery committed by his wife before his conversion.—Held, that the Court had no jurisdiction to entertain the petition. PERIANAYAKAM v. POTTURANNI, 14 M. 382
(3) S. 36—Alimony pendente lite—Net income—Allowable deductions—Change of circumstances—Letters Patent, s. 15—Order fixing date of hearing—Civ. Pro. Code, s. 156—See LETTERS PATENT, 1865, 14 M. 88

Easements Act (V of 1882).
(1) S. 15—Easement—Kumki right in South Canara.—The kumki right of landholders in South Canara is not an easement, but a right exercised over Government waste by permission of Government and it does not entitle the landholder to a decree for possession. NAGAPPA v. SUBBA, 16 M. 304.
(2) S. 24—Rights accessory to an easement.—The plaintiff having in a previous suit obtained a decree declaring his right of having the roof of his house projecting over the defendants' land, and discharging water thereon, now sued for a declaration of his right to go upon the defendants' land for the purpose of repairing the roof.—Held, that the plaintiff was entitled to the right claimed as being accessory to the easement already established, but that it should be exercised only once a year and after notice to the defendants. HAYAGREYA v. SAMI, 15 M. 286
(3) Ss. 53, 56—License—Permission to capture elephants.—The owner of a forest, in 1883, executed an instrument whereby he gave to the other party thereto permission to trap fifty elephants in the forest, and stipulated for a certain payment in respect of each elephant which was captured. In 1884, without the knowledge of the owner of the forest, the other party, by a similar instrument, gave permission to the defendant to trap ten elephants. The instrument of 1883 was expressed to be in force for six years, that of 1884 for four years. The latter instrument was not ratified by the owner of the forest, who, in 1885, granted the exclusive right of trapping elephants to the plaintiff. The plaintiff now sued the defendant...
GENERAL INDEX.

Easements Act (V of 1882)—(Concluded).
for possession of two elephants which had been captured by him:—Held, that the instrument of 1883 was a license merely, and that, since the owner of the forest had never consented to or ratified the instrument of 1884, the plaintiff was entitled to a decree. RAMAKRISHNA v. UNNI CHECK, 16 M. 380 = 3 M.L.J. 27

East India Company.
See INAM COMMISSION, 14 M. 431.

Ejectment.
(1) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 16 M. 271.
(2) See EVIDENCE ACT (I OF 1872), 16 M. 194.
(3) See HINDU LAW—PARTITION, 16 M. 96.
(4) See LANDLORD AND TENANT, 14 M. 269, 16 M. 131.
(5) See MIRASI RIGHTS, 14 M. 93.
(6) See SPECIFIC RELIEF ACT (I OF 1877), 16 M. 31.

Elephants.
See EASEMENTS ACT (V OF 1882), 16 M. 280.

Enfranchisement.
See HINDU LAW—INHERITANCE, 15 M. 384.

Enhancement.
See LANDLORD AND TENANT, 14 M. 365.

Equitable Assignment.
Proceeds of an intended appeal—Property substituted by agreement between decreeholder and third parties for such proceeds—Right to follow such proceeds in hands of such third parties—Notice.—A judgment-debtor paid into Court the sum due under a decree passed against him on appeal. The expenses of the appeal had been advanced by the present plaintiff under an agreement signed by the appellants, which provided as follows: "you should first "take out of the amount which may be collected from the defendants the "whole of the amount incurred on account of the said costs." Persons holding a decree against the successful appellants sought to enforce it against the money in Court having notice of the above agreement. Their application was first resisted by the successful appellants on the ground that the money was charity property, but subsequently it was consented to, and the money was paid out to them on their substituting certain other property for the purposes of the charity. The present plaintiff, having obtained a decree on the above agreement, now sought to execute it against the money which had been so paid out:—Held, that the above agreement constituted a valid charge on the funds realized under the appellate decree, which charge was binding on the payees of the money and the plaintiff was not bound to proceed against the property substituted by them for the purposes of the charity. PALANIAPPA v. LAKSHMANAN, 16 M. 429 ...

Estoppel.
(1) See CIV. PRO. CODE (ACT XIV OF 1883), 15 M. 412, 15 M. 477.
(2) See EVIDENCE ACT (I OF 1872), 15 M. 303, 15 M. 486, 16 M. 329.

European British Subject.
See CRIM. PRO. CODE (ACT X OF 1882), 16 M. 308.

Evidence.
(1) See DIVORCE ACT (IV OF 1869), 16 M. 455.
(2) See INSOLVENT ACT, 11 AND 12 VIC., C. 21, 14 M. 404.

M V—138

1097
Evidence (Secondary).


(2) Registration Act—Act III of 1877, ss. 17 (d), 49—Specific Relief Act—Act I of 1877, s. 4 (c)—Admissibility of unregistered sale-deed—Suit for specific performance of contract to sell land—See REGISTRATION ACT (III OF 1877), 14 M. 55.

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 15 M. 99.

(4) See EVIDENCE ACT (1 OF 1872), 15 M. 491.

(5) See INAM COMMISSION, 14 M. 431.

Evidence Act (1 of 1872).

(1) S. 13—Ejectment—Notice to quit.—In a suit for possession of land, the plaintiffs claimed title under a lease from the shrotriemdas of the village where the land was situated. The defendants, who had obstructed the plaintiffs from taking possession of part of the land, claimed to have permanent occupancy rights, and asserted that the shrotriemdas were entitled not to the land itself, but to meivaram only. To meet this allegation the plaintiffs tendered in evidence documents executed by other tenants in the same village showing that they were purakudis merely. The defendants had received no notice to quit before suit.—Held, (1) that the documents above referred to were admissible under Evidence Act, s. 13; (2) that the plaintiffs were entitled to eject the defendants without proof of notice to quit, as it did not appear that the latter were in possession as tenants at the time when the suit was filed. VYTHILINGA v. VENKATACHALA, 16 M. 294... 842

(2) S. 35—Malabar Law—Customary Law of Mapillas—Multihariousness—Suit by karnavan—Limitation—Evidence—Petition and order.—The plaintiffs sued as the karnavan of a Mapilla tarwad to recover lands in the possession of the defendants who were a donee from and the descendants of a previous karnavan and their tenants. It appeared that the alleged previous karnavan had died less than twelve years before the suit was filed, but more than twelve years before the joinder, as supplemental defendant, of one to whom he had conveyed certain property by way of gift five years before his death. An issue was raised as to whether the rights of the parties were governed by Makkatalayam or Marumakattayam law, and an order of a District Munif reciting a petition to which the alleged previous karnavan was a party, was put in evidence to show that he had in a particular instance acted in the capacity of karnavan of a Marumakattayam tarwad. The rough draft of a plaint which had been filed by the alleged previous karnavan was put in evidence to show that he admitted having alienated property in a manner which would be adverse to the claim of his tarwad.—Held, (1) that on the allegations in the plaint the plaintiff was entitled to maintain the suit alone, and that the suit was not bad for multifariousness; (2) that the order and draft plaint were admissible in evidence for the abovementioned purposes; (3) on the evidence, that the plaintiff had succeeded in office the previous karnavan as alleged, and that the previous karnavan had followed the Marumakattayam rule, although it was shown that other members of the family bad dealt with property, described as self-acquired, under the precepts of Muhammadan law; (4) that the suit was barred by limitation a-a against the donee above referred to, her possession having been adverse to the tarwad since the date of the gift. Observations as to documents marked as exhibits without proof. BYATHIAMMA v. AVULLA, 15 M. 19... 363

(3) S. 35—Recital in a judgment—Admission of jenmi’s title.—In a suit by a melkinamdar to redeem a kanom the kanom document was proved to have been lost; it appeared that a previous suit had been brought by the jenmi to redeem the same kanom, and the judgment in that suit, in which it was stated that the defendants admitted their position as kanomdash, was tendered in evidence to prove the jenmi’s title.—Held, that the judgment was admissible in evidence. THAMA v. KONDAN, 15 M. 378... 616

1098
GENERAL INDEX.

Evidence Act (1 of 1872)—(Continued).

(4) S. 35—"Res inter alias acta."—Title deeds—Petition of plaintiff’s predecessor asserting title—Judgment obtained by plaintiff’s predecessor recognising title.—In a suit to establish the plaintiff’s title to certain land, he put in evidence (1) a conveyance in favour of his father; (2) a sale certificate issued to his father’s vendor; (3) an order made in certain execution proceedings which was received as a petition by his father asserting his title; (4) a judgment obtained by his father in which his title was recognised. Neither the defendants nor their predecessors were parties to any of these instruments or proceedings:—Held, that all these documents were relevant. VENKATASAMI v. VENKATREDDI, 15 M. 123.

538

(6) Ss. 57, 58—Civ. Pro. Code, ss. 15, 539—Public charitable trust—District Court, jurisdiction of—Books of history.—A church at Palayur and the property appertaining to it were in the possession of certain of the yogakars or parishioners, who had been elected kulkars or church-wardens, but whose election had since been superseded in favour of three other persons who now sued to recover possession. The plaintiffs were Roman Catholics; and with the three persons above referred to were joined as plaintiffs the Vicar Apostolic, the Vicar appointed to the church by him, and two other persons representing the Roman Catholic yogakars. The defendants were Chaldean Syrian Christians, and with those in possession were joined as defendants the Chor Episcopa, the Vicar appointed to the church by him, and four persons representing the other yogakars. The plaint was framed under Civ. Pro. Code, s. 539, and contained, besides a prayer for possession, prayers for a declaration that the church, etc., was held on trust for worship according to the faith and discipline of the Church of Rome, and for injunctions against the defendants. The suit was tried by the District Judge in whose Court it was instituted, although the defendants pleaded that it was within the jurisdiction of the Subordinate Court, s. 539, being inapplicable. He passed a decree as prayed, holding that the church, etc., was dedicated to the trust stated in the plaint, although it had been diverted from the purposes of that trust for a time. In coming to this conclusion, he referred to a Portuguese work dated 1606, "India Orientalis Christiana" published in 1794, and Hough's "History of Christianity in India" published in 1839:—Held, (1) that the suit not being one brought by beneficiaries against trustees, or for any of the purposes mentioned in Civ. Pro. Code, s. 539, that section had no application; (2) that although the suit should accordingly have been brought in the Subordinate Court, the District Judge had jurisdiction to try it; (3) that the District Judge was justified in referring to the books aforesaid; (4) that the decree was right, on its appearing that the church, etc., had been held on the above trust from 1599 to 1832 with a doubtful interruption for one year, although the original trust may have been different. AUGUSTINE v. MEDLYCOTT, 15 M. 241.

519

(6) Ss. 65, 91—Limitation Act—Act XV of 1877, s. 19—Acknowledgment in writing—Secondary evidence.—Limitation Act, s. 19, must be read with Evidence Act, ss. 65 and 91, and does not exclude secondary evidence in cases where such would be admissible under s. 65. CHATHU v. VIRABAYAN, 15 M. 491.

694

(7) Ss. 60, 132—Self-incriminating statements of witness—Proof and admissibility of depositions containing such statements in proceedings against the witness.—A revenue official was charged with the offence of attempting to receive a bribe from certain ryas who gave evidence for the prosecution, and he was convicted. He subsequently charged the ryast with having conspired to bribe him, and in their trial their depositions in the previous case were tendered in evidence for the prosecution:—Held, that the depositions should have been admitted in evidence. QUEEN-EMPERESS v. SAMIAPPA, 15 M. 62 = 2 Writ 794.

398

(8) S. 92—Contract Act—1X of 1872, ss. 215, 216—Principal and agent—Unauthorised profits of agent—Contemporaneous oral agreement—Accountancy.—The plaintiffs, a firm of merchants, entered into an agreement (which was reduced to writing) with the defendants, who were dealers in...
Evidence Act (1 of 1872)—(Continued).

coffee and other produce, to the following effect, viz.: that all consignments of produce, which the defendants might make to Europe, should be made through the plaintiffs' firm; that the plaintiffs should receive a commission of 1 per cent. for themselves and 2½ per cent. for their agents at the port of consignment; that the plaintiffs should make certain advances to the defendants against the produce; and that the sums advanced should be repaid with interest at such rates as may be fixed at the various dates of such loans, it being agreed that such interest is to be regulated by the then prevailing rate at the office of the Bank of "Madras at Calcutta." The written agreement was silent as to the mode of sale, rate of exchange and other matters connected with the business; but it was, at the same time, further agreed orally that the sales of the defendants' produce were to be made under the directions and at the discretion of the plaintiffs. Business was carried on on the footing of the above agreements for eighteen months, during which period the plaintiffs furnished to the defendants copies of the account-sales for the consignments made through them and they were accepted without objection by the defendants. The business resulted in the defendants becoming indebted to the plaintiffs; and about nine months after the date of the abovementioned agreement the defendants executed in favour of the plaintiffs a mortgage in which the then amount of their indebtedness was recited. The defendants became further indebted to the plaintiffs, and the plaintiffs having furnished them with an account of the transactions between them now sued to recover the balance due. The defendants admitted the correctness of the debit side of the account, but denied in general terms that of the credit side. Evidence was given by the plaintiffs of the receipt of the account-sales in the ordinary course of business and of the delivery of copies to the defendants from time to time, and they were filed as exhibits without further proof. It appeared that in the account the defendants were charged on account of local exchange at a rate higher than that actually paid to the Bank, with which the plaintiffs had made a special arrangement without reference to the contract with defendants. It also appeared that the plaintiffs, under an arrangement made with their agents at the ports of consignment, had received from them about 1 per cent. on the various consignments by way of return commission, and that this arrangement had not been communicated to the defendants:—Held, (1) that the account-sales were prima facie proof of the transactions to which they related; (2) that evidence of the contemporaneous oral agreement was admissible; (3) that the defendants were not entitled to the benefit of the special arrangement between the plaintiffs and the Bank; (4) that the plaintiffs were liable to the defendants for the amount received by them as return commission. MAYEN v. ALSTON, 16 M. 239.

873

(9) S. 92—Sale-deed—Contemporaneous oral agreement for reconveyance—Mortgage—See MORTGAGE—GENERAL, 16 M. 80.

(10) S. 114—Estoppel—Transfer of Property Act—Act IV of 1882, s. 60—Partial v. demission—Indissolubility of mortgage—Civil Courts Act—Act III of 1873 (Madras), s. 14.—The Karunavan of a Melkarwar, having the jenna title to certain land and holding the nusiusa right in a certain public devasam to which other land belonged, demised lands of both description on kanom to the defendant's turwad, and subsequently executed to the plaintiff a mulkaran of the first-mentioned land and purported to sell to him the jenna title to the last mentioned land. In a suit brought by the plaintiff to redeem the kanom, and to recover arrears of rent:—Held, (1) that, for the purposes of determining the jurisdiction of the Court of appeal, the value of the subject-matter of the suit was the aggregate value of the two heads of relief; (2) that the defendants were not estopped from denying the plaintiff's right to redeem, on the ground that he did not represent the devasam; (3) that the plaintiff, who had denied the title of the devasam in the Court of First Instance, was not entitled to redeem the kanom as a whole, by virtue of his admitted title to part of the premises comprised in it. KONNA PANIKAR v. KARUNAKARA, 16 M. 328.

936

(11) S. 115—Estoppel by conduct—Hindu Law—Adoption.—A Hindu widow, professing to have authority from her husband to do so, took the second
Evidence Act (1 of 1872) — (Concluded).

defendant in adoption, brought him up as her adopted son, and permitted him to perform the funeral ceremonies of her husband. Land to which she otherwise would have been entitled was attached in execution of a decree against defendant No. 2. She now sued to release the attachment alleging the adoption was bad, as having been unauthorised; — Held, that the plaintiff was estopped from raising this contention. KANNAMMAL v. VIRASAMI, 15 M. 486 = 2 M.L.J. 114


(13) S. 115 — Estoppel — Execution-purchaser without notice of mortgage. — The plaintiff sued to realise his security under a mortgage executed to him by defendant No. 1, by sale of the mortgage premises which were in the possession of defendants Nos. 2 and 3. It appeared that the plaintiff had previously attached and brought to sale the mortgage premises in execution of a decree against defendant No. 1, and that the other defendants had purchased at the Court-sale without notice of the plaintiff’s mortgage, which was not referred to in the attachment list for sale certificates; — Held, that the plaintiff was estopped from setting up his present claim. JAGANNATHA v. GANGI REDDI, 15 M. 804

Execution of Decree.

(1) See Act I of 1866 (MADRAS AKBARI), 16 M. 479.


(3) See Limitation Act (XV of 1877), 14 M. 252.

Executor.

See Perpetuities, Rule against, 15 M. 424.

Foreign Court.

Judgment of — Bankruptcy in Mauritius — Right of suit by trustee under foreign composition-deed in British India — Stamp Act I of 1879, s. 31 — Registration Act 111 of 1877, s. 17 (e) — See Registration Act (III of 1877), 10 M. 85.

Foreign Judgment.


Fraud.


Government Solicitor.

See Costs, 15 M. 405.

Hindu Law.

1. — Adoption.
2. — Alienation.
3. — Custom.
4. — Debt.
5. — Gift.
6. — Guardianship.
7. — Impartible Estates.
8. — Inheritance.
10. — Maintenance.
11. — Marriage.
12. — Partition.
14. — Re-Union.
15. — Reversioner.
16. — Succession.
17. — Widow.
18. — Will.
GENERAL INDEX.

Hindu Law—I.—Adoption.

(1) By widow—Agreement between adoptive mother and natural father.—A Hindu, who is taken in adoption by a widow, acting under an authority from her husband, is not bound by an agreement entered into by her with his natural father at the time of the adoption. JAGANNADHA v. PAPAMMA, 16 M. 400—3 M.L.J. 193

(2) Competency of step-mother to give in adoption—Adoption of adult.—In a suit to set aside an adoption, it appeared that the person said to have been adopted was an unmarried man of forty years of age, who had already succeeded to his father's estate for twenty years at the time of the alleged adoption, and that he had been given in adoption by his step-mother without the previous consent of her husband, deceased;—Held, that the adoption was invalid on the ground that under the Hindu law a step-mother cannot give her step-son in adoption. Sembé: The adoption was not invalid by reason of the age of the alleged adopted son or of his having previously taken his patrimony in his natural family. Per cur: The English law of attainer did not apply in India in 1783. PAPAMMA v. APPA RAO, 16 M. 364—3 M.L.J. 60

(3) Jainas of Southern India—Personal law—Adoption—Proof of custom—Will of a Jain widow.—In a suit to declare plaintiff's right as the adopted son of a Jain (deceased) and as a beneficiary under the will of the adoptive mother, it appeared that the plaintiff had been taken in adoption by the widow without authority from her husband or consent of his kinsmen:—Held, that it lay on the plaintiff to prove by evidence that the adoption was valid and that he was entitled to take under the will according to the custom governing the family, and held, on the evidence, that the plaintiff had failed to prove this. Per Best, J.—If a Jain widow succeeds to her husband's property absolutely and has the right to dispose of it as she likes, the adoption of a son to herself who may succeed to such property would be valid. Observations of Holloway, J., in Rifkurn Lailah v. Soojun Mul Lailah (9 Mad. Jur. 21) distinguished, on the ground that there was no reason for supposing that the parties to the present suit were other than natives of Southern India whose ancestors had been converted to Jainism. PERIA ANMANI v. KRISHNASAMI, 16 M. 182—3 M.L.J. 109

(4) Made the day after the adoptive father made his will—Adopitive son bound by the will—Inconsistent pleas.—A Hindu wrote his will devising certain ancestral property to his wife and on the following day he registered it and took the plaintiff in adoption. The testator died shortly afterwards. It was found that the plaintiff's natural father was aware of the dispositions contained in the will and that the testator would not have adopted the plaintiff but for the consent of the natural father to those dispositions. The defendants who claimed under a gift from the wife had denied the adoption in their written statement, and on appeal raised the further plea that the adoption, if any, was conditional on the provisions of the will being acquiesced in:—Held, (1) that the defendants were not precluded from succeeding on the latter of these inconsistent pleas; (2) that the plaintiff was not entitled to the ancestral property devised by the will to the testator's wife. NARAYANASAMI v. RAMASAMI, 14 M. 172—1 M.L.J. 39

(5) Niyoga—Gift—Specific Relief Act—Act I of 1877, s. 19 (a)—Transfer of Property Act—Act IV of 1882, s. 43—See TRANSFER OF PROPERTY ACT, (IV OF 1882), 14 M. 459.

(6) See EVIDENCE ACT (I OF 1872), 15 M. 486.

(7) See HINDU LAW—WILL, 14 M. 65, 16 M. 355.

(8) See WILL, 14 M. 65.

———2.—Alienation.

(1) Of family property—Rights of a son unborn.—Under Hindu law a son conceived is equal to a son born; accordingly, an alienation by a Hindu to a bona fide purchaser for value is liable to be set aside by a son, who was in his mother's womb at the time of the alienation, to the extent of his share. SABAPATHI v. SOMASUNDARAM, 16 M. 76—2 M.L.J. 344
Hindu Law—2.—Alienation.—(Concluded).

(2) Power of father over ancestral land—Gift to daughters.—A Hindu, during the infancy of his son, conveyed certain immovable ancestral property to his wife and married daughters by way of gift. After his death the son sued by his next friend to have these alienations set aside and to recover the property:—Held, that the alienations should be set aside altogether.

Rayakkal v. Subbanna, 16 M. 84


(4) See Hindu Law—Widow, 14 M. 274.

—3.—Custom.

(1) See Hindu Law—Adoption, 16 M. 183.

(2) See Hindu Law—Inheritance, 15 M. 307.

(3) See Religious Institution, 16 M. 490.

(4) See Religious Office, 16 M. 146.

—4.—Debts.

Son's liability for his father's debt—Immoral origin of debt—Limitation Act—Act XV of 1877, sch. II, art. 120—Suit by a decree-holder against the sons of a deceased judgment-debtor whose property had passed to them.—A decree was passed against a Hindu for money dishonestly retained by him from the plaintiff's family to which he was accountable in respect of it. The judgment-debtor having died, the decree-holder sought to attach in execution property of the family which had passed into the hands of his sons by survivorship. The sons objected that such property was not liable to attachment, and the decree-holder was referred to a regular suit. He now brought a suit against the sons:—Held, (1) that the suit was governed by act. 120 of the Limitation Act and that time began to run for the purposes of limitation from the death of the father; (2) that the sons were not entitled to go behind the decree except for the purpose of showing that the judgment-debt was immoral or illegal in its origin; (3) that the judgment-debt was not of an illegal or immoral nature so as to exclude the pious obligation of the sons to discharge it.

Natesayyan v. Ponnu-

Sami, 16 M. 99 = 3 M. L. J. 1

—5.—Gift.

(1) Of land to a daughter—Presumption as to interest taken by donee.—In a suit to recover possession of certain land, the plaintiff claimed title under a gift made to his mother, deceased, by her father, whose sons and grandsons, the defendants, had entered into possession on the death of the donee, which took place less than three years before suit. The deed of gift was not produced, and it did not appear that the donee, who had been placed in possession of the land and had retained it for thirty-seven years, was a widow at the time of the gift:—Held, that the plaintiffs were entitled to a decree, there being no ground to presume that a life-interest merely was intended to pass under the gift.

Ramassami v. Papaya, 16 M. 466 = 3 M. L. J. 205

(2) See Hindu Law—Alienation, 16 M. 64.

(3) See Transfer of Property Act (IV of 1882), 14 M. 459.

—6.—Guardianship.


—7.—Impartible Estates.

(1) Poliem—Evidence of impartibility—Pannai lands attached to the poliem—Maintenance and marriage expenses of junior member of the family of poligar.—The step-brother of the holder of a poliem in the Madura district, of which the gross income was about Rs. 15,000 a year, sued him for a partition of the estate and in the alternative for maintenance. It appeared that the poliem had been held on military tenure from the sixteenth century, that it had never been partitioned, and that the custom
Hindu Law—7,—Impartible Estates—(Concluded).

of impartibility obtained in a large number of similar palioms in the same district. In 1824 and in 1812 enquiries were made of members of the zamindar's family and other persons connected with the zamindars to the nature of the estate, and their recorded answers showed that they understood the estate to be impartible and that it descended to a single heir:—

*Held,* (1) that the policy was impartible; (2) that the plaintiff was entitled to a decree for a monthly payment to him of Rs. 60 for his maintenance. The plaintiff's claim extended to certain 'pamai' lands within the limits of the zamindar; some of which had been handed down from zamindar to zamindar since 1811, others having been purchased by the plaintiff's father. The High Court found that they had been recognised and dealt with as part and parcel of the zamindar:—*Held,* that the pamai lands were impartible, and the plaintiff was not entitled to a share in them or in the cattle, etc., used for cultivating them. The plaintiff further claimed asum of Rs. 4,000 the amount of a loan alleged to have been contracted by him for the purpose of his marriage. It appeared that the cost of the marriage had been defrayed from the bride's brother:—*Held,* that the plaintiff was not entitled to a decree on this account, although if he had incurred debts for the purposes of his marriage the defendant would have been liable. 

LAKSHMAPATHI v. KANDASAMI, 16 M. 54

---


(3) See ZEMINDAR, 15 M. 101, 16 M. 268.

(4) See ZEMINDARI, 14 M. 237.

---

8.—Inheritance.

(1) Bandhu—Maternal uncle of the half-blood—Father's paternal aunt's son—

*Kindred of half-blood.*—Under the Hindu law of inheritance prevailing in the Madras Presidency a maternal uncle of the half-blood is entitled to succeed in preference to the son of the father's paternal aunt. The former is an *otma bandhu,* the latter is a *piru bandhu.* 

MUTTUSAMI v. MUTTUKUMARASAMI, 16 M. 23 = 2 M.I.J. 296

---

(2) Bandhu—Son's daughter.—A son's daughter is entitled to inherit to her grandfather as a bandhu. 

NALLANNA v. PONNAI, 14 M. 149 = 1 M.I.J. 40

---

(3) Karmam, hereditary officer of—Enfranchisement of endowment—Devolution of land—Enfranchised.—The holder of a hereditary office of karmam had two undivided sons, in favour of one of whom he resigned his office. Subsequently a revision of the village establishment took place, the new karmam was removed from the office, and, the lands which constituted its endowment having been enfranchised by the Inam Commissioner, a title-deed in respect of them was issued to him. After his death without issue his nephews sued to establish their right to the land:—*Held,* that the land passed to the grantee personally and not to his family, and, consequently, devolved, on his death, as private property. 

VENKATAKRAMAYU v. VENKATAKAMAYA, 16 M. 294

---

(4) Law of inheritance—Custom—Illegitimate son of a Sudra — Specific Relief Act—Act I of 1877, s. 42—Further relief.—The widows of a shrotriedmard who was a Sudra, brought a suit for a declaration of their title by inheritance to his lands against his illegitimate son, who had been registered as shrotriedmard in lieu of his deceased father, and to whom certain of the ryots had attorned. The defendant claimed to be legitimate according to the customary law governing the family, although his parents might not have been married at the time of his birth, by reason of his parents having performed the ceremony of *pariyam* before his birth:—*Held,* (1) that the suit was not precluded by Specific Relief Act, s. 42, proviso; (2) that the defendant was illegitimate and that the plaintiffs were accordingly entitled to one-half of the lands in question, and the defendant was entitled to the other half. 

Observations on the allegation and proof of a custom in derogation of the general Hindu law of inheritance. 

CHINNAMMAL v. VARADARAJULU, 15 M. 307
Hindu Law—8.—Inheritance.—(Concluded).

(5) Paternal aunt—Maternal grandfather.—Under the Hindu law obtaining in the Madras Presidency, the maternal grandfather of a deceased Hindu succeeds to him in preference to his paternal aunt. Chinnammal v. Venkatachala, 15 M. 421—2 M.L.J. 86

(6) Step-sister’s son.—A step-sister’s son is entitled to inherit under the Hindu law in force in the Madras Presidency. Subbaraya v. Kylasa, 15 M. 300

9.—Joint Family.

(1) Mortgage by one of two co-widows invalid without the consent of the other—Their joint interests and title by survivorship—Construction of mortgage deeds.—One of two co-widows mortgaged, without the consent of the other, part of the estate to which they were jointly entitled by inheritance from their deceased husband: Held, upon the construction of the deeds of mortgage executed by her that they were not so framed as to bind the estate in the possession of the surviving widow after the death of the mortgagor. But assuming that the deeds had been so framed, and that there had been what would have been a justifying necessity for a sole widow, or co-widows jointly, to have mortgaged an estate which had belonged to the deceased husband (a state of things not decided to have existed here), such a necessity could not render a mortgage attempted by one co-widow binding upon the estate, which had descended upon the widows for their joint lives with survivorship between them, so as to affect the interest of the surviving widow. Sripadavati Radhamani v. Mahamani Sri Pusapati Adayakajswari, 16 M. 1 (P.C.)—19 I.A. 184 = 17 Ind. Jur. 36 = 6 Sar. P.C.J. 1

(2) Suit by the purchaser of an undivided share of family property—Time when the share is ascertained.—The purchaser from a member of a joint Hindu family of his share of a house which belonged to the family, sued for the partition and delivery of possession of the share purchased by him. The number of persons entitled as co-partner to the property of the family had increased between the date of the purchase and that of the suit. It did not appear whether the house constituted the whole or only part of the property of the family, and no question was raised as to the competency of the plaintiff to sue for a partial partition. Held, by the Full Bench, that the share to be awarded to the plaintiff should be computed with reference to the state of the joint family at the date of the suit; by the Divisional Bench that the decree appealed against, by which the plaintiff was to recover the value of the share of the house computed as above and not the share itself, was right. Rangasami v. Krishnayyan, 14 M. 408 (P.B.)—1 M.L.J. 603

(3) See Hindu Law—Will, 16 M. 353.

(4) See Transfer of Property Act (1V of 1882), 14 M. 459.

10.—Maintenance.


(2) See Hindu Law—Impartible Estates, 16 M. 54.

(3) See Zamindar, 16 M. 368.

11.—Marriage.

A Brahman bride given in marriage by her mother without her father’s consent.—A Vaishnava Brahman girl was given to the plaintiff in marriage by her mother without the consent of her father who subsequently repudiated the marriage. It appeared that the mother falsely informed the Brahman, who solemnized the marriage, that the father had consented to it:—Held, that the plaintiff was entitled to a declaration that the marriage was valid and to an injunction restraining the parents from marrying the bride to any one else. Venkatacharyulu v. Ranga-charyulu, 14 M. 316—1 M.L.J. 85

...
Hindu Law—12.—Partition.

(1) Mortgagor and mortgagee—Redemption—Successive mortgages on family property—Assignment of equity of redemption.—Two brothers constituted an undivided Hindu family. The eldest mortgaged half of certain family lands to P and the other half to the father (since deceased) of the contending defendants, and placed the mortgages respectively in possession. Neither mortgage was binding on the younger brother who mortgaged his share of the same land to the plaintiff. The plaintiff obtained a decree on his mortgage and attached and brought to sale in execution and himself purchased the half share of his mortgagee, and having afterwards purchased the share of the elder brother and come to a settlement with P, now brought a suit for a moiety of the land in the possession of the contending defendants as forming part of the half share of his mortgagee:—Held, (1) that the contest being between strangers to the family, and the plaintiff having purchased the entire rights of the family in the land in question, the plaint was not defective for want of a prayer for the partition of the whole property of the family; (2) that the plaint being the assignee of the elder brother could not deprive his mortgagee of a portion of their security without asking for an account and offering to pay whatever might be due on the footing of the mortgagee. SUBBARAZU v. VENKATARATNAM, 15 M. 234

(2) Of part of family property—Suit for ejectment.—A Hindu sued for possession of a third part of a house, a portion of his family property. Defendant No. 1 claimed title from the purchaser at a Court-sale held in execution of a decree against the plaintiff's father, the other defendants were undivided brothers of the plaintiff. The title claimed by defendant No. 1 was supported by the other defendants, but the plaintiff alleged that the purchase at the Court-sale had been made benami for him:—Held, that the suit was not maintainable, being a suit for partition of a specific item of the family property, but the plaint might sue to eject defendant No. 1, joining his own brothers as defendants. VENKAYYA v. LAKSHMAYYA, 16 M. 98

(3) See ACT III OF 1873 (MADRAS CIVIL COURTS), 14 M. 183.
(4) See CIV. PRO. CODE (ACT XIV OF 1882), 14 M. 328.
(5) See HINDU LAW—JOINT FAMILY, 14 M. 408.
(6) See STAMP ACT (I OF 1879), 15 M. 164.

—13.—Religious Endowments.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 14 M. 57; 15 M. 355; 15 M. 389.
(2) See RELIGIOUS INSTITUTION, 16 M. 67; 16 M. 490.
(3) See RELIGIOUS OFFICE, 15 M. 183; 16 M. 146.
(4) See RELIGIOUS TRUST, 16 M. 73.

—14.—Re-union.

See HINDU LAW—SUCCESSION, 16 M. 440.

—15.—Reversioner.

Suit by reversioner to establish invalidity of a sale by a widow—Daughter of last male holder not joined.—Under the Hindu law obtaining in the Madras Presidency a reversioner is entitled to sue to establish the invalidity of a sale by the widow of the last male holder, notwithstanding the fact that he left a daughter, who was alive at the date of suit, but was not joined as a party. RAGHUPATI v. TIRUMALAI, 15 M. 422 = 2 M.L.J. 91

—16.—Succession.

(1) Appellant not allowed to raise in appeal a contention inconsistent with the case relied upon in the Courts below.—An appeal cannot be maintained upon a ground inconsistent with the case insisted on in the Courts below, notwithstanding that the new ground may be one that might have been brought forward, in the first instance, as an alternative. In a suit between the widows of two brothers deceased, the plaintiff's title rested on this, that her and the defendant's late husbands, respectively, having been the sons of the
Hindu Law—16.—Succession.—(Concluded).

same father, had, therefore, been sapindas to each other; so that the plaintiff, as the widow of the one, would be the heir of the other, expectant on the death of his widow. In this character she sued to have set aside an adoption made by the defendant. The Courts, however, found that the plaintiff's husband was an illegitimate son, and not a sapinda, and the suit was dismissed. The plaintiff, now appellant, on findings of fact that both the sons were illegitimate, urged that, though they could not inherit from their father, they yet could succeed to the estate of one another:— Held, that this contention was so inconsistent with the case made below that it was now inadmissible. Also, the opinion had been expressed by the High Court that, by the law prevailing in Madras, a widow is not in the line of succession to her husband's male collateral relations. Gajapathi Radhika v. Vasudeva Santa Singar, 15 M. 203 (P. G.) = 19 I.A. 179 = 6 Bar. P.O.J. 218

(3) Divided brothers of the full blood—Son of a re-united half-brother.—In 1872 a partition took place between the members of a joint Hindu family, being three brothers of the full and three of the half-blood. Two of the brothers, being the sons of different mothers, subsequently re-united. The elder took the plaintiff in adoption and died during the infancy of the plaintiff. The re-united half-brother retained possession of their joint property till his death, when the present suit was instituted to recover his share in the property. The two uterine brothers of the deceased resisted the plaintiff's claim:— Held, that the plaintiff was entitled to a one-third share. Ramasami v. Venkatesam, 16 M. 440 = 3 M.L.J. 107

—17.—Widow.

(1) Hindu Widow—Interest in immovable property—Power of alienation.—A Hindu testator, leaving a grandson by adoption him surviving, besides certain moveable property, bequeathed to his wife T. a house "on account of her maintenance" :— Held, confirming the decision below, that even if it was competent to the testator by apt language to clothe his widow with a power of alienation, yet in the absence of such words, regard being had to the surrounding circumstances and to the ideas which Hindus have regarding the interest ordinarily enjoyed by women in immovable property, it must be presumed that testator only meant to bequeath a life-interest:— Held, also, that the heir-at-law was not liable to make good moneys expended on the premises by one holding under the widow with knowledge of the contents of the will. Nunnur Meah v. Krishna- 

(2) See Hindu Law—Reversioner, 15 M. 422.

—18.—Will.

(1) Bequest to a boy directed by the testator to be adopted by his widow— Direction for the boy's maintenance—Rights of the legatees—No adoption having been made.—A Hindu made his will whereby he provided that his property should be enjoyed by his widow, who should maintain certain persons, including the plaintiff, whom he afterwards directed to take in adoption, and added: "my aforesaid wife shall enjoy all my above-men- tioned properties in every way as long as she may be alive, and after her death the same shall be taken possession of by the aforesaid adopted son." The testator died, not having taken the plaintiff in adoption, and his widow did not adopt him. In a suit by the plaintiff for maintenance and for the declaration of his title under the will:— Held, that all the provision of the will relating to the plaintiff were intended by the testator to come into effect only in the event of the adoption being made, and consequently that the plaintiff had no right to the family property or to mainte- 

(2) Construction of—Restricted power to widow to adopt.—A Hindu in 1884 made a will therein described as being executed in favour of the testator's wife in which he said "you must adopt for me a boy you like from the children that may be born in the families of my brothers," and after making certain provisions as to his property, d., added "the principal object of this will is that you should adopt for me any suitable boy,"
GENERAL INDEX.

Hindu Law—18.—Will—(Concluded).

After the testator’s death the widow, as in exercise of the power conferred on her by the will, purported to adopt a boy who did not come within the description in the first of the above clauses, although one of the testator’s brothers offered his own son in adoption. In a suit by the testator’s brothers for a declaration that the adoption purported to have been made by the widow was invalid:—Held, that notwithstanding the general terms of the second of the above clauses, the widow’s power to adopt was restricted by the first and the adoption purported to have been made by her was invalid. AMRITA RAY v. KETHARAMAYAN, 14 M. 65=1 M.L.J. 177.

(3) Legacy by an undivided father of a Hindu family—Bequest for religious purposes.—A Hindu made his will, whereby he bequeathed Rs. 600 to supply a silver image for a pagoda, and died leaving the defendant, his undivided adopted son, him surviving. He was not shown to have been possessed of any separate property. In a suit by the trustee of the pagoda to recover the above amount:—Held, that the legacy was not binding on the defendant. Rathnam v. Sivasubrahmania, 16 M. 383=3 M.L.J. 139.

(4) See Hindu Law—Adoption, 14 M. 172; 16 M. 182.

(5) See Limitation Act (XV of 1877), 15 M. 380.

Hindi.

See Negotiable Instruments Act (XXVI of 1881), 14 M. 470.

Inam Commission.

Reg. IV of 1831 (Madras)—Act IV of 1862 (Madras)—Resumption of inam.—East India Company’s jaghire.—Act of State—Menkaval lands.—Mirasi rights, evidence of.—Secondary evidence of lost grant by Government.—In a suit to declare the plaintiff’s title to a shrottam village which was included in the jaghire granted in 1763 by the Nabob of the Carnatic to the East India Company, it appeared that the village in question had been previously granted by the Nabob free of assessment to the Kazi of Madras as an endowment for his office, and afterwards to the son of the first grantee personally, without condition of service. In 1773 the British Government confirmed the village in perpetuity to the second grantee on account of the office of Kazi which he filled, and to his direct heirs who should be fit for that office. In 1862 on failure of the direct male line, the grantee’s grandson by a daughter was nominated to the office of Kazi with the approval of Government, who directed he should hold the village, adding that it had been assigned as an endowment for that office. In the same year the Inam Commissioner confirmed it as a personal inam, enfranchised it and granted a title-deed to the holder. In 1866 Government ordered that the village should be registered as an endowment of the Kazi-ship and the title-deed cancelled, and in 1866 notified in the Gazette that the title-deed which was not produced was cancelled. Between the dates of the above order and notification the Kazi transferred the village to the plaintiff under a deed of perpetual lease and placed him in possession. But in 1873 Government resumed the village and subsequently directed that the whole of its net revenue be paid to the Kazi. The Kazi, from whom the plaintiff claimed, died in 1868. An inam of certain Menkaval lands, which had formerly been allotted to the village watchman as inam, who had been granted to the Kazi in 1802-3; they were cultivated by raiyats who paid varam to the inamdar. The order of resumption in 1873 had no reference to these lands, but in 1877 Government issued pattas to the raiyats:—Held, (1) that the grant of 1779, the original document not having been produced by the plaintiff, was sufficiently proved by a translation produced from official custody and certified by the Collector in 1838 to be correct and attested by the Persian Translator to Government; (2) that it was competent for the Government in 1779 to alter the nature of the grant of 1761 as an act of State; (3) that on the right construction of Regulation IV of 1831 and Act IV of 1862, and in view of the facts that the plaintiff must have been aware of the nature of the tenures and of the contents of the grant of 1779 and the cancellation of the inam title-deed, the Government was not acting ultra vires in cancelling the enfranchisement, &c.; (4) that the Kazi through whom the plaintiff claimed having...
Jnag Commission—(Concluded).

died in 1868 there was no reason to question the resumption in 1873; (5) that the plaintiff was entitled to possession of the Menkaval lands, the action of Government in issuing pattas to the raiyats being ultra vires. Issues first framed on appeal as to the plaintiff’s claim to mirasi rights and Menkaval lands. Evidence of mirasi rights considered. KARUNAKARA MENON v. SECRETARY OF STATE FOR INDIA, 14 M. 431 302

Jnmdar.

See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 16 M. 49.

Jnag Title-deed.

See REGULATION XXV OF 1802 (MADRAS), 16 M. 34.

Injunction.

(1) See ACT V OF 1834 (LOCAL BOARDS, MADRAS), 16 M. 317.

(2) See CONTRACT ACT (IX OF 1872), 14 M. 185.

(3) See LANDLORD AND TENANT, 16 M. 407.

Insanity.

See ALAYASANNANA LAW, 14 M. 389.

Insolvency.

(1) 11 and 12 Vic., Cap. 21, ss. 9, 92—Petitioning creditors’ debt—Joint debt.—A trader in Madras made a promissory note in the joint names of two merchants, trading together as members of an undivided Hindu family, on which Rs. 527 were due. On a petition by the holders of the notice to have the maker adjudicated an insolvent:—Held, that the petitioning creditors’ debt was insufficient to support the petition. RAGAVALOO CHETTI, Ex parte; In re RANGIAH CHETTI, 15 M. 356 601

(3) See CIV. PRO. CODR (ACT XIV OF 1882), 15 M. 89; 15 M. 233; 15 M. 372; 16 M. 499.

Insolvent Act—11 and 12 Vic., Cap. 21.

(1) Ss. 40, 73—Commission.—Cesser of interest on filing of petition.—By a document styled an “agreement for commission” the executant acknowledged the receipt of a loan and bound himself to pay commission thereon at the rate of 10 per cent. per month and to repay the principal in two years and nine months. It appears that the so-called commission was in the nature of interest, and was fixed at a high rate, because the debtor was expected to obtain the lease of a forest and to derive large profits therefrom. The debtor filed his petition in the Insolvency Court on 1st September 1884:—Held, that the creditor was not entitled to a dividend on account of commission claimed to have accrued due after that date. SUBBARAYALU v. ROWLANDSON, 14 M. 133 94

(2) Ss. 72 and 73—Appeal.—Limitation—Evidence.—Certain creditors of an insolvent appealed against an order declaring him entitled to his personal discharge. The appeal time expired during the vacation of the Court and the appeal petition was presented on the day when the Court re-opened. The appeal petition was presented on the day when the Court re-opened. The appeal petition was presented on the day when the Court re-opened. The appeal petition was presented on the day when the Court re-opened. During the Insolvency proceedings evidence was not recorded under s. 73, and the appellant sought on appeal to use the Commissioner’s notes of evidence:—Held, (1) that the appeal was not barred by limitation; (2) that it was not competent to the Court to refer to the Commissioner’s notes. ABDULL v. MAHAMED, 14 M. 404 283

Interest.


Irrigation Channels.

Power of Collector to regulate water-supply.—In a suit between raiyats holding lands under Government, in which the Collector of the district was joined
Irrigation Channels — (Concluded).

as second defendant, it appeared that the first defendant, in pursuance of an order of the Sub-Collector, made on a petition preferred by him, had opened a new irrigation channel, thereby materially diminishing the supply of water necessary for the cultivation of the plaintiff's land and causing damage to him. The Lower Court passed a decree for damages and issued an injunction directing that the channel be closed: — Held, that the order of the Sub-Collector was in excess of his powers. RAMACHANDRA v. NARAYANASAMI, 16 M. 333—2 M.L.J. 279...

Jains.

See HINDU LAW—ADOPTION, 16 M. 182.

Joinder of Causes of Action.


Joint Decree.


Judgment.


Jurisdiction.

(1) Civil Courts Act (Madras)—Act III of 1873, s. 12—Valuation of relief—Suits Valuation Act—Act VII of 1887, s. 11—Suit by a Court purchaser for partition—See Act III of 1873 (MADRAS CIVIL COURTS), 14 M. 183.


Karnam.


Land Acquisition Act (X of 1870).

(1) Specific Relief Act, s. 42—Objection that consequential relief available—Claim to share of compensation—Valuation in private transaction.—The plaintiff, as heir to her husband, brought a suit, in which Government was not represented, for a declaration of title to a quarter share of the jemn value of land taken up under the Land Acquisition Act. It appeared that the plaintiff's husband had mortgaged his share of the land in question to the defendants' predecessor in title in 1872 by an instrument in which his share was valued at Rs. 375: — Held, (1) that the suit for a declaration only was maintainable; (2) that the valuation of the plaintiff's husband's share in the instrument of 1872 was not binding on the plaintiff in the present suit. _Per cur._—Assuming, for the moment, that the plaintiff was able and called upon in this case to ask for further relief, we are of opinion, following the decision of the Bombay High Court in (13 B. 548), that the suit should not, at the present state, be dismissed on this ground, the objection not having been raised in either of the Lower Courts. GEOMU v. UMMA, 14 M. 46...

(2) Ss. 15 and 18—Compensation—Mode of assessment—Antiquities not proved to have any market-value—Persons interested in the land acquired.—The Government having, under the Land Acquisition Act X of 1870, commenced proceedings to acquire a plot of land containing granite quarries besides ancient temples and sculpture, a reference was made to the District Judge (ss. 15 and 18) as to the amount of compensation to persons interested in the land: — Held, (1) with regard to the nature of the property that only the value of the stone quarries as yielding profit could form the subject of assessment, and the value of the antiquities could not; for, under the circumstances, no market-value could be assigned to the antiquities; (2) the right if not the only course of proceeding was to estimate...
GENERAL INDEX.

Land Acquisition Act (X of 1870)—(Concluded).

the rent at which possibly the whole plot might be leased, on the basis of how much rent a portion of the plot when leased for quarries had in fact obtained for the zamindar; (3) to calculate the purchase-money, as the first Court had done, at twenty-five years of such rent was proper, and no reason appeared for reducing this number of years to fifteen; (4) though quarry men had been employed, and had earned money on the plot, they were not interested therein, in the sense intended by the Act; and their earnings, in which the zamindar was not interested, could not enter into the question of compensation and increase the award; (5) under s. 43, fifteen per cent was to be paid on the sum awarded. THE SECRETARY OF STATE FOR INDIA IN COUNCIL V. SHAMBUGARAYA MUDALIAR, 16 M. 369 (P.C.) = 20 I.A. 80 = 17 Ind. Jur. 274 = 6 Sar. P.C.J. 395

(3) S. 55—Reference by a Collector—Jurisdiction of a District Court.—A Collector is not competent to refer nor a District Judge to decide any question arising under Land Acquisition Act, s. 55. RAMALAKEYSHMI V. COLLECTOR OF KISTNA, 16 M. 321 = 3 M.L.J. 189

Landlord and Tenant.

(1) Act XXIV of 1839, appeal under—Limitation—Civ. Pro. Code, ss. 13, 43—Res judicata—Service-tenure with rent—Enhancement of rent—Resumption.—In a suit brought in 1896 by a zamindar to recover an estate granted to his predecessor to the predecessor of the defendant on a service tenure, a small money rent being also reserved, it appeared that in 1864 the right of the plaintiff's predecessor to rent had been established by suit, but there was no evidence that the service was then dispensed with, but in 1888, it was intimated to the defendant that the service was dispensed with and a notice to quit was given to him; the option of holding the estate at an enhanced rent was however given to him at the same time:—Held, (1) that the suit was not barred by limitation, nor precluded by Civ. Pro. Code, ss. 13 or 43; (2) that the plaintiff was not precluded by any implied contract from increasing the rent; i.e., that the burden of proving the plea that the plaintiff was not entitled to eject lay on the defendants and had not been discharged. In computing the time for an appeal to His Excellency the Governor in Council, under the rules made by virtue of Act XXIV of 1839 against a decree passed by the Agent to the Governor, the time necessary for procuring copies of decree and judgment appealed against may be deducted. MAHADEVI V. VIKRAMA, 14 M. 365

(2) Civ. Pro. Code, ss. 13, 98, 103—"Res judicata"—"Court of competent jurisdiction"—Quiet enjoyment, covenant for—Parties—Suit for damages against lessor, including costs—Joiner of one of two co-lessees as defendant—Suit dismissed against such lessee.—See CIV. PRO. CODE (ACT XIV OF 1882), 15 M. 111

(3) Construction of lease—Word of inheritance.—A fixed permanent ijara patta conveys no rights on the heirs of the deminee. RAJARAM V. NARASINGA, 15 M. 199

(4) Forfeiture for non-payment of rent—Transfer of reversion—Transfer of Property Act—Act IV OF 1882, s. 6, cl. (6)—See TRANSFER OF PROPERTY ACT (IV OF 1882), 15 M. 125

(5) Lessee—Power to bring ejectment suit.—A lessee is entitled to maintain a suit for ejectment against the party in possession, notwithstanding the fact that, at the date of the lease, his lessor was not in possession of the property. ACHAYYA V. HANUMANTHAYUDHU, 14 M. 209

(6) License to occupy—Notice to quit.—The plaintiffs, who were mirisadis of a village, permitted the defendants to occupy their land on the condition that they should do blacksmith's work for the plaintiffs. The defendants ceased to do the work after a time:—Held, that the plaintiffs were entitled to evict the defendants without notice to quit. ATHAKUTTI V. GOVINDA, 16 M. 97

(7) Malabar law—Anubhavam tenure—Forfeiture by alienation—Denial of landlord's title in pleadings—Limitation.—Lands in Malabar were demised on anubhavam tenure. Some of them were alienated by the tenant, but the
Landlord and Tenant—(Concluded).

landlord subsequently accepted rent. More than twelve years after the alienation, the landlord sued to eject the tenant on the ground that the tenure was thereby forfeited. The tenant for the first time in his written statement denied the landlord's title:—Held, (1) that the cause of action alleged in the plaint was barred by limitation; (2) that the plaintiff could not recover in this suit on the ground of the denial of his title in the written statement. MADAVAN v. ATHI NANGIYAR, 15 M. 123 = 3 M.L.J. 81 ...

(8) Occupancy right—Undisturbed possession—Construction of grant—Conduct of parties.—In a suit for ejectment brought by the trustee of a temple, the defendants set up a right of occupancy as permanent tenants. It appeared that the defendants' ancestor had held the village from the Collector (then in charge of the temple properties) under a lease which expired in 1831, when he offered to hold it for two years more. The Collector made an order that if the tenant would not hold the land at the existing rate permanently he should be required to give security for two years' rent. Two 'permanent' muchalkas were subsequently taken from the tenant successively, but they were returned as not being in proper form. No further document was executed, but the tenant and his descendants remained in undisturbed possession at the same rate of payment up to 1888. In that year the plaintiff sent a notice of ejectment to the then tenant, who, however, set the plaintiff at defiance and remained in possession till the present suit was brought in 1890:—Held, that it should be inferred that the defendants were in possession under a permanent right of occupancy. VARADARAJA v. DORASAMI, 16 M. 131 ...

(9) Specific Relief Act—Act I of 1877, s. 54, cl.s.(b) and (c)—Perpetual injunction—Injury to interest in immovable property—Inapplicability of remedy by compensation—Erection of dwelling-house on agricultural land—Ameliorating waste.—A zamindar sued for an injunction to compel the defendant who held agricultural lands comprised in the zamindari with occupancy rights, to demolish a dwelling-house which he had erected thereon for purposes not connected with agriculture, and to restrain him from altering the character of the land:—Held, that the plaintiff was entitled to the injunction sued for. RAMANADHAN v. ZEMINDAR OF RAMNAD, 16 M. 407 = 3 M.L.J. 185 ...

(10) Suit for ejectment—Burden of proof.—In an ejectment suit by a landlord against his tenant the plaintiff cannot succeed unless he shows that under the terms of the tenancy and in the circumstances that exist he has a right to eject the defendant, although the latter may allege and fail to establish a right of permanent occupancy. VENKATACHARLU v. KANDAPPA, 15 M. 95 ...

(11) Surrender—Limitation—Adverse possession—Malabar law—Karnavan, powers of—Perpetual lease.—The karnavan of a Malabar kovilagam executed a kuikanom lease of certain land, the jenm of the kovilagam, in 1846, and in 1861 his successor demised the same land to the same tenants in perpetuity. The present karnavan sued in 1889 to recover possession of the land:—Held, (1) that the perpetual lease, as being of an improvident character, was ultra vires and void; (2) that the original lease was not surrendered; (3) that the suit was not barred by limitation, the possession of the defendants never having been adverse to the plaintiff's kovilagam. RAMUNNI v. KERALAVARMA VALIA RAJA, 15 M. 166 ...

(12) See LETTERS PATENT, 1865, 14 M. 406.

Lease Deed.

Compulsory registration.—Where a lease deed contained a clause whereby the tenancy thereunder was absolutely determinable at any moment at the option of the lessor, it was held, that such deed was not compulsorily registrable, notwithstanding that it also contained provisions for an "annual rental," and for payment of "rent in advance each year," provisions, which, had they stood alone, would have raised a presumption that a tenancy exceeding a year, was contemplated. RATNASABHAPATHI v. VENKATACHALAM, 14 M. 271 ...

11:12
(1) S. 15—Civ. Pro. Code, s. 622—Judgment—Landlord and tenant—Suit for rent.—In a suit in a Small Cause Court for rent due in respect of two pieces of land, the Court passed a decree in favour of the plaintiff. The defendant preferred a petition to the High Court under Civ. Pro. Code, s. 622, which came on for hearing before one Judge. He held that the Small Cause Court had failed to give effect to a former decree between the parties in respect of one piece of land, and made an order reversing the decree as to that, and calling for a report of what was due on the other piece of land. The plaintiff preferred an appeal under Letters Patent. s. 15—Held, (1) the above-mentioned order was subject to appeal as being a judgment; (2) even if the Subordinate Judge had failed to give effect to the previous decree, the error was not such as to give the Court jurisdiction to revise his proceedings under Civ. Pro. Code, s. 622. VANNANGAMUDI v. RAMASAMI, 14 M. 460

(2) S. 15—Divorce Act—Act IV of 1869, s. 36—Alimony pendente lite—Net income—Allowable deductions—Change of circumstances—Order fixing date of hearing—Civil Pro. Code, s. 156.—A petition by a wife—petitioner in the one and respondent in the other of two cross-suits (matrimonial)—for an increase of alimony was treated by consent on appeal as a petition for alimony. It appeared that the respondent was in receipt of a salary from Government which was subject to deductions on account of the pension and annuity funds, that his circumstances were involved and he had agreed with his creditors to discharge his liabilities by certain instalments, that as part of such agreement he was keeping up a policy of insurance on his life, and that he was maintaining and educating three children in England, but that his salary had increased since the order first made for alimony: Held, that the respondent was entitled as of right to have only the deductions on account of pension and annuity funds taken into consideration in the computation of his net income. Per cur.—"We resolve to take into consideration the expenses the respondent is put to in maintaining his children and also any arrangement he has made for liquidating his debts." An order made by a Judge of the High Court as settlement of issues fixing a distant date for the hearing of a suit is not an order under s. 156 of the Civ. Pro. Code, and is appealable under Letters Patent, s. 15. Quaere, whether the Court has power to increase or diminish an allotment of alimony made pendente lite on account of change of circumstances? R. v. R. 14 M. 86

(3) S. 28—Crim. Pro. Code, s. 2—Scheduled Districts Act—Act XIV of 1874, notifications under—Agency tracts, jurisdiction of High Court over—Agency Rules—Act XXIV of 1889 (Madras), s. 3—See CrIM. PRO. CODE (ACT X OF 1889), 14 M. 121.

License.
To occupy—Landlord and tenant—Notice to quit—See LANDLORD AND TENANT, 16 M. 97.

Limitation.

(1) Account settled but not signed—Oral promise by debtor to pay balance—Commencement of limitation.—The plaintiff and the defendant, who was his agent, examined the account between them on 13th July 1887 and a balance was found due by defendant, who orally promised to pay it in one month. The account was not signed. The plaintiff sued on 10th July 1890 to recover the amount, and it appeared that the last item in the account to the debit of the defendant was dated 28th May 1887: Held, that the suit was barred by limitation. AMUTHU v. MUTHAYYA, 16 M. 339

(2) Aliyasantana Law—Unjustified alienation of family property by a member of undivided family—Adverse possession.—In 1861 the eejaman of an Aliyasantana family mortgaged family property to the ancestor of some of the defendants who and whose alliances were now in possession. The mortgagor died leaving besides one brother, two sisters, each having a son—the family remaining undivided. In 1866 one of the sons, with the concurrence of his uncle and mother, conveyed the land to the mortgagee, but this transaction was not justified by any family necessity; and in
Limitation—(Concluded).

1857 the other son and his mother sold the undivided moiety to the plaintiff's predecessor in title. In a suit to redeem the mortgage of 1851 the plaintiff obtained a decree for redemption of a moiety of the mortgage property:—Held, that although it may have been supposed in 1857 that compulsory partition was permitted by the Aliyasantana law, yet as the right to the half share purported to be sold in 1857 had no legal existence, nothing could pass by that sale and the suit should be dismissed. Per cur. Neither the original mortgages nor his son can rely on the 12 years' rule of limitation, unless he can prove a subsequent valid sale, in the absence of which his possession must be taken to retain its original character. BYARI V. PUTTANNA 14 M. 38.

(3) Indian Penal Code—Act XLV of 1860, s. 499—Defamation—Privilege of party
—Appeal from the Resident's Court, Bangalore—See PENAL CODE (ACT XLV OF 1860), 15 M. 414.

(4) Insolvent Act—11 and 12 Vic., Cap. 21, ss. 72 and 73—Appeal—Evidence—See INSOLVENT ACT, 11 AND 12 VIC., c. 21, 14 M. 404.

(5) Landlord and tenant—Surrender—Adverse possession—Malabar law—Karnavan, powers of—Perpetual lease—See LANDLORD AND TENANT, 15 M. 166.


(7) Malabar law—Customary law of Mapillas—Multifariousness—Suit by karnavan—Evidence—Evidence Act—Act I of 1872, s. 35—Petition and order—See EVIDENCE ACT (I OF 1872), 15 M. 19

(8) Malabar Law—Melkoima—Compromise by Uralers of the right to manage a devasom—Claim of certain Uralers to exclude others from management.—The uraima right in a Malabar devasom was vested in the iloom, of which plaintiff No. 1, a Nambudri Brahman, was a member; the defendants represented the family which formerly ruled over the tract of country where the devasom was situated. The plaintiffs sued for a declaration that their families were entitled to the exclusive management of the affairs of the devasom. It appeared that the plaintiffs' and defendants' families had been in joint management since 1845 in accordance with the provisions of a deed of compromise:—Held, (1) on its appearing that the compromise had been entered into by the karnavan of the plaintiffs' iloom, and that the compromise was not vitiating by fraud or the like, that the compromise was binding on the plaintiff; (2) that the claim to exclusive management was barred by limitation. Per cur.—A legal origin to which the joint enjoyment of the rights of management may be referred may be found in the continuance of what was Melkoima in ancient times as a co-trusteeship subsequent to the British rule with the tacit sanction of the British Government, or in the status of the Nambidi family as patrons of the institution. NILAKANDAN V. PADMANABHA, 14 M. 153

(9) Malabar Law—Suit by junior members of a tarwad—Suit for declaration of invalidity of kanom—See MALABAR LAW—KARNAVAN, 14 M. 101.

(10) Malabar Law—Will—Gift of a life interest—The karnavan of a Malabar tarwad executed an instrument described as a vasayat whereby he made a gift of a life-interest in certain self-acquired property, to come into operation at once. The members of his tarwad acquiesced in this disposition of the property. In a suit by his successor in the office of karnavan to recover the property:—Held, that time began to run for the purposes of limitation from the death of the donee. Quare, whether the principle laid down in 12 M. 126 would apply in the case of a will made by a member of a Malabar tarwad having heirs in the tarwad. KUTTYASSAN V. MAYAN, 14 M. 495

(11) See ACT XIII OF 1859 (WORKMAN’S BREACH OF CONTRACT), 16 M. 347.

(12) See CIV. PRO. CODE (ACT XIV OF 1882), 14 M. 312.

(13) See CONTRACT ACT (IX OF 1872), 16 M. 474.
Limitation Act (XV of 1877).

(1) Suit for mutation of names in register—Parties—See PARTIES, 15 M. 350.

(3) S. 4—Unstamped memorandum of appeal—Stamp affixed after expiry of time of limitation.—Where a petition of appeal was presented unstamped within the period of limitation and the stamp was ultimately affixed after the appeal would have been barred by limitation:—Held, following 6 I.A. 126 that the appeal was in time. PATCHA BHABH V. SUB-COLLECTOR OF NORTH ARCOT, 15 M. 73

(3) Ss. 5, 12—Time occupied in seeking review of judgment—Computation of time for appeal.—An appellant is not entitled as of right to the exclusion of the time occupied by him in seeking a review of judgment, in the computation of the time within which his appeal is preferred. Where it appeared that the application for review proceeded on grounds dealt with in the judgment sought to be reviewed and on the discovery of fresh evidence which was made nearly three months before the application, the Court declined to exercise its discretionary power to exclude the time so occupied. GOVINDA v. BHANDARI, 14 M. 61

(4) Ss. 7, 8—Disability of one of two joint claimants—Transfer of Property Act—Act IV of 1882, s. 99—Usurpational mortgage.—In a suit by the two sons of a usufructuary mortgagee (deceased) to set aside the sale of the mortgage premises, which had taken place in execution of a money decree obtained by the mortgagees, it appeared that the suit, if brought by the first plaintiff alone, would have been barred by limitation, but that it would not have been so barred, if it had been brought by second plaintiff alone, who had not attained his majority three years before the suit:—Held, that the sale in execution sought to be set aside was illegal under Transfer of Property Act, s. 99, but that the suit to set it aside was barred by limitation. VIGNESWARA v. BABAYYA, 16 M. 436 = 3 M.LJ. 316

(5) S. 10—Suit against a trustee.—The plaintiff sued his father in 1887 for a declaration of his title to, and for possession of, certain property as being stridhanam property of his late mother, whose only son he was. The plaintiff asserted that some of the property had been given to the plaintiff’s mother about the time of her marriage in 1836: that in 1843 her father had appointed the defendant trustee of the property for the plaintiff and his mother, and that further sums had been since paid to the defendant in his capacity of trustee on account of the stridhanam of the plaintiff’s mother, and that he had traded with the property and misappropriated it. Held, that under Limitation Act, s. 10, the suit was not barred by limitation on the allegations in the plaint. SETHU v. KRISHNA, 14 M. 61

(6) S. 10, sch. II, arts. 120, 144—Suit by a uralan against an agent of a devasam—Repudiation of agency—Civil Procedure Code—Act XIV of 1882, s. 18—‘Res judicata’—Court of competent jurisdiction.—In 1873 a predecessor of the plaintiff claiming to be the uralan of a devasam brought a suit in a District Munsif’s Court against the present defendant, whom he alleged to be an agent to the devasam, and the defendant disputed the uraime right of the plaintiff and denied that he had been appointed agent as alleged. Issues as to both of these matters were decided in favour of the defendant and the suit was dismissed in 1874. A suit was now brought in 1890 for a declaration of the plaintiff’s title as uralan and to recover from the defendant as such agent, property of a value which exceeded the pecuniary limits of the jurisdiction of a District Munsif, the suit being therefore instituted in the Subordinate Judge’s Court:—Held, that the suit was barred by limitation. Semble: The decision in the prior suit did not constitute a bar to the present suit on the ground of res judicata. SANKARAN v. KRISHNA, 16 M. 456


(8) S. 14—Previous suit—Deduction of time.—In August 1895 the plaintiff and defendant entered into an agreement of partnership in a certain venture. On the 2nd September 1897 the plaintiff filed a suit against the defendant in a District Munsif’s Court to recover his share of the profits under the
agreement. In his evidence the plaintiff stated that there had been a settlement of the account between himself and defendant. The suit was thereupon dismissed as being cognizable by the Court of Small Causes, and the plaint was returned on the 1st March 1889. On 31st December 1889, the plaintiff applied to the Court of Small Causes, an addition having been made to it. The Court held that the addition was irregular and, on the 19th November, permitted the plaintiff to withdraw his suit with permission to bring a fresh one. He accordingly instituted the present suit on
6th December 1889:—Held, that in computing the period of limitation, the period from 2nd September 1887 to 1st March 1889 should be deducted under Limitation Act, s. 14. SAMINADHA v. SAMBAN, 16 M. 274 ... 868

(9) S. 19—Acknowledgment in writing—Deposition signed by a witness.—In a suit brought in 1890 to recover the principal and interest due on a bond, dated 1st September 1879, which provided for the repayment of the debt secured thereby within six months from the date of its execution, it appeared that the obligor had made a part payment of Rs. 50 on the 24th July 1882, which was endorsed on the bond. No other payments had been made, but the plaintiff pleaded in bar of limitation that the debt had meanwhile been three times acknowledged in writing. One of the acknowledgments relied upon was said to be contained in a deposition given by the obligor and signed by him, as a witness in a suit to which he was not a party:—Held, that an acknowledgment in order to satisfy the requirements of Limitation Act, s. 19, must be an acknowledgment of the debt as such and must involve an admission of a subsisting relation of debtor and creditor, and an intention to continue it until it is lawfully determined must also be evident. Semble per Mutthusami Ayyar, J., Wilkinson, J., dissenting, that a deposition given and signed by a party as a witness in a suit is as much a writing contemplated by s. 19 as is his written statement or a letter addressed by him to a third party. VENKATA v. PARTHASARADHI, 16 M. 220 = 3 M.L.J. 35 ... 860


(11) S. 19—Acknowledgment of liability—Requirements of the section.—In a suit to redeem a kanom of 1809 the plaintiff set up in bar of limitation an acknowledgment contained in the will of the deceased mortgagee, who thereby devised to his son lands therein described as held by him on kanom. The mortgagee's name was not mentioned nor the date of the kanom, nor was there any further description of the land which, however, was admitted to be the land in question in the suit. Held, that the will constituted an acknowledgment under s. 19. UPPU HAIJ v. MAMMVAAN, 16 M. 366 = 3 M.L.J. 191 ... 962

(12) S. 19, sch. II, arts. 57, 115—Date when money becomes due—Acknowledgment in holograph will unsigned.—In a suit against the legal representative of a deceased debtor to recover the amount of the debt, it appeared that the debt was contracted more than three years, but was payable less than three years before suit. In bar of limitation the plaintiff relied upon an admission of the debt in a draft will, written by the testator, in the first line of which his name appeared:—Held, per Weir, J., that the admission in the will did not constitute an acknowledgment under Limitation Act, s. 19; per Mutthusami Ayyar and Parker, JJ., that the period of limitation should be computed from the date when the debt was due and the suit was not barred. RAMASAMI v. MUTTHUSAMI, 15 M. 360 = 2 M.L.J. 42 ... 617

(13) S. 22—Amendment of plaint.—The creditor of a deceased trustee of a temple sued two persons, as his successors in office, to recover the amount of the debt. One of the defendants died; the other, who was the brother of the deceased, pleaded that other persons were joint trustees with him, and should have been impeded with him, he also alleged that the debt in question was a private debt, and had not been incurred by the deceased as a trustee. The persons named were joined as defendants, and they repeated the above allegation. The plaintiff, thereupon, amended the plaint and prayed for a personal decree against the original surviving
defendant, and the others were removed from the record. The amendment took place more than three years after the date when the debt was payable, but the suit had been instituted within that period:—Held, that the claim was not barred by limitation. **Saminatha v. Muthayya**, 15 M. 417 = 2 M.L.J. 119

(14) **Sch. II. arts. 49, 116—Suit to recover title-deeds left with a mortgagee after redemption—Demand and refusal.**—After the redemption of a mortgage, the title-deeds of the mortgagee were left with the mortgagee, who refused to return them on demand made by the mortgagor. The mortgagor now sued to recover possession of the them:—Held the Limitation Act, sch. II. art. 49, was applicable to the case and that time began to run from the date of the mortgagor’s refusal. **Subbakra v. Murupakkala**, 15 M. 157 = 2 M.L.J 54

(15) **Sch. II. arts. 62, 120—Money received for plaintiff’s use—Suit for which no period prescribed—Transfer of Property Act—Act IV of 1882, ss. 2, 135.**—A obtained a money decree against B and attached certain land in execution. C intervened in execution successfully. A then brought a suit to establish that the land was liable to be sold in execution, and obtained a decree. Meanwhile the land was taken up by Government under the Land Acquisition Act, and the compensation money was paid to C. A attached this sum as a debt due to B and sold it in execution, and it was purchased by the plaintiff. The plaintiff now sued C to recover the amount of the debt:—Held, that the suit was governed by Limitation Act, sch. II, art. 120, and not by art. 62, and that the plaintiff was entitled to recover without regard to the terms of Transfer of Property Act, s. 135. **Krishnan v. Perachan**, 15 M. 382

(16) **Sch. II. arts. 62, 120—Suit by the purchaser in execution sale to recover the purchase money—Civ. Pro. Code—Act XIV of 1882, s. 315—Saleable interest.**—The plaintiff purchased land sold in execution of a decree in favour of the defendant, but was subsequently evicted by the son of the judgment-debtor, he now sued in 1889 to recover the purchase money paid by him, on the ground that the judgment-debtor possessed no saleable interest in the property in question. It appeared that the son of the judgment-debtor had obtained a decree in 1888 against the plaintiff and others declaring that the judgment-debtor had no saleable interest in the property, and that in that suit the present defendant had given evidence in support of the claim that suit was now admitted in evidence against the defendant:—Held, (1) that Limitation Act, sch. II, art. 130, contained the rule of limitation applicable to the suit, which was accordingly not time-barred, since the cause of action did not arise until 1888; (2) that the judgment above referred to was not evidence against the defendant; (3) that the suit should be dismissed on the ground that there was no legal evidence, that the judgment-debtor whose interest in the land had been purchased by the plaintiff possessed no legal interest therein. **Nilakanta v. Imamsahin**, 16 M. 381 = 3 M.L.J. 134

(17) **Sch. II. arts. 64, 116—Suit between partners—Registered partnership deed.**—The plaintiff and the defendant entered into a partnership agreement, which was registered, whereby it was, among other things, provided expressly that each partner should bear the loss, if any, incurred in the business in proportion to his share. The plaintiffs, alleging that loss had been incurred and borne by them, sued to recover the defendants’ share of the loss:—Held, that since the partnership agreement was registered, the suit was governed by Limitation Act, sch. II, art. 116. **Ranga Reddi v. Chinni Reddi**, 14 M. 465 = 1 M.L.J. 462

(18) **Sch. II. art. 91—Specific Relief Act—Act I of 1877, ss. 39, 40, 42—Cancellation of instrument—Declaratory decree—See SPECIFIC RELIEF ACT (I OF 1877), 14 M. 26.

(19) **Sch. II, arts. 91, 120—Malabar law—Adoption by the last member of a Nambudri illom—Civ. Pro. Code, s. 13—‘Res judicata’—See CIV. PRO. CODR (ACT XIV OF 1882), 15 M. 6.

(20) **Sch. II, arts. 91, 120—Suit for declaration.**—The reversionary heirs to a stallom in Malabar sued in 1889 for a declaration that a kanom executed
in 1881 by the first defendant, the present holder of the stanom, in favour of the second defendant, was not binding on them or on the stanom:—Held, that the suit was barred under Limitation Act, 1877, sch. II, art. 120. PUKARIKAS v. PARIKAS, 16 M. 138

(21) Sch. II, arts. 91, 144—Suit for land—Cancellation of instrument affecting the land by plaintiff.—In a suit brought in 1889 to recover land, it appeared that the defendant had been in possession since 1885, having obtained in 1883 a conveyance of the land from one of the plaintiffs. It was found on the evidence that that conveyance had been obtained by fraud and was supported by no consideration. The other plaintiff claimed under an instrument of 1884 which recited that of 1883 and was executed by the same person. The plaint contained no prayer for the cancellation of the conveyance of 1883:—Held, that the suit was not barred by limitation. SUNDARAM v. SITHAMMAL, 16 M. 311 = 3 M.L.J. 144

(22) Sch. II, arts. 97, 132—Payment of entire rent by a co-tenant—Suit for contribution.—One of two persons, having a joint holding from a mittadar paid the whole of the mittadar’s dues for one year, and more than three years after the date of payment he sued the other for contribution:—Held, the payment did not create a charge on the land, and the suit was consequently barred by limitation. THANIGAIKEELLA v. SHUDACHIELLA, 15 M. 256

(23) Sch. II, arts. 110, 120—Suit to recover customary dues payable on account of a chaneeria—Rent.—In a suit by the District Board in charge of chaneeria to recover a certain sum as the arrears of various merais, being customary dues payable by the defendants for the benefit of the chaneeria on account of lands held by them, the defendants raised no objection on the ground that there had been no exchange of pattas and muchalkas, but among other defences they relied upon a plea of limitation:—Held, (1) that the defendants should be considered to have admitted tacitly that the exchange of pattas and muchalkas had been dispensed with; (2) that the suit was governed by Limitation Act, sch. II, art. 120, and not by art. 110 as a suit for rent. VENKATAPURAMANATH v. DISTRICT BOARD OF TANJORE, 16 M. 305

(24) Sch. II, art. 120—Hindu law—Son’s liability for his father’s debt—Immovility of debt—Suit by a decree-holder against the sons of a deceased judgment-debtor whose property had passed to them—See HINDU LAW—DEBTS, 16 M. 99.

(25) Sch. II, art. 130—Suit for the apportionment of assessment on land.—In a suit by the holder of one share against the holders of other shares in inam land, included in a single patta and assessed in an entire sum, for apportionment of the assessment, it appeared that the plaintiff had asked for the apportionment to be made more than six years before suit:—Held, that the suit was not barred by limitation. ANANDARAZU v. VIVYANNA, 16 M. 492 = 2 M.L.J. 256

(26) Sch. II, arts. 120, 131—Periodically recurring right—Denial of right.—In a suit brought in 1889 by a landholder against the Secretary of State for a declaration of his right against Government to have certain remissions made in the sum to which he was annually assessed, no consequential relief was sought, and it appeared that the plaintiff’s claim for the remission had been made in 1878 and had been refused by Government:—Held that Limitation Act, 1877, sch. II, art. 120 and not art. 131 applied to the case and the suit was barred by limitation. BALAKRISHNA v. THE SECRETARY OF STATE FOR INDIA, 16 M. 294 = 3 M.L.J. 98

(27) Sch. II, arts. 123, 127, 144—Suit by a Mapilla widow for her share in her husband’s property.—The widow of a Mapilla, who had died intestate more than fourteen years before suit, sued to recover a one-sixteenth share of the property left by him and his brother:—Held, that although the parties were Mapillas the suit was governed by art. 123 of the Limitation Act and was accordingly barred. KASMI v. AYISHAMMA, 15 M. 60 = 1 M.L.J. 754.

(28) Sch. II, arts. 133, 144—Distributive share of a Muhammadan—Suit for possession.—Res judicata between defendants.—A Mapilla, alleging that certain ‘family property’ had been enjoyed by herself and the defendants...
GENERAL INDEX.

Limitation Act (XV of 1877)—(Continued).

(who were her relations on the mother’s side) in common till one year before suit, when she was excluded from possession, now sued to recover the share to which she claimed to be entitled under the Muhammadan Law of Inheritance. It appeared that the property had been acquired in the lifetime of the plaintiff’s maternal grandfather who had died more than 30 years before suit, and that one of his sons had obtained a decree for his share of it in a suit to which among others the plaintiff and the father of the present contesting defendants were parties, and that a plea then raised by the latter to the effect that the property had been acquired by him was overruled. The present claim was sought to be resisted on the same ground, which was the subject of the second issue; but it was held that the defendants were estopped from raising the plea, and there was no evidence as to whether this matter had been in controversy between the present plaintiff and her uncle in the former suit, which was decided ex parte as far as she was concerned. The plaintiff’s mother died about 20 years before the present suit:—Held, by the Full Bench, that the plaintiff’s cause of action arose on her exclusion from enjoyment of the property and that the suit was not barred by limitation; by the Division Bench, that in the absence of evidence no finding on the second issue should be called for.

ABDUL KADER v. AISHAMA, 16 M. 61 (F.B.) = 2 M. L J. 200

760

(39) Sch. II, art. 127—Joint family property—Suit by Muhammadan heir for his share in an undistributed estate.—The words “joint family property” in Limitation Act, 1877, sch. II, art. 127, are intended to refer to joint family property in the Hindu sense of the term. A Muhammadan sued, as heir in 1888, to recover his share in the property of his grandfather, which had been enjoyed jointly by his descendants from his death, which occurred in 1840, up to a recent date. It did not appear that the family was governed by any special custom:—Held, that the suit was not governed by Limitation Act, 1877, sch. II, art. 127, and was barred by limitation.

PATICA v. MOHIDIN, 15 M. 57 = 1 M. L J. 757 (N)

389

(40) Sch. II, arts. 127, 144—Aliyasantana Law—Specific Relief Act—Act I of 1877, s. 42—Declaratory relief—See ALIYASANTANA LAW, 15 M. 186.

(41) Sch. II, arts. 131, 132, 140—Kattubadi—Recurring right—Rent Recovery Act—Act VIII of 1865 (Madras), s. 7.—In a suit by a zamindar against the grantee of an inam to recover arrears of kattubadi, it appeared that no payment had been made in respect of kattubadi for a period of twelve years before suit. The suit was dismissed in the Court of first appeal on the findings (1) that no exchange of patta and muchalaka had been proved, (2) that the plaintiff had not proved his right to the kattubadi, and (3) that his right to it, if any, was barred by limitation. On second appeal by the plaintiff:—Held, that the second and third of the above findings should be accepted and the second appeal dismissed: ALUBI v. KANTHI BI (I.R. 10 Mad. 115) distinguished. Per cur: We do not think it necessary to consider whether, if there had been a grant subject to kattubadi, patta and muchalaka ought to have been exchanged.

RAMACHANDRA v. JAGANMOHANA, 15 M. 161

461

(42) Sch. II, arts. 136, 138.—Limitation Act, 1877, sch. II, art. 136, is applicable to a suit brought by the assignee of a purchaser of land at a Court-sale to obtain possession of the land. ARUMUGA v. CHOCKALINGAM, 15 M. 381

561

(43) Sch. II, arts. 142, 144—Adverse possession—Burden of proof.—The plaintiff, who was the sister of the defendant, sued in 1888 to recover from him a moesty of a paramba purchased by them jointly in 1877. In 1878 the plaintiff went to live elsewhere, but, from time to time, returned and spent a few days with the defendant on the land in suit. The defendant pleaded limitation:—Held, that Limitation Act, sch. II, art. 144, applied to the suit, and the burden of proving adverse possession lay on the defendant.

ALIMA v. KUTTI, 14 M. 96

69

(44) Sch. II, arts. 144, 147—Suit for foreclosure or sale—Transfer of Property Act—Act IV of 1892, ss. 48 (c), 67, 87—Mortgage by conditional sale—Deeds for foreclosure and possession—Succession Certificate Act—Act VII of 1889—See TRANSFER OF PROPERTY ACT (IV OF 1892), 16 M. 84.

1119
GENERAL INDEX.

Limitation Act (XV of 1877)—(Concluded).

(35) Art. 179—Civil. Pro. Code, s. 235—Formal defects in application for execution.—On an application for execution of a decree, it appeared that the only previous application for execution which had been made within a period of three years had been defective, by reason of its not containing the particulars required by Civil. Pro. Code, s. 235 (f) and had been returned for amendment, but had not been amended:—Held, that the present application was not barred by limitation. RAMA v. VARADA, 16 M. 142

(36) Art. 179—Step-in-aid of execution—Malabar law—The Valiya Rajah of a Kovilagam sued as such—Liability of Kovilagam properties.—A decree was passed in 1884 against the Valiya Rajah of Chirakkal Kovilagam, since deceased. In 1886 the decree-holder made an application in execution for the attachment of the judgment-debt, but he did not pay the process fees, and the application was dismissed on that ground:—Held, that that application was a step-in-aid of execution within the meaning of Limitation Act, sch. II, art. 179. Semble:—That a decree passed against the Valiya Rajah of a Kovilagam is prima facie binding upon his successor and his Kovilagam. KERALA VARMA VALIYA RAJAH v. SHANGARAM, 16 M. 432

(37) Sch. II, art. 179, cl. 4—Civil. Pro. Code, ss. 231, 232, 623—Joint decreeholders—Assignment by operation of law of a share in a decree—Application for execution—Review, grounds of.—A Hindu obtained in 1878 a decree for partition of certain property, and he now applied in 1888 to have it executed. He relied in bar of limitation on an application for execution made by his son, who had obtained a decree against him in 1881 in a partition suit, whereby his right was established to one-fifth of whatever should be acquired by the father by virtue of the decree of 1878. The father's application for execution in 1888 was held to be barred by limitation in 13 M. 347. On review it appeared that the son had applied for execution of the whole decree, stating that his father would not join him in such application, and that notice was given to the father:—Held, (1) that the son was an assignee by operation of law of one-fifth of the judgment-debt in the suit of 1878; (2) that this application accordingly kept the decree alive under Limitation Act, 1877, sch. II, art. 179, cl. 4, and the father's application in 1888 was not barred by limitation. RAMASAMI v. ANDA PILLAI, 14 M. 232 = 1 M.L.J. 240

(38) Sch. II, art. 179, cl. 6—Decree for periodical payments.—If it can be gathered from a decree that payments are directed to be made on dates or at periods which are sufficiently indicated by the terms of the decree the requirements of Limitation Act, sch. II, art. 179, cl. 6, are satisfied. KAVERI v. VENKAMMA, 14 M. 396

Lunatics.

(1) Estates of lunatics subject to Mufassal Courts—Act XXXV of 1858—Aliyasantana Law—Inheritance—Uncongenital insanity—Suit by an unadjudged lunatic by the Agent of the Court of Wards as guardian—Authority of the Court of Wards—Regulation Y of 1804—Code of Civil Procedure, s. 404.—See ALIYASANTANA LAW, 14 M. 289.

(2) See ALIYASANTANA LAW, 14 M. 299.

Mahomedan Law.

1.—GIFT.
2.—INHERITANCE.
3.—RELIGIOUS ENDOWMENTS.

1.—Gift.

Deathbed gifts—Consent of heirs—Mushaa—Delivery of possession.—A Mohamadan on 27th February executed two deeds of gift, by one of which (attested by all his sons) he conveyed his one-fourth share in a certain mitta to his daughters; and by the other (attested by all his daughters), he conveyed the rest of his landed property to his sons. The donor died.
GENERAL INDEX.

Mahomedan Law—1.—Gift—(Concluded).

on 6th March, and it was found on the evidence that the above dispositions of his property were death-bed gifts. It appeared that the donor had separate possession of the land disposed of by him, though part of it was held under joint pattas, in which others were interested; and also that on the date of the gift, the transfer of ownership of the mitta property was proclaimed by beat of tom-tom, and that the tenants were called upon to attest to the donees, who subsequently collected rent. The widow took no exception to the gifts, but after two years one of the daughters brought this suit to have them set aside as invalid and to recover her share as an heiress of her father:—Held, (1) on the evidence, that the attestation of the heirs was regarded by all the parties concerned as evidence of consent, and that they did consent to the death-bed gifts at the time they were made; (2) that this consent not having been revoked on the donor’s death, and there having been sufficient delivery of possession the gifts were complete; (3) that the gifts were not impeachable on the ground of mustaa. Evidence of undue influence considered.

SHARIFA BIBI v. GULAM MAHOMED DASTAGIR KHAN, 16 M. 43=S M.L J. 14 ... 738

—2.—Inheritance.

See CIV. PRO. CODE (ACT XIV OF 1882), 14 M. 334.

—3.—Religious Endowments.

See CIV. PRO. CODE (ACT XIV OF 1882), 15 M. 355.

Malabar Law.

1.—GENERAL.
2.—ADOPTION.
3.—ALIENATION.
4.—CUSTOM.
5.—DEBTS.
6.—GIFT.
7.—INHERITANCE.
8.—KARANAVAN.
9.—MORTGAGE.
10.—PARTITION.
11.—RELIGIOUS ENDOWMENTS.
12.—WILL.

—1.—General.

Practice—Non-joinder—Suit by one of two co-uralars. In a suit by one of two co-uralars of a Malabar devasom to recover land, the property of the devasom, the other uralan being joined as defendant, there was no evidence that the latter had repudiated the right of the plaintiff to sue in conjunction with himself, and it appeared that he had not been consulted as to the institution of the suit:—Held, that the suit was bad for non-joinder of the co-uralan as plaintiff.

PANAMESWARARAN v. SHANGARAN, 14 M. 489 ... 341

—2.—Adoption.


(2) See CIV. PRO. CODE (ACT XIV OF 1882), 15 M. 6.

—3.—Alienation.

Anubhavom tenure—Forfeiture by alienation—Landlord and tenant—Denial of landlord’s title in pleadings—Limitation—See LANDLORD AND TENANT, 15 M. 123.

—4.—Custom.

See MALABAR LAW—INHERITANCE, 15 M. 281.

—5.—Debts.

See LIMITATION ACT (XV OF 1877), 16 M. 452.
GENERAL INDEX.

Malabar Law—6.—Gift.

Of land to a wife and her children—Incidents of tarwad property.—Land, which originally belonged to one Tavorai, was given after his death to one of his wives and her children in accordance with a wish orally expressed by him. He had not expressed any intention as to how it should be held by the donees. It appeared that they were subject to the Marumkattayam law:—Held, by the Full Bench, that they took the land with the incidents of property held by a tarwad:—Held, by the Division Court accordingly, that a decree against the assets of one of the sons could not be executed against the land as a whole or against his share in it. KUNHACHA UMMA v. KUTTI MAIMI HAJEE, 16 M. 201 (F.B.)—2 M.L.J. 236 ...

7.—Inheritance.

Makkatayam rule of inheritance—Custom of Tiyaars in South Malabar.—A community, following the Makkatayam rule, must not be taken to be necessarily governed by the Hindu law of inheritance with all its incidents:—Accordingly, when a member of the Tiyaar community in Calicut following that rule, alleged and proved a custom that brothers succeeded to self-acquired property in preference to widows, it was held that the Court should give effect to it. RARICHAN v. PARACHI, 15 M. 281 ...

8.—Karnavan.


(2) Disqualification for office of—Blindness.—A blind man sued, as the Karnavan of a Malabar tarwad, to recover certain land. One of the defendants, who claimed but was not admitted to be a member of the tarwad, and who asserted a right as kanomdar to the land in question, pleaded that the plaintiff was not competent to act as Karnavan, or consequently to maintain the suit by reason of his blindness:—Held, that the defendant was not entitled to raise this plea. UKKANDEN v. KUNHUNNI, 15 M. 483 ...

(3) Landlord and tenant—Surrender—Limitation—Adverse possession—Karnavan, powers of—Perpetual lease—See LANDLORD AND TENANT, 15 M. 166.

(4) Melkoma—Compromise by Ucallers of the right to manage a devasom—Chalm of certain Ucallers to exclude others from management—Limitation—See LIMITATION, 15 M. 153.

(5) Nambudri—Karnavan, decree against—Sale in execution.—A junior member of a Nambudri illom, of which he was held out as the manager and de facto Karnavan, contracted a debt for the purposes of the illom. The creditor sued him on the debt, but did not implead him as Karnavan, and, having obtained a personal decree, attached and brought to sale in execution property belonging to the illom. A son of the judgment-debtor now sued to set aside the sale:—Held, that the sale should be set aside. GOVINDA v. KRISHNAN, 15 M. 393 ...

(6) Specific Relief Act—Act I of 1877, s. 56 (b)—Suit by junior members of a tarwad—Injunction restraining execution of a decree obtained in a suit against plaintiffs' Karnavan—See SPECIFIC RELIEF ACT (I OF 1877), 14 M. 425.

(7) Suit by junior members of a tarwad—Suit for declaration of invalidity of kanom—Limitation.—The junior members of a Malabar tarwad brought a suit against their Karnavan and senior anandradvan and certain persons claiming under a kanom granted by the former for a declaration that the kanom was invalid and for possession of the land demised with mesne profits. The suit was filed nearly twelve years after the execution of the kanom:—Held, (1) that the suit was maintainable by the plaintiff; (2) that the suit was not barred by limitation. ANANTEN v. SANKAREN, 14 M. 101 ...

(8) Suit to remove a Karnavan for mismanagement as de facto Karnavan—Minor members of tarwad not joined—Civil Courts Act (Madras)—Act III of 1873, s. 13—Valuation of suit—See ACT III OF 1873 (MADRAS CIVIL COURTS), 14 M. 78.
GENERAL INDEX.

Malabar Law—8.—Karnavan—(Concluded).

(9) See CIV. PRO. CODE (ACT XIV OF 1882), 14 M. 150.
(10) See SPECIFIC RELIEF ACT (I OF 1877), 15 M. 255.

9.—Mortgage.

(1) Court sale—Decree on a mortgage to secure two debts—One debt only binding on tarwad.—In a suit by members of a Malabar tarwad to set aside a sale in execution of a decree, passed on a mortgage which had been executed by their Karnavan and senior anandhravan in consolidation of two prior mortgages executed, respectively, to secure two debts, it appeared that one of these debts was binding and the other not binding on the tarwad:—Held, that the Court should declare the plaintiffs entitled to the property sold notwithstanding the sale, but subject to the charge created to secure the binding debt. Kunhi Mannan v. Chali Vaduvath, 14 M. 494... 345

(2) Kanom—Redemption suit brought within twelve years from the date of kanom—Special stipulation for redemption.—In a suit to redeem a kanom executed less than twelve years before suit it appeared that the kanom instrument provided for the surrender of the property "if at any time the property should be necessary" for the jenni. It was found that no special exigency had been established by the plaintiff:—Held, on the above finding that the special stipulation did not oust the general rule that the kanom was not redeemable for twelve years and the suit was therefore premature. Mahomed v. Ali Koya, 14 M. 76... 55

(3) Ottidar’s right of pre-emption—Suit to redeem kanom.—In a suit to redeem kanom of 1874, it was found that the plaintiff’s predecessor-in-title had purchased the jenni title to the land in question at a sale, held in execution of a decree which was binding on the jenni’s tarwad; but it appeared that the defendant (the kanomdar) held an otti on the land, dated 1870, and had not waived his right of pre-emption as ottidar. A decree was passed providing for payment by the defendant of the purchase-money to the plaintiff, and the execution by the latter of a conveyance, and in default for redemption by the plaintiff on his paying to defendant the amount of the otti:—Held, that the decree was right. Ukku v. Kutti, 15 M. 401... 631

(4) Ottidar, right of pre-emption of—Waiver—Election not to purchase.—An ottidar in Malabar loses his right of pre-emption if he refuses to bid at a Court-sale of the land comprised in his otti, held in execution of a decree against the Karnavan and senior anandhravan of the tarwad, in which the jenni right is vested, after having been specially invited to attend and exercise that right, and makes no offer to take the property for a long time after the Court-sale. Ammotti Haji v. Kunnayen Kutti, 15 M. 490 = 2 M.L.J. 291... 686

(5) See CIV. PRO. CODE (ACT XIV OF 1882), 14 M. 284, 14 M. 301.
(6) See COURT FEES ACT (VII OF 1870), 14 M. 480.
(7) See EVIDENCE ACT (I OF 1872), 15 M. 378, 16 M. 329.

10.—Partition.

(1) Of tarwad—Tarwad debt—Construction of decree.—In 1870 the managers of the plaintiff’s tarwad demised certain land now in suit on kanom. In 1885 they sued to redeem the kanom and a decree was passed that the plaintiff do pay a certain sum to the kanomdar, and that he do surrender the land; but in the judgment it was said that the kanom amount should be charged on the land. In 1886 the tarwad was divided and the land above referred to was allotted to the present plaintiff’s branch. In 1887 the kanomdar, in execution of the above decree, brought the land to sale and it was purchased by defendant No. 1:—Held, that the sale was not binding on the plaintiff. Sankara v. Keli, 14 M. 29... 21

(2) See ACT III OF 1873 (MADRAS CIVIL COURTS), 15 M. 69.

11.—Religious Endowments.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 14 M. 312, 16 M. 449.
(2) See LIMITATION ACT (XV OF 1877), 16 M. 456.
GENERAL INDEX.

Malabar Law.—12.—Will.
Gift of a life-interest—Limitation—See LIMITATION, 14 M. 495.

Manager 'De Facto.'
Power of—See RELIGIOUS INSTITUTION, 16 M. 67.

Marriage.
(1) See ACT XV OF 1872 (CHRISTIAN MARRIAGE), 14 M. 312.
(2) See DIVORCE ACT (IV OF 1860), 16 M. 455.

Master and Servant.

Liability of master for servant's act—Offer of money by defendants to avoid litigation.—The servant of the defendant, who was staying in the plaintiff's hotel, broke a filter, the property of the plaintiff. In a suit by the plaintiff for damages it appeared that the servant, when he broke the filter, was not acting within the scope of his employment, nor on the defendant's business, or for his benefit. The defendant offered to the plaintiff as compensation Rs. 30 (which was refused), but without acknowledging any liability:—Held, (1) that the defendant was not liable for the act of his servant; (2) that the plaintiff was not entitled to a decree for Rs. 30. GRAY v. FIDDIAN, 15 M. 73 ...

Mauritius.
See REGISTRATION ACT (III OF 1877), 16 M. 85.

Menkaval Lands.
See INAM COMMISSION, 14 M. 431.

Mese Profits.
See CIV. PRO. CODE (ACT XLIV OF 1882), 14 M. 328.

Minor.
(1) See ACT III OF 1873 (MADRAS CIVIL COURTS), 14 M. 78.
(2) See PENAL CODE (ACT XLV OF 1860), 15 M. 41, 15 M. 75, 15 M. 323.

Mirasi Rights.
(2) Kasavargam tenant—Ejectment suit—Notice to quit.—The mirasidars of a village in the Tanjore District sued to recover a mannat, which had been put into the possession of the ancestors of defendant No. 8, who were village blacksmiths, as kasavargam tenants. Defendant No. 8 had left the village and sold the land as if it were his ancestral property to others of the defendants, who were now in occupation:—Held, that the plaintiffs were entitled to recover the land without proof of notice to quit to the occupants. SUBBARAYA v. NATARAJA, 14 M. 96 ...

Misjoinder.
See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 14 M. 103.

Mortgage,
1.—GENERAL.
2.—BY CONDITIONAL SALE.
3.—CONTRIBUTION.
4.—FORECLOSURE.
5.—REDEMPTION.
6.—SALE.
7.—USUFRUCTUARY.
GENERAL INDEX.

Mortgage—1.—General.

(1) By one of two co-widows invalid without the consent of the other—Their joint interests and title by survivorship—Construction of mortgage-deeds—See HINDU LAW—JOINT FAMILY, 16 M. 1.


(3) Evidence Act—Act I of 1872, s. 92—Sale-deed—Contemporaneous oral agreement for reconveyance.—In a suit to recover possession of land on the footing of a sale-deed executed by the defendants to the plaintiff’s vendor, the defendants set up a contemporaneous oral agreement for the reconveyance of the land to them on the repayment of a sum of money then borrowed by them from the vendee, and alleged that they had retained possession of, and held the pattas for, the land throughout: —Held, that the defendants were entitled to prove by oral evidence that the transaction was a mortgage and not a sale, unless the plaintiff was an innocent purchaser for value without notice of the mortgage. RAKKEN V. ALAGAPPUDAYAN, 16 M. 80 ... 763

(4) See HINDU LAW—JOINT FAMILY, 16 M. 1.

—2.—By Conditional Sale.

(1) Vendor and purchaser—Conditional right of re-purchase—See VENDOR AND PURCHASER, 14 M. 170.

(2) See MORTGAGOR AND MORTGAGEE, 15 M. 280.

—3.—Contribution.

See TRANSFER OF PROPERTY ACT (IV OF 1892), 14 M. 71.

—4.—Foreclosure.

See TRANSFER OF PROPERTY ACT (IV OF 1892), 16 M. 64.

—5.—Redemption.

(1) Civ. Pro. Code, s. 13—Res judicata—Transfer of interest—Appointment of a creditor as agent to collect rents and appropriate part towards the debt—See CIV. PRO. CODE (ACT XIV OF 1882), 14 M. 301.

(2) See COURT FEES ACT (VII OF 1870), 16 M. 415.

(3) See EVIDENCE ACT (I OF 1872), 16 M. 328.

(4) See HINDU LAW—PARTITION, 15 M. 234.

(5) See LIMITATION ACT (XV OF 1877), 15 M. 157.

(6) See MORTGAGOR AND MORTGAGEE, 15 M. 230.

(7) See TRANSFER OF PROPERTY ACT (IV OF 1892), 14 M. 71, 15 M. 54, 15 M. 170, 16 M. 214, 16 M. 486.

—6.—Sale.

(1) Mortgage-deed passing possession of certain parcels of land and hypothecating others—Remedy of mortgagee—Previous decree for rent obtained against mortgagor—Res judicata—See RES JUDICATA, 16 M. 325.

(2) Malabar law—Court-sale—Decree on a mortgage to secure two debts—One debt only binding on tawd—See MALABAR LAW—MORTGAGE, 14 M. 494.

(3) Suit for arrears of interest and sale—Suit before principal sum became due.—A suit for arrears of interest accrued due on a mortgage and for the sale of the property comprised therein was brought before the date fixed for the repayment of the principal. The mortgage provided that, on default of payment of interest on the due date, interest should be chargeable on the arrear, and also that interest at an enhanced rate should be chargeable on the principal: —Held, that the plaintiff was not entitled to sue for the arrears of interest or to bring the mortgage premises to sale before the principal became due. KANNU V. NATESA, 14 M. 477 ... 333

1125
GENERAL INDEX.

Mortgage—7.—Usufructuary.
(1) See LIMITATION ACT (XV of 1877), 16 M. 436.
(2) See RES JUDICATA, 16 M. 335.
(3) See TRANSFER OF PROPERTY ACT (IV of 1882), 14 M. 74, 14 M. 232, 15 M. 174.

Mortgagor and Mortgagee.

(2) Mortgage by conditional sale before Transfer of Property Act—Redemption.—Suit, in 1889, to redeem a mortgage of 1890, which contained a provision that, if the mortgage money was not paid in March 1892, the mortgage premises should become the absolute property of the mortgagee:—Held, that the plaintiff was entitled to redeem. VENKATASUBBAYA v. VENKATAYYA, 15 M. 230 = 1 M.L.J. 677

(3) Purchase by first mortgagee—Suit by second mortgagee—Inconsistent cases set up in the alternative—Relief not asked for—Practice—Defendant No. 1 mortgaged certain premises to defendant No. 2 in 1894 and to the plaintiff in 1895. The mortgage to the plaintiff was a usufructuary mortgage. In 1897 defendant No. 2 obtained a decree on his mortgage, and in execution brought to sale and himself became the purchaser of the mortgage premises. The plaintiff, who was in possession under the mortgage of 1895, prayed in this suit that the prior mortgage be declared fraudulent and void, and the sale in execution be set aside, and in the alternative that she be declared entitled to redeem the prior mortgage. The plaint was stamped as in a redemption suit and the Court of first appeal passed a decree for redemption:—Held, that the suit should be dismissed, since after the sale of the mortgage premises in execution of the decree obtained by defendant No. 2, the only right which remained to the puisne mortgage was the right to retain possession until her mortgage should be redeemed. Semple per BEST, J. —It is open to a plaintiff who is not a party to the transaction in respect of which allegations are made to come into Court seeking relief in the alternative, dependent upon what may be found by the Court to be the true facts of the case. Quere: Whether the Court can pass a decree for redemption when the plaint seeks only a declaration of the right to redeem. PERUMAL v. KAVERI, 16 M. 121 = 2 M.L.J. 281

Mutt.
Relation between the founder's representative and the Mahant—Agreement by the Mahant on his appointment—Power of dismissal.—In the absence of a deed of endowment the obligations of the head of a mutt to the representative of the founder can only be deduced from the usage of the institution. In a suit by the representative of the founder to remove the defendant from the headship of a mutt, it appeared that the usage was for the head of the institution for the time being to nominate his successor, and for the representative of the founder to sanction the nomination and invest the nominee with a sahe on his installation, and that the defendant had asked the plaintiff to appoint him and had undertaken on his appointment to furnish to him accounts of the income and expenditure of the mutt:—Held, that the plaintiff was not entitled to remove the defendant from office on the ground of his refusal to furnish accounts. GAJAPATI v. BHAGAVAN DOSS, 15 M. 44

Native Christian.
Hindu convert to Christianity—Divorce Act—Act IV of 1869—See DIVORCE ACT (IV of 1869), 14 M. 392.

Negotiable Instruments Act (XXVI of 1881).
S. 61—Hundi—Presumption—Notice of dishonour—Indemnity bond.—In a suit on an indemnity bond executed by way of collateral security by the maker of six hundies, it appeared that three of the hundies were paid and when three which were unpaid were presented to the maker, he did not at once insist upon want of notice of dishonour or on non-presentation as a
NEGATIVE INDEX.

Negotiable Instruments Act (XXVI of 1881)—(Concluded).

Ground of discharge:—Held, that since the defendant did not prove that
the drawer had effects of his to meet the hundies on presentment, or that
he had sustained damage by reason of the want of notice of dishonour,
the plaintiff was entitled to a decree. SHANMUGAM v. CHINNASAMI,
14 M. 470 = 1 M.L.J. 674

Non-Joinder.

(1) Practice—Civ. Pro. Code—Act X of 1877, s. 294, amended by Act XII of 1879
—Purchase at a Court sale on behalf of a judgment-creditor without per-

(2) Practice—Malabar law—Suit by one of two co-uralers—See Malabar Law
—General, 14 M. 499.


Notice to quit.

(1) Evidence Act—Act I of 1872, s. 13—Ejectment—See Evidence Act (I of
1872), 16 M. 194.

(2) See Landlord and Tenant, 16 M. 97.

(3) See Mirasi Rights, 14 M. 98.

Nuisance.

See Act IV of 1884 (Madras District Municipalities), 15 M. 91.

Omit to sue.

1882), 15 M. 296.

Panchayet.

Regulation XXXII of 1802 (Madras)—Reg. XII of 1816 (Madras)—Cases
—in which a District Panchayet may be appointed—Finality of award—
Notice of nomination of Panchayetdars.—The applicability of the proce-
dure provided in Reg. XII of 1816 is not limited to cases in which
a breach of the peace has taken place or is apprehended. When a District
Panchayet, appointed under that regulation, has come to a decision, that
decision is final and conclusive between the parties and cannot be im-
peached or set aside, except in the manner prescribed by the regulation.
Such decision is not invalid, because only one party consented to the
reference of the matter in dispute to a panchayet, or because the other
party, who protested against the proceedings, had not notice of the time
when the nomination of the Panchayetdars was to take place. NARAYANA
v. CHANDRA, 15 M. 1

Paradesi.


Parties.

(1) Civ. Pro. Code, ss. 13, 14, 103—"Res judicata"—"Court of competent juris-
diction"—Landlord and tenant—Quiet enjoyment, covenant for—Suit
for damages against lessor, including costs—Joiner of one of two co-
lessees as defendant—Suit dismissed against such lessee—See Civ.

(2) Club—Goods supplied to a member—Suit on behalf of club—See Club, 14
M. 362.

(3) District Municipalities Act (Madras)—Act IV of 1884, s. 169—Suit for declara-
tion of title against a Municipality.—The plaintiff sued a Municipal
Council, under the Madras District Municipalities Act, for a declaration
of title to a certain structure situated in the limits of the Municipality
and of his right to put a roof over it. The structure was found to belong
to the plaintiff:—Held, (1) that the Secretary of State was not a necessary
party to the suit; (2) that the Municipal Council had no discretion under
s. 169 of the above Act to prevent the plaintiff from dealing with the

1127
GENERAL INDEX.

Parties—(Concluded).

structure, provided he did not interfere with the convenience of the public or with any sanitary regulation. KRISHNAYYA v. THE BELLARY MUNICIPAL COUNCIL, 15 M. 392.

(4) Limitation Act—Suit for mutation of names in register.—The Collector of the district is a necessary party to a suit by a purchaser against his vendor to compel mutation of names in the register. Such a suit is not barred by limitation unless the Collector has refused without qualification to effect such mutation, negating the plaintiff’s right to the land in question. VIHASAMI v. RAMA DOSS, 15 M. 350


(6) See TRANSFER OF PROPERTY ACT (IV OF 1882), 15 M. 54.

Partnership.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 15 M. 362.

(2) See LIMITATION ACT (XV OF 1877), 14 M. 465.

Pauper.

See CIV. PRO. CODE (ACT XIV OF 1882), 14 M. 163.

Penal Code (Act XLV of 1860).

(1) Ss. 43, 177—“Legally bound.”—On 22nd November 1890 the accused, who was a Deputy Tahsildar, submitted to his official superior, a false “nil” return of lands in his enjoyment, and also on 5th December 1890 made a false statement to the same effect in a revenue enquiry before the Principal Assistant Collector. He was convicted of an offence under Penal Code, s. 177:—Held, that the conviction was wrong. QUEEN-EMPERESS v. APPAYA, 14 M. 484 = 1 M.L.J. 741 = 1 Weir 109

(2) Ss. 109, 290—Nuisance—Keeping a gaming house—Abetment.—The lessee of a house, who permitted disorderly people to use it for gambling and thereby caused annoyance to the public, was convicted of an offence under Penal Code, s. 290; it appeared, however, that the accused had not engaged the house with the object of letting it out as a gaming-house:—Held, that the conviction was right. QUEEN-EMPERESS v. THANDAVARAYudu, 14 M. 304 = 1 Weir 241

(3) Ss. 141, 143—Unlawful assembly—Assertion of right.—One of two village factions objected to the other passing in possession over a vacant piece of ground in the main street of the village. An injunction prohibiting the procession was obtained in the Court of the District Munsif on 20th March. On 11th May a procession was formed and approached the ground in question. Forty-six members of the first-named faction were assembled there to prevent the procession by force: the police ordered them to disperse: this order having been neglected the police prevailed on the other faction to abandon the procession:—Held, that the persons who did not disperse on being ordered to do so were guilty of the offence of being members of an unlawful assembly. QUEEN-EMPERESS v. TIRA KADU, 14 M. 126 = 1 Weir 69

(4) S. 168—Public servant—Regulation XXIX of 1802 (Madras), s. 12—Duties of zamindari karmin.—Per cur: A zamindari karmin is a public servant and is bound by law to produce accounts to the proprietor or farmer of a zamindari. SUBRAMANYA v. SOMASUNDARA, 15 M. 127 = 1 Weir 72

(5) S. 174—Disobedience to a summons.—It is not an offence under Penal Code, s. 174, to disobey a summons issued by a British Magistrate directing the person summoned to appear before him at a place outside British territory. QUEEN-EMPERESS v. PARANGA, 16 M. 463 = 1 Weir 86

(6) Ss. 183, 186—“Voluntarily.”—A District Judge ordered that the house of the defendant in a suit pending before him be searched and certain property brought to the Court, and appointed a commissioner to carry out this order. The commissioner went to the house, but the defendant shut the doors and would not admit him. A crowd collected, and the commissioner felt it would be unsafe to proceed to carry out the order
by force, and was unable to do so otherwise. The defendant was prosecuted and sentenced under Penal Code, s. 166: Held, that the facts disclosed no offence under that section. QUEEN-EMPRESS v. SOMMANNA, 15 M. 221 = 2 M.L.J. 120 = 1 Weir 133

(7) S. 186—Obstructing a public servant—Public vaccinator.—To spread a false report and thereby prevent persons from bringing their children for vaccination to the public vaccinator is not an offence under Penal Code, s. 186, QUEEN-EMPRESS v. THIMMACHI, 15 M. 93 = 1 Weir 131

(8) S. 214—Screening an offender.—The accused agreed to give Rs. 10 to Saminatha Pillai in consideration of his not giving evidence against Koulundavelu who was charged with the offences of house-breaking by night and theft in a building. Saminatha Pillai gave evidence against Koulundavelu who was, however, acquitted. The accused was charged under Penal Code, s. 214, but was acquitted: Held, that the acquittal was right. QUEEN-EMPRESS v. SAMINATHA, 14 M. 400 = 1 M.L.J. 163 = 1 Weir 195


(10) S. 372—Disposal of a minor—Dedication of a girl in a temple.—The accused dedicated his minor daughter as a Basivi by a form of marriage with an idol. It appeared that a Basivi is incapable of contracting a lawful marriage, and ordinarily practises promiscuous intercourse with men, and that her sons succeed to her father’s property: Held, the accused had committed an offence under Penal Code, s. 372. QUEEN-EMPRESS v. BASAVA, 15 M. 75 = 1 Weir 372

(11) S. 372—Illegal disposal of a minor.—A dancing woman of a temple applied to the manager of the temple for the appointment of a minor girl, whom she falsely described as her daughter, to her “kothu” miras; the manager ordered that the girl be placed on the pay registers like other dancing girls, and she was employed about the temple, though the ceremony of tying the bottu (after which the girl could not be married) did not take place: Held, that the above facts constituted prima facie evidence that an offence under Penal Code, s. 372, had been committed by the dancing woman, the manager above named, and the parents of the girl. SRINI- VASA v. ANNASAMI, 16 M. 41 = 1 Weir 365

(12) S. 372—Illegal disposal of a minor—Revision.—A dancing woman (fourth accused) of a temple applied to the manager (first accused) of the temple for the appointment of a girl under the age of sixteen, whom she had adopted as her daughter, to her “kothu” miras office to which duties more or less connected with the preparation of provisions of the temple were attached. The manager, before whom the girl had sung and danced, ordered that she be placed on the pay registers like other dancing girls and she was employed in the aforesaid duties about the temple for about five months. It appeared that the dancing women of the temple lived partly at least by prostitution, and there was evidence that the girl sang and danced in the temple, received wages and wore a pottu (an emblem of marriage). The Magistrate, upon these facts, refused to frame a charge against the manager of the temple and the adoptive mother of the minor under Penal Code, s. 372: Held, per Collins, C. J. (Parker, J., diss.), that the Magistrate should have framed a charge. On a petition under Crim. Pro. Code, ss. 435, 439, preferred by the complainant, who was a dismissed servant of the temple, after the prosecution had been pending for two years, it appeared that the girl had suffered no harm: Held, that whether or not the Magistrate should have framed a charge, the High Court was not bound to send the case for retrial. SRINI- VASA v. ANNASAMI, 15 M. 323 = 1 Weir 366

(13) Ss. 578, 403—Post Office Act—Act XIV of 1866, s. 48 —Secreting and fraudulently appropriating letters—Theft—Dishonest misappropriation.—The accused, being in the employ of Government in the Post Office Department, while assisting in the sorting of letters, secreted two letters with the intention of handing them to the delivery peon, and sharing with him certain monies payable upon them. He was charged under the Indian Post Office Act, s. 48: Held, (1) that since the intention of the accused...
GENERAL INDEX.

Penal Code (Act XLV of 1860)—(Concluded). ... 161

(14) S. 499—Defamation—Privilege of party—Appeal from the Resident's Court, Bangalore—Limitation.—A person who was being defended by counsel on a criminal charge interfered in the examination of a witness and made a defamatory statement with regard to his character. He was now charged with defamation and convicted in the Resident's Court at Bangalore. On an appeal to the High Court, preferred more than sixty days after the conviction: Held, (1) that the appeal should be admitted; (2) that the occasion was not privileged and the words complained of were uttered maliciously and the conviction was right. HAYES v. CHRISTIAN, 15 M. 414 = 2 M.L.J. 142 = 1 Weir 588 ... 641

(15) S. 499, exc. X—Defamation—Privilege—Mala fides—Privilege exceeded.—The complainant, a Brahman who had been put out of caste, was re-admitted by the executive committee of the caste after performing expiatory ceremonies. The re-admission was not approved of by the accused, who formed a faction of the caste; and they, after an interval of six months, distributed in the bazaar to all classes of the public printed papers in which the complainant was described as a "doshi" or sinner, which signified that he was a person unfit to be associated with. The accused were charged with the offence of defamation. They pleaded privilege, and it was admitted that they had acted without malice; Held, that the accused had not acted in good faith, and that the publication was not under the circumstances privileged and protected by Penal Code, s. 429, exc. X, and that the accused were accordingly guilty of defamation. THIAGARAYA v. KRISHNASAMI, 15 M. 214 = 2 M.L.J. 127 = 1 Weir 617 ... 500

(16) S. 500—Defamation—Privilege of witness—Investigation by Police.—A statement made in answer to a question put by a Police officer under Crim. Pro. Cod., s. 161, in the course of investigation made by him is privileged, and cannot be made the foundation of a charge of defamation. QUEEN-EMpress v. GOVINDA PILLAI, 16 M. 235 = 1 Weir 587 ... 871

Perpetuities. Rule against.

Superstitious uses—Trust for masses—Executor, assent of—Vesting of bequest.—An Armenian died in Madras in 1836, leaving a will whereby she appointed executors and bequeathed a certain sum "that the income thereof be given for perpetual masses for the benefit of my soul and for the souls in purgatory," and she also bequeathed, inter alia, Rs. 42,000 to her grand-daughter for life and provided that in the event of her marrying and having children she could bequeath to them the said Rs. 42,000, but in the event of her dying without issue, Rs. 14,000, out of the said Rs. 42,000, should be subtracted and given to her husband, and the remaining Rs. 28,000 should be added to the first-mentioned bequest and the income thereof be similarly given for masses. The executor with probate gave effect to the first-mentioned legacy. By a settlement made in contemplation of the marriage of the grand-daughter, the subject of the second legacy was settled as provided in the will except as to the Rs. 14,000, as to which it was declared that in the event of there being no issue of the marriage, and of the wife surviving the husband and dying without marrying again, it should be divided between the residuary legatees of the testatrix. The husband was a party to the settlement, as also was the executor of the testatrix who was one of the trustees of the settlement. The marriage having taken place, a suit was brought by the husband and wife against the trustees, and a decree was passed under which the trustees were relieved of their office, and the trust funds paid into Court with the direction that interest accruing thereon be paid to the wife until further order.
Perpetuities, Rule against—(Concluded).

The husband died without issue and subsequently in 1890 the wife died not having re-married. The Administrator-General of Madras took out letters of administration to administer the estate left unadministered of the testatrix, and the Rs. 42,000 above referred to were paid over to him. Held by Shepherd, J., that the sum of Rs. 14,000 by reason of the settlement, but not otherwise, fell into the residue of the estate of the testatrix.—Held, by Collins, O.J., and Handley, J., affirming Shepherd, J. (1) that the sum of Rs. 28,000 formed unadministered assets of the estate of the testatrix; (2) that the bequest for masses was void as infringing the rule against perpetuities. COLGAN v. THE ADMINISTRATOR-GENERAL OF MADRAS, 15 M. 424

Plaint.

See CIV. PRO. CODE (ACT XIV OF 1882), 14 M. 163.

Pleader.

(1) See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 16 M. 278.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 15 M. 135.

Pleadings and Proof.

Variance between—See PRACTICE, 15 M. 489.

Power-of-attorney.

See STAMP ACT (1 OF 1879), 15 M. 386.

Practice.

(1) Appellant not allowed to raise in appeal a contention inconsistent with the case relied upon in the Courts below—See HINDU LAW—SUCCESSION, 15 M. 508.

(2) Civil Courts Act—Act III of 1873 (Madras), s. 13 (2)—Appeal from Subordinate Court—Proceeding to be adopted when a District Court erroneously returns an appeal petition for presentation in High Court—Civ. Pro. Code, s. 57—See ACT III OF 1873 (MADRAS CIVIL COURTS), 14 M. 462.

(3) Civ. Pro. Code, s. 525—Suit on an award—Alternative claim on original consideration—Withdrawal of claim on award—See CIV. PRO. CODE (ACT XIV OF 1882), 15 M. 474.

(4) Inconsistent pleas—Hindu Law—Adoption made the day after the adoptive father made his will—Adoptive son bound by the will—See HINDU LAW—ADOPTION, 14 M. 172.

(5) Mortgagor and mortgagee—Purchase by first mortgagor—Suit by second mortgagee—Inconsistent cases set up in the alternative—Relief not asked for—See MORTGAGOR AND MORTGAGEE, 16 M. 121.

(6) Non-joinder—Civ. Pro. Code—Act X of 1877, s. 294, amended by Act XII of 1879—Purchase at a Court-sale on behalf of a judgment-creditor without permission of the Court—See CIV. PRO. CODE (ACT X OF 1877), 14 M. 498.

(7) Non-joinder—Malabar Law—Suit by one of two co-uralers—See MALABAR LAW—GENERAL, 14 M. 489.

(8) Succession Act—Act X of 1865, s. 187—Hindu Wills Act—Act XXI of 1870, s. 2—Estate of deceased Hindu—Representative—See SUCCESSION ACT (X of 1865), 14 M. 454.

(9) Variance between pleadings and proof—Relief not asked for.—The plaintiff, alleging that a certain lane was his property and that he had been obstructed by the defendants from building a door upon it, sued for an injunction and for damages. The Court held that the plaintiff's title to the land was not established, but passed a decree declaring that both the plaintiff and the defendants were entitled to use the lane by right of easement: Held, that this declaration, which had not been asked for, should not have been made, and that the suit should have been dismissed for want of proof of the title alleged by the plaintiff. SAMBAYYA v. GOPALAKRISHNAMMA, 15 M. 489—2 M.L.J. 257

1131
Practice—(Concluded).

(10) See CIV. PRO. CODE (ACT XIV OF 1882), 14 M. 498; 15 M. 240.
(11) See CRIM. PRO. CODE (ACT X OF 1882), 14 M. 36.

Pre-emption.

(1) Right of—Malabar Law—Ottidar—Waiver—Election not to purchase—See MALABAR LAW—MORTGAGE, 15 M. 480.
(2) See MALABAR LAW—MORTGAGE, 15 M. 401.

Principal and Agent.

See EVIDENCE ACT (I OF 1872), 16 M. 238.

Privy Council.

Practice—Refusal of rehearing—"Res noviter."—The judgment of the Judicial Committee reported to and confirmed by Her Majesty in Council cannot be re-opened only for the reason that new evidence is forthcoming.
SRIMANTU RAJA YARLAGADDA DURGA V. SRIMANTU MALLIKARJUNA, 14 M. 439 (P.C.)

Procedurc.

See CIV. PRO. CODE (ACT XIV OF 1882), 15 M. 82.

Process Fees.

(1) See COURT FEES ACT (VII OF 1870), 16 M. 423.
(2) See CRIM. PRO. CODE (ACT X OF 1882), 16 M. 234.

Promissory Note.

(1) See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 14 M. 63.
(2) See CONTRACT ACT (IX OF 1892), 16 M. 283.

Proof.


Public Street.

Obstruction of—Suit for declaration and injunction—Special damage.—A gate was erected on a public street (by the permission of the Municipal Council) which obstructed the exercise by the plaintiff and the public of their right to resort to and draw water from a well. It appeared in evidence, although it was not alleged in the plaint, that the plaintiff had to use the land between the newly erected gate and the well when he repaired his house. The plaintiff not having obtained permission to sue under CIV. PRO. CODE, ss. 30, sued for a declaration of his right to use the street and draw water from the well and for an injunction compelling the removal of the gate: Held, that the suit was within the rule precluding private actions for public wrongs without special damage alleged and proved, and was accordingly not maintainable. SIDDESWARA V. KRISHNA, 14 M. 177 = 1 M.L.J. 321

Receiver.

See CIV. PRO. CODE (ACT XIV OF 1882), 15 M. 233.

Registration.

See LEASE DEED, 14 M. 271.

Registration Act (III of 1877).

(1) Ss. 17 (d), 48—Transfer of Property Act—Act IV of 1882, ss. 3, 78, 101—Priority of mortgages—Gross negligence—Extinguishment of charges—Notice by registration.—In a suit for the declaration of the priorities of mortgages and for foreclosure, it appeared that the mortgage premises had
Registration Act (III of 1877)—(Continued).

been purchased by the mortgagor from the second defendant and others in 1878, under a conveyance containing a covenant that they were free from incumbrances, and the mortgagor then received, inter alia, a Collector's certificate which was recited in another title-deed also handed over to her. The premises were mortgaged to defendant No. 2 who was an experienced sawm in 1879 and to the plaintiff company in 1883 and again in 1884 and were conveyed absolutely by the mortgagor to defendant No. 2 in 1886. The mortgagor executed a rent agreement to the plaintiff company on the occasion of each of the mortgages of 1883 and 1884. The above mortgages were registered, but the plaintiff company and defendant No. 2 had no notice at the respective dates of their mortgages and conveyance of any previous incumbrance. The plaintiff company received the title-deeds of the estate from the mortgagor (but not the Collector's certificate) on the execution of the mortgage of 1883; the second defendant alleged that he had held them under a prior incumbrance which was consolidated in the mortgage of 1879, and that before the execution of that mortgage the mortgagor had obtained them from him for the purpose of obtaining a Collector's certificate and had told him that the Collector had retained them, in order to account for their not being replaced in his custody: 

_Held,_ (1) that the plaintiff company were not affected with constructive notice of the mortgage of the second defendant by reason of its registration or of their failure to search the registry or to inquire after the Collector's certificate; (2) that the second defendant not having given a reasonable explanation of his conduct in leaving the title-deeds with the mortgagor four years after his mortgage, lost his priority by reason of his gross neglect under Transfer of Property Act, s. 78 apart from the circumstances raising a suspicion of fraud on his part._

_Quaere_: Whether the case might not have been decided against the second defendant on the ground that his mortgage was enrolled in the conveyance of 1886. _SHAN MAUN MULL v. MADRAS BUILDING COMPANY_, 15 M. 268—22 M.L.J 95 ... 538


(3) _Ss. 17 (d), 49—Specific Relief Act—Act I of 1977, s. 4 (c)—Admissibility of unregistered sale-deed—Suit for specific performance of contract to sell land._—The defendant executed a sale-deed of certain land to the plaintiff. The instrument bore Rs. 1 stamp only. The plaintiff alleged that the defendant had improperly refused to register the sale-deed and prayed for a decree compelling its registration and for the possession of the land in question: _Held,_ that the unregistered instrument was admissible in evidence, and that in any case, secondary evidence of its contents was admissible, the document having remained unregistered through no fault of the plaintiff. _NAGAPPA v. DEVU_, 14 M. 55 ... 39

(4) S. 17 (e)—Foreign Court—Bankruptcy in Mauritius—Right of suit by trustee under foreign composition-deed in British India—Stamp Act, I of 1979, s. 31.—A debtor and the firm of which he was a member were adjudicated bankrupts in Mauritius and a receiver was appointed by the Court. Subsequently the creditors met and resolved that if the adjudication was annulled, a composition, payable by instalments, be accepted in full satisfaction of their debts, and that the security of the plaintiff's firm be accepted for payment of such composition, and that the bankrupts' estate be assigned to that firm, and that the plaintiff be appointed trustee to carry out such arrangement. An instrument was executed to give effect to these resolutions and was concurred in by the receiver and approved by the Court, which annulled the adjudication and ordered that the bankrupts' estate in Mauritius and India vest in the plaintiff, who was appointed trustee to carry out the said composition with full powers of realization. The plaintiff now sued to recover moveable and immovable property of the bankrupts in India: _Held_, (1) that the above instrument was valid as a composition-deed and did not require to be stamped and registered as such composition-deed; and that any surplus that might remain after payment to the creditors did not belong to the plaintiff's firm, but was subject to a trust for the bankrupts; (2) that the plaintiff was entitled to a decree for the amount expended by him in payment of the creditors together with... 1133
GENERAL INDEX.

Registration Act (III of 1877)—(Concluded).

such costs as were incurred by him in recovering debts due to the estate as could not be recovered from the debtors, and the costs of certain sales and a mortgage incurred in realization of the estate; (3) that plaintiff was entitled to a decree for possession of the immovable property until the sum due is paid to him by the defendants or is satisfied out of the rents and profits of the property. No order made by the Court at Mauritius can operate to transfer the ownership of immovable property in British India. So held without deciding that the Court cannot compel the bankrupt when within its jurisdiction to execute in favour of the trustees such a deed as will, in accordance with the formalities of the local law, render the order of the Court effectual. Subbaraya v. Vythilinga, 16 M. 85 = 3 M.L.J. 80

767

(5) Ss. 36, 72 to 77—Compulsory registration—Suit to compel registration.—The plaintiff and defendant agreed that in consideration of a sum of money already paid and of a further sum to be paid on the completion of the transaction, the defendant should transfer a certain mortgage to the plaintiff, and an instrument of transfer was prepared and executed to give effect to that agreement, but it was not registered. The defendant now sued for a decree compelling the defendant to execute and register the instrument: Held, the plaintiff was not entitled to a decree for compulsory registration, and should have proceeded under Registration Act, ss. 36, 74 to 77. Venkataram v. Krishnayya, 16 M. 341 = 3 M.L.J. 169

345

(6) S. 50—Unregistered mortgage with possession—Subsequent registered mortgage Notice—Priority.—The defendants Nos. 1 and 2, in 1877, placed the plaintiffs’ father (since deceased in possession of certain land as usufructuary mortgagee under an unregistered mortgage deed for Rs. 99, and in 1883 mortgaged the same land to defendant No. 3 by a mortgage-deed which was registered. Defendant No. 3 obtained a decree on his mortgage in 1886, and applied that the mortgaged premises should be sold. The plaintiffs, having opposed his application for an order for sale without success, now sued for a declaration of their title as mortgagees. It was found that defendant No. 3 took his mortgage with notice of the mortgage of 1877, but had not otherwise acted fraudulently: Held, that the plaintiffs were entitled to priority in respect of the mortgage of 1877: Held by the Full Bench, that when it is proved that a subsequent encumbrancer under a registered conveyance had notice of a valid prior unregistered encumbrance and of possession by such encumbrancer, or of such conveyance without possession, the Courts are not bound to interpret the Registration Act of 1877, s. 50, so as to defeat the title of the prior encumbrancer.

Krisnamma v. Suranna, 16 M. 148 (P.B.) = 3 M.L.J. 54

811

(7) Ss. 72—75—Crim. Pro. Code, s. 195 — “Court ” — Sanction prosecution for perjury—See CRIM. PRO. CODE (ACT X OF 1892), 16 M. 138.

Regulation XXV of 1802 (Madras).

Ss. 4, 12—Zemindar’s sanad, assets mentioned in—Quit-rent on an agraharam village—Inam title-deed, rate mentioned in—Joint liability of agraharm-dars.—The plaintiff was a zemindar holding his estate under an sanad dated 1802. This sanad followed almost verbatim the language of Regulation XXV of 1802, s. 4, and where it referred to “lands paying a small quit-rent,” added “ which quit rent unchangeable by you is included in the assets of your zemindari.” The suit was brought to recover arrears of jodi or quit rent accrued due on an agraharam village in the zemindari. The defendants, who were the agraharam-dars, had divided the village and held it in separate shares. They pleaded that they were not liable to pay jodi in excess of the rate fixed by the Inam Commissioner and specified in the inam title-deed granted by him for the village in 1869: Held, (1) that the decision of the Inam Commissioner did not affect the zemindar’s claim, and that the question to be determined was what was the jodi payable in respect of the village at the time of the permanent settlement on which the peishkush of the zemindari was fixed; (2) that the defendants were jointly and severally liable for the amount that should be found due to the zemindar. On its appearing that Rs. 6 per putti was the recognised
GENERAL INDEX.

Regulation XXV of 1802 (Madras)—(Concluded).—Page 731
rate from 1832 to 1879, and that there was no evidence to show the agraharamdars had ever paid any other rate, or had paid Rs. 6 under coercion, the Court presumed that that was the rate at the time of the permanent settlement. Sobhanadri Appa Rau v. Gopalkrishnamma, 16 M. 34...

Regulation XXIX of 1802 (Madras).

Regulation XXXII of 1802 (Madras).
See Panchayet, 15 M. 1.

Regulation V of 1804.
Aliyasanta Law—Inheritance—Uncongenital insanity—Suit by an unadjudged lunatic by the agent of the Court of Wards as guardian—Authority of the Court of Wards—Estates of lunatics subject to Mufussal Courts—Act XXXV of 1828—Code of Civil Procedure, s. 461—See Aliyasanta Law, 14 M. 299.

Regulation XII of 1816 (Madras).
See Panchayet, 15 M. 1.

Regulation II of 1825 (Madras).
See Stamp, 16 M. 419.

Regulation IV of 1831 (Madras).
See Inam Commission, 14 M. 431.

Religious Institution.
(1) Debt contracted by one claiming to be in possession as head of the institution—‘De facto’ manager, power of—Cost of defending ejectment suit.—Suit on a bond in which the obligor was described as the head of a mutt and the debt thereby secured was stated to have been incurred “for the reasonable expenses of the suit which was being proceeded with, and for the good of the mutt and for the said mutt’s own expenses.” The debt had been contracted by one who was in possession of the mutt under a claim that he was the duly constituted head of the institution, for the purposes of defending a suit brought by the head of another religious institution to eject him and to establish certain rights over the mutt. A decree for ejectment was obtained, but some of the protagonists of the plaintiff were successfully resisted. The present defendant was a receiver of the properties of the mutt appointed by the Court in the course of that litigation: Held, that the bond was not enforceable against the property of the mutt. Saminatha v. Purushottama, 16 M. 67...

(2) Law applicable to—Succession to the office of Dharmakarta—Act XX of 1862—Religious endowments—Custom and usage.—On a question of the right of succession to the office of Dharmakarta of a devasthanam or temple at Rameshwaram in Madura, and in such cases the only law applicable is the custom and practice, which are to be proved by evidence. Both the Courts below found that, according to the established usage, the succession was provided for by each successive Dharmakarta initiating a pandaram; and, whilst in office, appointing him as his successor. It followed that the appointment of a Dharmakarta by one who had already ceased to hold the office (having been removed under Act XX of 1863, s. 14) was not in accordance with usage, and was therefore invalid. The person whom the displaced Dharmakarta had attempted to appoint was head of the mutt from which preceding Dharmakartas, as it appeared, had been taken. Besides the above cause of invalidity in the appointment in question, the evidence supported the finding that the displaced Dharmakarta made his attempt to appoint the head of the mutt to succeed him in office in furtherance of his own interest, and did not bona fide exercise his powers, if any. This finding invalidated the whole appointment and applied to the headship of the mutt as well as to the office of the Dharmakarta. Ramalingam Pillai v. Vythilingam Pillai, 16 M. 490 (P.C.)=20 I.A. 150=6 Bar. P.C.J. 351=17 Ind. Jur. 678...
GENERAL INDEX.

Religious Office.

(1) Assignment of—Res extra commercium—Custom as to assignability.—The plaintiff, sued for a declaration of his title as purchaser of a mirasi office in a temple, to which were attached certain duties to be performed as part of a religious ceremony, and for a sum of money representing the emoluments of the office. The first defendant was the plaintiff’s vendor, the second defendant claimed title to the office by purchase, the other defendants were the trustees of the temple and they did not appear on appeal. The Court of First Instance passed a decree as prayed, which was reversed on an appeal preferred by the second defendant alone. On second appeal: Held, that defendant No. 2 was not entitled to a decree on the sole ground that the office was res extra commercium. Per PARKER, J.—Had the trustees of the temple appeared in the Court of first appeal and raised the question of the inalienability of the office, it would have been necessary for the Court to have determined the question whether by the custom of the particular institution such alienations were valid. RANGASAMI v. RANGA, 16 M. 146 809

(2) Transfer of—Transferee not solely entitled in succession to transferor.—In a suit against themocktakers or trustees of a temple, the plaintiff sought a declaration of his right to perform the puja in the temple, and an injunction restraining the defendants from interfering with the exercise of such right. It appeared that the office of pujari was hereditary in the plaintiff’s family, that it had been held by the plaintiff’s undivided uncle (deceased), that he transferred it in 1893 to the plaintiff’s father (deceased), in succession to whom the plaintiff now claimed it. The High Court called for a finding as to whether the plaintiff’s father was the sole heir next in succession to his transferor, and it was found that he had three brothers: Held, that the transfer of the office to the plaintiff’s father was invalid, and the suit should be dismissed. NARAYANA v. RANGA, 15 M. 183 = 2 M.L.J. 19 477

Religious Trusteehip.

Assignment of—Delegation of trust—Appointment by trustee of an agent for nine years.—One holding land on trust to supply a temple with rice, etc., out of the income of the land, placed the defendant in possession of it under a lease, and subsequently, in 1893, demised it to the plaintiff for nine years under an instrument which provided that the plaintiff should collect the income, pay part of it to the executant of the instrument, and with the rest perform the trusts above mentioned. In a suit for rent the defendant denied the plaintiff’s title questioning the validity of the instrument of 1893: Held, that the instrument was valid, as it merely appointed the plaintiff an agent, and did not amount to an assignment of the trust. KRISHNAMACHARLU v. RANGACHARLU, 16 M. 73 758

Religious Usages.


Report of Select Committee.


Res Judicata.

(1) Mortgage-deed passing possession of certain parcels of land and hypothecating others—Remedy of mortgagor—Previous decrees for rent obtained against mortgagors.—The obligee under an instrument, dated 1878, by which certain land was usufructually mortgaged and other land merely hypothecated to him, having obtained against the mortgagors decrees for rent due on part of the land under the terms of pattamahits executed by them on the date of the mortgage, now sued to recover the principal and interest 1136
Res Judicata—(Concluded).

due under that instrument:—Held, that he was not precluded from obtaining a decree by reason of his previous suit, and was entitled to a decree for the amounts due, and in default of payment for the sale of the mortgage premises. \textit{Nanu v. Raman}, 16 M. 335 = 3 M.L.J. 141 ... 940

(2) See \textit{Civ. Pro. Code (Act XIV of 1882)}, 14 M. 1, 284, 301, 312, 324, 328; 15 M. 296; 16 M. 11, 117, 380, 481.

(3) See \textit{Landlord and Tenant}, 14 M. 365.

"Res Noviter."

Privy Council—Practice—Refusal of rehearing—See PRIVY COUNCIL, 14 M. 430.

Restraint of Trade.

See \textit{Contract Act (IX of 1872)}, 15 M. 79.

Resumption.

(1) See \textit{Inam Commission}, 14 M. 431.

(2) See \textit{Landlord and Tenant}, 14 M. 365.

Review.


(2) See \textit{Limitation Act (XV of 1877)}, 14 M. 81; 14 M. 252.

Revision.


(2) See \textit{Act VII of 1889 (Succession Certificate)}, 16 M. 454.

Sanction for Prosecution.


Security Bond.

See \textit{Act XXVII of 1860 (Succession Certificate)}, 14 M. 473.

Service Tenure.

See \textit{Landlord and Tenant}, 14 M. 365.

Set-off.


South Canara.

See \textit{Easements Act (V of 1882)}, 16 M. 304.

Sovereign Price.


Specific Relief Act (1 of 1877).

(1) S. 4 (c)—Admissibility of unregistered sale-deed—Suit for specific performance of contract to sell land—Registration Act—Act III of 1877, ss. 17 (d), 49 —See \textit{Registration Act (III of 1877)}, 14 M. 55.

(2) S. 18 (c)—Hindu Law—Adoption—Niyoga—Gift—Transfer of Property Act—Act IV of 1882, s. 43 —See \textit{Transfer of Property Act (IV of 1882)}, 14 M. 469.

(3) Ss. 20, 54, 57—Stamp Act—Act I of 1879, s. 3, cl. 4—Bond—Contract Act—Act IX of 1872, s. 39—Contract for personal service—Contract for more than three years—Interim injunction. See \textit{Contract Act (IX of 1872)}, 14 M. 16.

(4) Ss. 39, 40, 42—Cancellation of instrument—Declaratory decree—Limitation Act—Act XV of 1877, sch. II, art. 91.—A suit was filed in 1889 on behalf of a Malabar tartwad by two of its members to recover property improperly
GENERAL INDEX.

Specific Relief Act (I of 1877)—(Continued).

alienated in 1879 under a kanom instrument by the karnavan, who had since been removed from office:—Held, that since a prayer for the cancellation of the kanom instrument was not an essential part of the plaintiff's relief, the suit was not barred by the three years' rule in Limitation Act, 1877, sch. II, art. 91. UNNI v. KUNCHI AMMA, 14 M. 26 19


(ii) S. 42—Civ. Pro. Code—Act XIV of 1882, s. 293—Suit for declaration of title by an objector in execution proceedings—Consequential relief.—In a suit under Civ. Pro. Code, s. 293, for a declaration that the sale to defendant No. 2 of certain land in execution of a decree was invalid, it appeared that the land had been attached in execution of a decree obtained by defendant No. 2 against defendant No. 1, who held it as the plaintiff's tenant, that the plaintiff had interened unsuccessfully in the execution proceedings and had been referred to a regular suit, and that the land had been brought to sale and purchased by defendant No. 2 who was now in possession:—Held, that the suit was not maintainable for want of a prayer for possession. KUNHIAMMA v. KUNHURI, 16 M. 140 805

(iii) S. 42—Civ. Pro. Code, s. 589—Suit to eject one claiming to be the Jheer of a mutt—Consequential relief.—Three disciples of a mutt brought a suit, with the consent of the Advocate-General, under s. 589 of the Code of Civil Procedure, alleging that the defendant was in possession of the mutt under a false claim of title as the successor to the late Jheer, and praying that it be declared that he was not the duly appointed successor to the late Jheer, and that an appointment to the vacant office of Jheer be made by the Court, but no consequential relief was asked for:—Held, that Civ. Pro. Code, s. 589, was inapplicable to the suit, and that the suit was not maintainable for the reason that relief consequential on the declaration sought under s. 42 of the Specific Relief Act was not asked for. SRINIVASA AYYANGAR v. SRINIVASA SWAMI, 16 M. 31 = 2 M.L.J. 139 729

(iv) S. 42—Declaration—Consequential relief—Civ. Pro. Code, s. 53—Amendment of plaint.—A karar was executed by members of two Malabar tarwads, by which the tarwad of the plaintiffs and defendants Nos. 1 and 2 was amalgamated with that of which defendant No. 3 was a karnavan; part of the property of the plaintiffs' branch was in the possession of defendants Nos. 1 and 3, and part of it was held under demises from defendant No. 3. The plaintiffs sued for a declaration of their title to this property and for a declaration that the karar was not binding on them. An issue was framed on the question whether the suit was maintainable for want of a prayer for all relief consequential on these declarations:—Held, (1) that the suit was not maintainable for want of a prayer for possession of the lands under demise; (2) that the plaintiffs should not be permitted to amend the plaint on appeal by the addition of such a prayer. NARAYANA v. SHANKURI, 15 M. 255 = 2 M.L.J. 20 528

(v) S. 42—Declaratory decree—Withdrawing portion of claim.—Plaintiffs, members of a Malabar tarwad, sued (1) for the cancellation of a deed of gift of certain immovable property alleged to belong to their tarwad, (2) for restoration of the property the subject of gift, either to plaintiff No. 1, or defendant No. 1, the present karnavan, on behalf of the tarwad. The Munsif dismissed plaintiff's suit on the merits. On appeal, the Subordinate Judge allowed plaintiffs, who were unable to pay the Court fees for recovery of the property, to withdraw that portion of the claim, and decreed for plaintiff as to the remaining portion, viz., for cancellation of the document. On second appeal it was held, reversing the decree below, that the prayer for restoration of the property being in the circumstances of the case maintainable, it was not competent to plaintiffs to restrict themselves to the other kind of relief sought, and that the maintenance of the suit in its maimed form would be an evasion of s. 42 of the Specific Relief Act. BIKUTTI v. KALEDANDAN, 14 M. 267 = 1 M.L.J. 227 187

GENERAL INDEX.

Specific Relief Act (1 of 1877)—(Concluded).

(11) S. 42—Objection that consequential relief was available—Land Acquisition Act—Act X of 1870—Claim to share of compensation under—Valuation in private transaction—See LAND ACQUISITION ACT (X OF 1870), 14 M. 46.

(12) S. 42—Suit for declaration—Fraudulent decree—Injunction.—Suit for a declaration that a decree of a Subordinate Court was passed fraudulently, the Judge having been bribed by the present defendant:—Held, that the suit did not lie. *Per cur.*—The remedy would appear to be by way of injunction to restrain the party from executing the decree. KUNHAMED v. KUTTI, 14 M. 167 = 1 M.L.J. 338

(13) Ss. 42, 56—Consequential relief—Civ. Pro. Cods, s. 53—Amendment of plaint.—The plaintiff obtained a decree in a suit in which he averred that he was entitled to the office of Sheik of Kallai and to certain properties attached thereto, and prayed for a declaration that the defendant had no right either to the office of Sheik or to the properties in question, for an injunction restraining him from interfering with the properties or doing anything in any way inconsistent with the plaintiff's right to the office, and for further and other relief. It appeared, on the evidence for the defence, that the defendant was in possession of part of the property, but no issue had been framed as to the maintainability of the suit under the last clause of Specific Relief Act, s. 43:—Held, on appeal by the defendant, that the Court of First Instance should take evidence and try an issue specifically directed to this question. It having appeared on the evidence recorded on that issue that the defendant was substantially in possession of the office of Sheik and of its emoluments: Held, that the suit was not maintainable, although an injunction was asked for as relief consequential on the declaration. The plaintiff was permitted to pay additional stamp duty and amend the plaint by adding a prayer for possession. ABDULKADAR v. MAHOMED, 15 M. 16

(14) S. 54, cls. (b) and (c)—Perpetual injunction—Injury to interest in immovable property—Inapplicability of remedy by compensation—Landlord and tenant—Erection of dwelling house on agricultural land—Ameliorating waste—See LANDLORD AND TENANT, 16 M. 407.

(15) S. 56 (b)—Malabar Law—Suit by junior members of a taraward—Injunction restraining execution of a decree obtained in a suit against plaintiffs' karnavan.—In a suit brought in a Subordinate Court by the junior members of a Malabar tarward against their karnavan and others, the plaintiffs prayed for a declaration of the usufruct right of their tarward in a certain devasom, and for an injunction to restrain the defendants, other than the members of the plaintiffs' tarward, from executing a decree of a District Court, passed on appeal from a Munsi's Court, whereby certain lands of the devasom were decreed to be surrendered to them in the character of uralers; it appeared (1) that plaintiffs' karnavan was a party to the suit in which the above-mentioned decree was passed; (2) that the plaintiffs' tarward was otherwise entitled to the usufruct right by adverse possession, if not immemorial title:—Held, (1) that the plaintiffs were entitled to maintain the suit without proof of fraud and collusion on the part of their karnavan in the previous suit; (2) that the injunction sought was not precluded by Specific Relief Act, s. 56 (b); (3) that the plaintiffs were entitled to the decree as prayed. APPU v. RAMAN, 16 M. 425

Stamp.

(1) Regulation II of 1825 (Madras), s. 4—Ad valorem stamp duty.—An instrument, dated 1853, which purported to be a transfer by the executant of the property inherited by her from her husband subject to the payment of his debts, and in which a provision was made for the maintenance of the executant and for the retransfer of the property in case she gave birth to a son:—Held, not to be liable to stamp duty. REFERENCE UNDER STAMP ACT, s. 49, 16 M. 419 (F.B.)

(2) See LIMITATION ACT (XV OF 1877), 15 M. 78.
GENERAL INDEX

Stamp Act (1 of 1879)


(2) S. 3, cl. 11, s. 29 (e)—Instrument of partition.—Three out of seven brothers, constituting an undivided Hindu family, executed documents whereby each acknowledged the receipt of certain property made over to him, "a division of family property having been effected," and acknowledged himself liable for one-seventh of the debts of the family. One of the documents contained a clause to the effect that the executant had no further claim on property of the family:—Held, that the documents should be stamped as instruments of partition, each member paying according to the share taken by him under the partition. REFERENCE UNDER STAMP ACT, s. 46, 15 M. 164 (F.B.) ... 463

(3) S. 3, cl. 4—Bond—Specific Relief Act—Act I of 1877, ss. 20, 54, 57—Contract Act—Act IX of 1872, s. 39—Contract for personal service—Contract for more than three years—Interim injunction—See CONTRACT ACT (IX OF 1872), 14 M. 18.

(4) S. 3, cl. 16; s 7, sch. I, art. 50 (e)—Power-of-attorney—Trust.—Ten mirasadars of a village executed an instrument authorizing the person therein mentioned to recover for them from their former agent the perquisites and other communal income appertaining to their mirasi rights, to cultivate their manims, to distribute to them proportionately to their shares the profits of certain common land, &c.:—Held, that the instrument was a power-of-attorney and should bear a stamp of Rs. 5. REFERENCE UNDER STAMP ACT, s. 46, 15 M. 386 (F.B.) ... 621

(5) S. 3, sch. I, art. 13—Bond—Attestation.—A Company agreed to pay £290,000 in five instalments for the cost of constructing a railway, on the terms, among others, that debentures on the railway should be handed over to the Company on each payment being made, and that in the event of the other party failing to perform his liabilities as to the construction of the railway, the Company should be entitled to sell the debentures, and also to recover damages and also to discontinue payments of the above instalments. It was also provided that the Company should be at liberty to retain £40,000 as compensation for risk, expenses, &c. The agreement was sealed with the seal of the Company in the presence of two Directors and the Secretary:—Held, that the instrument was liable to stamp duty as a bond for £290,000 under Act I of 1879. REFERENCE UNDER STAMP ACT, s. 46, 15 M. 193 (F.B.) ... 464

(6) Ss] 9, 33, 34, Rule 6—Promissory note—Hundi Stamp.—In a suit on a promissory note for Rs. 4,300, which was executed on an impressed sheet bearing an impressed stamp with the words "hundi" at the top and the words "three rupees" at the bottom of the impression:—Held, on its appearing that the instrument was correctly stamped as to the amount of duty, that the instrument was admissible in evidence. BANK OF MADRAS v. SUBBARAYALU, 14 M. 32 ... 23

(7) Ss. 17, 33, 37 (b)—Act XXXVI of 1860, s. 13—Act X of 1862, s. 16—Unstamped document executed in 1862 out of British India—Penalty.—A document comprising an assignment of the executant's interest under a will, and also a power-of-attorney was executed on 26th May 1862 in Australia. It was sought in 1890 to use the document in Madras, but it was not stamped:—Held, that no penalty could be levied upon it under the Stamp Act of 1879. REFERENCE UNDER STAMP ACT, s. 46, 14 M. 255 (F.B.) ... 179

(8) S. 31—Foreign Court—Bankruptcy in Mauritius—Right of suit by trustee under foreign composition-deed in British India—Registration Act III of 1897, s. 17 (e)—See REGISTRATION ACT (III OF 1877), 16 M. 85 = 3 M.L.J. 30 ... 767

(9) S. 46, sch. 1, arts. 5 (c), 44. Mortgage—"Agreement not otherwise provided for."—A license issued to an arrack vendor expressly required as one of its conditions that the licensee should deposit a sum equal to three months' rental as a security for the due performance of the contract. The licensee executed a mumbaka stating that he agreed to all the terms...
GENERAL INDEX.

Stamp Act (1 of 1879)—(Concluded).

and conditions mentioned in the license.—Held, that the muchalika ought to be stamped with an eight anna stamp. Reference Under Stamp Act, s. 46, 16 M. 134 (F.B.)...

442

(10) S. 51 (d), (6).—A mortgage deed, which provided for the transfer of possession of the mortgage premises, was executed to secure the re-payment of money to be advanced for the discharge of certain debts owing by the executants. The instrument was stamped but not registered; and on its appearing that the amount of the debts in question exceeded the sum named, the intended mortgagee refused to carry out the transaction, and the executants executed a deed of conditional sale of the same premises in favour of another:—Held, that the stamp duty paid on the mortgage could be refunded under Stamp Act I of 1879, s. 51 (d), (6). Reference Under Stamp Act, s. 46, 16 M. 459 (F.B.) = 2 M.L.J. 181...

1027

(11) Sch. I, art. 54—Release—One-anna adhesive stamp—Full stamp duty leviable.—A release chargeable with four-anna stamp-duty was executed on paper bearing a one-anna adhesive receipt stamp.—Held, that in calculating the stamp due the one-anna stamp ought not to be taken into consideration. Semble: A Collector is entitled under Stamp Act, 1879, s. 50, to refer to the High Court the decision of a Provincial Small Cause Court admitting in evidence an insufficiently stamped instrument on payment of duty and a penalty. Reference Under Stamp Act, s. 50, 16 M. 295 (F.B.)...

532

(12) Sch. II, art. 2—Exemption—Agreement for the sale of goods.—An agreement for the sale of goods does not require a stamp under the Indian Stamp Act, although it contains provisions as to the warehousing and insurance of the goods previous to delivery. KYD v. MAHOMED, 15 M. 150...

453

Stamp Duty.

See CIV. PRO. CODE (ACT XIV OF 1882), 14 M. 163; 15 M. 29.

Statute 11 & 12 Vic., Cap. 21.

(1) Ss. 9, 92—See INSOLVENCY, 15 M. 356.

(2) Ss. 40, 73—See INSOLVENT ACT, 11 & 12 VIC., CAP. 21, 14 M. 133.

Succession Act (X of 1865).

(1) S. 50, cl. 3—Attestation—Initials of witness.—Semble: If the attesting witnesses affix their initials at the time of witnessing the execution of a will, it is a sufficient compliance with the terms of s. 50 of the Indian Succession Act. AMMAYEE v. YALUMALAI, 15 M. 261...

533

(2) Ss. 68, 84, 98, 101, 105, 106, 125, 159—Will, construction of—Trust fund to be called after testator’s name—Perpetuities, rule against—Creation of fund, and dispositions except directions for making it a perpetuity, held valid—Persones designate, bequest to persons as—Vesting of legacy, time of Income of fund. gift of, carries corpus—Tenancy in common created, not joint tenancy—Advancement of minor legatee’s share for his benefit, power of—Vested interest, liable to be divested by condition subsequent—Pecuniary trust, expression of wish held not to create—Patent deficiency as to objects of bequest—Future of legacy—Charitable uses, void bequest to. Where by his will a testator directed the establishment in the Bank of Madras by the executor and trustee of the will of a fund, to be called, after the testator’s name, the “Garratt Trust Fund,” and directed “that such trust fund shall never be removed from deposit in the said Bank of Madras at Madras so long as that bank shall exist,” and “that The Garratt Trust Fund shall be a continuing fund to all time,” and that the interest therefrom should be enjoyed by certain legatees and “the same shall be inherited by any child or children of them hereafter from time to time and from one generation to another in accordance with all legal time and from one generation to another in accordance with all legal rights” :—Held, that there was nothing illegal about the creation of this fund, except the direction that the securities representing it should never be received from deposit in the Bank of Madras, which, as an attempt to create a fund in perpetuity, was invalid: but that this did not prevent the intention of the testator to create and endow the fund from being carried out and that the legatee took an absolute interest.
Succession Act (X of 1865)—(Continued).

The testator bequeathed “to my grandchildren by my said late daughter E. W., also to my grandson F. W. M. and to this step-brother G. W. M.” in equal shares a certain fund:—Held, that this was a bequest to the testator’s grandchildren by his late daughter E. W. not as a class, but to them individually as persona designata:—Held also, that under the terms of the will, the testator’s said grandchildren by the late E. W., and F. W. M. and G. W. M. took vested interests in their respective shares in the said fund from the death of the testator; that the gift to them of “the benefit, interest and profit” of the fund was a gift of the corpus of the fund by virtue of s. 159 of the Indian Succession Act; that they took as tenants in common, not as joint tenants; and that under a power given to the executor to make disbursements from the said fund for certain purposes for the benefit of F. W. M. in connection with his going to and returning from England the executor was not authorized to apply, towards those purposes, more than F. W. M. ’s one-ninth share in the said fund, as it was not the intention of the testator to give F. W. M. a benefit out of that fund over and above that share, and that the executor, in making disbursements for the purposes specified, was only empowered to trench upon the principal of that share if the income, as applied under the power of disbursement for F. W. M. ’s support and maintenance in England, were not sufficient:—Held also, that under the terms of the devise in the third and fourth clauses of the will of a certain house and premises to F. W. M., the devisees took on the testator’s death a vested interest in that property, liable to be divested in the event of his dying under the age of twenty-one years:—Held also, that under the terms of the devise in the fifth and sixth clauses of the will of a certain house and premises and furniture to the children of the testator’s late daughter E. W., (who was dead at the date of the will), there was an absolute gift to the children of E. W. of the testator’s whole interest in that property, and that such gift was not controlled by the directions in the latter part of the fifth clause that the house should not be sold until the youngest grand-child attained the age of eighteen years, which must be regarded merely as an expression of the wish of the testator and not as a precatory trust, and was of no legal effect; and that the children of E. W. who were living at the testator’s death, did not take as joint tenants, but took as persona designata, each an equal share in the property which vested in them on the death of the testator, and therefore the share of one of them, E. W., who had survived the testator, but died subsequently, having vested in E. G. W., passed to E. G. W.’s representative, the ninth defendant. In the sixteenth clause of the will the testator directed his executor and trustee out of a certain sum of Rs. 500 to “disburse various petty pensions to some poor people who have been mentioned to him” (the executor and trustee) “by me”:—Held, that there was a deficiency on the face of the will as to the objects of this bequest, and by s. 68 of the Indian Succession Act no extrinsic evidence could be admitted as to the intention of the testator, and that this legacy therefore failed and fell into the undisposed of residue:—Held also, that the bequest in the seventeenth clause of the will of Rs. 10,000 to the support of the testator’s temperance and reading rooms for European pensioners and the poor widows’ quarters attached thereto, being a bequest to charitable uses, was void under s. 105 of the Indian Succession Act, as the testator had nearer relatives than nephews, and the will was executed less than twelve months before his death. Administrator General of Madras v. Money, 15 M. 448.

(3) S. 182—Executor—Appointment of, by implication—Administration with will annexed. — A Hindu died leaving a will whereby he bequeathed all his property whatever (including debts) to two of his sons, who now applied for probate of the will on the ground that they were appointed executors by implication:—Held, that the sons were not entitled to probate of the will. Vittal Doss, Ex Parte, 15 M. 360

(4) S. 187—Hindu Wills Act—Act XXI of 1870; s. 2—Estate of deceased Hindu—Legal representatives. — A Hindu, who was one of the defendants in a suit, died leaving a will. The executors appointed by the will did not take out probate; and the property of the deceased came into the possession of his divided brothers, who were thereafter brought on to the record.
GENERAL INDEX.

Succession Act (X of 1865)—(Concluded).

of the suit as the representatives of the deceased defendant. A decree was passed for the plaintiff by consent. The mother of the deceased who would, apart from the will, have been his legal representative, now sued to set aside the above decree, having previously obtained a declaration that she was entitled to the property of the deceased in a suit against his brothers above referred to:—Held, that the plaintiff was not entitled to maintain the suit. JANAKI v. DHANU LALL, 14 M. 454...

Summary Procedure.

See CRIM. PRO. CODE (ACT X OF 1882), 15 M. 85.

Transfer.

In fraud of creditors—Transferee in good faith and for value.—A transfer of property made to certain creditors fraudulently and in contemplation of the insolvency of the transferor is not voidable at the suit of another creditor if the transferees were purchasers in good faith and for consideration. GOPAL v. BANK OF MADRAS, 16 M. 397—3 M.L.J. 197...

Transfer of Property Act (IV of 1882).

(1) Ss. 2, 76—Civ. Pro. Code, s. 111—Waste by mortgagee in possession—Possession after date fixed for payment—Interest.—In a suit in 1886 to recover principal and interest due on a usurious mortgage executed on 15th June 1870, which contained a covenant for repayment of the secured debt on 15th June 1878, the defendant pleaded and proved that the mortgagee had permitted certain buildings on the mortgage premises to fall into a ruinous condition, and it appeared that the mortgagee had remained in possession after June 1878:—Held, (1) that the defendant was entitled to have the amount of the loss occasioned by the plaintiff’s failure to make repairs brought into the mortgage accounts under Transfer of Property Act, s. 76, and a separate suit by him for that amount was not necessary; (2) that the profits derived by the mortgagee after the date fixed for repayment should be regarded as having been enjoyed in lieu of interest. SHIVA DEVI v. JARU HEGGADE, 15 M. 290...

(2) Ss. 2, 135—Limitation Act—Act XV of 1877, sch. II, arts. 62, 120—Money received for plaintiff’s use—Suit for which no period prescribed—See LIMITATION ACT (XV OF 1877), 15 M. 392.

(3) S. 3—Constructive notice—Notice of a deed, notice of its contents—Right of pre-emption reserved in family partition deed—Covenant by guardian of infant co-partner—Tender of price.—The plaintiff and his step-mother, as guardian of her son, defendant No. 1, then an infant, made a division of the family property under a deed of partition by which inter alia a house was divided: the deed contained a covenant that if either coparcener should desire to sell his share of the house, the other should have the right of pre-emption. Defendant No. 1, without the knowledge of the plaintiff, sold his share of the house to defendant No. 3 for Rs. 130 under a sale-deed which referred to the deed of partition. The plaintiff now sued to enforce his right of partition and in the course of the suit offered to pay Rs. 130:—Held, (1) that the purchaser had constructive notice of the covenant in the deed of partition; (2) that the covenant was not invalid and that it was unnecessary for the plaintiff to prove tender by him of the purchase-money before suit. RAJARAM v. KRISHNASAMI, 16 M. 301...


(5) S. 6, cl. (b)—Landlord and tenant—Forfeiture for non-payment of rent—Transfer of reversion.—A condition in a lease providing that the landlord may re-enter on non-payment of rent is penal and will be relieved against, apart from the provisions of the Transfer of Property Act. Semble: The transfer of the reversion based on a clause for forfeiture is not invalid by reason of Transfer of Property Act, s. 6, cl. (b). VAGURAN v. BANGAY-YANGAR, 15 M. 125...

1143
GENERAL INDEX.

Transfer of Property Act (IV of 1882) — (Continued).

(6) S. 43 — Hindu Law — Adoption — Niyoga — Gift — Specific Relief Act — Act I of 1877, s. 18 (a). — A member of an undivided Hindu family, consisting of himself, his adoptive son and his uncle, sold certain land belonging to the family to the plaintiff. In a suit by the plaintiff for a declaration of his title to, and for possession of, the land, it appeared that the sale was not justified by any circumstances of family necessity; and that the above-mentioned adoptive son was the son of the paternal uncle of the adoptive father. During the pendency of the suit the uncle died, having made a gift of his property to his daughter-in-law: — Held, (1) that the adoption was not invalid by reason of the above-mentioned circumstances; (2) that the gift by the undivided uncle to his daughter-in-law was invalid; (3) that the plaintiff was entitled to a moiety of the land sold to him. 

VIRAYYA v. HANUMANTA. 14 M. 459 ... 321

(7) S. 52 — " Lis pendens." — Of the three owners of certain properties, two executed a mortgage of their interest in December 1872. In 1879 a creditor of the three obtained a money-decree against them, and, in execution, attached, inter alia, the properties subject to the mortgage. In July 1880 the mortgagee intervened in execution, and an order having been made directing that the property be sold subject to his mortgage lien, filed a suit upon his mortgage. The property was brought to sale in execution of the money-decree in November 1880, and the defendant became the purchaser. The mortgagee obtained a decree in the following February, and the mortgaged property was sold in execution in March 1884 and was purchased by one who assigned his interest to the plaintiff: — Held, that the defendant's purchase was subject to the doctrine of lis pendens. 

KUNHI UMAH v. AMED, 14 M. 491-1 M.L.J. 476 ... 343

(8) S. 54 — Oral sale with possession — Land worth more than Rs. 100. — The plaintiff entered into an oral contract to sell certain land to the defendant for Rs. 2,500, and he put him into possession. The defendant made default in payment of the purchase-money. The plaintiff having professed to cancel the sale on the ground of this default, now sued to recover possession of the land with mesne profits: — Held, that the sale was not complete, and the plaintiff was entitled to the relief sought by him. 

PAPI REDDI v. NABASAREDDI, 16 M. 464 ... 1030

(9) S. 55 (2) — Vendor and purchaser — Covenant for title, waiver of — Power-of-attorney, construction of. — When a vendor, who sues to cancel a sale on the grounds of fraud, misrepresentation or concealment by his vendor, fails to establish these grounds of relief, he is not entitled to set up in second appeal a case founded on the implied covenant for title under Transfer of Property Act, s. 55 (2). 

MAHOMED v. SITARAMAYYAR, 15 M. 50 ... 348

(10) S. 58 — Unregistered mortgage — Personal covenant to pay. — An unregistered mortgage-deed executed in 1895 contained personal covenant by the mortgagees to pay the debt secured thereby: — Held, the mortgagees was entitled to sue on the covenant and obtain a personal decree against the mortgagees. 

GOMAJI v. SUBHASREDDI, 16 M. 253 ... 527

(11) Ss. 58, 67, 69, 93 — Mortgage and mortgages — Second redemption suit — Kanom. — The jenmi of land in Malabar sued in 1866 to redeem a kanom of 1849, to which it was subject, and obtained a decree which merely directed the surrender of the land to the plaintiff, on payment of the kanom amount and the value of improvements, within three months of the date of the decree. This decree remained unexecuted, the money not being paid. The jenmi now brought another suit to redeem the same kanom: — Held, that the present suit was not barred by the former decree. The nature of a kanom discussed. 

RAMUNNI v. BRAHMA DATTA, 15 M. 366 ... 607

(12) Ss. 58 (c), 67, 87 — Limitation Act — Act XV of 1877, sched. II, arts. 144, 147 — Suit for foreclosure or sale — Mortgage by conditional sale — Decree for foreclosure and possession — Succession Certificate Act — Act VII of 1889. — On 28th March 1871, the defendant's father borrowed a sum of money from the plaintiff's father, and placed him in possession of certain land under an instrument of mortgage, which provided for the application of the usufruct in liquidation of the interest and then in reduction of the principal; the instrument also contained a covenant for the repayment, in
four years, of the balance that ought then to be due by the mortgagor and a stipulation that, on default, the mortgagor was to surrender the property to the mortgagee as if it had been sold to him. In 1874, the mortgagor resumed possession without discharging the mortgage-debt. The mortgagee having died, his son, on 14th April 1888, filed the present suit on the mortgage and prayed for a decree for foreclosure or sale. During the pendency of the suit the Succession Certificate Act of 1889 came into operation, but the plaintiffs obtained no certificate under it. Held, (1) that the suit was not barred by limitation, and the plaintiffs were entitled to a decree for foreclosure with a direction that possession be delivered to them; (2) that the plaintiffs were not precluded from obtaining a decree by reason of their not having obtained a certificate under the above-mentioned Act. *AMANIYAM v GURUMURTHI*, 16 M. 64—2 M.L.J. 155 752

(13) Ss. 58 (d), 67—Usufructuary mortgage with a personal covenant—Suit by mortgagee for sale.—In a suit for sale by a mortgagee, it appeared that the mortgage comprised a covenant by the mortgagor for payment of the mortgage amount, but otherwise answered the definition of an usufructuary mortgage contained in Transfer of Property Act, s. 58 (d).—Held, that the mortgage was not precluded by Transfer of Property Act, s. 67, from bringing the property to sale under the mortgage. *RAMAYYA v. GURUVA*, 14 M. 293 163

(14) S. 60—Partial redemption—Indivisibility of mortgage—Civil Courts Act—Act III of 1872 (Madras), s. 14—Evidence Act—Act I of 1872, s. 114—Estoppel.—See EVIDENCE ACT (I OF 1872), 16 M. 329

(15) Ss. 60, 62 (a)—Mortgage with possession—Time for redemption of mortgage—Provision for discharge of debt out of income.—In 1885, the plaintiffs mortgaged certain land to the defendants, and placed them in possession under a mortgage-deed, which provided that the profits of the land should be taken towards the discharge of the mortgage-debt, and that when it was so discharged, possession should be surrendered to the mortgagor. In a suit in which the plaintiffs asked for an account and for a decree for redemption on payment by them of the balance that might be found due on the mortgage, it appeared on accounts being taken of the proceeds of the land, that the principal and interest had not been discharged thereby:—Held, that the right to redeem had not accrued to the plaintiffs, and that the suit should be dismissed. *TIRUGNANA SAMHANTRA PANDARA SANNADRI v. NALLATAMI*, 16 M. 456—2 M.L.J. 272 1041

(16) Ss. 60, 82—Partial redemption—Contribution.—In 1884 A and B, being divided brothers, hypothecated to X and Y the house now in suit, which was A's family property, and a house belonging to B. In 1886 A hypothecated the house now in suit to the plaintiff. In 1886 B sold his house for Rs. 700 by a conveyance attested by X and Y who accepted Rs. 550 in discharge of a moiety of the debt secured by the hypothecation of 1884, the balance of Rs. 150 being retained by B. In this suit the plaintiff sought to recover the principal and interest due on his security of 1886, and he contended that X and Y who were defendants Nos. 4 and 5 were not justified in permitting B to retain Rs. 150 of the price and that that sum should accordingly be debited against them in the accounts:—Held, that under Transfer of Property Act, s. 82, plaintiff was not entitled to compel defendants Nos. 4 and 5 to satisfy their debt against B's house so far as it extended. *NEELAMEGAN v. GOVINDAN*, 14 M. 71 51

(17) Ss. 67, 68—Usufructuary mortgage—Dispossession of mortgagee—Suit for sale—Costs.—The plaintiff, at the request of the mortgagor, paid off part of the debt due on a usufructuary mortgage to one of two mortgagees thereunder, and was placed by the mortgagors in possession under a usufructuary mortgage of that part of the mortgage premises which had been in the enjoyment of the mortgagee so paid off, who executed a release. The other mortgagee under the first mortgage obtained a decree for sale on the security of that instrument, and the mortgage premises were sold "subject to establishment" of the plaintiff's claim: the decree-holder purchased afterwards assigned his rights to two of the present defendants
who dispossessed the plaintiff. The plaintiff sued the mortgagees and mortgagees and the defendants above referred to:—Held, the plaintiff was not entitled to a decree for sale. 

S. 68—Personal decree against mortgagor.—Suit for a personal decree on a usufuctuary mortgage which contained no express covenant to pay, but provided that if the mortgagor repaid the secured debt before a certain date (now past), he should be replaced in possession. The mortgage premises had been attached in execution of a decree obtained by a third party against the mortgagor, and a claim rejected by the plaintiff having been erroneously rejected and the premises sold, he was dispossessed. The mortgagees accordingly brought their suit as above:—Held, that the plaintiff was not entitled to maintain the suit either under the terms of the mortgage or under Transfer of Property Act, s. 68. GOPALASAMI v. ARUNACHELLA, 15 M. 304 = 2 M.L.J. 122

S. 69 (2)—Personal suit for mortgage amount.—In a suit against a mortgagor for the principal and interest due on a mortgage, it appeared that the payment of interest had fallen into arrears, and that the mortgagee provided that in such event the mortgagor should be entitled to possession of the mortgage premises, the mortgagor falsely alleged that all the interest due had been tendered:—Held, that the mortgagee was entitled to sue as above. SARAVANA v. CHINNAMMAL, 15 M. 65

S. 83—Deposit in Court by mortgagor.—The deposit intended by Transfer of Property Act, s. 83, must be made unconditionally. Accordingly when the mortgagor in making the deposit prays that the amount should be paid out to the mortgagee on his producing certain deeds the provision of the section are not complied with. NANU v. MANCHU, 14 M. 49

S. 85—Parties to a mortgage suit—Objection in written statement as to non-jointer.—In a suit by a mortgagee against two of his three mortgagees, the defendants objected in their written statement that the suit was bad for non-jointer of the third mortgagee, and also alleged that subsequent encumbrances on the mortgage premises had been created with the concurrence of the plaintiff. It appeared that the third mortgagee, as a witness, renounced interest in the greater part of the mortgage premises. On second appeal:—Held, that the suit should be remanded to the Court of first instance for disposal after jointer of the third mortgagee and the subsequent encumbrancers. SUBBA v. ARUNACHALAM, 15 M. 497

Ss. 85, 91—Parties to a mortgage suit—Redemption—Suit by puisne mortgagee—Jointer of mortgagee on second appeal—Plaintiff, a name-lender.—On second appeal against decree dismissing a suit which had been brought by a puisne mortgagee to redeem a prior incumbrance, it was ordered that the mortgagee be brought on to the record. On its appearing that it had not been intended that the plaintiff should take any interest under the mortgage sued on:—Held, that the second appeal should be dismissed. CHINNAN v. RAMACHANDRA, 15 M. 64

Ss. 92, 93—Appeal against a decree for redemption—Time fixed for redemption.—A mortgagor obtained a decree for redemption of his mortgage “within six months from the date of this decree.” The mortgagee appealed, but the Appellate Court confirmed the decree. The mortgagor sought to redeem within six months from the date of the appellate decree:—Held, the Court to which the application of the mortgagor was made should, before passing orders on the application, have given the plaintiff time to apply to the District Court to amend the decree under Transfer of Property Act, s. 92. MANAVIKRAMAN v. UNNIAPPAN, 15 M. 170 = 2 M.L.J. 35

S. 93—Redemption decree—Appeal—Time for redemption.—In a suit on a kanom or usufuctuary mortgage brought by the mortgagor a decree was passed on 16th March 1889, whereby it was only directed that on payment by the plaintiff of a certain sum within six months the defendant should surrender the mortgage premises to him. Against this decree an appeal was filed objecting both to the direction for surrender of the