REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF MADRAS

IN

1874 AND 1875.

BY

SPRING BRANSON,

BARRISTER-AT-LAW.

VOL. VIII.

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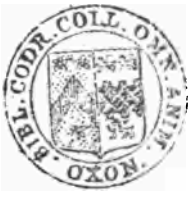

In a few days an additional part to this Volume will be published containing the Official Memorandum, Tables of Cases Affirmed, Followed, Doubted, Overruled and Reversed, and an Index to the whole of the Madras High Court Rulings which have been reported.

SIR WALTER MORGAN, KNIGHT, *Chief Justice,*

THE HON. WILLIAM HOLLOWAY,
" LEWIS CHARLES INNES,
" JAMES KERNAN, Q. C.,
" JOHN ROBERT KINDERSLEY,
" LOUIS FORBES,
} *Puisne Judges.*

" HENRY STEWART CUNNINGHAM, *Advocate General.*

MEMORANDA.

The Honorable JAMES KERNAN was absent on privilege leave from the 15th day of October to the 13th day of December 1874.

The Honorable L. C. INNES was absent on sick leave from the 1st day of February to the 23rd day of July 1875.

On the 30th day of March 1875, the Honorable W. HOLLOWAY left Madras on 10 months and 13 days leave of absence and LOUIS FORBES Esquire, of the Madras Civil Service (Acting District Judge of Bellary) was appointed to act and continued to discharge the duties of Judge from the 14th day of July to the 25th day of September 1875.

The Honorable J. R. KINDERSLEY was absent on privilege leave from the 27th day of June 1875 and resumed his seat on the 21st day of September 1875.

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CORRIGENDA.

Page 9 note (8). For "p. 437" read "p. 487."

„ 22 line 19. „ *Dele* comma after "namely" and insert comma, after "Rupees 62,386."

„ 35 „ 19. „ "of land or its payment" read "of land for its payment."

„ 36 note (*a*). „ "Si" read "Sir."

„ 52 line 6. „ *Seonoth* read *Sheonath*.

„ 53 „ 17. „ (2) read (3).

„ „ „ 27. „ (2) read (1).

„ 96 „ 6. *Dele* (1).

„ „ „ 13. *Dele* (2).

„ „ „ 19. For (3) read (2).

„ 107 „ 14. For "a fresh" read "afresh."

APPENDIX, page i, marginal date. Read 1875 for 1874.

„ „ side note, line 9. Insert "of" before "offences."

„ „ last line. Insert "not" between "could" and "be."

„ „ vi, „ „ For "erfectly" read "perfectly."

„ „ ix, line 10 from the bottom. For "Act" read "act."

Appellate Jurisdiction: (a)

Regular Appeal No. 57 *of* 1873.

THOTA VENKATACHELLASAMI CHETTIAR. *(Plaintiff) Appellant.*

KRISTNASAWMY IYER and another... *(Defendants) Respondents.*

Even where formalities in the embodiment of contracts are at the option of the parties, there may be a concluded and binding contract, although there is an intention to put its terms into a more formal shape. The existence of such intention is evidence that neither party was to be bound until the intended formalities have been complied with. But when a sale, so as to pass an interest, requires certain formal steps, and nothing turns upon the intention of the parties, no inference against a concluded agreement can be drawn from the non-completion of formalities which are not of their selection.

The parties to a suit executed a written agreement, which was duly registered, whereby the plaintiff agreed to accept the property of the defendant, specified in the agreement, in adjustment of the said suit. The agreement was not recorded under Section 98, Act VIII of 1859. Plaintiff proceeded with his suit, obtained a decree, and sold the property mentioned in the agreement in execution of the said decree. The sale proceeds being insufficient to satisfy the decree, other property belonging to the defendant was attached and sold for Rs. 23,360. In a suit for damages brought by the defendant :—*Held*, that the agreements to withdraw the previous suit and to accept the properties of the present plaintiff in discharge of the claim were concluded agreements, and that, therefore, present plaintiff was entitled with interest, to the sum which property, not mentioned in the agreement, fetched at the sale under the decree obtained by the defendant.

1874.
July 15.
R. A. No. 57 *of* 1873.

THIS was a Regular Appeal against the decision of Mr. R. Davidson, the Civil Judge of Trichinopoly in Original Suit No. 66 of 1871.

The present 1st defendant sued the present plaintiff in Original Suit No. 20 of 1869 for money due on an instrument of hypothecation. While the suit was pending the parties applied to have the hearing of the case adjourned for seven days to allow of an amicable adjustment being made. The adjournment was granted, and the parties entered into a written agreement, Exhibit A, which was duly registered, whereby the present plaintiff promised to sell, and the 1st defendant agreed to accept the property, consisting of a

(a) Present:—Holloway and Kindersley, J. J.

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village and four bungalows, mentioned in A, for the sum of Rs. 60,000 in adjustment of the suit. No agreement or compromise was, however, recorded under Section 98 of the Civil Procedure Code. Notwithstanding this agreement the 1st defendant proceeded with his suit, and obtained a decree for Rs. 52,988-2-5, with interest, and a lien on so much of the hypothecated property as belonged to the 1st defendant in that suit (present plaintiff) was declared in his favor. The present plaintiff then appealed to the High Court in R. A. No. 7 of 1871. That appeal was dismissed on the ground that the agreement entered into under A was not a final adjustment of the suit which precluded its being further proceeded with. Present plaintiff then brought a suit against the present 1st defendant, to compel him to perform the terms of the deed of sale A. The plaint was rejected under Section 2 of the Civil Procedure Code; whereupon he brought the present suit to recover Rs. 1,00,000 as damages alleged to have been sustained by him owing to the 1st defendant's breach of contract.

In framing his plaint the plaintiff divided his claim under three heads, viz., Rs. 60,000 value of the property as agreed upon in document A.; Rs. 5,000 damages sustained by perishable articles in consequence of 1st defendant's attachment of them in O. S. No. 20 of 1869; and Rs. 35,000 on account of loss sustained by the plaintiff owing to the alleged breach of contract.

The defendants, who were undivided father and son, admitted the breach of contract by 1st defendant, but pleaded :—1*st*, that the plaintiff had not been damnified thereby; 2*nd*, that the damage, if any, which the plaintiff sustained, was too remote; and 3*rd*, that the 2nd defendant could not be held responsible for his father's acts during his father's life-time.

The Lower Court held that the suit was not barred by Section 2 of the Civil Procedure Code, that the claim for Rs. 60,000 was untenable, and that as regarded the claim for Rs. 5,000 plaintiff was not entitled to the relief sought. As

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to the third item of Rs. 35,000 claimed by the plaintiff the Lower Court observed :—

"Now this item of Rs. 35,000 is made up thus, viz :—

1*st*.—Rs. 19,600 the difference between Rs. 60,000 the sale price of the village and four bungalows fixed in A, and Rs. 40,400 the actual price they fetched at the Court sale.

2*nd*.—Rs. 23,360 the price realized by the sale of 15 other bungalows required to satisfy the balance of the 1st defendant's decree in O. S. No. 20 of 1869 in consequence of 1st defendant having withdrawn from A. Less Rs. 7,960 remitted by plaintiff on account of stamp duty.

"All these are admitted to be the correct prices realized. It is very obvious that the plaintiff would have been in a better position than he is at present had the 1st defendant adhered to the agreement he entered into with the plaintiff under A as he would still have retained possession of the 15 houses in question, which, in the absence of anything apparent or alleged to the contrary, may be taken to represent Rs. 23,360.

"But the question arises, did the price of Rs. 40,400, which the villages and four bungalows mentioned in A fetched at the Court sale, represent the fair market value of the property, for if so, the 1st defendant would hardly have been expected to accept them as representing the value of Rs. 60,000 when he discovered the mistake he had made in agreeing to the terms of A.

"There is no doubt a great deal to be said on both sides of the case, but in deciding the point at issue it seems to me that the real question that presents itself for solution is this—Is the particular result in this case such as might have been contemplated by the parties as naturally flowing from the act done ? Because I think that before the plaintiff can become entitled to any favorable decree at all, it is necessary that it should clearly appear that the damage for which com-

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pensation is claimed was the natural and reasonable consequence of the defendant's act.

"Now, I do not think that the three witnesses whom the plaintiff examined to prove this part of his case, have succeeded in establishing this proposition.

"I by no means intend it to be understood that I think it impossible the sale of the property may not have been prejudiced in some degree by the 1st defendant's act, but I am of opinion that there is no sufficient proof of such having been the case even remotely, and no intimation was given to the 1st defendant that the plaintiff was likely to suffer any probable loss in consequence of the 1st defendant's withdrawing from the original agreement.

"My finding on the 2nd issue therefore is, that the plaintiff is not entitled to recover any sum from the 1st defendant as damages, and the result is that I dismiss the suit, but there are circumstances in the case which induce me to think that the dismissal should be without costs."

From this decision the plaintiff appealed on the following grounds :—

I.—The decree is against the weight of evidence.

II.—The defendants having admitted breach of contract, the plaintiff was entitled in law to a decree for damages.

III.—The plaintiff is at all events entitled to recover as damages the two sums of Rs. 19,600 and Rs. 23,360, with interest from the date of the execution of the decree in O. S. No. 20 of 1869, these two sums being the loss incurred by plaintiff in consequence of the defendant's withdrawal from the agreement entered into with him in compromise of the above mentioned suit then pending between them.

Mr. Miller and *Mr. Scharlieb* for the appellant, the plaintiff, contended that the contract to sell being admitted, the only question was as to the measure of damages for the

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of 1873.

breach of that contract, and submitted that the damages should be the full value of the fifteen bungalows.

Mr. Shephard for the respondents, defendants, contended that the plaintiff had aggravated his damages. Rs. 1,500 must be deducted as that sum never came to defendant, but went to pay other creditors.

Ramachendraiyar for the 2nd respondent, defendant.

Mr. Miller in reply.

The Court delivered the following

JUDGMENT:—At its final stage, the two contracts to withdraw the suit and to accept through the medium of a sale the properties of the plaintiff in discharge of the claim there made are admitted by the defendant, who has persistently denied that there were any such agreements.

The evidence that the agreements were concluded was of the most cogent character, and the success of the defendant in evading justice for so many years has arisen from the not distinguishing between a concluded contract to sell and a sale; between an agreement to compromise and a compromise.

It has been long settled, even where formalities in the embodiment of contracts are at the option of the parties, that there may be a concluded and binding contract although there is an intention to put its terms into a more formal shape; *Fowle* v. *Freeman* (1). The existence of such intention is evidence that neither party was to be bound until the intended formalities have been complied with; *Ridgway* v. *Wharton* (2). Where, however, as here, a sale so as to pass an interest requires certain formal steps and nothing turns upon the intention of the parties, it is manifest that no inference against a concluded agreement can be drawn from the non-completion of formalities which are not of their selection. In the present case the evidence of the completion of those formalities so as to bind the defendant is of the most cogent character. The mode in which the

(1) 9 Ves., p. 351. (2) 6 H. L., p. p. 238, 264, 268, 305.

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plaintiff has been advised has prevented him from obtaining more relief than we have given by our decree. That relief is probably very incommensurate with the wrong which he has sustained. *Appeal allowed.*

DECREE :—"This Court doth order and decree that the decree of the Lower Court be, and the same hereby is, reversed, and this Court doth direct that the defendants do pay to plaintiff Rs. 31,050 being Rs. 23,000 with interest at 12 per cent. from the 15th August 1871 the date of the sale, to the date of this Court's decree, together with further interest at 6 per cent. from the date of this decree to the date of its execution on the judgment debt and costs"—with costs of both hearings.

Appellate Jurisdiction. (*a*)

Special Appeal No. 481 *of* 1871.

VITLA BUTTEN.....*(Plaintiff) Special Appellant.*

YAMENAMMA.....*(3rd Defendant) Special Respondent.*

A long course of decisions in this Presidency recognise the right of a co-parcener to dispose of his interest in the joint family property before partition : a co-parcener cannot, however, before partition, convey away as his interest any specific portion of the joint property.

In a suit by an adopted son to set aside a Will made by his adoptive father disposing of immovable ancestral property ; *Held*, that the Will was of no effect as a valid devise of property. At the moment of death the right of survivorship was in conflict with the right by devise. Then the title by survivorship, being the prior title, took precedence to the exclusion of that by devise.

1874. *October* 16. *S. A. No.* 481 *of* 1871.

THIS was a special appeal against the decision of V. Jayaram Row, the Principal Sadr Amin of Mangalore, in Regular Appeal No 725 of 1869, modifying the decree of the Court of the District Munsif of Mulki, in Original Suit No. 23 of 1868.

Plaintiff sued as the adopted son of the 1st defendant, to set aside a Will made by his adoptive father on the 4th January 1868, whereby he bequeathed his immovable property to his daughter, the 3rd defendant, and another daughter, a minor named Kistnamah. The plaintiff further sought to obtain immediate possession of the property in dispute on the ground of the imbecility of his adoptive father.

(*a*) Present :—Sir W. Morgan, C. J., Innes and Kernan, J. J.

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The 1st defendant died after the institution of the suit.

The 2nd defendant, admitted plaintiff's right as adopted son of her husband, the 1st defendant, but set up a life-interest in herself in the property in dispute.

The 3rd defendant denied the adoption of the plaintiff by the 1st defendant, and maintained that the Will of the 1st defendant was valid.

The Munsif dismissed the suit on the ground that the adoption set up by the plaintiff, was not proved. The Principal Sadr Amin found that the alleged adoption had been satisfactorily proved, and as to the Will made by the 1st defendant, he remarked as follows :—

"The Will I. shows that some part of the property in dispute was purchased by the 1st defendant. Plaintiff says that the said purchase was made by the said defendant from ancestral funds. While the said allegation of plaintiff is supported by the presumption of law, the 3rd defendant's vakil was not prepared to deny its truth; but on the contrary made a general admission that all the property in dispute was 1st defendant's ancestral property. There appears, therefore, no objection to hold that the said property is ancestral property. It being so, and the bequest thereof made by the 1st defendant in favor of 3rd defendant, &c., being apparently after the date of plaintiff's adoption, the said bequest can, by no means, affect plaintiff's share of it, which is a moiety, under the Hindu Law, which is applicable to this case.

"As to the remaining portion, that is, a half of the property in question, the Will I. in question must, I consider, be upheld. For, plaintiff has utterly failed to prove that 1st defendant was incompetent to deal with property at all by reason of unsoundness of mind. He had consequently a right to alienate the said portion of the property in question as forming his undeniable share, by gift, &c., and of consequence to bequeath it by Will, the power of a Hindu to devise being co-extensive with his power of alienation, as ruled in the Judgment of the Madras High Court in

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Special Appeal No. 34 of 1862 at page 326 of the Reports, Volume I. I therefore uphold the said Will to the extent of the 1st defendant's aforesaid share in the disputed property.

"I therefore, in modification of the decree of the Lower Court, cancel the bequest made by the 1st defendant under the Will I. as regards plaintiff's moiety in the property in question, and award possession of the same to plaintiff, regard being had to the quality of the soil, &c. I also direct that plaintiff and the 3rd defendant should bear the costs of original and appeal suits with reference to the amount allowed and disallowed, and that plaintiff shall recover the mesne profits of the property awarded to him, as will be determined at the execution of the decree, from date of plaint till delivery of possession to him."

From this decision the 3rd defendant appealed on the ground that, Nos. 2 and 3 were the self-acquired property of the 1st defendant, and that the 3rd defendant was therefore entitled to the whole of them instead of a moiety only.

And the plaintiff appealed on the following grounds:—

1. The 1st defendant could not have alienated any part of the property in question without the consent of his son.

2. The document No. 1 is not an alienation but a Will, and is, as such, invalid,—

a. As being without consideration.

b. For want of possession given.

These appeals were heard on the 29th January 1872.

Mr. Shephard for *Mr. Mayne*, for the special appellant, plaintiff, contended 1st, that a father having a son cannot alienate ancestral immovable property to third persons *inter vivos*; 2ndly, that if such alienation is good, it does not follow that he can dispose of such property by Will. The sole foundation for the affirmative proposition is the decision in *Virasvámi Grámini* v. *A'yyasvámi Grámini*. (1) It is admitted that the judicial authorities were decided upon the *Dáya Bhága*. Here there is really nothing but the vague expres-

(1) 1 Madras H. C. Rep. p. 471.

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sion of Sir T. Strange, (Vol. I. p. 201) and the opinion of Mr. Colebrooke. The real grounds, as appears from other cases, were, that a co-parcener who had contracted ought not to be allowed to escape from his liability; and that a co-parcener might sever the joint tenancy. The doctrine that the contract ought to be good to the extent of the contractor's share, is an attempt to reconcile archaic anomalous property with modern ideas of individual responsibility. As to the difference between the Hindu undivided family and the English joint tenancy, see *Sadabart Prasad Sahu* v. *Foolbash Koer.* (1) The rule adopted here is opposed to the authorities in the other Presidencies :—

Sadabart Prasad Sahu v. *Foolbash Koer.* (1)

Nathu Lal Chowdhry v. *Chadi Sahi.* (2)

Haunman Dutt Roy v. *Baboo Kishen Kishor Narayan Sing.* (3)

Gangubái kom Sidháppá v. *Bámanná bin Bhimanná.* (4)

Even if the alienation be good by act *inter vivos*, it does not follow that it is good if made by Will. Though the general proposition has been laid down in *Vallináyagam Pillai* v. *Pachché* (5) the Privy Council in *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty* (6) and Holloway, J., in *Tara Chand* v. *Reeb Ram* (7) were more guarded. Wills have proceeded on the analogy of gifts.

1 Sir T. Strange's H. L. p. 258.

Náráyanasáwmi Chetty v. *Arunachella Chetty* (8).

N. Visalatchmi Ammál v. *N. Subbu Pillai* (9).

No fiction can establish delivery here, for the son takes by survivorship but the property vests in him on his birth, therefore there is nothing for a Will to operate upon. A son is not merely an heir; he has two rights vested in him, 1st, the right to partition, and 2ndly, the right of survivorship. In point of equity there are no reasons in favor of a

(1) 3 Bengal L. R., (F. B.) p. 31.
(2) 4 Ib., (A. C. J.) p. 15.
(3) 8 Ib., p. 358.
(4) 3 Bombay H. C. Rep., (A.C.J.) p. 66.
(5) 1 Madras H. C. Rep., p. 326, (at p. 332.)
(6) 6 Moore's I. A., p. 309, (at p. 345).
(7) 3 Madras H. C. Rep., p. 50, (at p. 55).
(8) 1 Ib., Appendix p. 437 (at p. 491).
(9) 6 Ib., p. 270, (at p. 274.)

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claimant under a Will, as there are in favor of a purchaser. The cases hitherto have been either of purchasers, or, where there have been no issue or co-parceners.

2 Sir T. Strange's H. L., 433.

Vallinayágam Pillai v. *Pachché.* (1)

Nagalutchmee Ummal v. *Gopoo Nadaraja Chetty.* (2)

Baboo Beer Pertab Sahee v. *Maharajah Rajender Pertab Sahee.* (3)

Bissonauth Chunder v. *Sreemutty Bamasoondery Dossee.* (4)

Sunjiva Row, for the special respondent, 3rd defendant, contended that the power of a Hindu to make a Will is indisputable at the present day. The power of testamentary disposition is co-extensive with the power to alienate *inter vivos.* The right of survivorship made no difference. The current of authorities is too strong to be over-ruled now.

Virasvámy Grámini v. *A'yyasvámi Grámini.* (5)

Cur. adv. vult.

On the 16th October 1874, the Court delivered the following

JUDGMENT:—We consider it necessary to determine only the first and third of the three questions referred to us, as this will be sufficient for the decision of this special appeal.

In regard to the first question, we are of opinion that the long course of decisions in this Presidency, recognizing the right of a co-parcener to dispose of his interest in the joint family property before partition, has not been in conflict with the law of the Mitakshara. Our view, we are aware, is not in accord with that of the High Court of Calcutta, and we have, therefore, given the question all the more careful consideration. The reasons upon which the High Court of Calcutta have based their opinion will be

(1) 1 Madras H. C. Rep., p. 326.
(2) 6 Moore's I. A., p. 309.
(3) 12 Moore's I.A., p. 1, (at p. 38).
(4) Ib., p. 41, (at p. 61).
(5) 1 Madras H. C. Rep., p. 471.

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found at page 44, Vol. III. Bengal Law Reports (Full Bench Rulings) (1) also 12 W. R. (Full Bench.)

The Court say "so long as the family remains joint, "and separation has not been effected, either by parti- "tion or by agreement, such as that recognized in "the case above cited by the Privy Council (2) every "son who is born becomes, upon his birth, entitled "to an interest in the undivided ancestral property. "In such a case neither the father nor any of the sons can, at "any particular moment, say what share he will be entitled "to when partition takes place. The shares to which the "members of a joint family would be entitled on partition "are constantly varying by births, deaths, marriages, &c., "and the principle of the Mitakshara law seems to be that "no sharer, before partition, can, without the assent of all "the co-sharers, determine the joint character of the pro- "perty by conveying away his share." If by the word 'share' is intended specific share, the argument is of course valid that a co-parcener cannot, before partition, convey his share to another, because, before partition it cannot be ascertained what it is. It is equally the law in Madras that a co-parcener cannot, before partition, convey away, as his interest, any specific portion of the joint property. See *Venkatachella Pillai* and another v. *Chinnaiya Mudaliar*, (3) in which it is said (4); "By the sale in the present case, "therefore, the vendor, Subbaroya, could not, in our judg- "ment, transfer to the 1st defendant's father a valid title to "any specific portion of the joint family property, but only "to his beneficial estate as an undivided co-parcener, with the "incidental right of partition." Considered in this light, the difficulties which have influenced the Calcutta High Court disappear. The person in whose favor a conveyance is

(1) *Sadabart Prasad Sahu* v. *Foolbash Koer*.

(2) *Appovier* v. *Rama Subba Aiyan*, XI Moore's I. A., p. 75; approved of and followed in *Ram Chunder Dutt* v. *Chunder Coomar Mundul*, 13 Moore's I. A., p. 182; *Runjeet Singh* v. *Kooer Gujraj Singh*, L. R., 1 Indian Appeals, p. 9; and *Baboo Doorga Pershad* v. *Mussamut Kundun Koomar*, Ib., p. 55.

(3) 5 Madras H. C. Rep., p. 166.

(4) At p. 171.

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made of a co-parcener's interest takes what may, on a partition, be found to be the interest of the co-parcener. What he so takes is, at the moment of taking, and, until ascertained and severed, subject to the same fluctuations as it would be subject to, if it continued to subsist as the interest of the co-parcener.

But it can at the proper period be ascertained without difficulty, and there appears to us no reason, either derived from the Hindu Law current in this Presidency, or founded upon general principles, for saying that such an interest is inalienable.

With regard to the third question, we are of opinion, that the Will in the case referred to cannot take effect. At the moment of death the right of survivorship is in conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise. We must, therefore, reverse the decree in special appeal, and declare the Will of no effect as a valid devise of property in favor of defendant.

KERNAN, J. subsequently, on the 12th February 1875, recorded the following

JUDGMENT :—The 3rd question is whether a co-parcener, of an ancestral property had, before the late Hindu Wills Act, a right to dispose of his share by Will so as to defeat the right of survivorship.

Although I see some difficulty in arriving at a conclusion in the negative, I am not prepared to dissent from the above judgment of the Court on this point. On the first question I agree in the above judgment fully.

Special Appeal No. 481 *of* 1871, *allowed.*

NOTE.—As the following case, heard and decided on the 18th March 1874 but not hitherto reported, has been frequently referred to with regard to the question whether the powers of disposition by will, and of gift *inter vivos* are co-extensive, the Acting Reporter, who appeared for the plaintiffs, has copied from his brief his note of the judgment delivered therein after comparing it with the note made by Mr. Johnstone, counsel for the defendants.

ORIGINAL JURISDICTION.

Original Suit, No. 748 *of* 1873.

O. GOOROOVA BUTTEN, and another.....*Plaintiffs.*

versus

C. NARRAINSAWMY BUTTEN and two others.....*Defendants.*

1874.
March 18.
O. S. No. 748
of 1873.

This was a suit for a declaration that the 2nd plaintiff, as the daughter of C. Chenchoo Rama Butten, deceased, was his sole legal representative, and, as such, entitled to his estate; and for delivery to the plaintiffs of such portion thereof as, on an account being taken, might be proved to have come into defendants' hands.

The plaintiffs were husband and wife. C. Chenchoo Rama Butten died in the year 1859 leaving his widow Kamatchee Ummall, and the 2nd plaintiff, his daughter by his first wife, him surviving. In 1860, Kamatchee Ummall obtained letters of administration to the estate of the deceased. She died on the 8th July 1873, and the 1st defendant, her father, the 2nd defendant, her mother, and the 3rd defendant, her brother-in-law, with whom she resided, took possession of the estate of C. Chenchoo Rama Butten, left by Kamatchee Ummall. The defendants alleged that whatever estate C. Chenchoo Rama Butten left, his widow took and disposed of as his only rightful representative. They set up a will executed by Kamatchee Ummall on the 24th April 1862, whereby she appointed the 1st defendant her sole Executor, and bequeathed the whole of her property to the 2nd defendant. On the 21st July 1873, the will was proved by the 1st defendant, and probate thereof was granted to the 2nd defendant on the 8th December 1873. The defendants denied the 2nd plaintiff's right to her father's estate, pleaded that she had released her claim to such estate, and that her present claim was barred.

Mr. Spring Branson, for the plaintiffs, contended that the widow, Kamatchee Ummall, had only a life interest, and, therefore, she could not dispose by will of the property which, immediately upon her death, vested in the 2nd plaintiff as the daughter and only legal representative of Chenchoo Rama Butten.

Sooba Moodelly v. *Auchalay Aumy.* (1)

Pránjivandás Tulsidás v. *Dekúvarbai.* (2)

Macnaghten's, H. L., 19—22.

1 Sir T. Strange's, H. L. 134—234.

As to the alleged release, the defendants are bound to show most clearly that the 2nd plaintiff was fully aware of all her rights, and unequivocally and absolutely waived them. As 2nd plaintiff's cause of action accrued on the death of Kamatchee Ummall, and as that event took place only six months before this suit, the Statue of Limitations does not apply.

Mr. Johnstone for the defendants gave up the contentions as to the release, and the Statute of Limitations, but contended that the personalty left by a divided Hindu without male issue, vested in his widow.

Pránjivandás Tulsidás v. *Devkúvarbai* (2)

Jamiyatrám v. *Bâi Jamna.* (3)

Ramasashien v. *Akylandummal* (4)

Gopaula Putter v. *Narraina Putter.* (5)

1 Sir T. Strange's, H. L. 246—247.

(1) Madras Sadr Rep. for 1854, p. 153.
(2) 1 Bom. H. C. Rep., (O.C.J.) p. 130.
(3) 2 Ib., (A. C. J.) p. 11.
(4) Sadr Dewany Rep. for 1849, p. 115.
(5) Ib. for 1850, p. 74, (at p. 77).

1874. *March* 18. *O. S. No.* 748 *of* 1873.

HOLLOWAY, J.—The theory of the will of a Hindu is an anomaly and ought, therefore, not to be pressed. I am of opinion that the authorities cited are inapplicable. Those were suits between persons who would be co-parceners and the widow of a childless, divided Hindu. 'Childless widow' does not mean that the woman is childless, but that her husband was. Here the widow had a daughter, and had no power to dispose of the estate of her deceased husband by will. Principles of law should be followed to their logical conclusions, but where an exceptional law is introduced, such as this of Wills among Hindus, it should not be carried further than the anomaly introduced requires. It is not law that all that a Hindu may dispose of *inter vivos* can be disposed of by him by mortuary instrument. That has never been decided by the Court, but, on the contrary, has been distinctly found against in a late case from Mangalore.(a) I must give judgment for Rs. 1,445, the admitted value of the jewels. The enquiry into the houses will stand over till to-morrow, and the question of costs, is reserved.

Appellate Jurisdiction. (b)

Referred Case No. 49 *of* 1874.

KANDOTH MAMMI

against

NEELANCHERAYIL ABDU KALANDAN and another.

Defendants appeared in the French Court at Mahé, defended a suit, and made no objection to the jurisdiction. In a suit upon the decree of the said Court, defendants pleaded want of jurisdiction. *Held*, that a man who has thus taken the chances of a judgment in his favor which would, if obtained have relieved him from all liability, is equitably estopped from afterwards pleading want of jurisdiction.

1875. *January* 22. *R. C. No.* 49 *of* 1874.

THIS was a case referred for the opinion of the High Court by K. Kunjan Menon, the Subordinate Judge of North Malabar, in Suit No. 687 of 1874.

"1. This is a suit for recovery, with costs and further interest, of Rs. 346-13-7 being the amount due under a decree of the Mahé Court, dated 15th April 1874.

"2. Plaint recites that one Chembangádan Mússa, to whom the defendants stood indebted under a bond dated 9th November 1869, transferred the said bond to plaintiff, that he (plaintiff) sued the defendants on that bond in the Mahé Court and obtained a decree against them; and that the amount as per this decree is still unpaid. The plaintiff, therefore, now sues upon this decree in this Court on the

(a) The principal case above reported, p. 6.

(b) Present:—Sir W. Morgan, C.J., and Holloway, J.

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ground that the defendants are living within the jurisdiction of this Court.

"3. Defence is that the Mahé Court had no jurisdiction to make a binding decree against the defendants who lived always in British Territories; and that the cause of action also arose in British Territories.

"4. The Court after perusing the evidence adduced, and hearing the arguments on both sides, adjourned the case for further consideration, subject to the decision of the High Court upon the following case :—

"5. The admitted or proved facts of the case are, that the defendants were, and have always been, permanent residents in British Territories; that the bond upon which they were sued in the French Court at Mahé was executed in British Territories and upon a British Stamp; that the Chembangádan Mùssa to whom it was executed, and by whom it was subsequently assigned to the plaintiff, was a resident of both British and French Territories, though, in the bond, he is described as a resident of the latter only; and that the bond stipulates that the defendants should take the money to him and pay him within a fixed time.

"6. The defendants contested the suit in the Mahé Court on the merits, and failed. The question of want of that Court's jurisdiction which they now raise was not there raised.

"7. The plaintiff now maintains that that Court had jurisdiction over the cause, though not over the defendants, because the cause of action arose within that Court's jurisdiction, inasmuch as Mahé must be taken to have been the place intended by the bond for payment, the non-making of which was the cause of action.

"8. The bond does not say where the payment should be made. It merely says, 'we will bring the amount due to you and pay you' without mention of any particular place to which the money was to be brought. The plaintiff's argument then is, that because the obligee is stated in the bond as a resident of Mahé, therefore Mahé must be

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taken as the expected place for the production and payment of the money and that the cause of action consequently arose there; while the contention on the other side is, that because the obligee had also a residence in British Territories (a fact well established by various records to which I referred), and because the transaction was entered into in British Territories with British subjects, and subject to British laws, therefore the intended place for the discharge of the bond was the obligee's residence in British Territories, and that, consequently the cause of action did not arise in Mahé.

"9. Beyond asking me to draw inferences on this point from the aforesaid circumstances, neither party has adduced any evidence *aliunde* to establish that any particular place for payment was intended. As to the inference derivable from circumstances it does not in my opinion favour one party more than the other. Under these circumstances I think it is unsafe to hold that the Mahé Court had jurisdiction, but, at the request of both parties, I beg to submit for the decision of the High Court the question—Whether the French Court at Mahé had jurisdiction."

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—This is a suit upon a judgment of a French Court, and the question is whether the plea that the French Court acted without jurisdiction is sustainable.

The facts are that the defendant appeared in the Court at Mahé, defended the suit and made no objection to the jurisdiction. Whether in such circumstances the objection can afterwards be taken in an action upon the judgment is a point stated to be still open by Blackburn, J. in *Schibsby* v. *Westenholz* (1) but the opinion of the learned Judge is plainly that it cannot.

We think that justice requires us to hold that a man who has thus taken the chances of a judgment in his favor

(1) L. R., 6 Q. B., p. 155 (at p. 160).

which would, if obtained, have relieved him from all liability is equitably estopped from afterwards setting up the objection. It becomes unnecessary therefore to consider the rather nice question when by the contract of the parties a jurisdiction may be created which would not otherwise exist. The recent case of *Copin* v. *Adamson* (2) is an example of discordance of view upon the point.

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We answer that the Subordinate Court has jurisdiction.

Appellate Jurisdiction. (a)

Regular Appeal No. 81 *of* 1874.

(*Civil Miscellaneous Petition No.* 21 *of* 1875.)

KALLAVETTI KURIYIL KUMHOLEN KUTTY ..... *Appellant.* (*Defendant.*)

NILAMBUR THACHARAKAVIL MANA VIKARAMEN *alias* THIRUMULPAD ..... *Respondent.* (*Plaintiff.*)

He who seeks a declaration of matters not necessary to the immediate relief sought, must sustain the burden of making out the abstract proposition which he has volunteered to support, and it will even then be a matter for the discretion of the Court, not to be lightly exercised, whether it will undertake the solution of the problem.

Suit brought for a declaration of title to a considerable tract of country on account of a trespass committed by defendant on a particular hill. *Held*, that as to that particular hill, the plaintiff's claim was sustainable, and that that disposed of the only question which it was necessary to decide.

THIS was a Regular Appeal against the decision of I. K. Ramen Nair, the Subordinate Judge of South Malabar, in Original Suit No. 45 of 1873.

1875. *January* 25. *R. A. No.* 81 *of* 1874.

The suit was brought to establish plaintiff's jenm right to, and to obtain possession of, the hills mentioned in schedule A attached to the plaint, and valued at Rupees 6,000; to procure the demolition of the shed (kuttipura), valued at Rupees 10, wrongfully erected by the defendant on hill No. 11, and to recover 8 logs of timber, or their value Rupees 180, felled by the defendant.

(2) L. R., 9 Ex., p. 345.

(a) Present :—Sir W. Morgan, C. J., and Holloway, J.

1875. January 25. R. A. No. 81 of 1874.

The plaintiff alleged that the hills mentioned in the plaint were his ancestral jenm and in his possession, that the defendant, who has no right whatever thereto, having assembled a large number of persons, forcibly felled some teak trees thereon and attempted to carry away the timber, whereupon plaintiff, with the view of preventing the removal of the timber, preferred a complaint in the Ernad Police Inspector's kutcherry on the 1st January 1873. On the Inspector's report the District Magistrate of Malabar passed an order directing the 2nd Class Magistrate of Ernad to investigate the matter. This officer having repaired to the hill, found that the defendant had erected a shed and occupied it with his own people and had felled 8 logs of timber. He thereupon submitted a report of his having issued an order to defendant to abstain from any act towards removing the timber from the place where it lay, and ejected the men occupying the shed. As the defendant contended in this case that the hills were the jenm (absolute) property of Athi Koten Thenapurath Nair, and that they were leased to defendant's father on perpetual tenure, the Magistrate in his order dated 10th July 1873 referred the plaintiff to the Civil Court for redress, and for a determination on the question of title.

The defendant alleged that the southern boundary of the hills is Koranayen Poya and not Maniyen Poya, as incorrectly shown in the plaint schedule; that as the hills up to Koranayen Poya, which is about 6 miles from Maniyen Poya, form one group, the latter Poya, which flows through these hills, could not have been shewn as the boundary; that the names of the hills were incorrectly entered in the plaint; that there is no hill called Parappapara or Kalakangott within the plaint boundaries; that the dismissal of the complaint by the Magistrate strengthened his right to possession; that the plaintiff has no right whatever to the hills and was never in possession; and that of these hills those marked Nos 3, 5 and 24 are included in the more important ones, viz: Vallia Pattiyati, Cheria Pattiyati and Katakasheri, and were the jenm of Maruvithil Athikoter Vaganatt Thenapurath Etathil Chappen Nayar and another, who conveyed

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them in Vrischigom 1022 (November, December 1846) to defendant's father, the deceased Alli Kutty, in perpetuity.

The Subordinate Judge in giving judgment observed:—"The evidence of the 1st and 2nd witnesses (village officers) for the plaintiff satisfactorily proves that the forests in dispute are situated in Nilamboor Amshom in the Ernad Taluk, and I doubt whether better witnesses than the above can be had to prove a point like this. That the above officials have truly testified to the fact is proved by the prosecution of the Police complaint regarding these forests before the Tahsildar of Ernad, and by the ultimate disposal of the same by the Deputy Magistrate of Calicut Division without any objection being raised to their jurisdiction over the matter. Plaintiff lays claim to forests situated in Nilamboor Amshom, and defendant admits that the plaintiff is possessed of forests bearing the same name as the plaint forests, on jenm right. Then the above 1st and 2nd witnesses further prove that the forests owned by the plaintiff are the very forests here sued for, and that there are no other forests in Nilamboor Amshom which are called by the names given in the plaint, and their evidence is strongly supported by the documents B to S and U. B is an old pymash account of 993 (1817-18) of forests Nos. 1 and 4. Objections to the reception of the documents C, D and E may perhaps be raised on the ground of their being summary decisions. I shall therefore leave these documents out of consideration. We have still the documents F to S to supply their place. These documents supported by the evidence of the above witnesses prove beyond a doubt that in several successive years Moden crops were raised on these forests by plaintiff and his tenants, and that the forests are assessed in their names. Hence the plaintiff has, in my opinion, produced the best evidence that can be procured to prove his title to, and possession of, the forests in dispute, and I am bound to give him judgment as sued for with all costs against the defendant."

The defendant appealed from the decree of the Subordinate Judge.

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Mr. O'Sullivan and *Mr. Poonen* for the appellant, the defendant, contended that the plaintiff had failed to prove title to any part of the land, but that, even if it could be held that he had proved any title to the land on which the alleged trespass was committed, the Court could not make a decree on that account, declaring generally that he was entitled to all the lands in the plaint mentioned. He was admittedly in possession of the greater part of the property, of which he seeks to obtain a declaration of title in this suit.

Mr. Spring Branson for the respondent, the plaintiff, contended that a cloud had been cast upon the plaintiff's title to the whole of the lands in dispute, by the claim of title thereto set up by the defendant, a claim he attempted to enforce by entry upon part of the land. It is admitted that the title to the whole is the same as that to the part trespassed upon, and the object of the wrongful entry of the defendant was to manufacture evidence for himself of so called acts of ownership. The suit has been so conducted by both parties throughout, as to raise the question of title to the whole of the property, and defendant cannot now contend that the declaration asked for and obtained, is too general.

The Court delivered the following

JUDGMENT :—In the present case a declaration of title to a considerable tract of country has been sought and granted on account of a trespass committed by defendant upon a particular hill, alleged to belong to plaintiff.

As to the particular hill, we are of opinion that the evidence is sufficiently cogent to sustain the plaintiff's claim, and this is quite sufficient for the determination of the only question, which it was necessary to decide. There is a great deal of evidence of a somewhat loose and unsatisfactory character of acts done by the plaintiff upon other of these hills, and the case has no doubt been conducted by both parties on the assumption that the owner of three of the principal ones is owner of the whole. This, however, does not absolve us from considering the propriety of making a declaration so extensive upon evidence so slight. As be-

1875. *January* 25. *R. A. No.* 81 *of* 1874.

tween these parties, we agree that the preponderance of evidence is in favor of the plaintiff, but he who seeks a declaration of matters not necessary to the immediate relief sought must sustain the burden of making out the abstract proposition which he has volunteered to support, and it will even then be a matter for the discretion of the Court, not to be lightly exercised, whether it will undertake the solution of the problem. It seems to us that we shall do all, which can be discreetly done, by declaring that we confirm the decree so far as it declares defendant a trespasser upon the particular hill. We see no reason to doubt that he is so, and we must not be considered as either affirming or disaffirming the plaintiff's claim to the others. We merely decide that it is a question upon which, in this case, we ought not to enter. The defendant will pay the costs of this appeal.

Appeal dismissed with costs.
Judgment of Lower Court modified.

Appellate Jurisdiction *(a)*

Appeal No. 2 *of* 1875.

M. VYTHELINGA MUDELLY ..... { *Appellant,* *(Defendant.)*

M. CUNDASAWMY MUDELLY..... { *Respondent,* *(Plaintiff.)*

Leave to institute a suit relating to property out of the jurisdiction as well as to property within such jurisdiction was refused by one Judge on the 30th June 1874. The same application, in the same suit, between the same parties, relating to the same property, and founded on the same cause of action was made before another Judge on the 15th December 1874, and the leave prayed for was granted.

Held, that the order should not have been made, and that it should be discharged.

1875. *January* 26. *Appeal No.* 2 *of* 1875.

THIS was an appeal against the order of Mr. Justice Kernan, dated the 15th December 1874, admitting the plaint in Original Suit No. 12 of 1875.

On the 30th June 1874 the plaintiff (respondent herein) through his then attorney Mr. Clarke, applied for leave to file a certain plaint then presented against appellant, for an

(*a*) Present :—Sir W. Morgan, C. J., and Holloway, J.

1875. January 26. Appeal No. 2 of 1875.

account of family property, and in respect of property out of the jurisdiction of the High Court as well as in respect of property within such jurisdiction.

The said application was made before Mr. Justice Kindersley, and it was at the time of such application stated by Mr. Clarke that the suit was for a very large amount; property to the extent of Rupees 40,000 or thereabouts being out of the jurisdiction and the remainder within the jurisdiction of the High Court.

After perusing the plaint, Mr. Justice Kindersley refused to grant leave for the suit to be filed.

On the 12th August 1874 the plaintiff, (respondent) filed a suit against defendant (appellant) for an account of family property within the jurisdiction of the High Court, being Original Suit No. 645 of 1874; in such suit the family property within the jurisdiction of the High Court was represented to be worth Rupees 83,886, Rupees 21,500 of which was represented by landed property, and the remainder, namely, Rupees 62,386 jewels and furniture.

On the application of Mr. Clarke on the 5th November 1874, the said Original Suit No. 645 of 1874 was withdrawn by the plaintiff (respondent herein) before service of any summons thereunder upon defendant (appellant) and without notice.

On the 15th December 1874, the plaintiff (respondent herein) by his then vakil Parthasarathy Iyengar applied for leave to file a suit against defendant (appellant) for an account of family property and in respect of property outside the jurisdiction of the High Court, but no mention was made at the time of the previous application to Mr. Justice Kindersley and his refusal to grant the same, and no plaint was presented at the time of such application.

The said application was made before Mr. Justice Kernan, and an order was made thereon permitting the said plaint to be filed.

On the 22nd December 1874, the said Parthasarathy Iyengar, at the request of Messieurs Prichard and Barclay defendant's (appellant's) solicitors, appeared before Mr.

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Justice Kernan and mentioned the fact of the previous application and refusal by Mr. Justice Kindersley, of which fact he Parthasarathy Iyengar, had not been informed by his client, the plaintiff, (respondent).

Upon enquiry before Mr. Justice Kernan, Parthasarathy Iyengar admitted that the plaint then sought to be filed, was between the same parties as the former one which Mr. Justice Kindersley had refused to admit, was in reference to the same property, and that the cause of action was also the same.

Messieurs Prichard and Barclay appeared on the said motion, objected to the reception of the plaint, and submitted that the plaintiff, (respondent), if dissatisfied with the order of Mr. Justice Kindersley, should be referred, in the usual course, to an appeal therefrom, that as the application had been refused by one Judge, it was not competent for another Judge to set that order aside upon the same statement of facts, and that a final order having been passed in the matter, and no appeal having been presented therefrom, the plaintiff was precluded from taking further action in the matter.

Mr. Justice Kernan, however, refused to alter the order, and directed the plaint to be received.

The defendant (appellant) appealed against the order of Mr. Justice Kernan made herein dated the 15th December 1874, on the following grounds :—

1. That the learned Judge had no jurisdiction to make the order in question, the same application in the same suit between the same parties in reference to the same property and with the same cause of action having already been made and refused by Mr. Justice Kindersley on the 30th June 1874, and if plaintiff was dissatisfied with the said order he should have appealed against the same.

2. That as the plaint was not presented or filed until the 11th January 1875, the reception of the same is irregular as it should have been presented at the time of the application.

1875. *January* 29. *R. A. No.* 77 *of* 1875.

THIS was a Regular Appeal against the decision of Mr. J. C. Hannyngton, District Judge of Salem, in Original Suit No. 4 of 1873.

The suit was brought to set aside the wrongful attachment of the immovable self-acquired property mentioned in the schedule annexed to the plaint, by the 1st and 2nd defendants on account of a decree that they obtained against the 3rd defendant.

The plaint set out that the plaintiff and the 3rd defendant are plaintiff's divided cousins, and that a partition took place between plaintiff's father and Narappa Chetty, the 3rd defendant's father, 30 years ago, since which time the families have continued to live separate. Plaintiff purchased the property in the plaint mentioned out of his own self-acquired property. The 1st and 2nd defendants having obtained a decree against the 3rd defendant, in Original Suit No. 11 of 1866, on the file of the Principal Sadr Amin's Court, falsely represented in their Petition No. 48 of 1872, that a moiety of the property aforesaid belonged to the 3rd defendant, and thus had it attached. When plaintiff petitioned against this attachment in Petition No. 220 of 1872, an order was passed on the 15th July of the said year, directing him to file a separate suit. Hence the present suit.

After the institution of the suit plaintiff paid the debt of the judgment debtor, the 3rd defendant, and procured the release of the land. The Civil Judge dismissed the suit when it came on for hearing, because the land had been released from attachment at the period of the decision of the suit.

On appeal, the High Court reversed the order of dismissal, and remitted the case for trial on the ground that the plaintiff was clearly entitled to an enquiry as against the 3rd defendant, whether the land was his self-acquisition, or the property of the 3rd defendant. If found to be his self-acquisition, he was entitled to have his title quieted by a declaration that this was so, and to recover the money paid for the release, with interest from the 3rd de-

1875. *January* 26. *Appeal No.* 2 *of* 1875.

If the making of this order were a mere question of discretion, an Appellate Court would, ordinarily, not interfere; but the ground on which he put his decision was that this was a renewed application on the same grounds as those laid before Mr. Justice Kindersley which he had considered and decided upon.

HOLLOWAY, J., was of the same opinion. When in the Appellate Court one Judge doubted the power of that Court to review a discretionary order, and one Judge thought that there was the power, but that it should be most sparingly exercised, it seemed *â fortiori* that one Judge cannot review the order of another. It seemed clear that these people, in bringing the same application on two occasions before two different Judges, were abusing the process of the Court.

Following the Chief Justice in refusing to say that there was an utter absence of jurisdiction to make the order appealed against, he certainly thought the order should not have been made, and that it should be discharged.

Appeal allowed and order discharged.

Attorneys for the appellant: *Messrs. Prichard* and *Barclay.*

Attorney for respondent: *Mr. Smith.*

Appellate Jurisdiction. (*a*)

Regular Appeal No. 77 *of* 1875.

KRISTNAPPA CHETTY ... ...*Appellant* (*Plaintiff.*)

RAMASAWMY IYER and 4 others...*Respondents* (*Defendants.*)

Evidence of some separation in residence, separate transaction of affairs in certain instances, and acquisition of the property in dispute by plaintiff, all occurring in recent years, are not sufficient to prove division.

Where the joint Hindu family derived considerable property from an ancestor after whose death these members of the family lived long together, the purchases of the property in dispute by the plaintiff, could not be treated as his separate acquisitions made from the money which had come to him with his wife, and by means of funds arising from that money.

(*a*) Present :—Sir W. Morgan, C. J., and Kindersley, J.

1875. January 29. R. A. No. 77 of 1875.

letters to 3rd and 5th defendants, convince me that there must have been a joint interest between the parties. If it had not been so it is incredible that the plaintiff would have permitted the 3rd defendant to conduct suits in his own (3rd defendant's) name on his (plaintiff's) behalf. He would undoubtedly have simply employed, and described him, as his agent.

"Under this impression I am of opinion that the plaintiff has failed to establish a non-community of interest, and consequently has failed to establish the self-acquisition of the plaint property; and I consequently decree that his plaint be dismissed, and that he do bear his costs and those of the defendants."

From this decision the plaintiff appealed on the following grounds:—

I. Document No. 16 is not evidence against plaintiff who was not a party thereto.

II. The Lower Court erred in assuming that a member of an undivided Hindu family could not possess self-acquired property.

III. The issue was as to the self-acquisition of the property in dispute, and the decision thereupon is, that a failure to prove division is a failure to establish the fact of self-acquisition, which is an error.

IV. There is, therefore, no decision upon the only issue in the case.

Mr. Spring Branson for the appellant, the plaintiff.

The evidence shows that the plaintiff and the 3rd to 5th defendants lived and traded apart, and that plaintiff acquired property in his own name. The sole question, as admitted by the Court below, was,—Was that property the self-acquisition of the plaintiff? The chief criterion in such cases is—What was the source whence the purchase money came? *Dhurm Das Pandey* v. *Mussumat Shama Soondri*

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Dibiah (1). Though that is not the only criterion. *Dhunookdharee Lall* v. *Gonput Lall* (2).

Mere commensality is insufficient to raise a presumption one way or the other.

Norton's L. C. in Hindu Law, pages 175, 177, 179, 191.

Failure to prove division does not involve failure to prove self-acquisition. The Judgment of the Lower Court appears to be as follows; The plaintiff has failed to prove division—therefore the property in dispute is not his self-acquisition. The questions of division and self-acquisition are separate and distinct. In this case the decision on the second question is simply an illogical inference from a decision on the first. There is, then, no decision upon the merits as to the only question before the Court, and the case should be remanded for an enquiry and decision thereupon.

Mr. Shephard for the 1st and 2nd respondents, the 1 and 2nd defendants.

The decree-holders are entitled to attach the proper The plaintiff and the 3rd defendant were members of undivided Hindu family of which the 3rd defendant is managing member and entitled to a share liable be taken in execution of a decree against him. is clear from the evidence that he conducted in his own name, and not as agent of the plaintiff. The *onus* of proving that the property was self-acquired was upon the plaintiff, and he has failed to rebut the presumption that the gains of a member of a joint Hindu family are obtained by family funds. Cesser of commensality is no proof of division, *Mussumat Anundee Koonwur* v. *Khedoo Lal.*(3)

Rama Row for the 3rd and 5th respondents, the 3rd and 5th defendants.

Evidence of separation as to residence, and food, is not sufficient proof of division, *Mussumat Anundee Koonwur* v. *Khe-*

(1) 3 Moore's I. A., p. 229, (at p. 240.)
(2) 10 Suth. W. R., p. 122.
(3) 14 Moore's I. A., p. 412.

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doo Lal (1). The presumption of law is against division and self-acquisition. He who sets up either allegation must prove it. Here, the plaintiff has failed to prove division, and has not shown from what source he obtained his funds. On the other hand there is ample evidence that the 3rd defendant was the managing member of the family and brought suits in his own name, not as the agent of the plaintiff, as alleged, but as such managing member of the undivided family. Plaintiff having failed to prove division, the presumption of law is that property acquired by him was acquired by means of family funds. That presumption he has failed to rebut.

Mr. Spring Branson in reply.

The Court delivered the following Judgments :—

KINDERSLEY, J.—Except as to the separate residence of the parties, the testimony as to their living in a state of division of interests is of the most general description. There is no clear trace of partition having taken place and even as to the separate residence of the plaintiff and 3rd defendant the evidence is conflicting, and it is not clear that they lived separately more than three years previous to the suit. There is general testimony as to separate dealings, but separate dealings are not inconsistent with community of interest. There is no evidence of separate celebration of the anniversaries of deceased ancestors. On the other hand the Judge has pointed out circumstances indicating non-division. We must therefore take it that the plaintiff has not proved that he is divided in interest from the 3rd defendant. Then it is in evidence that the plaintiff's father died leaving considerable property; and even if the plaintiff did receive Rupees 1,000 from his father-in-law at his marriage many years ago, it is by no means clear that the property now in question was acquired without the aid of ancestral funds. The decision of the District Judge appears to be correct, and I would dismiss this appeal with costs.

Sir W. MORGAN, C. J:—I agree. The plaintiff has shown little more than this, viz., some separation in residence, a sepa-

(1) 14 Moore's I. A., p. 412.

1875. January 29. R. A. No. 77 of 1875.

rate transaction of affairs in certain instances, and an acquisition in his own name of the property in dispute, and all these occurring in recent years. On the other side is shown a joint Hindu family deriving considerable property from the ancestor, Virappa, and living long together after his death. As to a partition the Court rightly held that none was proved, such separation as was shown falling far short of this. In this state of things, the purchases in question could not be treated as separate acquisitions made from the 1,000 Rupees, which many years before had come to him with his wife, or by means of funds arising from that money.

Appeal dismissed with costs.

Appellate Jurisdiction. (a)

Regular Appeal No. 90 *of* 1874.

MASHOOK AMEEN SUZZADA ... ...*Appellant* (*Plaintiff.*)

MAREM REDDY, VENKATA REDDY and two others ... ... } *Respondents* (*Defendants.*)

By the terms of an agreement entered into by the plaintiff and defendants, a pending suit was compromised, and payment of an ascertained balance found due by plaintiff was secured by the creditors (defendants) being placed in possession of plaintiff's land for 55 years, with the right of enjoying all the rents and profits thereof, subject to the payment of a fixed rent, part of which was to be paid to the plaintiff, and the remainder to be retained by the creditors towards payment of the debt. *Held*, that the agreement was a mortgage, and, as such, redeemable on the usual terms.

1875. February 5. R. A. No. 90 of 1874.

THIS was a Regular Appeal against the decision of Mr. J. R. Daniel, the Acting District Judge of Nellore, in Original Suit No. 6 of 1874.

On the 10th October 1857 a razinamah was entered into between the plaintiff and the defendants in Original Suit No. 2 of 1852, on the file of the District Court of Nellore. The plaintiff was found indebted to the defendants in the sum of Rupees 6,538, and, in order to secure this sum, and a debt of Rupees 510 due to the defendants by one Jorabibi, the plaintiff's grandmother, defendants were let into possession of the land now sought to be redeemed, on a fixed rent of Rupees 298 for

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1875. *February 5.* *R. A. No. 90 of 1874.*

the term of 55 years. Out of this fixed rent of Rupees 298 the defendants were to pay annually to the plaintiff the sum of Rupees 169, crediting the balance Rupees 129 in liquidation of the debt.

Deducting payments made up to the filing of the suit, there was a balance due by the plaintiff to the defendants of Rupees 4,801, upon payment of which the plaintiff sought to redeem the lands mentioned in the plaint. The defendants refused to receive the money tendered or to deliver up the lands, on the ground that the agreement entered into by the parties was not a mortgage but a lease for 55 years.

The Acting Civil Judge held that the agreement was an usufructuary mortgage for a fixed term of years, and that as that term had not expired, the plaintiff had no present right of redemption. His judgment was as follows :—

"It is undoubtedly an usufructuary mortgage, and the question is, whether being granted for a fixed term of years the plaintiff has a right to present redemption without any clause in the agreement to that effect.

The case at page 363, Volume 3, H. C. R. (1) adduced in support of plaintiff's case, is not a case in point, in that instrument there was a special clause allowing redemption within the term, and the Judges expressly refrain from giving their opinion on the case, if the special clause was excluded.

Another case quoted by plaintiff's pleader, is certainly more to the point, but it is not published under any authority and therefore is not binding. This was a miscellaneous order passed by the Civil Judge, in Original Suit No. 3 of 1867, on the file of this Court, and confirmed in appeal by the High Court, (Civil Miscellaneous Regular Appeal No. 121 of 1871.) Here the principal amount secured, was Rupees 9,890, and a village was mortgaged for a term of 30 years, the mortgagor paying annually interest of Rupees 890, and paying the principal sum after the expiration of the term. Here the mortgagor was permitted to pay the principal within the 30 years. The case somewhat differs from the

(1) *B. Dorappa* v. *Kundukuri Mallikarjunudu.*

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present, and I do not know the principle on which it was decided, as the judgment of the High Court merely confirms the order, and the reasons are not given. I do not therefore feel bound by this as an authority. On behalf of defendant a case decided by the Calcutta High Court, at page 527 of Cowell's Digest, *Soorjun Chowdhry* v. *Imambandee Begum*, (1) was quoted against the right of immediate redemption, this is called a zur-i-peshgee lease, and the principal, and interest, was to be cleared off by the usufruct of the property, the balance found due at the end of the period, was to be paid by the lessor, and he was to take possession, he was not allowed to take possession before the expiry of the term.

In this case the reasons for the decision are not known.

The case must be decided according to the intention of the parties, and it seems to me that the clear intention was, that the debt should be paid off by the enjoyment of the land for the full term of 55 years, and the mortgagor should not be entitled to redeem before. I can find nothing in the rules of equity regarding redemption, which will assist a mortgagor in relieving himself from the consequences of his own contract in this respect, because, he afterwards changes his mind, and wants to recede from his contract. A man cannot make a mortgage, and at the same time stipulate that there shall be no right of redemption, if he does, equity will relieve him and allow him to redeem in spite of his agreement, but here the right of redemption exists, though it cannot be enforced until the expiry of a term. In the present agreement no interest is charged, in lieu of that, the mortgagee is to receive any profits which he may be able to obtain from the land in excess of the rent, which he is bound to pay to the mortgagor, he must pay the rent whether the land yields a profit or loss, he cannot claim the principal now if he wished, and therefore the mortgagor cannot claim immediate possession of the land; as therefore, the terms of the contract are expressly against the present right of redemption, and there is in my opinion no equitable reason why the

(1) 12 W. R., p. 527.

1875. February 5. R.A. No 90 of 1874.

contract should be set aside in favor of the mortgagor, I dismiss the suit with costs."

From this decision the plaintiff appealed to the High Court on the following, among other grounds:—

The plaintiff is entitled in equity, and under the terms of Exhibit A, to redeem at once the property in question by payment of the mortgage amount.

The plaintiff's right of redemption is absolute, and can be exercised in equity at any time before it is barred by lapse of time.

The provisions entered in Exhibit A are for the benefit of the plaintiff, and if he chose to waive them, he cannot be compelled to adhere to the same.

Mr. Miller for the appellant:—This is a suit to redeem an usufructuary mortgage. It is resisted on the ground that the time specified in the razinama creating the mortgage has not yet expired. *B. Dorappa* v. *Kundukuri Mallikarjunudu* (1) is really on all fours with the present. The matter of the provision for payment within two months having been got rid of, the facts are identical. Then Original Suit No. 3 of 1867, is exactly in point. The Judge disregarded it; but he is bound by his own previous decision. If we look to the intention of the parties, it was merely the repayment of a debt.

The Advocate General for the respondents:—This was not a simple usufructuary mortgage, but a lease, and an arrangement for payment thereon. There was a lease in existence before Original Suit No. 2 of 1854 was brought. Regulation 34 of 1802, s. 8, (*a*) refers only to cases where no time is specified. The English law is clear on the subject. II W. and T. 887: *Brown* v. *Cole*, 14 Sim. 427; 1 Fisher 656;

(1) 3 Madras H. C. Rep., p. 363.

(*a*) Act XXVIII of 1855, Section 1, repealed Section 3 of 13 Geo. 3, c. 63, and all the usury laws in force with the Regulations mentioned in the Schedule. Sections 2, 4, 5 and 6 of Regulation 34 of 1802 of the Madras Code are repealed thereby "and Section 8 of the same Regulation so far as it may be deemed to limit the rate of interest to be allowed on mortgage bonds."

1875. *February* 5. *R. A. No.* 90 *of* 1874.

such arrangements are good for both parties. See also *Khajah Lotf Ali* v. *Gujraj Thakoor*, XI Suth. W. R., 408; and *Soorjun Chowdhry* v. *Imambandee Begum*, XII W. R., 527.

The arrangement here was called a "lease." It was a fair arrangement for paying off the debt. It would be unfair for the tenant to be turned out at any moment the mortgagor pleases; and we have a right to take our chance of good and bad seasons over the long prescribed period. Then again the Hindu law appears to forbid the redemption of a mortgage before the time settled. *B. Dorappa* v. *Kundukuri Mallikarjunudu.* (1) The only ground for the Court to proceed upon, is the *intention* of the parties.

Mr. Miller in reply.—The facts of the case indicate that it was practically one of mortgage. The 4,000 Rs. alleged to have been spent on improvements for 17 years, is no great sum, and the mortgagee has no doubt received the full amount by this time from the produce of the land.

SIR W. MORGAN, C.J.:—The cases come to this, that when once you get a debt with the security of land or its payment, then the arrangement is a mortgage, by whatever name it is called. If we find here that the transaction was a mortgage, then justice will be done by allowing the money to be paid. If on the other hand, we find that it was practically a sale of the property for 55 years, then it cannot be set aside. That is the principle on which our decision will be grounded.

Cur. Adv. Vult.

JUDGMENT:—The Court below having found the lease for 55 years to be "undoubtedly an usufructuary mortgage," nevertheless held that no right of redemption existed during the term. Now if it is once ascertained that the parties intended to create a mortgage security and not to convey an absolute interest, the transaction will always be regarded as a mortgage and redeemable on the usual terms.

We are satisfied that the terms of the arrangement itself, by which a pending suit was compromised and payment of a balance (ascertained to be due on a settlement of

(1) 3 Madras H. C. Rep., p. 363, (at p. 366).

1875. *February* 5. *R. A. No.* 90 *of* 1874.

accounts) was secured, import nothing more than the creation of a security for this debt. The defendants, the creditors, are thereby allowed to occupy the land for 55 years at a fixed rent of 280 Rupees out of which, after deducting 160 Rupees for the plaintiff's maintenance and other specified purposes, 120 Rs. are declared to be applicable in liquidation of the debt of 6,538 Rupees ascertained to be due. In this way the debt would be liquidated in 55 years, the defendants during such period having full possession and enjoyment of the land and its profits. In thus providing for the gradual liquidation of the debt and the extension of the period of payment there is no certain indication of an intention to create an absolute lease of the land or to put an end completely to the relation of debtor and creditor previously existing. We are of opinion that, according to the true construction of the document, it creates a mortgage security and the decree dismissing the suit for redemption must be reversed. The case must be remanded to the Court below. Each party will bear their own costs of this Appeal.

Appeal allowed and case remanded.

Appellate Jurisdiction. (a)

Referred Case No. 3 *of* 1875.

KUNDEME NAINE BOOCHE NAIDOO *Plaintiff.*

RAVOO LUTCHMEEPATY NAIDOO and another ... ...*Defendants.*

Where plaintiff's sheep had been attached in satisfaction of a decree against a third party, and the 2nd defendant had purchased the property at the Court sale;—*Held*, that a suit merely to recover the sheep or their value is cognizable by a Small Cause Court.

1875. *February* 22. *R. C. No.* 3 *of* 1875.

THIS was a case referred for the opinion of the High Court by Mr. J. C. Hughesdon, the Judge of the Court of Small Causes, Vellore.

No Counsel were instructed.

The facts sufficiently appear from the following

JUDGMENT:—The first defendant in this suit had attached a flock of sheep belonging to the plaintiff in satisfaction

(a) Present:—Si W. Morgan, C.J., and Kindersley, J.

1875. *February* 22. *R. C. No.* 3 *of* 1875.

of a decree against a third party. The second defendant had purchased the property at the Court sale. The plaintiff sued for recovery of the sheep or for their value.

The Judge of the Small Cause Court was of opinion that he had jurisdiction to try the suit, but referred the case as the Proceedings of the High Court, dated 27th November 1872 and 5th November 1873, conflicting apparently with the decision in *Janakammal* v. *Vithenadien* (1) seemed to be an authority for a contrary opinion.

The Proceedings in November 1872 and 1873 show that this Court thought that the discretion conferred by Section 4, Act XXIII of 1861 (2) should not be exercised so as to give jurisdiction to the Small Cause Court in the *particular* cases. In the later case (that of November 1873) a number of defendants (purchasers of different lots) were sued together and the suit itself was for other reasons regarded as one in which we judged it inexpedient to authorize a Small Cause Court to proceed.

The earlier case (that of November 1872) was of the same kind, though in that the further circumstance occurred that the plaintiff sought to set aside an attachment in addition to the recovery of his property.

The present suit is *merely to recover the goods* or their value and is maintainable.

(1) 5 Madras H. C. Rep., p. 191.

(2) "If in any suit there are more defendants than one, and at the date of the institution of the suit all the defendants shall not reside within the jurisdiction of the Court in which the suit is brought, but one or more of the defendants shall reside within such jurisdiction, the suit shall not be rejected by reason of all the defendants not residing within the jurisdiction of the Court in which the suit is brought, but the District Court, if the suit is pending in any Court subordinate to such Court, or the Sudder Court may order that the suit be heard in any Court subordinate to such Sudder or District Court, and competent in respect of the value of the suit to try the same."

Appellate Jurisdiction. (a)

Special Appeal No. 611 *of* 1874.

BHEEMA CHARLU ... ... *Special Appellant (Defendant.)*
DONTI MURTI ... ... *Special Respondent (Plaintiff.)*

Where a wrong person is arrested and imprisoned under a decree to which he was no party, the person setting the Court in motion is not liable for such arrest and imprisonment if he did not obtain the process fraudulently or improperly.

1875. *March* 19. *S. A. No.* 611 *of* 1874.

THIS was an appeal against the decision of Mr. L. Forbes, the Acting District Judge of Bellary, in Appeal Suit No. 19 of 1873.

Plaintiff brought this suit in the Court of the Principal Sadr Amin of Bellary to recover Rs. 1,300 as damages for his illegal arrest by the defendant, and for his detention in custody in the Civil Debtor's Jail at Bellary, for a period of four months.

The defendant, as the assignee of a bond executed to one Venkatadasappa by Authi Murthi, Ramiah and Narrainappah, brought a suit, Original Suit No. 220 of 1860, thereupon in the Purghy Munsif's Court, and obtained a decree. In execution of that decree the plaintiff was arrested.

The defendant alleged that the said Original Suit No. 220 of 1860 in the Court of the District Munsif of Purghy was brought against the present plaintiff and his paternal uncles upon a bond executed by them; that the plaintiff bears two names, Murthi, and Donthi Murthi, and was the first defendant in the said Original Suit No. 220 of 1860, and one of the judgment debtors, that the plaintiff was the son of Sinjivappah for whose debt the bond sued upon was given, and that his real name is Authi Murthi, by which name he was arrested and imprisoned; and that when the plaintiff was arrested and brought before the District Munsif's Court of Purghy, he raised no objection on the point of identity. The defendant denied that the plaintiff had sustained any injury and that the arrest was malicious or unlawful or without reasonable cause.

(a) Present—Sir W. Morgan, C.J., and Holloway, J.

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of 1874.

The Principal Sadr Amin dismissed the plaintiff's suit with costs on the ground that he was one of the judgment debtors in Original Suit No. 220 of 1860 on the file of the Purghy District Munsif's Court, and that, therefore, his arrest was perfectly legal. On appeal the Acting District Judge of Bellary reversed the decree of the Principal Sadr Amin on the ground that the plaintiff was not one of the judgment debtors in the said suit, and raised that objection when brought before the Purghy Munsif's Court. He gave him a decree for Rupees 350 with costs.

From this decree the defendant appealed to the High Court on the following grounds:—

I. Malice not having been alleged on the part of the defendant, the plaintiff's suit must fail, and there is no cause of action.

II. The plaintiff did not prove that he sustained any damages; he is therefore not entitled to any.

III. The amount of damages awarded to the plaintiff is excessive.

IV. Plaintiff having been arrested under a warrant of the Court, he cannot recover any damages as against the defendant.

Mr. Miller for the appellant, the defendant, contended that the mere setting the Court in motion did not make the person obtaining the process liable for the arrest of the wrong person where, as here, no fraud had been proved.

Mr. Gould for the respondent, the plaintiff, submitted that there was distinct evidence that the proceedings in execution were taken by the defendant against the plaintiff whom he knew was not the judgment debtor, and that he was consequently liable for the result of his fraud upon the Court.

SIR W. MORGAN, C. J.:—There is no reason why the decree should have been against the appellant. He set the law in motion, no doubt, and the result was that a person was taken in execution who turned out to be the wrong

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person. Unless he who sets the officers of the Court in motion does so fraudulently or improperly, of which there is not the slightest evidence in this case he is not liable for such arrest. I would reverse the decree of the Civil Judge on the ground that the appellant is not liable for simply putting the Court in motion.

HOLLOWAY, J.:—I entirely agree. There are several ways whereby a person may become liable for arresting the wrong man. If he take an active part in such arrest, then he is a trespasser, whatever his motive may have been. He is also liable when he sets the process of the Court in motion, but there he is only responsible if he obtain such process fraudulently or improperly. There is no evidence here that such was the case. It does not appear that the appellant induced the Court to commit, but even if he had done so, that fact alone would not render him responsible. The decree of the Civil Judge must, therefore, be reversed, with costs.

Appeal allowed, and Lower Court's decree reversed with costs.

Appellate Jurisdiction. (a)

Civil Miscellaneous Special Appeal No. 358 *of* 1874.

THE COLLECTOR OF SOUTH ARCOT.(*Petitioner*) *Appellant.*
THATHA CHARRY... ... ...(*Counter-Petr.*) *Respondent.*

Five years after the dismissal of a pauper suit, from the decree in which no appeal had been preferred, Government sought recovery of the stamp duty by attachment and sale of the pauper plaintiff's property; *Held* that, the claim was not barred.

1875. April 9. C. M. S. A. No. 358 of 1874.

THIS was a Special Appeal against the order of Mr. O. B. Irvine, the District Judge of South Arcot, dated the 25th September 1874, passed on Civil Miscellaneous Petition No. 151 of 1874, reversing the order of the Court of the District Munsif of Villupuram, dated 18th April 1874.

Suit No. 443 of 1866 on the file of the Villupuram District Munsif's Court, brought by the plaintiff Thatha Charry

(a) Present:—Sir W. Morgan, C. J., and Kindersley, J.

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in formâ pauperis, was dismissed on the 25th February 1868, and from that decree no appeal was preferred.

In 1873 an application was made, on behalf of Government, to the Villupuram District Munsif's Court for the recovery of the stamp duty by attachment and sale of the pauper plaintiff's property. By Miscellaneous Petition No. 947, the said plaintiff contended that execution could not issue as the claim was barred under Article 167, of Schedule 2, of Act IX of 1871, more than three years having elapsed since the decree was passed. A counter-petition, Miscellaneous Petition No. 1017, was presented to the said District Munsif's Court on behalf of the Collector of South Arcot, wherein it was contended that by Circular Order No. 7 of 1873 of the Board of Revenue, Stamp duty, &c. due to Government could be collected at any time after the passing of the decrees in pauper suits. The District Munsif held that "under the standing Circular Order No. 234 of the Board of Revenue, there is no bar by lapse of time," and ordered warrant of attachment to issue. From this order the petitioner in Miscellaneous Petition No. 947, the pauper plaintiff in the Original Suit No. 443 of 1866, appealed to the District Court of South Arcot, by Civil Miscellaneous Petition No. 151 of 1874. In reversing the District Munsif's decree, the District Judge observed :—

"The Government Vakil on the part of the Collector draws the attention of the Court to an order of the High Court, dated 22nd November 1872, directing that copies of all decrees in pauper suits should be furnished to Collectors, a practice which it appears had not previously obtained, and Collectors are consequently often kept in the dark as to suits in which they should recover the stamp duty on behalf of Government.

"In the present instance the Vakil argues that the Collector did not become aware of the decree until the end of 1872, and that hence his application should not be held to be barred.

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"The Munsif should be aware that the Board of Revenue have not the power to prescribe within what period a Court's decree should be executed. This is the province of the Legislature, who have declared 3 years to be the limitation.

"The recovery of stamp duty on behalf of the Government is a proceeding taken in execution of the decree.

"Under Section 17 of the old Limitation Act (Act XIV of 1859),(*a*) such claims were regarded as "public claims," and were expressly exempted from the ordinary rules of limitation, but this Act having been repealed by the present Act (IX of 1871), and there being no similar provision under this recent enactment, applications on behalf of Government for recovery of stamp duty must be treated like ordinary applications in execution of a decree.

"The Munsif's order will be, and hereby is, reversed and annulled, and the land will be released from attachment.

"The Collector's motion must be also rejected, but, under the circumstances, without costs."

From this decision the Collector of South Arcot appealed to the High Court on the ground that the application for execution was not barred by any Act of Limitation.

The Acting Government Pleader for the appellant:—Limitation Act No. XIV of 1859, Section 17(*a*) applies, whereas the Lower Court has decided the case upon the present Limitation Act IX of 1871 which did not come into force until April 1873, long after the filing of this suit.

[CHIEF JUSTICE.—According to one reading of Act XIV of 1859, Section 17, that Limitation Act would not touch this case. Would the application by Government for recovery of stamp duty be considered "a public claim?"]

I submit that it would be so considered; but in any view of the case the application is not barred by Act XIV of

(*a*) Act XIV of 1859, Section 17 is as follows:—"This Act shall not extend to any public property or right nor to any suits for the recovery of the public revenue or for any public claim whatever, but such suits shall continue to be governed by the laws or rules of limitation now in force."

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1859, for the application was made within six years after the making of the decree in the pauper suit.

The Court delivered the following

JUDGMENT :—The suit having been instituted before the 1st of April 1873, the Limitation Act of 1871 does not govern this application for execution. (*a*) And the previous Act XIV of 1859 contained a Section (17), cited by the Judge, excluding from its operation a claim like the present one, which is in respect of costs recoverable by the Government in a pauper suit under the provisions of the Code of Civil Procedure. Suit for the recovery of public claims continued by the terms of that Act "to be governed by the laws or rules of limitation now in force." But the Regulation (*b*) contained no special provision applicable to a Government claim like the one before us. Assuming in the respondent's favor that it would fall within the general provisions of the old limitation rules, then the application is not barred. The order will be rescinded.

Order rescinded.

(*a*) See however, *Naranappa Aiyan* v. *Nanna Ammal*, page 97, *post*.

(*b*) Regulation II of 1805, the only provision in which as to the claims of Government is contained in Section 2, cl. 1, whereby "all claims on the part of Government, whether for the assessment of land held exempt from the public revenue without legal and sufficient title to such exemption, or for the recovery of arrears of the public assessment, or for any other public right whatsoever (the judicial cognizance of which may not have been otherwise limited by some special rule or provision in force) are to be heard, tried, and determined, in the Courts of civil justice, if the same be regularly and duly preferred at any time within the peried of sixty years from the origin of the cause of action."

Appellate Jurisdiction. (a)

Civil Miscellaneous Petition No. 181 *of* 1875.

SYED MOHIDIN HUSSEN SAHEB { *Petition, Appellant in C. M. R. A. No.* 181 *of* 1871.

An appeal under Madras Act VIII or 1865 must be presented within 30 days from the date of the decision appealed against. The appellant is not required to file a copy of such decision with his appeal.

1875. *April* 12. *C. M. P. No.* 181 *of* 1875.

THIS was an application under Section 376 of the Civil Procedure Code for review of the judgment of the High Court, dated the 22nd July 1874, dismissing Civil Miscellaneous Regular Appeal No. 181 of 1874 presented against an Order of the District Court of Chingleput, dated 22nd April 1874.

The plaintiff in summary Suits Nos. 22 to 27, and 29 to 31 of 1873 before the Assistant Collector of Chingleput, presented appeals from the decision therein to the District Court of Chingleput, by which the said appeals were rejected on the ground that they had been presented out of the time prescribed for such appeals. From this order of rejection the plaintiff appealed to the High Court on the ground that the application for a copy of the decision of the said Assistant Collector of Chingleput, in order that the said copy might be filed with the appeals, was made on the 5th February 1874, *i.e.*, the very day on which the said decision was passed; that the appeals were presented on the 8th April 1874, and were therefore presented within thirty days from the 9th March 1874, the day on which the copy of the said decision was furnished to plaintiff. The appellant (plaintiff) submitted that the order of rejection was "contrary to Section 13 of the Limitation Act of 1871."(b)

(a) Present :—Sir W. Morgan, C.J., and Kindersley, J.

(b) Act IX of 1871, Section 13, so far as it affects this case, is as follows :—

"In computing the period of limitation prescribed for an appeal, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence, or order appealed against or sought to be reviewed, shall be excluded."

1875. *April* 12. *C. M. P. No.* 181 *of* 1875.

On the 1st July 1874 the High Court transmitted a copy of the appeal to the District Judge of Chingleput and requested him to state the circumstances in which the appeals were rejected as being out of time. On the 6th July the District Judge of Chingleput replied that he rejected the appeals "because they were presented after the time allowed in Section 69 of Act VIII of 1865."(*a*) By its order of the 22nd July the High Court dismissed the appeal.

The present application for review of judgment was made on the grounds—(1) that the appellant's illness at Vellore prevented his appearance on the 22nd July, and (2) that the Lower Court's decision was wrong as the thirty days within which the appeal must be presented were to be calculated from, and exclusive of, the day on which the copy of the decision of the Assistant Collector of Chingleput was granted.

Mr. Johnstone for the Petitioner.

The Court in refusing this application observed :—

The Act requires the appeal to be presented in the Zillah Court within 30 days from the date of the Collector's judgment and makes no provision for an extension of the time of appeal.

It is suggested that in the case now before us, the days should be reckoned "exclusive of the time requisite for obtaining a copy of the decree." (Section 13, Act IX of 1871)(*a*) and that, according to this computation, the appeal was presented within the prescribed period. But the Limitation Act of 1871 is inapplicable to the present case, the suit having been instituted before the 1st April 1873, assuming that its provisions can be applied to any appeals under the Madras Rent Act of 1865.

A clause in like terms in Section 333 of the Code of Civil Procedure is also inapplicable here. It is suggested

(*a*) Madras Act VIII of 1865, Section 69, is as follows :—"A regular appeal shall lie to the Zillah Judge, from all judgments passed by a Collector under this Act; provided that the appeal be presented to the Zillah Court within 30 days from the date of the Collector's judgment. But no judgments of a Collector under this Act shall be set aside for want of form or for irregularity of procedure; but upon the merits only."

1875. *April* 12. *C. M. P. No.* 181 *of* 1875.

that whereas in this case a delay of 29 days occurs in furnishing a copy of the decree appealed against, the right of appeal is in effect taken away. But as this Act does not, like the Civil Procedure Code (Section 335) require that the appeal shall be presented in a prescribed form "and shall be accompanied by a copy of the decree appealed against," it may well be that an appeal may be duly presented within the meaning of the Act, notwithstanding the appellant's involuntary omission to produce with it a copy of the decree.

Petition dismissed.

Appellate Jurisdiction. (a)

Regular Appeals Nos. 82 *and* 86 *of* 1874.

NAGASAWMY NAIK ... { (1*st Defendant*) *Appellant in No.* 82 *and Respondent in No.* 86.

RUNGASAMY NAIK ... { (*Plaintiff*) *Respondent in No.* 82 *and Appellant in No.* 86.

An agreement to refer an existing dispute to arbitration is as binding and capable of enforcement as any other lawful contract; and a submission of such a dispute to arbitration once made is not, without just and sufficient cause, revocable.

S. A. No. 491 *of* 1865, 3 Madras H. C. Rep., p. 82 overruled, *C. P. No.* 246 *of* 1865, Ib., p. 183, and *R. A. No.* 55 *of* 1873, 7 Ib., p. 257, followed.

1875. *March* 19. *R.A. Nos.* 82 *&* 86 *of* 1874.

THESE were Regular Appeals against the Decree of Mr. F. C. Carr, District Judge of Tinnevelly, in Original Suit No. 13 of 1873.

The plaintiff sued for the recovery of moveable and immoveable property "unlawfully and fraudulently appropriated," by the 1st defendant the elder brother of the plaintiff, and, as head of the family the manager of its affairs.

The plaintiff alleged that the 1st defendant executed a deed of division on the 20th March 1871, whereby (after deducting certain sums for the maintenance of the mother of the plaintiff and defendant, and assigning over to their sisters certain debts) the 1st defendant undertook to collect

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debts, mentioned in the deed of division, and the moveable and immoveable property amounting in value to Rs. 56,687-9-9 was to be equally divided between the plaintiff and the 1st defendant. The plaintiff further alleged that the 1st defendant collected the debts above-mentioned and appropriated the sums collected to his own use, and "concealed certain properties without including them in the division," and that he has collected some of the debts assigned over to the sisters, "and has, subsequent to the division, obtained bonds in his name for some other debts." The plaintiff further alleged that soon after all the above circumstances came to his knowledge in June 1871, he and the 1st defendant appointed certain arbitrators to enquire into the matter in dispute between them, but before the arbitrators could make their award, the 1st defendant withdrew his submission to arbitration by a petition dated the 2nd November 1872. On the 29th of that month the arbitrators published their award.

The 1st defendant admitted that a division was effected between himself and the plaintiff; traversed the allegations of fraud, concealment, and appropriation; alleged that the plaintiff was put into possession of the property to which he became entitled under the deed of division, and further alleged that the plaintiff appropriated certain debts which fell to 1st defendant's share. The 1st defendant submitted that the alleged award was "fraudulent and invalid in law," and that the plaintiff's suit was not brought thereupon.

The Judgment of the District Judge, so far as it relates to the subject of arbitration, is as follows:—

"It is undisputed that on the 20th March 1871, after long consultation, the brothers mutually wrote their deeds of division, Exhibits A and I, which were registered at Vilathicolam on the 1st April 1871. Subsequently, however, disputes arose between them, and on the 9th November 1872 they submitted their disagreement to village arbitrators [Exhibit P 1] putting in lists which detailed their difference [P 3 and 4] upon which the arbitrators appointed one Chockalingam

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Pillay (P 7) to compare their lists of differences, with the schedules of the properties attached to the deeds of division, and a slight amount of evidence (2 witnesses) was heard on the 23rd November 1872; the defendant put in through the post a protest (P 10) withdrawing his submission to the arbitration, mainly on the ground that their proceedings were partial and irregular, and that he had had no fair opportunity of producing before the arbitrators his witnesses and evidence.

"This letter was received by the arbitrators the following day, viz., 24th November 1872. The arbitrators, however, considered the withdrawal was invalid as having only been put in after the defendant knew that the award was going to be against him, and they accordingly proceeded to draw up their award which was completed and signed on the 27th November 1872. P 8 is the original award, and it was produced, in obedience to summons, by the curnam Chockalingam Pillay (plaintiff's 1st witness) who, though not actually one of the punchayet, was employed by them to compare the accounts and to draft and write the award.

"When the plaintiff filed this plaint, he made allusion to this award in the 8th paragraph, which is as follows:—'As 'soon as the plaintiff became aware of the aforesaid deceitful 'circumstance, *i. e.* in June 1872, both parties appointed 'arbitrators to settle the case, but before they gave their 'decision, the 1st defendant knowing that it would go 'against him, withdrew himself from his submission to arbi-'tration, sending on 23rd November 1872 a letter with-'drawing. Subsequently, however, the arbitrators gave their 'award on the 27th November 1872.'

"The prayer of the plaint contained no petition to file the award in Court under the provisions of Section 327 (*a*): and the relief sought by the plaintiff was not in accordance with the award, but, on the contrary, was an adjustment of the division between the brothers on a consideration of the whole circumstances of the case.

"The defendant in his written statement in the 8th para. stated that 'the arbitrator's award referred to in the plaint

(*a*) Act VIII of 1859.

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'is fraudulent and is not sustainable in law, and no claim 'has been preferred thereon by the plaintiff.' At the first hearing of the case no definite reference was made by either party to this award, and the six issues, which were then (October 4th, 1873) settled had no reference thereto ; these issues were agreed to and signed by the pleaders of both parties.

"On the 19th December 1873 the plaintiff's pleader put in a Miscellaneous Petition (No. 3 of 1874) saying that the plaintiff's claim was based upon the award of the arbitration, and praying for an additional issue to settle how far it was now binding.

"The defendant's vakil objected to the issue, but I was of opinion that as the question had been raised, it was better to settle it in the suit, although it had not actually formed a portion of the prayer in the plaint. I accordingly recorded the additional issue which is now under consideration. 'Whether the parties are bound or not by the award of the punchayet.'

"On my asking the plaintiff's pleader why he had only so late advanced this plea, he acknowledged that when he drafted the plaint and agreed to the original issues, he was of opinion that the withdrawal of the defendant before the award was effectual to nullify the award, but that owing to the decision of the High Court in Regular Appeal No. 55 of 1873, *Ramaraya* v. *Santaiya* and another (1), which only became known here on its publication in the December number of the Madras Jurist, he now was ready to maintain that the withdrawal by the defendant could not be allowed to operate.

"The defendant's pleader, on the contrary, has urged that the withdrawal was good, having been filed before the award, as is clear from its being mentioned in the award itself, and that as not only he had withdrawn his submission, but also as plaintiff had ignored the award, by framing his plaint independently of it by asking for things which the award

(1) 8 Madras Jurist, p. 455, reported as *Santaiya* v. *Rámaráiya*, in 7 Madras H. C. Rep., p. 257.

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had disallowed, and by not asking for a certain item of Rupees 442½ which the award had given, it was not now open to him upon a new ruling to change his plea.

"Reading, however, the judgment of the Acting Chief Justice in that case, I am not of opinion that it, in any way, alters the former rule relative to the power to withdraw. In that case after an award had been made, one of the parties applied under Section 327 to file the award. Such has not here been done. The objecting party asserted, but did not prove, that he had revoked his assent. In the present instance he has not only proved it, but it is admitted that he did so revoke, upon which the Original Court ordered the filing of the award. Against this the defendant appealed on the ground that he had authority to revoke and did revoke his submission.

"The judgment of Mr. Holloway, Acting Chief Justice, was that the application must be dismissed as there was no appeal.

"He said 'the point urged on appeal does not arise, for there was no evidence of any attempt to withdraw.' In the present instance, the withdrawal was undisputed. Then follows the part on which the plaintiff's pleader relies as laying down that being once in an arbitration, a party can never withdraw.

"'If there had, (been an attempt to withdraw) however, 'and simply on the ground that the appellant did not like his 'agreement, and such withdrawal was allowed to defeat a '*completed* award, this curious consequence would follow;—

"'No man can withdraw from his contract to submit, and that contract can be filed despite this objection while the arbitration is going on. If, however, the matter proceeds to its natural and legally compellable conclusion, a matter which would be wholly ineffective to stay any part of the proceeding at any stage of its progress, is adequate to destroy it when all the stages have been passed and the goal reached.'

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"These two contingencies do not arise in the present case, the objector did not withdraw simply because he did not like it, but because the enquiry was not full, and the question is not whether a withdrawal should defeat completed awards, but whether there being a withdrawal before award is made there is any authority remaining in the arbitrators to decide the case. The remaining part of the paragraph shows that the *reductio ad absurdum* argument rests on the supposition that the withdrawal is subsequent to the award.

"That a man may object previous to the giving of an award is undoubted. Mr. Justice Holloway himself has so ruled. In the case of *Kula Nágabúshanam* v. *Kula Séshá-chalam* (1) there would have been no necessity for the argument as to whether an award was to date from its rough draft or not if a party could *never* withdraw. In the case of *Alla Aiyappa* v. *Nundula Peraiya*, (2) it clearly sets out that either party may revoke before award. That decision raises the very point now under discussion, and its ruling is authoritative and has not been overruled by the case of *Ramaraya* v. *Santiya*. (3) Mr. Broughton, at page 252 of his Civil Procedure Code, 4th Edition, referring to the decision of the Calcutta High Court, says 'It is an almost universal rule that a submission to arbitration is revocable before award made.' It is true that in the case of *Pestonjee Nusserwanjee* v. *Maneckjee*(4) the Privy Council held that 'when parties have agreed 'to submit the matter to arbitration, no party to the 'agreement can revoke the submission to such arbitra-'tion, unless for good cause: a mere arbitrary revocation of the authority will not be permitted.' But in the first place this had reference only to cases falling under Section 326 of the Code, *i. e.*; where the case has come before the Court before arbitration has commenced, whereas in the present case, the arbitration and the award were without any

(1) 1 Madras H. C. Rep., p. 178.
(2) 3 Madras H. C. Rep., p. 82.
(3) 7 Madras H. C. Rep., p. 257.
(4) 12 Moore's I. A., p. 112, confirming the judgment of the High Court reported in 3 Madras H. C. Rep., p. 183.

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Court intervention, and in the second place the defendant assigned a good cause for his withdrawal, viz; that the enquiry was defective, an objection which seems well founded, considering that before this Court the plaintiff alone examined 44 witnesses occupying many days in the enquiry, and before the arbitrators only two were examined. In the case of *Seonoth* v. *Ramanath*(1), which, in many of its features, was very much like the present suit, the parties had at first agreed to an arbitration by written agreement, but one party subsequently drew back from his agreement and refused to have it registered. Nothing, therefore, came of the attempt to settle the dispute by arbitration. On the case coming before the High Court and Privy Council no objection whatever was taken to this apparently arbitrary revocation of submission. The case is reported in Sutherland's Judgments of the Privy Council, page 616(1).

"Lastly, a feeble effort was made by the 2nd and 3rd witnesses to prove that the award was really out before the revocation, which so completely broke down that the plaintiff's pleader relinquished that point without comment. Without doubt the defendant withdrew before the award as stated in the plaint, and he so withdrew for a reason, which it is impossible to call inadequate, and hence I hold upon the *Supplemental Issue* that the parties are not bound by the award (P. 8) of the punchayet."

The District Judge then considered the case on its merits and in conclusion observed:—

"The result of the judgment is that the defendant do pay to plaintiff,

	Rs.	A.	P.
For moiety of 12 podies of cotton ...	360	0	0
For moiety of common debts	5,405	3	3
Total...	5,765	3	3

with interest at 12 per cent. per annum from the 10th March 1871, together with proportionate costs upon the decreed amount."

(1) 10 Moore's I. A., p. 413.

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From this decision both parties appealed; the first ground of the plaintiff's appeal being "The award of the Punchayet (P. 8) was final, binding, and conclusive upon both plaintiff and defendant."

Mr. Johnstone for appellant (1st defendant) in No. 82 and respondent (1st defendant) in No. 86. There is a distinct decision of this Court that either party to an arbitration may reveke before award. *Alla Aiyappa* v. *Nundula Peraiya* (1).

[HOLLOWAY, J :—That decision is bad. It is one of the worst in the Reports. I then had the jargon of the English Common Law running in my head, and my attention was not called to the fact that the Civil Procedure Code had completely altered the law out here. I would not have thought that the point could be doubted or that it was open to argument had not my attention been drawn by Mr. Mayne, in *Pestonjee Nusserwanjee* v. *Maneckjee*, (2) to the change in the law made by Act VIII of 1859.]

But that case has not been overruled. In the present case the submission to arbitration was a private arrangement not effected through the Court, and the award, made after notice by 1st defendant of his withdrawal from his submission, was not made an order of Court, and was not originally relied upon by plaintiff.

Mr. Tarrant and *Rama Row*, for respondent (plaintiff) in No. 82 and appellant (plaintiff) in No. 86. The case of *Alla Aiyappa* v. *Nundula Peraiya*(2) has been in effect overruled by more recent decisions. *Pestonjee Nusserwanjee* v. *D. Maneckjee & Co.*, (2) and *Santaya* v. *Rámaráya*,(3). The subject is governed by Act VIII of 1859.

The Court delivered the following

JUDGMENT :—In this suit, in its origin, both parties seem to have lost sight of the agreement whereby they were minded to close their disputes by a reference to arbitration. Certain disputes having arisen between the two brothers respecting the division of family property of which they had

(1) 3 Madras H. C. Rep., p. 82.
(2) 12 Moore's I. A., p. 112.
(3) 7 Madras H. C. Rep., p. 257.

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lately made deeds of partition they resolved to appoint these seven men to be arbitrators, and the instrument whereby these arbitrators were appointed indicates the large powers intended to be given. It is not therein provided, in formal terms, that they are to hear the witnesses called by the parties, and to examine all documents that the parties might produce; but the submission to arbitration does clearly state that the disputants both agreed to present themselves before the arbitrators with the partition deeds and to abide by such decision as they might pass. The arbitrators held an enquiry and made an award—the substantial justice of which is in no way impugned. It appears that one of the parties to this arbitration, not being able to shew that the arbitrators had in any respect misconducted themselves or that they had proceeded precipitately in their enquiry, on the pretext that their proceedings were partial and irregular and their enquiry defective, withdrew from his submission to arbitration, and the first question for decision in this suit, upon the additional issue framed by the District Court, is whether the submission could in the circumstances be revoked.

The Judge held that there had been a revocation (for reasons which he could not call inadequate) of the arbitrators' authority *before* the award was made, and that the parties therefore were not bound by the award. After a careful examination of the evidence we think it appears, that the arbitrators closed their enquiry on the 21st, and that on the 22nd or 23rd a rough draft of their award was prepared, and the award itself was afterwards, on the 27th, formally made and published.

The arbitrators' decision was made known by themselves, or became known, on the 23rd, and it is in evidence that both the plaintiff and the defendant were present when the arbitrators on that day stated what their decision was.

Upon this evidence, even according to the law relied on by the Judge, there could be no revocation of authority, for the arbitrators had in substance fully executed their task, and the reference was at an end before the 24th when the defendant's letter of revocation was received.

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But we cannot admit that by the law which governs this case a person is allowed to revoke at his pleasure, or without sufficient cause, the authority of arbitrators once appointed, and to whom a difference has been submitted.

In England, no doubt, a rule of law had long prevailed which enabled parties, in breach of binding engagements and without shadow of excuse, to revoke the arbitrators' authority at any time before the making of an award, and in some instances here it had apparently been assumed that a like rule existed.

In the case of a reference through the intervention of a Court or where the order of reference or award is filed in Court, it is now clear that the provisions of the Code of Civil Procedure do not permit such a revocation of authority.(*a*)

In the present case the reference having been made without the intervention of a Court of Justice, can it be said that the authority was revocable even if the fact that it was withdrawn before the award be assumed ?

The "horror"(*b*) which formerly prevailed in the English Courts of a *domestic forum* never found place in British India.

(a) Pestonjee Nusserwanjee v. *D. Maneckjee & Co.*, 3 Madras H. C. Rep., p. 183, confirmed on appeal by the Privy Council, see 12 Moore's I. A., p. 112. See also *Santaya* v. *Rámaráya*, 7 Madras H. C. Rep., p. 257.

(b) In *Livingston* v. *Ralli*, 5 E. and B., p. 132, s. c., 24 L. J., Q. B., p, 269, which was an action on a contract containing an agreement that should any difference arise, the same should be left to arbitration in the usual manner; averment, that a difference arose; and breach, that defendant refused to refer it to arbitration, it was held on demurrer that the action lay. Lord Campbell, C. J., observed, in the course of his judgment (p. 136) "There seems at one time to have prevailed in our Courts a horror of a domestic forum which I can neither sympathize with nor account for; but the Legislature has recently, in the Common Law Procedure Act, 1834 (17 and 18 Vict., c. 125.), s. 11, made a provision in such cases, not that the agreement to refer shall be pleadable in bar, but that the Court may stop the action. This shows the opinion of the Legislature that such agreements are not contrary to public policy."

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where it has always been the policy of the Legislature(*a*) to promote the reference of disputes to arbitration; and the framers of the Code in the chapter on Arbitration embodied most of the existing law of the Company's Courts.

Having regard, not only to the former law in force in this country, but to the provisions of the Indian Contract Act (s. 28) of 1872,(*b*) we are inclined to say that an agreement to refer an existing dispute to arbitration is as binding and capable of enforcement as any other lawful contract, and that a submission of such a dispute to arbitration once made is not, without just and sufficient cause, revocable.

Notwithstanding the frame of the Original Suit, having regard to the course of the case in the Court below, we think we may be justified in making the terms of this award those of the decree of this Court. The conduct of the parties has been such that we are of opinion that each should be made to bear his own costs.

Regular Appeal, No. 86 *of* 1874 *allowed.*

(*a*) Bengal Regulation XVI of 1793, (1st May 1793) "A Regulation for referring suits to arbitration, and submitting certain cases to the decision of the Nazirs" was extended, with the exception of Section 10, to Benares by Regulation XV of 1795 (27th March 1795), was adopted almost literally by Madras Regulation XXI of 1802 (1st January 1802), and literally, except as to the Preamble and Section 10 which were omitted, by Regulation XXI of 1803 (24th March 1803) for the Ceded Provinces. See also Regulation XIII of 1810 superseded by Regulation X of 1829, Section 13. Suits referred under these Regulations were those "concerning disputed accounts, partnerships, debts, doubtful or contested bargains, or non-performance of contracts, in which the cause of action shall exceed two hundred (*sicca*) rupees" and "in all suits for money or personal property, the amount or value of which, shall not exceed the sum of two hundred (*sicca*) rupees." Bengal Regulation VI of 1813 extended the provisions of Regulation XVI of 1793 and Regulation XXI of 1803, so as to include disputes about title to land. See also Madras Act V of 1816, Section 14 of which was repealed by Act XXVIII of 1855, and Section 19 by Regulation IX of 1828, while Section 7 was modified by Act VIII of 1840. See also Madras Regulation XII of 1816 relating to the Collectors' powers to refer disputes as to lands, boundaries, &c., to village Punchayets.

Bombay Regulation VII of 1827 was passed on the 1st January 1827 "to facilitate the amicable adjustment of disputes of a civil nature by means of Arbitrators (a Punchayet.)"

(*b*) The Indian Contract Act, No. IX of 1872, s. 28, after declaring "every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent" provides that contracts to refer any dispute which may arise (*Exception* 1), or questions which have already arisen (*Exception* 2), to arbitration are not rendered illegal by this section.

Appellate Jurisdiction. (*a*)

Special Case No. 71 *of* 1875.

MOHUN SING ... ... *Plaintiff.*
KAREEM OONISSA BEGUM and another ... *Defendants.*

The right to distrain for rent in arrear has always to some extent existed and been recognized in the Presidency towns; and the Acts passed since 1847 are distinct declarations by the Legislature, made while regulating the exercise of the right and providing for its exercise only through the intervention of a Judge of a Court of Small Causes, that the right itself, subject to the restriction, is general, and that "any person claiming to be entitled to arrears of rent of any house or premises" in a Presidency town is authorized to apply for the issue of a Distress Warrant.

By the terms of the Law, the Small Cause Court Judges are authorized to reserve questions for the opinion of the High Court only where they arise in suits depending before them and not when doubts may occur upon applications for the issue of process or warrants.

1875.
April 19.
S. C. No. 71
of 1875.

THIS was a case stated under Section 55(*b*) of Act IX of 1850 for the opinion of the High Court by Mr. T. M. Busteed, the First Judge of the Court of Small Causes at Madras.

The facts sufficiently appear from the reference made which was as follows:—

"In this matter the applicant by his Vakeel Mr. Ramanuja Chariar, applied to the First Judge of this Court, to issue a warrant to distrain the moveable property of Kareem Oonissa Begum and Alimbee on the house and premises of the applicant in the occupation of the said Kareem Oonissa Begum and Alimbee as his tenants for Rupees 64-0-0 arrears of rent of the said house and premises justly due by the said tenants to the said applicant for 8 months, viz. from June 1874 to February 1875.

"2. The application was supported by affidavit made in accordance with the provisions of Act I of 1875.

"3. It appears from a statement which accompanied the affidavit that the said applicant was, by an instrument in writing not under seal, mortgagee or pawnee in possession for a term of 4 years from 9th March 1874, still unexpired of the house and premises in question from the said tenants, who were the mortgagors, thereof, and who by an unsealed

(*a*) Present:—Sir W. Morgan, C.J., and Kindersley, J.
(*b*) See note (*a*) p. 58.

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instrument in writing, usually called a rent-agreement, became the tenants of the mortgagee for the term, stipulating to pay to the mortgagee, a monthly rent of Rupees 8-0-0 for the same.

"4. The mortgagors are stated to be absolute owners of the house and premises in question, and the position of the parties by virtue of the mortgage and rent-agreement is that of ordinary landlord and tenant at a monthly money rent. The rent is not a rent service nor has a right to distrain been created or specially reserved by the mortgage instrument or the rent-agreement or by any other instrument or agreement between the parties.

"5. The First Judge made an order declining to issue the distress warrant applied for on the ground, that the rent in arrear was not a rent to which the right of distress was incident, reserving leave to the applicant to move the full Court to set aside such order.

"6. The applicant pursuant to leave reserved moved accordingly, and the full Court confirmed the order of the First Judge.

"7. But as the Court entertains doubts whether a higher Court may not be able to put a different construction on the Act, and as a matter of much importance is involved, this Court made its order contingent upon the opinion of the Judges of the High Court on a case to be stated to the said Court under Section 55(*a*) of Act IX of 1850.

"8. Act VII of 1847(*b*) was, it is apprehended, incorporated with Act IX of 1850 by Section 89(*c*) of the latter Act, and

(*a*) Act IX of 1850, s. 55 is as follows:—

"The Judges of the Court of Small Causes may, in their discretion, reserve any question of law or equity on which they entertain doubts, or which they shall be requested by either party to the suit to reserve, for the Judges of the Supreme Court, and shall give judgment contingent upon the opinion of the said Supreme Court on a case which they shall thereupon be entitled to state to the Court. If only two Judges sit together, and shall differ in opinion, the question on which they differ shall be so referred."

(*b*) "An Act to regulate distresses for Small Rents in Calcutta."

(*c*) Act IX of 1850, s. 49 extends the powers of Act VII of 1847 "to the recovery of all arrears of rent not exceeding five hundred Rupees," and declares that "the Judges of every Court of Small Causes under this Act shall be empowered to exercise within their several jurisdictions the extended powers of the said Act."

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Act I of 1875(*a*) is merely substituted for Act VII of 1847, so that this Court has, it is presumed, a right to state this case to the High Court, and your Lordships will no doubt put the most liberal construction possible on the above enactments in aid of the appellate jurisdiction of the High Court in the matter.

"9. Act VII of 1847, has been practically a dead letter in Madras. The records of this Court do, it is believed, show four or five instances of distress before 1855, but do not show a single instance of the provisions of the Act having been put in force since 1855. This is a very remarkable fact considering that since 1864 (see Act XXVI of 1864, Section 4) arrears of rent up to Rupees 1,000 were recoverable by distress through this Court, and could not otherwise be distrained for.

"10. In practice therefore it may be safely asserted from an experience of nearly 20 years, that the remedy by distress as between individuals is unknown in the town of Madras.

"11. In fact however the right of distress existed. Being in the nature of a remedy upon the contract to pay rent, it would in the Presidency towns most probably form part of the *lex fori*, brought with them by the English. But if any doubt could have existed on the matter, Act VII of 1847, and Act I of 1875, have removed it.

"12. These Acts profess to regulate distresses for rent in the Presidency towns. They are a legislative recognition of the existence of a right of distress which they proceed to modify and control. That right never was derived from the Hindus or the Mahomedans, for, even supposing them to have possessed it, the legal remedies and procedure of the English and not their's would prevail. There is no Act of any Indian Legislature dealing with the subject of distress in the Presidency towns before Act VII of 1847. That Act is called "An Act to regulate distress, &c." and its 6th Section provides that "no dis-

(*a*) "An Act to regulate Distresses for Rents in the Presidency Towns."

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tress shall be levied for arrears of rent amounting to Rs. 100 or less except under the provisions of this Act." It is therefore abundantly clear that Acts VII of 1847 and I of 1875, *do not create any new right of distress* for rent, but *only modify and control an existing right*, and that the existing right is not derived from the Hindus or Mohamedans, and is not created by any Act of any legislature in India. How then did it come into being? Clearly it must have come in with the English. The right of distress with which Acts VII of 1847 and I of 1875 deal, therefore, must be the right as it existed at Common Law and by Statute in the year 1726, the date of the Charter creating the Mayors' Courts in the Presidency towns.

"13. If any corroboration of this view were needed it is amply supplied by the second schedule of Act I of 1875, which repeals the Statutes of Henry III., Edward I., Edward II., &c., which deal with distress, replevin, &c. The vast extent of the remedy given by Section 3(*a*) Act VII of 1847 which embraced the goods of any one on the premises, would also tend to corroborate it. That the remedy did go to this extent is clear for the restricted wording of Section 10(*b*) of Act I of 1875, and the proceedings of the legislature when the bill was under discussion, the authority of the case in 1 Ind. Jurist, (N. S.) 361 (1) (quoted at page 842 of Mr. Cowell's Digest) notwithstanding.

(*a*) Act VII of 1847, s. 3 provides "that by virtue of the warrant of distress it shall be lawful for the Bailiffs to seize the whole or such part of the goods and chattels upon the said premises as shall be sufficient to cover the amount of the said rent, together with the costs of the said distress."

(*b*) Act I of 1875, s. 10 is as follows :—"In pursuance of the warrant aforesaid the bailiff shall seize the moveable property found in or upon the house or premises mentioned in the warrant and belonging to the person from whom the rent is claimed (hereinafter called the debtor), or such part thereof as may in the bailiff's judgment be sufficient to cover the amount of the said rent, together with the costs of the said distress.

Provided that the bailiff shall not seize—

(*a*) things in actual use ; or

(*b*) tools and implements not in use ; where there is other moveable property in or upon the house or premises sufficient to cover such amount and costs ; or

(*c*) the debtor's necessary wearing apparel ; or

(*d*) goods in the custody of the law."

(1) *Dwarka Nauth Biswas* v. *Uddit Churn Auddy*.

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"14. If this view of the question be correct the word 'rent' used in both Acts in connexion with distress, cannot by any possibility mean any rent usually so-called, but only such rent as in 1847, would have had incident to it the right of distress. From this position, there is, it seems to this Court, no escape.

"15. This necessitates the inquiry what rents in the Presidency towns in 1847, had incident to them the right of distress.

"16. In 1731, Statute 4, Geo. 2, Chap. 28, Section 5, which has no application to India, greatly extended the remedy by distress in England. Prior to that Statute only rent-services, that is, such rents as had some corporeal service incident to them, and rent-charges, that is rents in respect of which the right of distress was specially reserved by the deed or will creating them, were liable to distress. The Statute of Geo. 2 gave a similar remedy in case of rents-seck, rents of assize, and chief-rents or quit-rents, and generally may be said to have created the enlarged remedy by which in modern times the vast majority of rents are reached.

"17. From this point of view the operation of Act I of 1875 will necessarily be very limited. We should mistake our duty if we did not strive to give its full effect to the Act, and to that which we believe to be the intention of the legislature if it were possible to do so, having due regard to the rules and principles applicable to the interpretation of Statutes, but we do not feel ourselves at liberty to give this Act any other interpretation than the one we have put upon it.

"18. The questions which this Court begs to submit for the opinion of the High Court are :—

"1. What are the rents for which distress warrants may be issued by this Court under the provisions of Act I of 1875 ?

"2. Whether this Court was right in declining to issue the distress-warrant applied for in this instance."

Ramanuja Charri for the Plaintiff.

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Anandla Charlu and *Kamesam* for the Defendants.

The Court delivered the following

JUDGMENT:—The language of the enactments, passed to regulate Distresses for Rents in Calcutta first, and afterwards in the other Presidency towns, is clear; and it is needless to consider either the state of the Law of Distress in England at the time when the Mayors' Courts were established or the precise extent of the introduction and recognition here of this part of the English Law. That the right to distrain for rent in arrear has always to some extent existed and been recognized in the Presidency towns is certain; and the Acts passed since 1847 are distinct declarations by the Legislature made while regulating the exercise of the right and providing for its exercise only through the intervention of a Judge of a Court of Small Causes, that the right itself subject to the restriction, above referred to, is general and that "*any person claiming to be entitled to arrears of rent of any house or premises*" in a Presidency town is authorized to apply for the issue of a Distress Warrant.

In the first Act not only are the general words above quoted used, but they are followed by others plainly indicating that the law was applicable generally in the case of Natives as well as of Europeans. The assumption that the rents contemplated by these Acts are the "rents service" of the English Law, or rents of that nature (if any such rents can be found in Calcutta and Madras) and that the Acts only modify and control the right to distrain for such rents is unfounded and inconsistent with the language of the Acts.

We are of opinion that the Court erred in declining on the grounds alleged to issue the warrant applied for. We have in this instance answered the case stated for our opinion in order to avoid expense and delay to the parties concerned. But it must in future be borne in mind that by the terms of the Law, the Small Cause Court Judges are authorized to reserve questions for our opinion only where they arise in suits depending before them and not when doubts may occur, as here, upon applications for the issue of process or warrants.

Appellate Jurisdiction. (*a*)

Regular Appeal No. 5 *of* 1875.

SHAH GULAM RAHUMTULLA SAHIB. (*Plaintiff*) *Appellant.*

MAHOMMED AKBAR SAHIB and 4 others..... } (*Defendants*) *Respondents.*

A plaintiff must succeed, if at all, upon the strength of his own title and not by the infirmity of his opponent's.

Where property has been devoted exclusively to religious and charitable purposes, the determination of the question of succession depends upon the rules which the founder of the endowment may have established, whether such rules are defined by writing or are to be inferred from evidence of usage.

Where, so far as the will of the founder can be ascertained from the usage of former days, it seemed to authorize a mode of succession *originating* in an appointment by the incumbent of a successor, the Court would not be authorized to find in favor of any rule of succession by primogeniture solely from the circumstance that the persons appointed were usually the eldest sons.

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July 9.
R. A. No. 5
of 1875.

THIS was a Regular Appeal against the decree of Mr. J. R. Daniel, the Acting District Judge of Nellore in Original Suit No. 14 of 1873.

The facts of the case sufficiently appear in the judgment of the Acting District Judge of Nellore, which, so far as it is material, is as follows :—

"This suit is brought to establish the hereditary right of the plaintiff to the office of *Sujjadah*(*b*) in the mosque at Anasamudrampett, and to obtain possession of moveable and immoveable property belonging to the institution.

"The minor plaintiff Shah Gulam Rahumtulla Sahib is the nephew of the 1st defendant Mahommed Akbar Sahib. His father Bade Sahib (the elder brother of 1st defendant) held the office of *Sujjadah* and died in June 1860. At the time of his death his son was only four years of age, and 1st defendant, the younger brother of deceased, has, from that time, performed the duties of *Sujjadah*, and has had the management of all the property attached to the mosque. The mosque was founded by one Hazarah Khaja Rahumtulla Sahib (the date is unknown, but more than 100 years ago,) and ten villages were assigned for the support of the

(*a*) Present :—Sir W. Morgan, C. J., and Kernan, J.

(*b*) "سجّادہ *Sajjada* (from سجد) s. m. A carpet, or mat, on which Muhammadans kneel at prayers, an altar, a mosque." Shakespeare,

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mosque and its charities. It is alleged in the plaint that the succession to the office of *Peerzada*,(a) according to the long established custom of the family, is by primogeniture, that on the death of his father Bade Sahib in 1860, the plaintiff would, but for his minority, have succeeded to the office, but being incapable of succeeding, his uncle, the 1st defendant, was appointed merely to manage the institution on plaintiff's behalf during the minority, by the minor's mother and guardian. During this management it is alleged that the 1st defendant has unnecessarily contracted many debts and has illegally alienated the villages by granting them on long leases at low rents to the other defendants, and the plaintiff seeks to have these leases set aside. The plaintiff asks to be declared *Peerzada* by right of succession, to be placed in possession of the ten villages Gunmazu and houses Nos. 12-13 in plaint schedule attached to the mosque and to have made over to him the moveable property specified in Nos. 14 to 143 in the plaint schedule, and Rupees 13,000, being the amount of net profits, which ought to have accumulated during the management.

"The 1st defendant Mahommed Akbar Sahib denies that the succession to the office is by primogeniture, and gives instances in which it is alleged, that the eldest son did not succeed by right of primogeniture.

"He alleges that during the one year before his death Bade Sahib was ill and unable to manage the affairs of the mosque, so during that time and from Bade Sahib's death up to the present time, he, 1st defendant, has been performing the duties of *Sujjadah* in his own right and not on behalf of the plaintiff.

"He further pleads that he has not mismanaged the affairs of the mosque; that the debts have been contracted by necessity; the leases are legal and have not been granted for lower rent, that there was a debt of nearly Rupees 11,000 contracted by his elder brother and father when he assumed the office; and the debts were necessarily incurred

(a) A compound of the Persian words پیر a saint, a spiritual guide, and زادہ a son.

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to pay off these old debts, for purposes of charity, for the maintenance of the family, and repairs to the mosque.

" The expenditure has exceeded the income of the villages. The income of the nine villages specified in No. 11 of the plaint schedule is Rupees 5,000, while the expenditure is Rupees 6,000, and the income derived from the tenth village mentioned No. 10 plaint schedule is entirely devoted to the wages of the musicians attached to the mosque, and therefore there is no surplus in his hands.

" He is not in possession of the moveable property described in the plaint schedule Nos. 11, 14 to 20, 22, 23, 25 to 27, 29 to 33, 38, 39, 78 to 80, 86, 89 to 91, 93, 94, 98 to 100, 102 to 105, 107, 110, 111, 113 to 118, 122 to 124, 127, 129, 131, 133, 134, 138 to 141, and 143. The properties specified in plaint schedule Nos. 12, 21, 24, 28, 34, 35, 46, 47, 72, 74, 81, 82, 83, 84, 85, 87, 88, 112, 125, 126, 128, are used for charitable purposes connected with the mosque.

" The remaining properties belong to the family, but are over-estimated.

" The 2nd defendant, Subba Reddy, is the lessee of five of the villages. He pleads that these five villages were leased to him by the 1st defendant for a period of 15 years under a lease dated May 2nd, 1870; that on the strength of this cowle he lent 1st defendant Rupees 10,000 to pay off his creditors, and received a bond executed by the 1st defendant for this amount, dated May 3rd, 1870; that on the strength of this lease he has repaired the tanks, and spent money and labour on the improvement of the village.

" That Rahumtulla Sahib, the Dewan of the Rajah of Venkatagiri, who is supporting the plaintiff in this case, persuaded him that these leases were invalid, and therefore on August 14th, 1873, he executed to the plaintiff a deed relinquishing his right to these villages under the leases, and accepted from the minor plaintiff a lease for only one year, and accepted a bond from minor plaintiff for Rupees 3,200 as the amount of debt due to him instead of the bond which 1st

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defendant had executed for Rupees 10,000. The 1st defendant, however, had his property attached on October 4th, 1873, for an instalment of the amount due under the lease, and he applied in vain to the Dewan of Venkatagiri Rajah to relieve him from his dilemma.

"The 3rd defendant, Narasa Reddy, is the lessee of two other villages Nos. 8 and 9. He pleads that he obtained these two villages from the 1st defendant for a period of fifteen years under a lease dated July 27th, 1871.

"The 1st defendant borrowed from him Rupees 6,000, and gave him a bond for this amount on the same date.

"On the strength of the lease he has spent money in improving the property. He too pleads that he was persuaded by Rahumtulla Sahib, the Rajah of Venkatagiri's Dewan, that the lease was invalid, and he accordingly gave a deed of relinquishment in favor of the minor plaintiff on August 14th, 1873, and accepted a bond for his debts to the amount of Rupees 2,800 instead of Rupees 6,000. His property was attached by the 1st defendant on October 3rd, 1873, for non-payment of the instalment due under the lease executed by him to 1st defendant.

The 4th defendant, Akkulu Reddy, and 5th defendant, Akkapa Naidu, are the lessees of one village Nabinagaram. They plead that the 1st defendant is legal owner of the villages; that he borrowed from them Rupees 1,750 for the expenses of the family, for charitable expenditure, and for the discharge of old debts; and executed to them two bonds, and leased to them this village for thirteen years, the lease amount to be credited to the bond debt every year; that this lease is binding on the plaintiff even though the 1st defendant be declared merely his agent, and further that it was attested by the plaintiff himself. That they are paying a higher rate of rent than was formerly given, and have spent money, Rupees 600-0-0, in improving the lands, and therefore the lease must not be cancelled."

The two following issues were settled amongst others :—

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(1.) Whether the plaintiff by custom in the family and long established usage is entitled to exclusive possession of the mosque sued for and its appurtenances, to the administration of its revenues, and to the title of *Peerzadah* by right of primogeniture.

(2.) Whether the plaintiff's father was in possession as manager from 2nd July 1857 to June 1859, merely, and the 1st defendant subsequently in his own right as alleged in paragraph 7, of the 1st defendant's written statement, or whether the 1st defendant was appointed on the 16th August 1860 by plaintiff's mother as her mukthyiár or agent.

First Issue.

"The founder of this mosque was one Hazarat Khaju Rahumtulla Sahib, a priest of the Udayigiri Jaghirdar and Nawob of Arcot. Two of the ten villages now forming the endowment were granted to the founder by Nawab Abdul Khan, Fouzdar of Nellore, and the grant was confirmed shortly afterwards by the Nabob himself.

"The lands comprising the other eight villages had been previously acquired by the founder from the Udayigiri Jaghirdar; he had paid a nominal price for them, being unwilling to accept them as a gift.

"The lands thus acquired, and the subsequent royal grant, were appropriated by the founder for charitable and religious purposes, to which have been subsequently added festivals in honor of deceased *Sujjadahs*, superiors of the mosque, the principal festivals in honor of the founder.

"This is therefore an endowment known in Mahommedan law as *Wuqf* (*a*) where proprietary right is relinquished, and the property set apart for religious service. According to Macnaghten (Chapter X on Endowments) where no provision is made by the appropriator for a successor to the person appointed by him as superintendent, such superintendent may on his death-bed appoint his own successor, but in the case of the present endowment, there has been no

(*a*) See "Memorandum" p. 14, وقف literally *detention*.

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superintendent as distinct from the appropriator ; the founder himself was the superior under the title of *Sujjadah* or *Peerzadah* ; and all his successors have held the same title.

"No provision has been apparently made by the founder for the appointment of successors, so that under the general rule of Mahommedan law, each *Sujjadah* on his death-bed should appoint his successor, subject to the confirmation of the ruling power ; and the property is not subject to the ordinary rules of inheritance.

"The plaintiff (a minor,) now claims to succeed his father the last *Sujjadah*, by right of inheritance, based upon the long established custom of the family by which the eldest son of the eldest branch has always succeeded.

"Since the foundation of the mosque, there have been five *Sujjadahs* including the founder, but excluding the present defendant Akbar Sahib whose appointment is now the subject of contention.

"The names of the successive *Sujjadahs*, and the relationship of each to his predecessor is acknowledged by all the parties ; the genealogical tree (O) filed before the Inam Deputy Collector by the 1st defendant, gives all the members of the family, and is acknowledged to be correct.

"(1.) Hazarat Khaja Rahumtulla Sahib, the founder ; the date of his death is not known—probably more than 100 years ago.

"(2.) Shah Gulam Nakshbund Sahib. He was the son of the founder's wife's brother. There was also a son of another brother-in-law to the founder, viz. Hussain Sahib, who is said to have been older than the one who succeeded.

"(3.) Mohideen Sahib. He was the only son of the preceding and died about 1816.

"(4.) Shah Gulam Rahumtulla Sahib. He was also the son of the preceding.

"There were other sons, one Ibbadula Sahib older than his brother who succeeded. The legitimacy of Ibbadula Sahib is a point of contention between the parties. Died in 1857.

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"(5.) Shah Gulam Nukshbund, more generally called Bade Sahib. He was the eldest son of the preceding—a younger son being Akbar Sahib (1st defendant)—died in June 1860.

"On the death of the last holder his only son (the minor plaintiff) was a child of four years old, and Akbar Sahib succeeded his elder brother, and has performed the duties of the office, and had the management of the lands attached to the endowment up to the present time. Whether he succeeded in his own right, or on behalf of his minor nephew, is a question, which forms the subject of the 2nd issue.

"With the exception of the immediate successor to the founder, the office has passed from father to son.

"The successor to the founder was the son of his wife's brother, and there was the son of another brother of his wife older in years than the actual successor. There is no mention made of any sons or relations of the original founder, and as the names of all other members have been religiously preserved in the family history, it may be assumed that he had none. The son of a wife's brother is no heir at all under Mahommedan law; so it must be inferred, that the founder himself appointed his successor. In the first instance therefore the property did not pass by inheritance, but, as there was no heir, this cannot be taken as an instance against the custom.

"The third *Sujjadah* was an only son.

"The fourth was a son but not the eldest.

"The fifth was an eldest son.

"There is therefore one instance where there were more than one son in which a younger succeeded, and other instances in which the eldest succeeded.

"The succession of Rahumtulla Sahib, No. 4, (in 1816) to his father, though there was an elder son Ibbadula Sahib alive, is a subject of contention between the parties. The plaintiff alleges that Ibbadula Sahib was illegitimate and

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therefore did not succeed, and a considerable amount of evidence has been adduced to prove and disprove his legitimacy.

"If the legitimacy of Ibbadula Sahib were directly in issue, I should not consider the evidence now adduced to establish his illegitimacy as conclusive against the natural presumption of law in favor of legitimacy.

"It is clear, however, that Mohidin Sahib for some reason or other, selected his son Rahumtulla Sahib to succeed him in preference to Ibbadula Sahib. As Ibbadula was considered fit by the Collector to hold the office, I do not imagine that incompetency was the reason for his exclusion; his illegitimacy is the most satisfactory reason that I am able to assign.

"I do not consider this as a matter of vital importance; if the other instance established the custom of succession by the eldest son of the eldest branch by simple right of inheritance, I should not consider this succession of Rahumtulla Sahib, a younger son, under the circumstances, as sufficient to disprove the custom otherwise established.

"If this were ordinary property governed by the ordinary rules of inheritance, excepting that from the nature of the property it is impartible, I should say that the history of the various successions establishes a custom by which the eldest son succeeds; in fact this would be in accordance with the ordinary rules of inheritance, and it would be unnecessary to prove a custom in support of it. But in property of this kind, the ordinary law requires that each *Sujjadah* should be appointed by his predecessor. As a matter of fact each *Sujjadah*, with the exception of the founder, has appointed his eldest son, but it seems to me that the son does not succeed solely by right of primogeniture, but partly also by nomination by his father. Ordinarily a father would select his eldest son, but if the father appointed a younger son, or in fact another member of the family, the eldest son would not be entitled to oust his father's nominee by mere right of inheritance.

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"The custom of primogeniture set up by the plaintiff is opposed to the ordinary rule of law, which governs the succession to property of this description, and he also alleges that it has been hitherto the custom for each *Sujjadah* to appoint his successor by a written document called a hibbanamah. There is no such hibbanamah granted by Bade Sahib to his son, or to his brother, any appointment made by him was oral.

"The whole evidence therefore, establishes this, that the custom has been that each *Sujjadah* should nominate his successor; and that each *Sujjadah* has appointed his own son, with one exception. The custom, therefore, in this endowment, agrees with the general law of succession to property of this description.

"If this were property governed by the ordinary rules of inheritance, I should say that the plaintiff had established the custom of succession of the eldest son, or rather no such custom would be necessary, but here he cannot succeed by the mere right of inheritance; he must also have been appointed by his father, and my finding on this issue is, that the plaintiff is not entitled to succeed by right of primogeniture alone.

Second Issue :—

"Bade Sahib died June 29th, 1860. For a year or so before his death he was too ill to look after the affairs of the mosque, so that his brother Akbar Sahib, 1st defendant, performed the duties of *Sujjadah*, during this period, until his brother's death. In his written statement, paragraph 7, the 1st defendant alleges that during the latter part of his brother's life-time, and subsequently, up to the present time, he was *Sujjadah* in his own right. This position was abandoned at the hearing, and it is now admitted that the 1st defendant was only acting on behalf of his brother, who remained the real *Sujjadah* up to his death.

"This is acknowledged by the 1st defendant himself in his deposition and is besides abundantly proved.

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"It is obvious from these papers that Akbar Sahib succeeded, because his nephew was a minor; if he had been of age, he would probably have succeeded his father.

"In his written statement, the 1st defendant denies the custom of primogeniture set up by the plaintiff, but he does not state what rule of succession is followed. I ascertained from his pleader, and 1st defendant himself subsequently in his deposition states, that the rule is this, 'After the death of a *Sujjadah*, his successor is appointed by the other members of the family, who select a competent person.' This mode of appointment excludes all rights derived from inheritance, or from the nomination of the last *Sujjadah*, and it is opposed to all the recorded cases of succession in this endowment, and to the general rule of law applicable to all endowments of this nature.

"This is evidently not a true account, because afterwards in his own deposition, he says, that if he appointed his own son to succeed him, all the other members of the family would be bound by his selection. The defendant in his own case would recognize the hereditary rights of his son, if confirmed by his own sanction.

"Bade Sahib has left no written instructions regarding the succession to his office, and the only oral evidence is that of the minor's mother, and her father Durvish Sahib the third witness.

"The mother in her deposition says that Bade Sahib the day of his death called his brother Akbar Sahib, and commending herself and her son to his care, directed him to look after affairs, until the boy came of age; Durvish Sahib her father, the third witness, says the same, except that this took place two days before Bade Sahib's death.

"These two witnesses are naturally interested in the success of the minor, and it would not be safe to rely entirely upon their statements especially where the addition of the simple words that 1st defendant should hold the office merely during his nephew's minority are so easily made, and no mention of such limited appointment was made at the time,

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"On the 3rd day after the death of Bade Sahib, the usual ceremony observed in cases of succession to the office of *Sujjadah* was held. This consists in the new *Sujjadah* visiting the tomb of the founder, going round it three times, then, seated on the pillow (*takla*) in the mosque, he puts on the coat (*jubba*) and cap (*topi*) belonging to the founder, the members of the family, and heads of the endowment villages bring presents.

"It is admitted on both sides that the ceremony of installation was gone through by Akbar Sahib, but the plaintiff's witnesses try to make out that it was performed, not on his own account, but on account of his nephew, that during the ceremony the boy was placed before him, the coat and cap were put on the boy, the presents, &c., were made to the uncle on behalf of the boy.

"I disbelieve this vicarious installation, I think it probable, that whether the 1st defendant succeeded to the office permanently, or merely during the minority of his nephew, he would still for the time being be the *Sujjadah* in power, and as there was no other *Sujjadah*, he would perform the usual ceremony on his own account, and the boy be installed when he came of age. If the boy had really been installed, I think some mention of the fact would have been made during the enquiry held by the Tahsildar. The appointment of the 1st defendant would not have been spoken of in the way it was if the boy had performed this ceremony and was the real *Sujjadah*, and his uncle only acting for him.

"The next piece of evidence is the conduct of the defendant himself before the Inam Deputy Collector when these villages were enfranchised. This was August 1861. The title deed was issued in the joint names of the minor and the 1st defendant. Before the Deputy Collector, the 1st defendant stated, that he was authorized by his brother to take charge of the management, not simply as regent of the minor, but independently, and that his minor nephew was the next heir.

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"Here the 1st defendant distinctly claims to have succeeded in his own right, but his statement there is inconsistent with his present position, that he was selected and appointed by the members of the family after his brother's death, and also with his present contention, that inheritance confers no right; he then clearly considered his nephew to be the next heir.

"Upon the evidence, I cannot find that 1st defendant was appointed by the mother as her agent, to hold office temporarily only during her son's minority; in the enquiry made at the time, nothing is said about the temporary nature of the office; all that can be deduced from that enquiry is, that Akbar Sahib was nominated by Bade Sahib to succeed him as *Sujjadah*, because his own son was incompetent by reason of his youth.

"There is one expression in the deposition of Durvish Sahib in which he says that his daughter consented to 1st defendant's appointment as a Mukthyár, but this word is used to denote the deed of authority granted by one *Sujjadah* to his successor, and it is not expressly stated that the minor should succeed when he attained his majority.

"Further, the widow could have no authority to make 1st defendant her agent, the authority of his successor must be derived from Bade Sahib himself if he appointed his brother to be *Sujjadah* permanently, his widow could not afterwards make him her agent, and if the widow did say that 1st defendant was only an agent, this would not make him her agent in reality. The consent of the widow was asked in order to ascertain whether the appointment of Bade Sahib was regular, and it was given because Akbar Sahib had been nominated by her husband before his death, she did not, and could not of her own authority appoint Akbar Sahib, or make any alteration in the disposition made by her husband.

"My finding on this issue is, that Akbar Sahib was not appointed on August 16th, 1860, by the plaintiff's mother as her Mukthyar or agent, but that he succeeded in his own right in July 1860, on the death of his brother, prior to that date he had merely acted on behalf of his brother.

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"The result of my findings on these two issues is, that the plaintiff's suit must be dismissed.

"The plaintiff is not entitled to succeed simply by right of primogeniture; he must have been appointed by his father; nothing that his mother could do after her husband's death could alter the position of the 1st defendant; if he had been appointed to succeed as *Sujjadah* by Bade Sahib, his widow could not make him her agent; if Bade Sahib appointed him without restriction, the widow could not make him the *locum tenens* of her son.

"Bade Sahib appointed his brother Akbar Sahib to succeed him, and I cannot say that he did so temporarily only, and therefore 1st defendant is entitled to hold the office during his life-time.

"I am aware that the 1st defendant has not always been consistent in the grounds on which he rests his title to hold the office against his minor nephew. Now, he declares that he was appointed by the members of his family because he was a competent person, and inheritance has nothing to do with the question. In 1861 before the Deputy Collector he claimed to have derived his authority from his brother, he then claimed a right to hold the office during his life-time, but stated that his nephew was the heir. Here he distinctly recognizes some right of inheritance. He obtained the signature of the minor to the lease (No. 83); here he recognized some interest of the minor in the property.

"He was obviously uncertain of his position, but I think his recognition of rights in his nephew are quite consistent with his claim to the office himself—he knew that he had succeeded owing to his nephew's minority, and might therefore be willing to recognize him as his successor.

"It is unfortunate for the plaintiff that his father, if he meant his son to succeed him, left no written instructions. Although it has been usual for a *Sujjadah* to nominate his son, and there is no apparent reason why Bade Sahib should not have nominated his own son excepting his youth, I am not justified in assuming that Bade Sahib intended his son

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to succeed him when he came of age, because the appointment must necessarily depend in some degree upon the fitness of the nominee, and Bade Sahib could not know until his son grew up, whether he would be qualified or not, and he may well have appointed his brother who had for some time performed the duties without limiting the appointment to the minority of his son.

Memorandum in Original Suit No. 14 *of* 1873.

"I have wrongly described this property as *wuqf* which is property set aside solely and exclusively for religious purposes. This property has not been thus exclusively set apart; it partakes partly only of the nature of *wuqf*. This however, is a misdescription only.

"I was of opinion that the plaintiff was not entitled to succeed, not because the property was *wuqf*, and therefore not liable to the ordinary rules of inheritance, but because the evidence regarding the previous succession to this particular property shows that inheritance combined with selection by the previous holder, and the fitness of the person succeeding was the rule or custom prevailing in the family.

"The requirements necessary to constitute the property *wuqf* were, therefore, not so accurately considered as they would have been, had the succession depended solely upon the question whether the property was really *wuqf* or not."

From this decision the plaintiff appealed on the ground that:—

The plaintiff, as the eldest son of the late *Sujjadah* is entitled to succeed to the office of *Sujjadah* and to the trust property of the mosque; and that if it be held that an appointment by the late *Sujjadah* is necessary, no such appointment is proved or alleged by the defendant or his witnesses, but the plaintiff's witnesses prove such an appointment in his case.

The *Advocate General, Rama Row*, and *M. Parthasarathy Iyengar* for the appellant, the plaintiff.

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The plaintiff was the eldest son and entitled by custom to succeed. If the Court hold that he is not entitled to succeed under the custom alleged, but that the successor to the office was he whom the last *Sujjadah* appointed, then we say that the plaintiff was duly appointed to the office by his father the last *Sujjadah*. This was the case of a family provision coupled with a trust. As an impartible property charged with trusts, it must vest in a single individual.

[CHIEF JUSTICE.—Is it such a trust as can be performed by a minor?]

No, except through a guardian.

[CHIEF JUSTICE.—Can you show that a charity, or public trust can be performed by the guardian of a minor?]

In the history of this very case, a minor, Rahumtulla Sahib, performed the trust through his mother. Rahumtulla Sahib was born in 1803, and succeeded to the office of *Sujjadah* in 1816; he was, therefore, only thirteen years of age when he so succeeded.

[CHIEF JUSTICE.—In *Greedharee Doss* v. *Nundokissore*(1) the Privy Council remarked(2) "It is to be observed that the only law as to these *Mohunts* and their offices, functions, and duties, is to be found in custom and practice, which is to be proved by testimony." Their Lordships go on to say (3) that it is unnecessary for them to go into the question whether the respondent was duly appointed *Mohunt*, or not, that it is not the question which they have to determine, because, for the appellant to succeed "he must succeed by force of his own title, and not by the infirmity of the respondent's title." They observed that to obtain a decision upon that point "it must be raised in a suit properly framed for that purpose." That, no doubt, was the case of a Hindu *Mohunt*, but the principle is equally applicable to the present case.]

(1) XI Moore's I. A., p. 405.
(2) Ib. p. 428.
(3) Ib. p. 430.

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Neckista Deb Burmono v. *Beerchunder Thakoor* and others(1) is very similar to the present suit. There the plaintiff impeached the title of the defendant who had been appointed *Jobraj* by the last reigning Rajah of Tipperah on the ground that he had not been lawfully appointed, first, because of an alleged promise by a former Rajah that the plaintiff should succeed, and secondly, because plaintiff was the eldest living member of a class out of which, according to *Koolachar*, or family custom, a *Jobraj* could alone be selected. There the Privy Council say(2) "on the argument of this appeal before their Lordships, the appellant's preferential title by seniority to the *Jobraj-ship* was sought to be established by evidence of a family custom to be collected from the instances given in the genealogy of actual successions. But where there is evidence of a power of selection, the actual observance of seniority even in a considerable series of successions cannot of itself defeat a custom which establishes the right of free choice, and had the instances been uniform and without exception, that alone would not have been sufficient to support the appellant's case. Such uniformity of practice was, however, not proved, * * * * * * * still it was open to the appellant to contend, as he did, that, in default of any appointment to either office, seniority of age constituted a title by descent to the *Raj*."

Mr. O'Sullivan for all the respondents, the defendants, and *C. Ramachendra Row Sahib* for the 1st respondent, the 1st defendant.

The case is governed by the decision in *Jáafar Mohí-u-dín Sáhib* v. *A'ji Mohí-u-dín Sáhib* and others(3) where it was decided that lands endowed for a religious office cannot be claimed by right of inheritance. As to the different views of his case put forward by the 1st defendant on different occasions, his want of decision as to his position under the endowment is not to be wondered at, seeing that the

(1) XII Moore's I. A., p. 523.
(2) XII Moore's I. A., p. 523; at p. 538.
(3) 2 Madras H. C. Rep., p. 19.

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person who first made the endowment had no family. The evidence supports the 1st defendant's case and the Lower Court disbelieved the alleged vicarious installation of the 1st defendant for the infant. The plaintiff based his claim upon his right to succeed upon his reaching majority, but he filed his suit while still a minor.

The *Advocate General* in reply.

At first the property was simply a charity, but in the course of the century it has increased largely, and now, the charity is a very small fraction of the whole fund, which has become mainly private property. From his own case, this is the view of the nature of the fund he has been managing, entertained by the 1st defendant himself. The cases of *Jáafar Mohí-u-dín Sahib* v. *A'ji Mohí-u-dín Sahib*(1) and *Greedharee Doss* v. *Nundokissore*(2) do not bear upon this case.

The CHIEF JUSTICE in delivering judgment observed, that most of the argument had been occupied with a consideration of the defects and inconsistencies in the 1st defendant's title to the office in dispute; but, in the present suit the Court could not determine upon the sufficiency of the defendant's title, the only question being whether the plaintiff had on his part established a right.

The property had originally been devoted exclusively to religious and charitable purposes, and, notwithstanding the fact that in later times considerable portions of the income had been applied for the maintenance of different members of the family of the founder or of his successors, the Court was bound to regard the case as one in which the trust was substantially of a public nature and not for the benefit of a family.

It was hardly disputed that, in cases of this kind, the determination of the question of the succession depends not on the general law of property but upon the rules which the founder of the endowment may have established, whether

(1) 2 Madras H. C. Rep., p. 19.
(2) XI Moore's I. A., p. 405.

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such rules are defined by writing or are to be inferred from evidence of usage.

The plaintiff had apparently based his own case, so far as it was set out in his plaint, upon usage prevailing in the family to the effect that the eldest son should succeed to the office. But on the argument of the appeal, he had for the first time sought to rely upon an appointment of himself (when a minor of the age of four years) to the office, orally made by his father; the respondent, his uncle being at the same time authorized to act as his guardian and to perform the trusts during his minority.

Now, so far as the will of the founder could be ascertained from the usage of former days, it seemed to authorize a mode of succession *originating* in an appointment by the incumbent of a successor whatever subsequent ceremonies of installation and confirmation may have been requisite or usual in practice. He himself having no children, had appointed his brother-in-law to succeed him. The plaintiff's father had been formally appointed by his predecessor by a written instrument, and it appeared that his predecessors also had, in almost every instance, received a similar written appointment. It was true that the persons appointed were usually the eldest sons, but the Court would not, from this circumstance alone, be authorized to find in favor of any rule of succession by primogeniture such as that on which the plaintiff had relied in his plaint. Even if it were open to the plaintiff to avail himself of the case first brought forward at the hearing of the appeal, viz., of an appointment of himself when a child to this office, the Court would be of opinion with the Court below that the fact of such an appointment could not safely be established upon the only evidence to be found in support of it—that is the evidence of his mother and of Durvish Sahib.

Whether, if established, such an appointment could be held a valid exercise of the power according to the usage of the endowment may well be questioned.

Appeal dismissed with costs.

Appellate Jurisdiction. (*a*)

Special Appeal No. 217 *of* 1875.

KOTA SEETAMMA..... (*Plaintiff*) *Special Appellant.*
KOLLIPURLA SOOBBIAH... (*1st Defendant*) *Special Respondent.*

Rights arising under an award are on the same footing as other rights except in so far as the legislature has otherwise provided; and the provision in the Civil Procedure Code, enabling a summary enforcement of such rights, contains nothing indicating an intention to bar the ordinary remedy by suit where an application for the summary enforcement has been made and refused.

1875. *July* 30. *S. A. No.* 217 *of* 1875.

THIS was a Special Appeal against the decision of Mr. J. R. Daniel, the Acting District Judge of Nellore in Regular Appeal No. 82 of 1874, reversing the decree of the Court of the District Munsif of Ongole in Original Suit No. 1017 of 1873.

The plaintiff, who is the sister of defendants, sued to recover moveable property valued at Rupees 278-7-0 and a portion of a house situated at Ongole, valuing that portion at Rupees 44.

The plaintiff alleged that she and defendants referred their differences to certain arbitrators for their decision; that by the decision of the said arbitrators plaintiff was entitled to ½th share of the property with the condition that the same should revert to the defendants in case the plaintiff should die without adopting a son; that a division of the greater portion of the assets was made in accordance with the award when plaintiff obtained possession of some property; that the moveable property now sued for having been also allotted to plaintiff's share was left with the 1st defendant to be held by him until plaintiff should deliver him a kararnamah, as required by him, for the reversion of her share to the first and second defendants in case she should die without adopting a son, and that plaintiff subsequently offered to execute the requisite kararnamah, but the defendants neither returned her property, left with the 1st defendant, nor gave her a share in the family house which was left undivided. Hence this suit.

(*a*) Present :—Sir W. Morgan, C. J., and Innes, J.

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The 1st defendant pleaded that the plaintiff's application to file the award was dismissed by the Court; that that dismissal was a bar to plaintiff's suit; that plaintiff's claim was also barred by lapse of time. He further denied the alleged division and plaintiff's right to share any property.

The 2nd defendant admitted the plaintiff's claim.

The District Munsif of Ongole adjudged that plaintiff should receive the moveable property claimed or its value, and plaintiff's share of the house, and that 1st defendant should pay plaintiff her costs. The defendants were ordered to bear their own costs.

Against this decree, the 1st defendant appealed.

The Acting District Judge of Nellore decided as follows:—

"The objection that this is a suit already heard and determined is fatal to the plaintiff's suit.

"The plaintiff is the sister of the 2nd defendant, they referred their dispute to certain arbitrators. The arbitrators gave their award and the plaintiff applied under the provisions of Section 327 to have this award filed and a decree passed in her favor in accordance with its terms. Notice was given to the defendant and the application was registered as a suit between the parties.

"The 1st defendant then opposed the claim in the same way that he does now. He raised three objections, First, that the award was not stamped, this was removed by the payment of the penalty; secondly, that the award did not specify to what definite property the plaintiff was entitled and consequently was not capable of execution; and thirdly, that the award was illegal because plaintiff had no right under Hindu Law to a share.

"The Munsif found that sufficient cause was shown against the award and declined to file it: an appeal was preferred against this decision but was dismissed on the ground that no appeal lies against an order under Section 327 refusing to file an award.

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"The plaintiff has now brought a regular suit to enforce the award.

"The Munsif now has entertained the suit considering that the former refusal of the Munsif to file the award is not a decision upon the merits, and there was no adjudication upon the validity of the award, that the judgment was based upon technical grounds not vitiating the award.

"It seems however clear that the application under Section 327 is a regular suit to enforce the award. It is not as if there was an application to file the award simply without any determination whether the award was valid or not. The suit was a regular suit, and the Munsif found that there was sufficient cause against the award; that is, that it was an award which could not be enforced as a decree of Court. It is a judgment on the validity of the award. A Court could grant or refuse a decree in accordance with an award in an application under Section 327 for the same reasons as in a regular suit brought after the 6 months. Section 327 merely provides a method of enforcing an award on a mere application instead of on a stamp required in a regular suit if such application be made within 6 months. But it is equally a suit upon the award whether brought under Section 327 or subsequently by a regular suit. The same Judge who considered there were sufficient grounds against the award under Section 327 would consider the same grounds as sufficient to disallow the suit upon the award.

"In the present case the two cases have been decided by different Munsifs who have taken different views, and although I am of opinion that the refusal of the Munsif to file the award was wrong, that there was not sufficient cause against the award, still the case is *res judicata* and cannot be tried again.

"The Munsif rejected the application not on any particular or technical grounds, but because he was of opinion that all the reasons brought against the award were sufficient for a refusal to file the award, and gave decree accordingly.

"The same reasons, if valid there, would be equally valid against the present decree. The plaintiff no doubt loses the

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advantage of the award by, what I consider, an erroneous decision on the first application, and as the Appellate Court determined that there was no appeal, the plaintiff has no remedy. The decree of the Munsif is therefore reversed and the plaintiff's suit dismissed; each party to bear their own costs."

From this decision the plaintiff appealed.

Nullathumby Mudaliar for the special appellant, the plaintiff.

Anundacharlu and *Kamasam* for the special respondent, the 1st defendant.

The Court delivered the following judgments :—

SIR W. MORGAN, C. J. The Lower Appellate Court has misapprehended the nature of the proceeding under Section 327 of the Code of Civil Procedure. The Court is, by that section, empowered to give to a private award the effect of a decree of Court by an order that the award be filed; but such an order must be applied for within six months from the date of the award.

In this case an application, under the section, having in due time, been made and refused, the order of refusal has been regarded by the Judge as an adjudication, which bars the suit. But the order adjudged nothing except that the award should not be filed and enforced under Section 327.

It has been decided that a suit lies to enforce an award, made on a reference to arbitration without the intervention of a Court of Justice, *Palaniappa Chetty* v. *Rayappa Chetty*.(1) It is suggested on behalf of the respondent that there had not been in that case any such previous application and refusal as here appears. This may be true, but it does not affect the question. Rights arising under an award are on the same footing as other rights except in so far as the legislature has otherwise provided; and the provision in the Code, enabling a summary enforcement of such rights, con-

(1) 4 Madras H. C. Rep., p. 119.

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tains nothing indicating an intention to bar the ordinary remedy by suit where an application for the summary enforcement has been made and refused.

INNES, J.:—The point of *res judicata* was wrongly taken. The refusal of the application under Section 327 was no determination of the present matter. It was merely a refusal, right or wrong, to register the award as a decree of the Court; the matter now sought to be determined is the plaintiff's right to recover upon the award.

Appeal allowed.

Appellate Jurisdiction. (*a*)

Criminal Petitions Nos. 255 *and* 267 *of* 1875.

WILLIAM JOHN REARDON,... ... ... *Petitioner.*

The Merchant Shipping Act, 1854, 17 and 18 Vict., Cap. 104, s. 243(*b*) has no application to British India. The Act applicable to cases of continued wilful disobedience of lawful commands by sailors is Act No. I of 1859, s. 83, clause 5.(*c*)

1875. *August* 3. *C. P. Nos.* 255 *and* 267 *of* 1875.

THESE were petitions praying the High Court to revise the sentences of Mr. J. Cameron, the Joint-Magistrate of Tanjore in Cases Nos. 30 and 24 of 1875 respectively.

The petitioner was one of seven seamen convicted of continued wilful disobedience of lawful commands and sentenced to one month's rigorous imprisonment under clause 5, Section 243 of the Merchant Shipping Act of 1854.(*b*)

No Counsel were instructed.

(*a*) Present:—Innes and Forbes, J. J.

(*b*) This Section has been literally copied in the Merchant Seamen's Act, No. 1 of 1859, s. 83, for which, so far as it is material to the present case, see next note (*c*).

(*c*) Section 83 is as follows:—"Whenever any seaman who has been lawfully engaged, or any apprentice to the sea-service, commits any of the following offences, he shall be liable to be punished summarily as follows (that is to say):—

"*Clause* 5." For continued wilful disobedience to lawful commands, or continued wilful neglect of duty, he shall be liable to imprisonment for any period not exceeding twelve weeks, with or without hard labor, and also, at the discretion of the Court, to forfeit for every twenty-four hours' continuance of such disobedience or neglect, either a sum not exceeding six days' pay, or any expenses which have been properly incurred in hiring a substitute."

1875. *August* 3. C. P. Nos. 255 and 267 of 1875.

The Court delivered the following

JUDGMENT :—There appear to be no grounds for interfering with the conviction of the prisoner.

The petitions will accordingly be dismissed. The sentence, however, is stated to have been passed under Section 243, Clause 5 of the Merchant Shipping Act of 1854. This Act of Parliament (Chap. 104, 17 and 18 Vict.) has, in regard to the offences charged, no application to British India —the Legislature of which in Act I of 1859 has legislated upon the same matters, as would appear to have been contemplated by Section 288(*a*) of the Merchant Shipping Act of 1854. This is not the case contemplated in Section 290(*b*) of the same enactment of there existing any conflict between the two laws. Where that exists the Merchant Shipping Act of 1854 must be followed but not otherwise.

The liability of the accused to punishment arose under Act I of 1859 of the Government of India, Section 83 clause 5.(*c*) Section 83 of the Indian Act corresponds in its terms with Section 243 of the Parliamentary Statute. The accused has been in no way prejudiced by the mistake of the Magistrate. The record should, however, be amended by substituting the clause and section of the Indian Act for the clause and section quoted by the Magistrate.

(*a*) Section 288 is as follows :—" If the Governor-General of India in Council, or the respective legislative authorities in any British possession abroad, by any Acts, Ordinances, or other appropriate legal means, apply or adapt any of the provisions in the Third Part of this Act contained to any British ships registered at, trading with, or being at any place within their respective jurisdictions, and to the owners, masters, mates and crews thereof, such provisions, when so applied and adapted as aforesaid, and as long as they remain in force, shall in respect of the ships and persons to which the same are applied be enforced, and penalties and punishments for the breach thereof shall be recovered and inflicted, throughout Her Majesty's dominions, in the same manner as if such provisions had been hereby so adopted and applied, and such penalties and punishments had been hereby expressly imposed."

(*b*) Section 290 is as follows :—" If in any matter relating to any ship or to any person belonging to any ship, there appears to be a conflict of laws, then, if there is in the Third Part of this Act any provision on the subject which is hereby expressly made to extend to such ship, the case shall be governed by such provision, and if there is no such provision the case shall be governed by the law of the place in which such ship is registered."

(*c*) *Ante* p. 85 note (*c*).

Appellate Jurisdiction. (a)

Referred Case No. 20 *of* 1875.

PYLWAN JARKAN SAHIB VASTHATH... ....*Plaintiff.*
JENAKA RAJA TE'VAR..... ....*Defendant.*

A suit for arrears of a monthly payment agreed to be made for instructions in fencing and wrestling is not governed by the 7th clause of the Limitation Act, as that clause does not apply to the pay of a teacher or instructor.

1875. *August* 16. *R. C. No.* 20 *of* 1875.

THIS was a case referred for the opinion of the High Court, under Section 22, Act XI of 1865, by Mr. C. W. W. Martin, the Acting Judge of the Court of Small Causes at Madura, in Suit No. 599 of 1875.

The following is the statement of the case for the decision of the High Court :—

"Plaintiff sues defendant under an alleged verbal contract whereby defendant was to pay him 15 Rupees per mensem for instructions in the arts of wrestling and fencing.

"The time at which he has laid the contract is from 1st March 1873 to 31st July 1873, and the question on which I request the opinion of the High Court is whether Section 7 of the Limitation Act is the section applicable to the case ?

"The word generally applied to persons of such a profession in England is the word artist, but I find from the dictionaries that artist is almost synonymous with artisan, and that "manual dexterity" is the leading characteristic of both artists and artisans.

"If the complainant be held to be an artisan, the character of his employment with the defendant was such as to make his present claim to be for "the wages of an artisan," and I have found it to be so."

No Counsel were instructed.

(a) Present :—Sir W. Morgan, C. J., and Forbes, J.

1875. *August* 16. *R. C. No.* 20 *of* 1875.

The Court delivered the following

JUDGMENT :—The 7th clause provides for suits "for the wages of a domestic servant, artisan or labourer not provided for by this Schedule No. 4," and No. 4 relates to suits for wages, hire or price of work under Act IX of 1860 ("to provide for the speedy determination of certain disputes between workmen engaged in Railway and other public works and their employers.") In the case stated, the suit is for arrears of a monthly payment agreed to be made for instructions in fencing and wrestling. Such a suit is not, in our opinion, governed by the 7th clause, which applies to the wages of servants and labourers skilled and unskilled but not to the pay of a teacher or instructor.

Appellate Jurisdiction. (*a*)

Special Appeal No. 484 *of* 1871.

KUTTI AMMAL.....(*Plaintiff*) *Special Appellant.*
RADAKRISTNA AIYAN...(*2nd Defendant*) *Special Respondent.*

A sister may succeed to her brother and sue for the recovery of property unlawfully alienated by their mother which the latter inherited on the death of her son.

1875. *August* 27. *S. A. No.* 484 *of* 1871.

THIS was a Special Appeal against the decision of Mr. P. P. Hutchins, the Acting Civil Judge of Tanjore in Regular Appeal No. 123 of 1870, presented against the decree of the Court of the District Munsif of Mannargudi in Original Suit No. 40 of 1869.

Plaintiff stated that she and 1st and 3rd defendants were sisters; that their father, who had no male issue, died 15 years ago leaving certain properties which were in the enjoyment of his widow, the mother of the plaintiffs

(*a*) Present :—Sir W. Morgan, C. J., and Innes, J.

1875.
August 27.
S. A. No. 484
of 1871.

and 1st and 3rd defendants, who removed to 1st and 2nd defendants' residence with the moveable property a year ago, and died there two months before date of suit; and that the property was all in the enjoyment of the 1st and 2nd defendants. Plaintiff, therefore, sued to recover her ⅓rd share in the moveable and immoveable property.

The 1st defendant admitted the relationship alleged by the plaintiff, and the fact of her father having left immoveable property to the extent mentioned in the plaint, but she denied that there was any ready cash, and that her mother brought any property with her when she removed to her (1st defendant's) house. 1st defendant added that her father had an adopted son who died six months after him, that of the land belonging to the family ¹⁄₁₆ karai in Sattanore and ¹⁄₁₆ in Kakkaiyadi were delivered to the 5th defendant under the terms of a razinamah entered into by her mother and 5th defendant in Original Suit No. 164 of 1860, and that that extent has been since sold by 5th defendant to the 2nd defendant, in whose possession it now is, that the remaining land and certain tamarind trees were in the enjoyment of the 4th defendant under the terms of a lease executed to him by plaintiff's mother, and that plaintiff was entitled to ⅓rd of the same and of the houses and grounds in her possession.

The plaintiff admitted that her father had an adopted son, who died six months after his adoptive father as stated by 1st defendant.

The Lower Court found that all the property mentioned in the plaint was in the possession of the 1st and 2nd defendants and of the 4th defendant on their account; that ⅛th karai of land was alienated by plaintiff's mother to 5th defendant, and that that alienation was not for necessary family expenses, and that it was consequently invalid as against the plaintiff.

From this decision the 2nd defendant appealed upon the following, amongst other grounds. "That this suit

1875. *August* 27. *S. A. No.* 484 *of* 1871.

brought by plaintiff as heiress of her father while there had been an adopted son surviving him is not sustainable in law."

The 1st defendant appealed as to the value of the property, costs, and appreciation of evidence.

The Acting Civil Judge gave the following judgment.

"This is a suit to recover a share of certain property lately held by the mother of plaintiff and 1st defendant. Their father left an adopted son, and it is admitted that the property vested in that son, and that the mother took it only after his decease. The mother had therefore only a life estate, *Bachiráju* v. *Venkatappadu*(1); the property now reverts to the heirs of the son. That being so, it is admitted that his sisters have no right of inheritance whatever, and upon this ground put forward by the 2nd defendant in his appeal, the decree of the Munsif must be reversed, and the suit dismissed so far as the 2nd defendant is concerned. That defendant will also be entitled to his costs as defendant, but as the objection was not taken in the Lower Court, he will bear his own costs in this appeal.

"As for the 1st defendant, she has only raised two objections to the decree, and on both these points her demands have been conceded. As regards her the decree will be modified by the one-third of the lands decreed to plaintiff being directed to be made over with reference to good and bad soils, and by the reversal of the Munsif's order as to costs. At the hearing the 1st defendant wished to take advantage of the objections raised by the 2nd defendant, but as she has throughout admitted plaintiff's claim, and that claim is at all events as good as her own, I think that the decree as now modified may fairly be regarded as a decree by consent or on a razinamah at all events. I am not prepared to allow her to repudiate all her admissions and take a totally new ground for the first time at the final hearing of the appeal. She is, however, entitled to her costs in this

(1) 2 Madras H. C. Rep., p. 402.

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appeal in which she has succeeded, and probably the Munsif will consider it a proper case in which to require the plaintiff to pay all costs which may be fairly incurred in execution."

From this decision the plaintiff appealed on the ground that it was "wrong in law in holding that a sister cannot inherit."

Mr. Shephard for *Mr. Mayne*, and *Lutchmipathy Naidoo* for the special appellant, the plaintiff.

Mr. O'Sullivan for the special respondent, the 2nd defendant,

The Court delivered the following

JUDGMENT :—The plaintiff is one of three sisters, whose father adopted a son. On the death of the father, the property devolved on the son, and on his death, the mother took it. Part she sold to 5th defendant, who again sold to 2nd defendant. Part she leased to 4th defendant. 1st and 3rd defendants are the sisters of plaintiff, and 2nd defendant is the husband of 1st defendant.

Plaintiff claims a right to question the alienations made by her mother and to have them set aside in her favor.

The only question, which we have to determine in connexion with this case on the reference to us by the Division Court, is whether a sister is in the line of heirs.

But this question must be answered with reference to the positions of the parties in the case. The mother took only an estate for life, and we have the authority of the Privy Council in the *Collector of Masulipatam* v. *Cavaly Venkata Narainapah*(1) for saying that the restrictions on her power of alienation are inseparable from her estate and independent of the existence of heirs capable of taking on her death. This being so, it is clear that, whatever view may be taken of plaintiff's claim, the mother could not give a title beyond her own life. Then the next question is—Is plaintiff entitled, as an heir to the person to be traced from, to question the alienations and have them set aside in her

(1) VIII Moore's I. A., p. 500.

1875. *August 27.* *S. A. No. 484 of 1871.*

favor ? Her brother is, according to the decisions of this Court, the person to be traced from, and so the question comes to this—Is a sister an heir to her brother ? That she is a Sapinda, is, we think, a position, which cannot be maintained. The contention that she is so is founded on the opinion of Bálambhatta as to the meaning of the word 'brethren' used in verse 185 of the 9th Chapter of Manu and quoted in the Mitácharâ. But none of the treatises of Hindu Law, not excepting the Vyaváhara Mayúkha, have placed the sister, in regard to partition, on a footing with the brothers. She is allowed a fourth part of a brother's share for her marriage ; but she does not take it as a share and is not, therefore, to be regarded as having an equal interest in the property with the brothers. Further, she does not join with the surviving brothers in succeeding to a deceased brother, but her inheritance is obstructed by a long list of other heirs, far more remotely related, interposed between surviving brothers and her. If the term 'brethren' in the passage referred to, be taken to mean brothers and sisters, it is inferrible from it that they have an equal interest in the ancestral property, which they have never been held to have. That such a position is against the common understanding of the people as to the law in this part of the country would seem tolerably clear from the fact that there is no instance on record of any such claim having been put forward, though the occasion for it must be of every day occurrence.

Whether the sister is entitled to succeed as a relative of deceased more remote than a Sapinda is another question. Since the decision of the Judicial Committee in *Gridhari Lall Roy* v. *The Government of Bengal,* (1) the High Court of Madras, following that decision and the decision of the High Court of Bengal in *Amrita Kamari Devi* v. *Lakhinaraiyan Chakkerbatti* (2) of which the Judicial Committee approved, have held (3) that a sister's

(1) XII Moore's I. A., p. 448.

(2) 2 Bengal L. R., (F. B.) p. 28.

(3) *Chelikani Tirupati Rayaningáru* v. *Rájah Suraneni Vencata Gopala Narasimha Rau Bahadur,* 6 Madras H. C. Rep., p. 278.

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son is entitled to succeed as a Bandhu, and that the text and commentary in Chapter 2, Section 6 of the Mitácharâ do not restrict the limit of Bandhus to the cognate kindred there mentioned but are to be read as merely offering illustrations of the degree of Bandhus in their order of succession. In Section 3 of Chapter 2 of the Mitácharâ, para. 4, it is said "nor is the claim in virtue of propinquity restricted "ed to kinsmen allied by funeral oblations but, on the con- "trary, it appears from this very text (verse 187, Chapter 9 "of Manu) that the rule of propinquity is effectual without "any exception in the case of (Samánodakas) kindred con- "nected by libations of water *as well as other relations* "when they appear to have a claim on the succession," and it is afterwards said in Section 7 "If there be no relatives "of the deceased, the preceptor, &c., according to the text "of Apastamba, 'If there be no male issue, the nearest "'kinsman inherits or, in default of kindred, the precep- "'tor.'" It follows from the above not only that, in regard to cognates, is there no intention, expressed in the law or to be inferred from it, of limiting the right of inheritance to certain specified relationships of that nature, but that, in regard to other relationships also, there is free admission to the inheritance in the order of succession, prescribed by law for the several classes, and that all relatives, however remote, must be exhausted, before the estate can fall to persons, who have no connexion with the family. In this view plaintiff must be regarded as a relative entitled to succeed on an equal footing with her sisters, who are relatives of the same degree.

We must therefore modify the decree of the District Judge by restoring the decree of the District Munsif except as to the award of costs against 1st defendant who admitted plaintiff's claim. Plaintiff must have her costs in appeal and special appeal.

Appeal allowed.

Appellate Jurisdiction. (a)

Civil Miscellaneous Regular Appeal No. 136 *of* 1875.

STREE SASHADRY AIYANGAR..... .....*Appellant.*

PERIA NATCHIAR *alias* PARWATHA VURTHANI NATCHIAR and another. } ..... *Respondents.*

A testamentary guardian applied to the District Court for permission to remove his wards for the purpose of having them educated. *Held*, that as the guardian derived his authority from the will of the minors' father, and did not come within the meaning of the Regulations and Acts previous to Act IX of 1861, he could not thus apply to the District Court.

1875. *August 27.* *C.M. R.A. No.* 136 *of* 1875.

THIS was an Appeal against the order of Mr. F. H. Woodroffe, the Acting District Judge of Madura, dated the 22nd March 1875, passed on Civil Miscellaneous Petition No. 93 of 1875.

In this case petitioner, as guardian of the minor sons of the late Poonnusami Tévar, applied to the Court for permission to remove the minors from Ramnad to Madras or elsewhere for their better education.

Counter-petitioners, the mothers of the minors, opposed the application.

The Acting District Judge was of opinion that he had no jurisdiction to make any such order as that applied for, and observed "under Regulation V of 1804 as extended by Regulation X of 1831, the District Court, subject to confirmation of the High Court, may appoint guardians to minor heirs not subject to the jurisdiction of the Court of Wards, and under Section 2, Act XIV of 1858, the District Judge is further empowered to exercise in respect of such minors all the powers, &c., which by Sections 2 and 3, Act XXI of 1855, the Collector is authorized to exercise in respect of minors subject to the Court of Wards. In the present instance then, if petitioner could be regarded as having been so appointed by this Court, there could be no question as to his right to make this application and mine to adjudicate thereon. It is clear, however, that petitioner has not been appointed guardian so, but under Act IX of 1861, and the Act no where provides that such guardian and

(a) Present :—Sir W. Morgan, C. J., and Innes, J.

1875.
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his wards shall be amenable to the provisions of Act XXI of 1855 as extended by Act XIV of 1858, and very naturally so, as the object of Act IX of 1861 was simply to afford opportunity for relief which did not exist before, and, subject to the granting of such relief, it leaves the provisions of Act XIV of 1858 extending Act XXI of 1855, just as it found them.

"This being so, and petitioner not having been appointed guardian in the manner set forth in the preamble of Act XIV of 1858, this application is not maintainable and must be dismissed. The costs of each party will be chargeable to the estate."

From this order the petitioner appealed on the ground that the District Court had jurisdiction to make the order asked for by the appellant, and ought in the interests of the minors to have made it.

Mr. O'Sullivan and *Bhashyam Iyengar* for the petitioner contended that Section 1 of Regulation V of 1804,(*a*) did not apply as the appellant is guardian by Will. Regulation X of 1831(*b*) extends the sections to all minors. Act XIV of 1858(*c*) extended Act XXI of 1855(*d*).

(*a*) Regulation V of 1804, s. 18:—"Where persons succeeding by right of inheritance to land, or other property, paying revenue directly to Government, may happen to be incapacitated by reason of sex, minority, or natural infirmity, for the management of such property on their own behalf, Collectors shall, respectively, accompany their reports of such cases, to the Court of Wards, with a description of the conditions of the persons concerned, the value of the property devolving to them, and the names of persons most proper in the judgment of them (the Collectors) to be appointed guardians of the disqualified heirs: *provided that guardians may not have been appointed for such disqualified heirs, according to the Will of persons authorized by law to make such appointment.*

(*b*) "A Regulation to prohibit the sale of estates belonging to Minors, not under the charge of the Court of Wards; and to extend the provisions of Section XX of Regulation V of 1804, to property of every description, not subject to the jurisdiction of that Court."

(*c*) "An Act to extend the provisions of Act XXI of 1855 in the Presidency of Fort St. George to Minors not subject to the superintendence of the Court of Wards."

(*d*) "An Act for making better provision for the education of Male Minors, and the marriage of Male and Female Minors, subject to the superintendence of the Court of Wards in the Presidency of Fort St. George."

1875. *August* 27. *C. M. R. A. No.* 136 *of* 1875.

[CHIEF JUSTICE. Do not these Acts apply only to cases where no guardian has been appointed by the father ?]

We rely on Act IX of 1861(*a*.) The order under this last Act is dated the 26th April 1872. *Skinner* v. *Orde*(1).

The *Advocate General* and *Mr. Shephard*, for the counter-petitioners, contended that (1) guardians under Act IX of 1861 are not invested with powers given under Act XXI of 1855. Act XIV of 1858 extends these powers to Zillah Courts in cases where guardians have been appointed under Regulations V of 1804 and X of 1831. Under Regulation V of 1804, Section 20, a guardian is appointed on the report of the Collector. Under Act IX of 1861, guardians are appointed on the motion of the parties. (2.) The agreement under Act IX of 1861 was obtained by a fraud on the Court, and behind the back of the widow, therefore appellant will not be recognized as having the general power of a guardian. If Sobadu be guardian, this case must go back, but probably he would succeed, *Eyre* v. *Countess of Shaftesbury*. (3.) The Will favors his position. If the Court has jurisdiction apart from Regulations and Acts, a party must proceed by regular suit.

Mr. O'Sullivan in reply.

The Court delivered the following

JUDGMENT:—The appellant is stated to be the testamentary guardian of the minors: his application to the Judge was clearly not made or intended to be made under the Act of 1861, but was an application such as was authorized by previous Regulations and Acts to be made by certain guar-

(*a*.) The Preamble of this Act recites the expediency of amending the law for hearing suits relative to the custody, &c. of minors.

Section 1 provides that any relative or friend of a minor desiring to prefer claims as to the custody, &c. of the minor, may apply by petition to the principal Civil Court, which, if satisfied with the grounds, shall give notice of the application to the person named in the petition, and, under *Section* 2, may direct that the minor be produced in Court on a day named; when, under *Section* 3, the case shall be heard and an order made as to the custody of the minor, &c. *Section* 4 provides that the procedure under Act VIII of 1859 is to be followed as far as applicable. *Section* 5 gives an appeal to the Sudder Court, whilst *Section* 6 declares that the order shall not be contested in a regular suit. The two remaining sections are immaterial to the present enquiry.

(1) XIV Moore's I. A. p. 309.

(2) 2 White and Tudor's L. C., p. 694 (4th edition)

dians in some cases to Collectors, in others to the District Courts. The appellant, not being a guardian within the meaning of those Laws but deriving his authority from the will of the minors' father, could not thus apply to the District Court; and, on this ground alone, we dismiss the appeal. The costs will be paid out of the estate.

1875. *August 27.* *C.M.R.A. No.* 136 *of* 1875.

Appeal dismissed.

Appellate Jurisdiction. (a)

Civil Miscellaneous Special Appeal No. 178 *of* 1874.

NARANAPPA AIYAN ... ...(*Defendant*) *Appellant.*
NANNA AMMAL *alias* PARVATHY AMMAL.(*Plaintiff*) *Respondent.*

Limitation Act No. IX of 1871, governs applications to execute decrees made before the Act, and, in computing the period of limitation, the Act directs the date of the prior application to be taken, and that date cannot be altered because intermediate payments may have been made on account of maintenance.

1875. *August 27.* *C.M.S. A. No.* 178 *of* 1874.

THIS was an appeal against the order of Mr. J. H. Nelson, the Acting District Judge of North Tanjore, dated the 11th March 1874, passed on Civil Miscellaneous Petition No. 57 of 1874, presented against the order of the Court of the District Munsif of Negapatam, dated 20th January 1874.

Plaintiff in O.S.No.229 of 1864 sought to execute the decree she obtained in the said suit awarding her maintenance. The Judgment of the District Munsif of Negapatam, so far as it is material was as follows :—

" The Act No. XIV of 1859, which was in force at the time the Judgment alluded to by the Plaintiff was passed by the High Court, has been cancelled. It is laid down in para. 167 of Schedule 2 of the new Limitation Act IX of 1871 that the limitation period for the decree passed for payment of money by instalments should be calculated from the date of each instalment. It has to be ascertained now whether the plaintiff's decree had, prior to the date when the said new Act came into force, been barred under the said Act No. XIV and the High Court's decision, and if so, whether the benefit of the said new Act can be given to the said decree. It is clear from the records of this Court that the plaintiff's decree is not barred as aforesaid, it appears that the execution of the plaintiff's decree was carried out in this Court in No. 182 of 1868 at the end of

(a) Present :—Sir W. Morgan, C. J., and Innes, J.

1875. *August* 27. *C.M.S.A. No.* 178 *of* 1874.

the year 1869. Hence, I decide that the plaintiff's decree is not barred by Limitation Rules."

From this order the defendant appealed, and the Acting District Judge of North Tanjore thereupon passed the following order :—

"I am of opinion that the order of the Lower Court must be affirmed, and the decree-holder held to have applied in time, with reference to the Judgment of the Madras High Court at p. p. 183(1) and 275(2) of the Reports. The decree is not for payment by instalments, but for a sum of money year by year, and therefore Article 6 of Section 167 of the Limitation Act of 1871 does not affect the case, but Article 4 does.

From that order the defendant appealed on the ground that

"The application for the execution of the decree is barred by the Act of Limitation."

A. Ramachendra Iyer for the appellant, defendant.

The Court delivered the following

JUDGMENT :—We must reverse the order of the Court below. Our Judgment was reserved because we desired to consider whether, upon any fair construction of the facts found or suggested to require a finding, it could be determined that process of execution was not barred. It has been already held that the new Limitation Act governs applications to execute decrees made before the Act ; and, in computing the period of limitation, the Act directs the date of the prior application to be taken. The time must be reckoned from such date. We are not authorized to make deductions or to alter that date because intermediate payments may have been made on account of maintenance. The appeal will be allowed but without costs.

Appeal allowed.

(1) *Sinthayee* v. *Thanakapudayen*, 4 Madras H. C. Rep., p. 183.

(2) *Lakshmi Ammal* v. *Sashadry Aiyangar*, Ib., p. 275.

NOTE.—The oral decisions referred to in the above judgment were delivered by the Full Bench in *Saldanha* v. *Hajam Rama*, *Mannah Pujary* v. *Mannah* and others, *Vellayan Chetty* v. *Krishniyen* and others, and *Venkadare Sanjeevappa* v. *Mooktam Sahib*, on the 7th August 1874 but were not reported. With this decision compare that in *The Collector of South Arcot* v. *Thathacharry*, page 40 *ante*. See next case *Krishna Chetty* v. *Rami Chetty* and 2 others; *Mahalakshmi Ammal* v. *Lakshmi Ammal*, post p. 105; and *Govind Lakshman* v. *Náráyan Moreshvar*, 11 Bombay H. C. Rep., p. 111.

Appellate Jurisdiction. (*a*)

Civil Miscellaneous Special Appeal No. 175 *of* 1875.

KRISHNA CHETTY... .....*Appellant.*
RAMI CHETTY and 2 others..... .....*Respondents.*

In computing the period of limitation, the time during which the judgment creditor was prosecuting another suit to obtain a reversal of the order dismissing his application for execution of decree and for attachment of the property of the judgment debtor cannot be deducted.

Provisions in the Limitation Act enacted for extending the period in certain cases where the limitation of suits is in question are inapplicable to proceedings in execution of decrees.

1875.
October 1.
C. M. S. A. No.
175 *of* 1875.

THIS was an Appeal against the order of Mr. F. M. Kindersley, the Acting District Judge of Coimbatore, dated the 10th April 1875, passed on Civil Miscellaneous Petition No. 99 of 1875, confirming the order of the Court of the District Munsif of Erode, dated 3rd February 1875.

In this case the final decree of the Appellate Court was passed on the 16th January 1861. The last application made to enforce, or keep in force, the decree was presented on the 22nd September 1871, and a notice under Section 216 of the Code of Civil Procedure was issued on the 6th October 1871.

Upon the last application presented on the 22nd September 1871, the property of the judgment debtor was attached on the 19th November 1871. A counter-claim was preferred and allowed. A summary order was passed withdrawing the attachment, and the last application was struck off the file on the 7th February 1872. The plaintiff instituted a Regular Suit No. 83 of 1873 to set aside the summary order and to make the said property liable to attachment. The suit was dismissed on the 10th October 1873. The plaintiff preferred an appeal, in Appeal Suit No. 1 of 1874, and the original decree was reversed and a decree was passed on the 20th October 1874, directing that the said property be held liable to attachment and sale for the satisfaction of the decree to enforce which the present application was made.

(*a*) Present :—Sir W. Morgan, C. J., and Kindersley, J.

1875. October 1. C. M. S. A. No. 175 of 1875.

The plaintiff contended that he presented this application within three years from the date of the appeal decree, dated 20th October 1874, and from the date (7th February 1872) on which the last application was struck off the file.

The Lower Court dismissed the application for execution as barred. At the hearing of the appeal from the order of dismissal it was conceded that the order of dismissal was correct, unless the time during which petitioner was prosecuting another suit could be deducted.

The Acting District Judge of Coimbatore dismissed the appeal with costs on the ground that the claim was barred by the Law of Limitation.

From this order the plaintiff appealed.

Mr. P. Shaw, for the appellant.

T. Rama Row, for the 1st respondent.

The Court delivered the following

JUDGMENT :—The application as made is barred, for the appointed time has expired and we are not authorized by the Act to apply to proceedings in execution, provisions enacted for extending the period in certain cases where the limitation of suits is in question.

The appeal is dismissed but without costs.

Appeal dismissed.

NOTE.—See preceding case *Naranappa Aiyan* v. *Nanna Ammal*, ante p. 97, and the cases in the note thereto.

Appellate Jurisdiction (a)

Special Appeal No. 365 *of* 1875.

NARA'YANA PILLAY.....(*Plaintiff*) *Special Appellant.*

RAMASAWMY THAVUTHARAN... { (*4th Defendant*) *Special Respondent.*

A bond whereby "the superstructure of a house exclusive of the land beneath" is hypothecated creates an interest in immoveable property within the terms of the Limitation Act, the apparent intention being to mortgage the existing house and not merely the materials.

1875. October 4. S. A. No. 365 of 1875.

THIS was a Special Appeal against the decree of Mr. A. C. Burnell, the Acting District Judge of South Tanjore, in Regular Appeal No. 460 of 1874, reversing the decree of the Court of the District Munsif of Combaconum in Original Suit No. 365 of 1873.

(a) Present :—Sir W. Morgan, C. J., and Kindersley, J.

1875.
October 4.
S. A. No. 365.
of 1875.

The suit was brought to recover Rupees 100, being principal and interest due upon the following hypothecation bond.

" Hypothecation deed granted on the 14th December 1867 *i. e.*, the 1st of Margali of the year Prabhava, to Narraina Pillay, son of Appu Pillay, living in the Eastern street of the village of Swami Malai by Panchanada Charry, son of Sakschiacharyar. I have hypothecated to you the superstructure (building and roof) inclusive of the tiled roofing now built, standing on my own house-site situated in the northern row of Kuchipollum, Swami Malai village, Combaconum Taluq, to the east of Muthusawmi Davudroyer's house, to the west of the house-site occupied by Chinna Chetty and included in the site belonging to the pagoda, to the south of Subramania Achary's house-site and to the north of the path; and the amount I have borrowed on the security of that (the superstructure) from you is silver Rupees 50 in the currency of the country; as I have received from you the said 50 Rupees given by you I will pay the said sum of Rupees 50 with interest thereon at 1½ per cent. per mensem from this day whenever the holder hereof may demand it and redeem the superstructure. Should any payments be made on account of this bond they are to be endorsed hereon alone. No other payments shall be accepted by you. In this manner has Punchanada Charry granted this hypothecation bond to Narrain Pillai hypothecating the superstructure exclusive of the land beneath. (*a*)

(Signed) PUNCHANADA CHARRY.

The District Munsif of Combaconum held that the mortgage bond was genuine, but did not include the site upon which the house was built and gave judgment for plaintiff.

The 4th defendant, who was in possession, appealed, and the Acting District Judge of South Tanjore reversed the decree and dismissed the suit on the ground that the plaintiff's remedy was barred by the Limitation Act as the bond was

(*a*) தீழ் நிலம் நீங்கலாக—*lit* removed, apart, distinct from the land beneath.

1875. October 4. S. A. No. 365 of 1875.

executed on the 14th December 1867, and the suit was not brought until the 11th September 1873, whereas the period of limitation was three years "as in this case only moveable property (the structure of a house) was hypothecated."

From this decision the plaintiff appealed.

Bhashyam Iyengar, for the special appellant, the plaintiff, contended that the Lower Court had given too narrow a meaning to the term "immoveable property." That term would include the house as well as the house-site. The narrow view here taken is opposed to the spirit of the decision in *Muttusamy Mudaly* v. *Sadagopa Gramany* (1) and the signification given to immoveable property by the Registration Act.

Nallathumby Moodaliar for *Dorasawmy Iyer*, for the special respondent, the 4th defendant, contended that as the house-site was specially excluded, all that the plaintiff took as security was the house, which was not immoveable property, and therefore the suit is barred by the Law of Limitation.

The Court delivered the following

JUDGMENT :—We have not now to determine the rights of the several parties but merely the question of limitation.

The hypothecated property is a house standing on a site, which belonged to Panchanada Charry, who gave the instrument of hypothecation in 1867. It existed at that time as immoveable property in the sense that it was attached to the ground on which it had been built; and it has ever since so continued to exist.

The terms of the deed show clearly that the existing building and not merely the materials of the building, as held by the Lower Appellate Court, has been hypothecated, and, notwithstanding the words excluding the land from the security, the language used is amply sufficient to show that an interest in immoveable property is thereby created. In this view the suit was not barred by limitation. The decree of the Lower Appellate Court must be reversed and the case remanded to that Court for decision. The costs will abide the result. *Appeal allowed and case remanded.*

(1) 4 Madras H. C. Rep., p. 398.

Appellate Jurisdiction. (*a*)

Regular Appeal No. 65 *of* 1875.

AROONACHELLA GRAMANY ... ...*Appellant.*
VELLIAPPA GRAMANY and another... ...*Respondents.*

No appeal lies to the High Court from a decision apportioning compensation by a judicial officer appointed to perform the functions of a Judge within the town of Madras, under Act X of 1870, the Land Acquisition Act.

1875.
October 8.
R. A. No. 65 *of* 1875.

THIS was a Regular Appeal against the decision of Mr. T. M. Busteed, the First Judge of the Madras Court of Small Causes appointed by the Local Government to perform the functions of a Judge under Act X of 1870, the Land Acquisition Act.

In this case the amount of compensation for the land taken was agreed upon by and between the Collector and the persons interested, but the conflicting claims thereto were referred under Sections 15(*b*) and 38(*c*) of Act X of 1870 to Mr. T. M. Busteed who had been appointed under Section 3(*d*) of the Act, by the Local Government.

(*a*) Present :—Sir W. Morgan, C. J., and Kindersley, J.

(*b*) Section 15. "When the Collector proceeds to make the enquiry as aforesaid, whether on the day originally fixed for the enquiry or on the day to which it may have been postponed, if no claimant attends, or if the Collector considers that further enquiry as to the nature of the claim ought to be made by the Court, or if any person whom the Collector has reason to think interested does not attend, or if the Collector is unable to agree with the persons interested who have attended in pursuance of the notice as to the amount of compensation to be allowed, *or if upon the said enquiry any question respecting the title to the land or any rights thereto or interests therein arise between or among two or more persons making conflicting claims in respect thereof*, the Collector shall refer the matter to the determination of the Court in manner hereinafter appearing."

(*c*) Section 38 :—"When the amount of compensation has been settled under Section fourteen, if any dispute arises as to the apportionment of the same or any part thereof, the Collector shall refer such dispute to the decision of the Court."

(*d*) Section 3, so far as it is material, is as follows :—"The expression 'Court' means in the Regulation Provinces, British Burma and Sindh, a principal Civil Court of original jurisdiction, and in the Non-regulation Provinces other than British Burma and Sindh, the Court of a Commissioner of a Division, unless when the Local Government has appointed (as it is hereby empowered to do), either specially for any case, or generally within any specified local limits, a judicial officer to perform the functions of a Judge under this Act, and then the expression 'Court' means the Court of such officer."

1875. October 8. R. A. No. 65. of 1875.

Mr. Busteed decided that the land in question was the self-acquired property of K. Soobroya Gramany, father of Velliappa Gramany, one of the claimants, and paternal uncle of Vencatasawmy Gramany another of the claimants; and that the said Vencatasawmy Gramany and the third claimant Arunachella Gramany were not entitled thereto. The learned Judge declared that the claimant Velliappah Gramany was entitled to be paid one-fourth of the compensation agreed upon, and ordered Vencatasawmy Gramany and Arunachella Gramany to pay fifteen Rupees each to Velliappa Gramany as and for his costs.

Arunachella Gramany appealed from this decision.

M. Parthasardhi Iyengar for the appellant.

The Court delivered the following

JUDGMENT:—We have not jurisdiction to hear this appeal.

An appeal lies to the High Court from the decision under this Act of the Judge of a District Court; but when the Judge, whose decision is appealed from, is not a District Judge, "the appeal shall lie *in the first instance* to the District Judge," (Section 39.)

The decision before us is by a Court constituted in Madras under the provisions of the 3rd Section of the Act. It is not the decision of a District Judge, nor can there be any appeal here under the words above quoted, nor do we find elsewhere in the Act words authorizing us to hear such an appeal from the decision of a specially constituted tribunal.

NOTE.—In *Bamasoonderee Dossee* v. *W. Verner*, 13 Bengal L. R., p. 189, the appeal was under Section 35 of Act X of 1870 from the award of a judicial officer appointed to exercise the functions of a Judge under that Act within the town of Calcutta. Section 35 provides that "If the Judge differs from both the assessors, as to the amount of compensation, he shall pronounce his decision, and the Collector or the person interested (as the case may be) *may appeal therefrom to the Court of the District Judge, unless the Judge, whose decision is appealed from is the District Judge*, or unless the amount which the Judge proposes to award exceeds five thousand Rupees, *in either of which cases the appeal shall lie to the High Court.*" The Chief Justice, in delivering the judgment of the Court, observed "The object of the Section was that there should be an appeal, and bearing this in mind we must read the words of s. 35 'may appeal therefrom to the Court of the District Judge,' not literally but as meaning the

Court which is the appellate Court of the District..... They should be read with reference to the object of the section and as meaning the Court of Appeal for the district, treating Calcutta as a district, which it is for the purposes of this Act, and the High Court exercising its appellate jurisdiction as the Court of Appeal. There is nothing in the Act (the General Clauses Act I of 1868) to prevent us from putting on s. 35 of the Land Acquisition Act a construction which carries out the object of the Legislature. For these reasons we think that the appeal lies." See also *In the matter of the Petition of Syud Abdool Ali*, 15 Bengal L. R., p. 107.

1875. *October* 8. *R. A. No.* 65. *of* 1875.

Appellate Jurisdiction. (*a*)

Civil Miscellaneous Special Appeal No. 244 *of* 1875.

MAHALAKSHMI AMMAL ... ...*Appellant.*

LAKSHMI AMMAL ... ...*Respondent.*

Under Act No. IX of 1871 deductions can no longer be made on account of proceedings between the decree-holder and third persons, to remove obstacles to the execution of the decree, for the present Limitation Act makes the date of application for execution of decree the time from which the computation must be made.

1875. *Octobrr* 15. *C. M. S. A. No.* 244 *of* 1875.

THIS was an appeal against the order of Mr. A. C. Burnell, the Acting District Judge of South Tanjore, dated the 1st May 1875 passed on Civil Petition No. 138 of 1875 presented against the order of the Court of the District Munsif of Combaconum, dated 9th February 1875.

In Original Suit No. 147 of 1866 a decree was passed on the 22nd June 1868 for the payment of a certain sum of money by the defendant to the plaintiff solely on the liability of the mortgaged house. Accordingly, plaintiff applied for execution and had the house attached, but upon a petition of claim preferred by one Narayanaran, the attachment of the property was withdrawn on the 2nd February 1870.

Thereupon, on the 6th October 1870, the plaintiff instituted a suit for cancellation of the above order and for a declaration of his right to recover the decree amount from the said property. In that suit a decree was passed in favor of the plaintiff on the 28th October 1873, and that decree was affirmed in appeal on the 20th April 1874.

Subsequently, on the 13th June 1874, the plaintiff put in an application praying for realization of the amount of the

(*a*) Present :—Sir W. Morgan, C. J., and Kindersley, J.

1875. October 15. C. M. S. A. No. 244 of 1875.

decree in the above suit by the attachment and sale of the mortgaged property. As the first application for execution of the decree was dismissed on the 2nd February 1870, and as no other application for its enforcement was made by the plaintiff within the three years preceding the 13th June 1874, the date of the present application, it was contended by the defendant that execution of the decree is barred under the Indian Limitation Act.

The District Munsif of Combaconum being of opinion that so far as applications for the execution of decrees and orders in suits brought before 1st April 1873, are concerned, the period of limitation should be reckoned under Act XIV of 1859, it was unnecessary to give the reasons shewing that the present case is barred under the new Limitation Act and accordingly dismissed the defendant's application.

Against this order the defendant appealed, and the Acting District Judge of South Tanjore passed the following order upon the said appeal:—

"The decree is dated 22nd June 1868, and application for execution is dated June 1874. But meanwhile there were proceedings in respect of the property up to 20th April 1874 from 6th October 1870, and in consequence of which nothing could be done meanwhile. Execution is not therefore barred, and I must reject this application."

From the said order the counter-petitioner (defendant) appealed on the following grounds:—

"1. The application for the execution of the decree is governed by the present Act for the Limitation of suits, and not by the old Limitation Act No. XIV of 1859.

2. The execution of the decree is barred by Clause 4 of Section 167 of the second Schedule of Act No. IX of 1871."

V. Bhashiam Iyengar for the appellant, contended that the suit was barred as the proceedings in the suit filed on the 6th October 1870 could not be deducted. *Krishna Chetty* v. *Rami Chetty*(1).

(1) *Ante* page 99.

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A. Ramachendra Iyer for the respondent, contended that the suit was not barred as the proceedings under the original decree were stayed in consequence of the subsequent suit. *Ragava Pisharri* v. *Valia Thambrakle.* (1).

The Court delivered the following

JUDGMENT :—The two cases cited are distinguishable from the present case.

In both of them, applications had been made and execution had taken place, although it had not been completed. The orders postponing sale "operated simply as a temporary stay of the process for the sale of the property," See 4 H. C. 262, (2) and when the litigation between the claimants and the decree-holders closed, the latter were in this position——that they had not to apply a fresh to the Courts to enforce or keep in force these decrees but merely to ask the Court to proceed with the sales, which the Court had for a time stayed.

Here the case is wholly different. The decree-holder is an applicant for execution. The proceedings of 2nd February 1870 wholly terminated his former application, and he can show us no subsequent *application* to the Court (within 3 years of his present application) to enforce or keep in force his decree.

But he shows us litigation undertaken by him in furtherance of that decree and to remove obstacles to its execution. This litigation between himself and a successful claimant would have saved the decree-holder under the old Act, for it was a *proceeding taken* within the meaning of Section 20, but the new Act makes the *date of applying* to the Court to enforce &c. the time from which the computation must be made. We can no longer, therefore, make deductions on account of proceedings between the decree-holder and third persons.

Special appeal allowed.

(1) 4 Madras H. C. Rep., p. 261.

NOTE.—See *Naranappa Aiyan* v. *Nanna Ammal*, ante p. 97, and the cases in the note thereto.

Appellate Jurisdiction. (a)

Special Appeal No. 377 *of* 1875.

ANNAMMAH and another..... *Special Appellants. (2nd & 3rd Defendants).*

MABBU BALI REDDY, the natural father and guardian of the minor Munisawmy..... *Special Respondent. (Plaintiff.)*

An inheritance having once vested cannot be defeated and divested by an adoption.

1875. *October* 19. *S. A. No.* 377 *of* 1875.

THIS was a Special Appeal against the decision of Mr. Henry Sewell, the acting District Judge of North Arcot in Regular Appeal No. 19 of 1875, confirming the decree of the Court of the District Munsif of Tripaty in Original Suit No. 112 of 1874.

This suit was brought to recover real and personal property worth Rupees 1,362-8-0 and costs.

The plaintiff alleged that Narainappa died 15 years ago leaving a widow 1st defendant, and a son named Sithappah by another wife. Sithappah died in 1870 unmarried, and shortly after his death the plaintiff was adoped by the 1st defendant. Plaintiff alleged that the 1st defendant was the heir at law of Sithappah. The suit is brought as the defendants are colluding " and are trying to defraud the plaintiff of the family property."

The 1st defendant pleaded that she was forced to execute the deed of adoption of which she knew nothing, and alleged that she accepted from Sithappah Rupees 140 in cash and jewels for her maintenance. The property was enjoyed by Sithappah and after his death by his widow.

The 2nd and 3rd defendants, (the widow and widowed daughter-in-law of Narainappa's brother Venkatesamy) set up a division between the brothers Narainappa and Ven-

(a) Present :—Sir W. Morgan, C. J., and Innes and Kindersley, J. J.

1875. October 19. S. A. No. 377 of 1875.

katesamy, and that 1st defendant was not entitled to inherit the property of her step-son Sithappah, and therefore no right to such property accrued to plaintiff in consequence of the alleged adoption.

The District Munsif of Tripaty held that the 1st defendant, as step-mother of Sithappah, was entitled, on his death, to inherit his property in default of parties superior to her in the line of heirs; that the 2nd and 3rd defendants did not come within the line of heirs; that 1st defendant had permission from legally competent persons to adopt, and did adopt the plaintiff who is entitled to succeed to the property of Sithappah derived from his father, in preference to the 2nd and 3rd defendants. From this decision the 2nd and 3rd defendants appealed on the ground that the 1st defendant, the step-mother of Sithappah, was not his heir according to the Hindu law, and that the adoption by her of the plaintiff was invalid.

The Acting District Judge of North Arcot held that the plaintiff had been adopted; that the adoption was valid, and that plaintiff was entitled to the property of Narainappah inherited by Sithappah. In delivering judgment he observed:—

"I think the necessity for an adoption from spiritual and other reasons is obvious. Narainappah when he died left a son by his second wife, Chinnah Sithappah, but on the death of the latter unmarried there were no male members of the family left who could perform funeral ceremonies, &c. The 2nd widow being dead also, there was no one who could possibly adopt for Narainappah's benefit except his 1st widow the 1st defendant, and nothing has been adduced to show that she was unfit to adopt.

"Then comes the question whether the adoption was valid.

"The 1st defendant admits that she executed the deed of adoption, but says she was compelled to do so against her will. This allegation is unsupported. It is stated by some of the witnesses that Chinnah Sithappah before his death authorised the 1st defendant to adopt a son. The Munsif

1875. October 19. S. A. No. 377 of 1875.

disbelieved this portion of the evidence, but I am inclined to think on insufficient grounds. Any how it is clear that some of the relations of Narainappah and Chinnah Sithappah authorised the adoption and the judgment of the High Court, in the Chinnah Kimmedy case,(1) clearly lays down that the sanction of one Sapinda however remote is sufficient for adoption.

"The minor plaintiff also is shown to be a relation of Narainappah and Chinnah Sithappah and was, therefore, a fit person to be adopted. It was argued by appellant's vakil that at the time of adoption 1st defendant was in a state of pollution as it took place within 16 days from Chinnah Sithappah's death. This point was not raised in the Lower Court, and I, therefore, decline to consider it.

"Again, it was argued that 1st defendant being only step-mother could not inherit property from her step-son. Whether this is so or not does not affect the question. Plaintiff states, the adoption being held valid, was that of a son to Narainappah and half brother to Chinnah Sithappah. He would, therefore, certainly inherit Narainappah's share of the property before 2nd and 3rd defendants who are widow and daughter-in-law respectively to Narainappah's nephew. They inherit the share of the property which belonged to Venketasamy, the brother of Narainappah, and the Lower Court has awarded this to them.

"The judgment of the Lower Court is therefore confirmed and the appeal dismissed with costs."

From this decision the 2nd and 3rd defendants appealed on the ground that a step-mother is not the heir at law to her step-son; and that the Lower Appellate Court was wrong in having thought that the determination of this point of law was unnecessary for the right decision of the case.

T. Rama Row for the special appellants, 2nd and 3rd defendants.

(1) *Shri Brozo Kishoro Pato Devu* v. *Shri Vira Shri Viradhi Virapratapa Shri Raghunatha Ananga Bhima Devu*, 7 Madras H. C. Rep., p. 301.

1875.
October 19.
S. A. No. 377
of 1875.

Anandacharlu and *Kamesam* for the special respondent, plaintiff.

The Court delivered the following

JUDGMENT:—Narrainappah, whose son by adoption the minor plaintiff claims to be, died 15 years ago, leaving a descendant Chinna Sithappah, his son by birth, fully competent to perform all requisite religious services.

Chinna Sithappah died unmarried in 1870, and shortly after his death the alleged adoption is supposed to have taken place.

It is not certain upon what precise ground the Lower Appellate Court maintained this adoption, but even if it be considered that, in some recognized mode, Narrainappah's widow Lakshmakka possessed or acquired in 1870 power to adopt a son to her husband, it has to be determined whether, according to Hindu Law, any adoption could then be lawfully made by her.

The principle of the decision of the Privy Council in the case reported in 10 Moore's Indian Appeals 279, (1) appears to us to govern this case and to show that it could not.

Chinna Sithappah had inherited his father's property; "he had full power of disposition over it; he might have alienated it; he might have adopted a son to succeed to it, if he had no male issue of his body. He could have defeated every intention which his father entertained with respect to the property." (2).

On the death of Chinna Sithappah, the next heir, it is here admitted, was Bali Reddy, who is the natural father of the minor plaintiff and who has also other sons. The inheritance, having passed in 1870 to Bali Reddy, still remains in him and we must hold, upon the authority cited, that the estate of the heir of the deceased son, thus vested in possession, cannot be defeated and divested.

(1) *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry.*

(2) X Moore's I. A., at page 310.

1875. October 19. S. A. No. 377 of 1875.

It is said that he is assenting to the adoption, but this fact does not validate it or enable the widow to substitute a new line of heirs in the place of those who have already inherited.

The decisions of the Lower Courts must be reversed and the suit dismissed with costs.

Appeal allowed.

Appellate Jurisdiction. (a)

Case Referred by the Board of Revenue No. 2 of 1875.

Certificates of sale issued under Sections 35 and 40 of Madras Act VIII of 1865 are not conveyances subject to stamp duty.

1875. October 19. Case Referred by the Bd. of Rev. No. 2 of 1875.

THIS was a case referred for the opinion of the High Court under Section 41, Act XVIII of 1869 by the Board of Revenue in their Proceedings dated 14th May 1875, No. 1284.

The Proceedings of the Board of Revenue in which they stated the case were as follows:—

"The question for determination is whether certificates of sale issued under Sections 35 and 40 of Act VIII of 1865 (*b*) are to be written on stamped paper.

"The Collector of Madura having been instructed to pass an order in a case of the kind and submit it to the Board with a view to an authoritative ruling being obtained, has decided that such sale certificates should be stamped as conveyances under Article 15, Schedule I of Act XVIII of 1869, the stamp duty being borne by the purchaser under Clause 4, Section 6 of the Act.

"The Board have held (Proceedings, 27th August 1874) that certificates under Section 38, Act II of 1864, are not liable to stamp duty on the ground that they are not conveyances as shown by the form prescribed for such documents; but no form is laid down for certificates under Act VIII of 1865, nor does it appear from the Act what the effect of the certificate is, or how the purchaser is to enforce the right evidenced thereby.

(*a*) Present:—Sir W. Morgan, C. J., Innes and Kindersley, J. J.

1875. October 19. Case Referred by the Bd. of Rev. No. 2 of 1875.

"The High Court have ruled (Proceedings, 13th November 1871) that sale certificates issued by Civil Courts under Section 259, Civil Procedure Code, are instruments declaring an interest in property, and must, therefore, if the value exceeds Rs. 100, be registered, and the Inspector-General of Registration has instructed his subordinates to treat them as deeds of sale executed by the Courts granting them.

"The Board are of opinion that certificates issued under Act VIII of 1865 are just as much deeds of sale and should be treated as conveyances, the stamp duty being borne by the grantee. They concur, therefore, in the view expressed by the Collector."

The Court delivered the following

JUDGMENT:—Certificates of sale issued under Sections 35 and 40 of Act VIII of 1865,(a) cannot, we think, be regarded as conveyances subject to the stamp duty.

The certificate under Section 259 of the Code of Civil Procedure has, by virtue of the express provisions of that Section, the effect of an instrument of transfer or conveyance. In the absence of any such provisions, a certificate under the Act of 1865 of the fact of sale and other matters therein mentioned, cannot be converted into a conveyance.

(a) Madras Act VIII of 1865 was passed "to consolidate and improve the Laws which define the process to be taken for the recovery of Rent." Section 33 provides for the sale of the property distrained under Section 14 of rents due to landholders under Ryotwar Settlements, and Section 35, after providing for the payment in ready money of the amount for which the property sold, and for re-sale in default, provides that "When the purchase money has been paid in full, the officer holding the sale shall give the purchaser a certificate, describing the property purchased by him, the date of the sale, and the sum paid." Section 40 provides that when any arrears are due to any of the landholders specified in Section 3, and property is sold under Section 38, the sale "shall be conducted under the rules laid down for the sale of movable property distrained for arrears of rent."

Appellate Jurisdiction. (a)

Regular Appeal No. 29 *of* 1875.

CANNAMMAL AIYAR..... (1*st Defendant.*)...*Appellant.*

VIJAYA RAGUNADA RUNGASAMY SINGAPULLIAR..... (*Plaintiff.*
THE COLLECTOR OF TANJORE..... (2*nd Defendant*) ..... } *Respondents.*

The issues should raise matters fairly in controversy between the parties even though the pleadings may be defectively drawn.

The effect of the Istimrar Sunnud is to ascertain and limit the demand of the Government for revenue and to recognize and confirm, subject to this, the proprietary rights already in existence.

Katama Natchiar v. *The Rajah of Shivagunga*, (1) distinguished.

1875. *December* 10. *R. A. No.* 29 *of* 1875.

THIS was a suit brought by the plaintiff to obtain the transfer of the registry of the Zemindary of Kallakottai.

In his plaint the plaintiff set out that

"1. The zamin of Kallakottai, consisting of the undermentioned villages in Pattakottai taluk, is our ancestral property.

"2. The late Zemindar, who was our undivided elder brother and husband of the 1st defendant, died on the 8th March 1872 without any issue.

"3. While all the moveable and immoveable property appertaining to the said zamin were in our possession and enjoyment according to an agreement executed to us by the 1st defendant on 10th April 1872, the said 1st defendant on 10th August of the said year, made a gift to us of all the said moveable and immoveable property and also of all the property of the 1st defendant's husband and executed a deed of gift and got it registered.

"4. From that time we have been in undisputed enjoyment of all the said moveable and immoveable property with all privileges.

"5. After the death of the 1st defendant's husband, the said zamin has been registered in the name of the 1st

(a) Present :—Sir W. Morgan, C. J. and Kindersley, J.

(1) 9 Moore's I. A., p. 539.

1875. December 10. R. A. No. 29 of 1875.

defendant in the register in the Collector's Office. As the 1st defendant would not join in getting the same transferred to our name, we presented a petition in the office of the 2nd defendant for transfer of the registry to our name, but he passed an endorsement thereon on the 12th March 1873 to the effect that he would not interfere.

"We pray therefore for a decree directing the registry of the said zamin in our name in the register in the office of 2nd defendant and the payment of our costs by the 2nd defendant."

The agreement of the 10th April 1872 above referred to and marked B was as follows :—

Agreement granted on the 10th April 1872 (corresponding with 30th Panguni, Prajapathi) to M. R. Ry. Vijia Ragunada Rungasamy Singapulliar, the undivided brother of the late Zemindar Vijia Ragunada Tirumalai Singapulliar, living at Kallakottai, Pattakottai taluq, Tanjore district, by me Cannammal Aiyar, the widow of the said Vijia Ragunada Tirumalai Singapulliar. After my husband the said Vijia Ragunada Tirumalai Singapulliar, the Zemindar of Kallakottai, in Pattakottai sub-district, Pattakottai taluq, Tanjore district, departed this life on the 8th March 1872, without leaving any description of heirs whatever, whether of his body or by adoption, that can take after him, but leaving you his undivided brother, and me his widow surviving him, you yourself have become the head of the family, entitled to get the villages and other immoveable property of the said Zemindari mentioned in the list hereunto annexed, which were in the management of the said (Zemindar), and the moveable properties and pecuniary dealings in his management, and as you are able and competent to manage the affairs of the Zemindari, &c., and moreover as you have accordingly got and been enjoying the villages of the said Zemindari and the immoveable and the moveable properties and have been conducting the management of the pagodas, &c., you shall hereafter also enjoy the said zamin villages and the other immoveable and moveable properties and pecuniary dealings and conduct the management of the pagodas in the same manner with full proprietary rights, and protect me and the other members of the family as long as we live. If I, who have been in the family-way these eight months, give birth to a female child, you, who enjoy the properties in the abovesaid manner, are to maintain her, and celebrate her marriage justly and properly. If the child happen to be a male, you are to protect him till he shall be of proper age, and on his coming of age give up to him the properties he is entitled to ; thus I have granted this

1875. *December* 10. *R. A. No.* 29 *of* 1875.

agreement with my full consent and of my own accord that you may conduct affairs, that there may be peace in the family, and that I do not want to have any interest whatever in the said Zemindari and other properties other than maintenance as long as I live.

(Signed) CANNAMMAL AIYAR,

Consenting.

Witnesses.

(Signed) Tirumalai Pannikandan, junior paternal uncle of the said Cannammal Aiyar, and son of Andi Pannikandan, residing in Pannikandan Vidudi, and eleven others.

The agreement of the 10th August 1872 referred to in the plaint and marked A was as follows :—

" Deed of Gift granted on the 10th of August 1872, (corresponding with 28th Adi, Angirasa) to M. R. Ry. Vijia Raghunada Rungasawmy Singapulliar, the undivided brother of the deceased Zemindar, M. R. Ry. Vijia Raghunada Tirumalai Singapulliar, a Kalla by caste, a Surti by religion, and a Zemindar by occupation, and aged 26, living at Kallakottai, Pattakottai taluq, Tanjore district, by me, Cannammal Aiyar, the widow of the said Zemindar Vijia Ragunada Tirumalai Singapulliar of the same caste, of the same religion and a Zemindarni, aged 27. Though after my husband, the Zemindar of the said Kallakottai Zemindary, consisting of the undermentioned villages, situated in the Pattakottai sub-district, Pattakottai taluq, Tanjore district, died without issue, leaving the concerns of this world, on the 8th of March last of the current year, while you were enjoying the moveable and immoveable properties, and villages of the said Zemindary, and conducting the pecuniary dealings (thereof) and the management of the pagodas, &c., and were protecting me, as I was then pregnant, I granted an agreement to you already on the 10th of April last as to the arrangements to be carried out if I had issue, and stipulating that I wanted no more interest in, enjoyment of, or connexion with, (the said Zemindari) than (a right to) maintenance for my life-time, and that you yourself were to enjoy and use (the same) yet it is stated in the notice sent by the Pattakottai Tahsildar, on the order issued by the Collector, agreeably to the orders of the Board of Revenue passed subsequent to it, that, if I had male issue, such issue, and if there be none such, then I, and after me, my daughter, if any, should enjoy the Zemindari before you. After the death of the female child given birth to by me, who had then been pregnant, on the report submitted by the Collector, the Board, in their Proceedings No. 4607, dated the 2nd July last, directed that the Zemindari should be registered, and proceedings conducted in my name; and though it has been registered accordingly in my name, yet as you are entitled to obtain all the

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said Zemindari villages, &c., and other immoveable and moveable properties and pecuniary dealings, after me, and as you yourself are entitled to protect me and others belonging to the family, I have this day given away of my own accord as gift to you the undermentioned Zemindary villages, moveable and immoveable properties, pecuniary dealings, other privileges (lordships), and the management of the pagodas which I can enjoy during my life-time, and the right to the moveables and pecuniary dealings of my husband; and as I have given them up to be enjoyed by you yourself, I shall make known by petition to the Board and the Collector to transfer the registry now standing in my name, into your name; you shall, in that manner, have the registry transferred in your name, and conduct all the proceedings connected with the Zemindari and enjoy the same with all rights and privileges as aforesaid; and moreover you shall protect me and the other members of the family; thus I Cannammal Aiyar have granted this deed of gift with my full consent to Vijia Ragunada Singapulliar."

(Signed) RANI CANNAMMAL,
AIYAR AVERGAL, *Zemindarni.*

Witnesses.

(Signed) Tirumalai Pannikandan, junior paternal uncle of the said Rani Cannammal Aiyar, and son of Andi Pannikandan, residing in Pannikandan Vidudi and twelve others.

The 1st defendant by her written statement pleaded that the suit was bad for misjoinder: that the zamin in question was conferred on her husband by the Government and afterwards continued to her; and that it was not ancestral property as alleged in the plaint; that the plaintiff has no right to the zamin in question, and was never in enjoyment of the property; and that the two documents referred to in the plaint are invalid in law for the following reasons:—

"I was in a very unsteady state of mind owing to grief caused by the death of my husband and my child. A guard of servants was placed (by plaintiff) around me so that my near relatives might not come to me and thus I was kept in restraint. My fears were roused to a great degree by the representation of various troubles such as that in the course of my enjoying the zamin, I would be compelled by Sircar frequently to appear in person in Courts, and other public offices and that thereby I would sustain loss of honor. The

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plaintiff fraudulently represented to me that the two documents above specified were indispensable for his managing my affairs as my agent, and afterwards got those documents registered in the office of the registrar. He has further wrongfully usurped all the moveable property of my husband. As therefore the said documents are fraudulent and executed under duress and without consideration they are not valid. Exhibit A ought not to be accepted, being engrossed on insufficient stamp."

She further pleaded that the amount of the institution fee paid by the plaintiff was insufficient.

The 2nd defendant, the Collector of the district who succeeded Mr. Cadell, pleaded that the late Collector could not have done otherwise than refuse the transfer of registry sought by the plaintiff, as the application for the transfer was unaccompanied by the assent of the registered holder, the 1st defendant, and declared his willingness to abide by such decision as might be passed in the suit.

The following issues were framed :—

1st.—Whether the suit is bad for misjoinder as contended by the 1st defendant.

2nd.—Whether the documents A and B were obtained under duress and fraudulently and with false representations.

3rd.—Whether plaintiff had enjoyment of the property under A, and

4th.—Whether the stamp on which the document A is drawn up is insufficient.

The Subordinate Judge held that the plaintiff had no cause of action against the 1st defendant, whom he exonerated from the suit. He set aside the order of the Collector of the 12th March 1873 and directed him to cause the registry to be transferred in the name of the plaintiff and he directed each party to pay his own costs.

From this decree the plaintiff appealed on the following grounds :—

"1. The 1st defendant ought not to have been exonerated from the suit.

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"2. The decree ought to have directed her to consent to the registration unless the issues raised by her defence were determined in her favor.

"3. The plaintiff is desirous of having the issues tried.

"4. The decree so far as it gives relief as against the 2nd defendant is vague. It ought to have directed the 2nd defendant to enter the name of the plaintiff in the register in the place of the name of the 1st defendant."

On the 10th August 1874 the High Court in reversing the decree of the Subordinate Judge of the 25th April 1874 made the following observations :—

"It appears from the allegations in the plaint and in the written statement of the widow (the 1st defendant in the suit) that the latter being the registered owner, executed in the plaintiff's favor a deed of gift of this and other property, and that this deed is now disputed by the widow who claims to be herself the owner of the property. And issues have been framed upon the allegations of the parties raising the several matters in contest. The prayer of the plaint asked only for registration in the plaintiff's name as the Court below observes, but the scope of the suit includes the other matters in controversy between the plaintiff and the 1st defendant, and until the decision of these matters registration cannot be obtained.

"The Court has not entered upon any enquiry touching the matters in controversy and has proceeded to make a decree, the effect of which apparently is to direct registration in the plaintiff's name.

"In the circumstances of this case the decree cannot be maintained.

"The case must be remanded to the Court below for trial upon the issues already framed and upon such further issues as may appear necessary. The suit is not merely one for registration ; the other matters in controversy also required adjudication, and the question of the sufficiency of the stamps should also be considered.

"The costs both here and in the Court below will be disposed of by the order of the Subordinate Judge."

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Upon the case being remanded the Subordinate Judge framed the following additional issues :—

" 5th. Whether the zemindary in question is an ancestral one.

" 6th. Whether the heir certificate obtained by plaintiff from the District Court was fraudulent.

" 7th. Whether 2nd defendant, the Collector, was right in refusing the transfer of the registry of the zemindary in the name of the plaintiff, without the consent of the 1st defendant."

And on the 18th December 1874, he gave judgment for the plaintiff, declaring him entitled to have the registry transferred in his name, and directed that the costs of the plaintiff and of the 2nd defendant in both Courts should be paid by the 1st defendant.

The Subordinate Judge held that there was no misjoinder; that the 1st defendant had failed to establish her pleas of mental depression, duress, threats and false representations; " that plaintiff is the proper and fit person to manage the affairs of the estate," but that " the circumstances of the case render it unnecessary to go very minutely into this point, for, plaintiff did not ask for the recovery and possession of the estate," but sought only the transfer of the registry in his name. The Subordinate Judge further held that the stamp affixed to the document A was sufficient.

As to the 5th issue the Subordinate Judge remarked as follows :—

" The 1st defendant's vakil argues that plaintiff has based his claim only upon the bonds A and B, and that he should not now rely on the plea that he is the undivided brother of the 1st defendant's husband, and that the estate is an ancestral one. I consider this objection is unsustainable. The plaintiff has not based his claim solely upon the said bonds. In the beginning of the plaint he has clearly stated that the 1st defendant's husband was his undivided brother, and the estate is an ancestral one. He also stated that the estate was in the enjoyment of the 1st defendant's husband, and that after his death, the 1st defendant, under

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A and B, gave up her right to this zemindary, and he lastly prayed for the transfer of the registry of the zemindary in his name. The 1st defendant in her written statement denied the fact of the zemindary being an ancestral one. The Board of Revenue have also expressed in their Proceedings (marked SSS) dated 15th June 1874, that plaintiff's claim is also based on the fact that the estate is an ancestral property, and the High Court in their remand order have clearly pointed out that this suit is not one merely for registration, but the other matters in controversy between the parties (plaintiff and 1st defendant) must be adjudicated in the suit. Thereupon this issue was framed. The 1st defendant's contention is that though the estate was enjoyed in her family as a polliem, yet it was given to her husband under the Istimrar sunnud (marked QQQ,) and as the registry thereof was subsequently transferred in her name by the Revenue Board, the estate is not an ancestral one, and that plaintiff has no right to the zemindary. But the Board themselves have stated in the said Proceedings that plaintiff became the undoubted heir, and the estate should have been registered in his name, but through mistake the Board directed its registration in the name of the 1st defendant. As for the Istimrar sunnud granted in her husband's name, it is of no avail to her. It has been decided by the Madras High Court and confirmed by the Privy Council that polliems enjoyed by succession are under the Hindu Law no doubt hereditary and not affected by an Istimrar granted by the Government, which is only effectual so far as the revenue of the estate is concerned.—*Vide* Madras High Court Reports, Volume VI., Page 208,(1) and the Privy Council decision published at page 215, Volume IX, Madras Jurist.(2). Here it has been abundantly shown that the polliem in dispute is an ancestral one, and that it was enjoyed by plaintiff's ancestors one after the other successively. Document TTT, dated A.D. 1738-39, is a copy of the Sicca bearing the royal seal sent for from the Tanjore palace record

(1) *Lekkamani* v. *Puchaya Naiker.*

(2) *The Collector of Trichinopoly* v. *Lekkamani* reported L. R., I. A., p. 282.

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at the instance of the 1st defendant, which shows that the estate of Kallakottai was given as a grant by the former Rajah of Tanjore to the ancestors of the 1st defendant's husband to be enjoyed in succession. Further it is clear from paras. 1 and 10 of the said Istimrar that the estate of Kallakottai was enjoyed for a long series of years by the 1st defendant's husband and his predecessors, and that it is to be enjoyed by him and his heirs and successors in perpetuity. Moreover the fact of the estate having been enjoyed successively one after the other in plaintiff's family, is established in evidence of the plaintiff's witnesses and document MMM and by the admission of the 1st defendant in her deposition as 5th witness for plaintiff. Hence I have no hesitation in deciding this issue in favor of the plaintiff."

The Subordinate Judge considered that, as he had decided that the plaintiff was the legal heir to succeed to the zemindary, it was unnecessary to discuss the 6th issue. And that, as to the 7th issue, the Collector was not in a position to transfer the registry in plaintiff's name without a razinamah from the 1st defendant.

From this decision the 1st defendant appealed on the following grounds :—

"1. The decree of the Subordinate Judge is against the weight of evidence.

"2. The plaintiff having based his title to the transfer of registry in his name on the deeds of gift A and B executed by the 1st defendant, the Subordinate Judge erred in having framed the 5th issue and entered upon an investigation of his title as heir of the deceased husband of the 1st defendant.

"3. Considering the admittedly fiduciary and confidential position in which the plaintiff stood towards the 1st defendant, the Subordinate Judge erred in throwing the onus of establishing undue influence and fraud on the 1st defendant.

"4. The Subordinate Judge erred in law in establishing the validity of the gift relied upon by the plaintiff with-

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out giving a finding on the 3rd issue regarding the possession of the property.

"5. Exhibit A is insufficiently stamped.

"6. Upon the evidence in the case, the Subordinate Judge ought to have given a finding in favour of the 1st defendant on the 2nd, 3rd, 5th and 6th issues.

"7. Exhibit TTT has been misconstrued."

The *Advocate General* and *Bhashyam Iyengar* for the appellant, the 1st defendant.

We submit that on such a plaint as this the Court cannot go into the question whether the plaintiff is entitled to succeed to his brother. Though there is the expression "our undivided elder brother" in the second paragraph of the plaint, the question of his right to succeed to such brother is abandoned by the plaintiff for the position set up by him in the third paragraph of his plaint. From this latter paragraph it is clear that he claims as the donee of the widow. The present contention was not raised in the issues. Title by gift was merely in question, and the decree was that the Collector ought to register. In the grounds of appeal the present contention was not distinctly raised. In the order of remand passed by this Court on the 10th August 1874, it is pointed out that the question of Registration was not the only one for decision and it is directed that "the other matters in controversy" between the parties shall be tried. It is true that the 5th issue is "whether the zemindary in question is an ancestral one," but all polliems are not necessarily terminable. Some recent judgments have decided that they are but not that they are all ancestral and hereditary. The most that has been said is that each case must be decided upon its own merits. *Oolagappa Chetty* v. *Honorable D. Arbuthnot and others*(1). The Istimrar Sunnud merely put an end to the terminable estate. We submit that this question as to the right of the plaintiff to succeed to his deceased brother ought not to be gone into on the present plaint.

Mr. O'Sullivan and *Rama Row*, for the 1st respondent, plaintiff.

(1) L. R., 1 I. A., p. 268.

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The present question ought to have been tried because it was sufficiently raised by the pleadings.

[CHIEF JUSTICE.—Plaintiff alleges all the facts which would lead one to suppose that he was going to set up his right to succeed his deceased brother, and then he goes on to rely upon a deed of gift.]

Yes—but he sets up a clear title which, if admitted, would entitle him to a judgment. In his second and third grounds of appeal the plaintiff clearly refers to the contentions of the 1st defendant and asks for a decision upon those contentions. Moreover, at the hearing of that appeal a cross appeal was put in by the 1st defendant, one ground of which was that the issues framed were insufficient. The High Court's order was passed upon the hearing of both appeals. It was by that order suggested that "such further issues as may appear necessary" should be framed by the lower Court. Such issues were framed and there was abundant notice to the parties what was in dispute.

[CHIEF JUSTICE.—By that phrase, "such further issues as may appear necessary," is meant such issues as raise matters fairly in controversy.]

We submit that this was a matter fairly in controversy between the parties. The presumption of Hindu Law is in favor of the plaintiff, therefore the onus is upon the 1st defendant. The plaint refers to documents which set forth, whether rightly or wrongly, that the plaintiff was entitled, but that, by the action of the Revenue authorities, he was led to believe that his chances of success were small.

The *Advocate General* in reply. The mere mention in the plaint that the deceased was plaintiff's "undivided elder brother" is insufficient. The right to succeed is not claimed specifically, but is to be obtained by inference alone. As plaintiff did not choose to assert a title by inheritance, it is going very far to say that the Court ought to help him, and allow him to catch a decree by some loose statements in his plaint.

The CHIEF JUSTICE intimated that, with regard to the preliminary objection there was no doubt as to the principle which ought to be followed. If the issues are unsupported by the pleadings, or do not raise questions in controversy and

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closely connected with the rest of the case, this Court would allow such issues to be amended or would, if necessary, frame additional issues. In this case if the plaint alone were looked at it is one asking for a decree enforcing registration in the plaintiff's name. The property is assumed to be in the plaintiff's possession, and the title the plaintiff alleges is a title which cannot be considered as simply arising on a deed of gift. The opening allegation in his plaint clearly refers to a title in the plaintiff and his brother, the late Zemindar. He then glances off to this subject of the deed of gift under which he says he is in possession of the property. On the other side his opponent does not rest her case only on the gift, but notices and meets the introductory allegations in the plaint. It is clear that there is something more in the averment than a simple reference to the deed of gift. That being so the issues which, in the first instance, were confined to the deed of gift, were afterwards extended to this new matter. It appears to us that that matter was clearly in dispute and that the issue was correctly framed. The form of this plaint is a good illustration of a remark of that eminent Jurist, Sir Henry Maine, to the effect that Court Fees have been a more considerable power in legal history than historians of the law are altogether inclined to admit.

The *Advocate General.* Then as to the appeal. The question between the parties is whether the widow of the late Zemindar is entitled to a life estate, or whether the brother of the deceased inherits immediately on his death—the widow only taking that to which any other Hindu widow would be entitled.

The only grant in this case was that which declared the estate to be terminable. The first devolution of the estate appears in document MMM which is as follows :—

"Order to Vijia Raghunada Muthu Vijia Singapulliar, son of the late Vijia Raghunada Singapulliar, Zemindar of Kallakottai Pauliaput.

Your Arji of the 20th instant saying that your father died, that before his death he executed a Will, and that he had directed you to instal yourself and look after the affairs of the Zemindary, and that of the 29th July stating that you are in your 19th year reached us

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And when we sent for and saw you in person we found you competent and of proper age to look after the said Zemindary. We therefore believe that you will, in accordance with the arrangements made by your father, assume possession of the Zemindary and manage the same well. As you have become the ruler of the Zemindary, you must bear in mind to please your subjects and to render such assistance to them as may tend to the improvement of the Pauliaput, you must also bear in mind that you must not go on borrowing and spending. We have sent an order to the Tahsildar also.

TANJORE, 13th *August* 1851. (Signed) ———— *Acting Collector.*

It was upon the proceedings of 1854 that the late Zemindar came in. The estate was evidently not considered, at that time, to be one devolving from one to the other. That really constitutes the title to this estate.

[CHIEF JUSTICE.—The effect of that document seems to be rather advice given by the Collector. It does not amount to a sunnud or grant by Government.]

No—because the Government did not intend to give the Zemindar such an estate at that time.

The current of the later authorities has been towards considering that Polliems are terminable estates. None of the decisions has gone the length of saying that all Zemindaries are ancestral. That is a question which must be decided on the merits in each case. In the *Shivagunga* case(1) the Judicial Committee of the Privy Council observed(2) "The Zemindary is admitted to be in the nature of a Principality—impartible, and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindu law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject."

[CHIEF JUSTICE.—That case seems to be based upon a previous forfeiture and a new grant.]

(1) *Katama Natchiar* v. *The Rajah of Shivagunga*, 9 Moore's I. A., p. 539.

(2) Ibid, p. 588.

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Yes, and the effect of such new grant on the question of self-acquisition is decided by their Lordships.(1)

The grant of the Sunnud-i-Milkeut Istimrar, or deed of permanent property is provided for by Regulation XXV, Section 3. Paragraph 10 of the Sunnud appears to create the perpetuity. That would seem to be the commencement of an hereditary estate. The recital as to the terminable estate shows that it was intended that there should be a change in the nature of the estate. It is a great deal more than simply saying "we will not change the assessment." The evidence of the estate being ancestral so as to support the plaintiff's claim to oust the widow, is not sufficient.

The present case is not so strong as the *Shivagunga* case(2), but the estate is a Polliem and, as such, is hereditary according to *The Collector of Trichinopoly* v. *Lekkamani*(3). It is not however an ancestral estate, therefore, as the last holder held under a sunnud, we submit the right view of his estate is that it was his self-acquisition.

Then, assuming that the estate was not ancestral, the effect of the deeds is a complete handing over by the widow of the plaintiff's right. The lady's case is that she thought that she was signing authorities to the plaintiff to carry on the Zamin. She was living a secluded life, was in great grief at the loss of her husband, was enceinte, and had no independent legal advice. Her signature was procured by the plaintiff, at whose instigation the document was drawn up. It was for him to show that the widow possessed free-will, complete knowledge and desire. One view of the case would be that there had been not sufficient enjoyment of possession to meet the requirements of the law. In their character such gifts arouse the very gravest suspicions.

[CHIEF JUSTICE.—What position of confidence was there between the parties, besides that of relationship?]

Plaintiff was manager of the estate on behalf of the widow.

(1) 9 Moore's I. A., p. 606.
(2) *Katama Natchiar* v. *The Rajah of Shivagunga*, 9 Moore's I. A., p. 539.
(3) L. R., 1 I. A., p. 282.

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[CHIEF JUSTICE.—You cannot put it upon the ground that he was one holding a fiduciary relationship. He was not her guardian.]

The theory of the Hindu law is that a woman is always under guardianship. 1 Sir T. Strange's H. L., p. 244, and, Mitákshárá. ch. 2, s. 1, v. 25.

It lies upon the person supporting such documents to prove they were executed with perfect knowledge and freedom of will. The widow had a life estate and could, with the consent of the sapindas, have adopted a son. It is very unlikely that she would have thrown away all her rights as alleged by the plaintiff. We do not say that there was actual force or fraud in the present case, but the rule, as laid down in *Huguenin* v. *Baseley*(1) is "not whether she knew what she was doing, had done or proposed to do, but how the intention was produced; whether all that care and providence was placed round her, as against those who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf." Both these considerations apply to this case.

If it were a compromise which gave her anything it might possibly be upheld as a family arrangement to avoid disputes, but the arrangement in this case is all against the widow who is stripped of everything except her right to maintenance which the law gives her without the agreement. Here, whatever was the influence brought to bear, that influence was not for the benefit of the widow. The English cases upon this subject are collected in Watson's Compendium of Equity, page 287, title "Undue influence." The gist of the cases, English and Indian, is pretty fairly summed up in the Evidence Act.

A very strong opinion is expressed by the Judicial Committee of the Privy Council as to gifts of this kind in *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan.*(2)

(1) 14 Ves., p. 273 at p. 300; S. C., 2 White and Tudor's L. C., p. 462 at p. 484.

(2) L. R., 1 I. A., p. 192 at p. 206.

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[CHIEF JUSTICE.—Ordinarily, of course, any gift of this kind by a Hindu woman would be looked upon with considerable doubt before the Courts would act upon it.]

Yes.—Their Lordships said in *Geresh Chunder Lahoree* v. *Mussumat Bhuggobutty Debia.*(1) "But this Committee and the Courts in India have always been careful to see that deeds taken from Purdah women have been fairly taken; that the party executing them has been a free agent, and duly informed of what she was about."(2)

[*Mr. O'Sullivan.*—This lady was not a Purdanasheen.]

She was not perhaps such strictly speaking, but she was, at any rate, living in seclusion, and did not go to such places as the Registration office.

Mr. O'Sullivan and *Rama Row* for the 1st respondent, the plaintiff.

The first question is that raised by the 5th issue, because if the plaintiff be entitled to succeed to the estate of his deceased brother, he is clearly entitled to compel registration.

[CHIEF JUSTICE.—Even if we think that the plaintiff had a right by inheritance, ought we not to recognise the widow's right to something? Ought we not to restore the parties to the respective positions occupied by them before the execution of these documents? How would that affect the suit?]

The suit would have to be dismissed, although, in point of fact the plaintiff would be entitled to bring a suit immediately afterwards to enforce his right of inheritance. If we look at the transaction from the supposed point of view of unfair dealing by the plaintiff with this lady, then the complaints of the latter dwindle down to nothing, because if the appellant had legal advice, such cases as *Huguenin* v. *Baseley*(3) are inapplicable. The cases do not affect such a

(1) 13 Moore's I. A., p. 419.
(2) Ib., p. 431.
(3) 14 Ves., p. 273: S. C., 2 White and Tudor's L. C., p. 462.

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contention as the present one, where the mistake of the parties as to their respective rights is brought about by the action of the Revenue authorities.

[CHIEF JUSTICE.—In cases of agreements entered into under duress, the principle of law is to restore the parties to such agreements to their original positions.]

The present case was not put forward as one of duress by the Advocate General. There was a distinct issue upon that point, and the lower Court found that there had been no duress. The Advocate General abandoned this contention, and did not rest the appellant's case even upon the ground of fraud. He contended that it came within the principle of such cases as *Huguenin* v. *Baseley*(1) But where a person merely does what the law would compel him to do if a suit were brought for that purpose, the principle of such cases cannot possibly apply.

[CHIEF JUSTICE.—Suppose that a person in possession is found to have relinquished that possession owing to fraud or force, would not a Court of Equity interpose and restore such a person to the possession of which he had been thus deprived ?]

In this case though the agreements are called donations, they are really confirmations. In fact the lady had nothing to give, and what she professed to give, was, what she might have been compelled to give—assuming that she was in possession. If she had had a substantial interest in the Zemindary, then those documents would bear a very different aspect and construction. Moreover there is no such fiduciary relationship here as would come under the head of "active confidence" required by the Court of Chancery and the Indian Evidence Act.

[KINDERSLEY, J.—There are other cases than those of family relationship in which one person is placed in a position of power over another.]

(1) 14 Ves., p. 278: S. C.,
2 White and Tudor's L. C., p. 462.

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Yes, as in the cases of priest and penitent, solicitor and client, doctor and patient. This woman is not, strictly speaking, a purdanasheen, but, even if she were, she was made fully aware of the transaction into which she was entering. There is no suggestion that undue influence was practised, but what she alleges is fraud. That is the whole of her case, and that case is completely negatived by the evidence.

[CHIEF JUSTICE.—Even if we are satisfied that this document was read to the appellant, still she was practically a purda lady, and this was a document by which she waived the whole of her rights, gave up the entire property, and conferred rights on the plaintiff. Would not these facts bring her case within the principles enunciated in the reported cases ?]

That there was knowledge on her part has been found by the lower Court. As to the alleged undue influences, there is no proof that the parties were in a fiduciary position.

[The *Advocate General*.—The written statement distinctly sets up pressure as well as fraud.]

[CHIEF JUSTICE.—The appellant certainly does set up something very like duress.]

Yes—but that allegation has been found by the lower Court to be false. She knew all along that she was not to have the Zamin.

[CHIEF JUSTICE.—Supposing those two elements—restraint and false representation were absent—then the position of the parties would be such that they ought to be put back into the respective positions occupied by them before the execution of these documents.]

If this were a complete gift, parting with some rights, that might be so, but here the plaintiff must have known that he was entitled to the estate, and the only doubt was that raised by the Revenue authorities. As to the independent legal advice the position of the country is not such as to allow of it in every instance, and probably such advice, if given, would not be followed.

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The *Government Pleader*, submitted that the Collector ought not to have been made a party to the suit, and claimed costs.

The *Advocate General* in reply.

The Court delivered the following

JUDGMENT :—We agree with the Court below that, having regard to the plaint and written statement, the 5th issue was duly framed for the decision of a material question, which was in controversy between the parties and which fell within the scope of the suit.

Further, we are of opinion, concurring with the Subordinate Judge, that the estate is ancestral and not a self-acquisition made by the husband of the appellant. It is necessary in the present suit only to determine this question and not to enquire further into the particular character of the estate, which the respondent, as a member of a joint Hindu family, has inherited. Clearly as between the widow and himself, the rights of the former do not exceed the ordinary rights of the widow of a deceased member of a joint Hindu family in the ancestral estate and her claim is only to maintenance.

It was contended for the appellant that the holders of this property possessed therein no estate of inheritance prior to the Istimrar Sunnud, and that by the Sunnud the grantee became entitled to the estate as his self-acquisition and the Shivagunga case(1) was cited in support of this contention. But the circumstances of the two cases are very different.

In the latter it was considered that the estate had escheated for want of lineal heirs and a fresh grant was made, which constituted the grantee the acquirer of the property.

In the present case the property had descended from ancestors, and there was no interruption to the descent. Some expressions in the Sunnud may indicate on the part of the Government an assertion of rights larger than those

(1) 9 Moore's I. A., p. 539.

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which as the law is now understood might be admitted. Notwithstanding this the effect of the Sunnud clearly is to ascertain and limit the demand of the Government for revenue and to recognize and confirm, subject to this, the proprietary rights already in existence.

If the respondent is the proprietor by inheritance of this ancestral estate as we think he is and the appellant is entitled merely to maintenance, we are next to consider, whether, upon the evidence, there is any bar to the relief which has been granted to the former.

We are satisfied that the appellant's case fails in respect of the allegations of force and fraud and misrepresentation made by her. Her real position had been in some measure misapprehended by herself and others and in consequence she was perhaps enabled, if she thought fit, to offer obstacles to the respondent in the assertion of his just rights. The documents executed by her did not in any way prejudice any claim really possessed by her. And it is needless, therefore, to consider what degree of proof would be requisite for their support on the assumption that valuable rights were conveyed by them. As they in fact took effect upon the actual and not the supposed rights of these persons, we cannot say upon the result of the evidence that they should be disregarded.

The decree contains no directions in regard to them but deals only with the registry of the property and the respondent is satisfied with this.

We shall affirm the decision of the Court below except in the matter of costs. Notwithstanding the conduct of the appellant in impugning the documents executed by her on untenable grounds, we think that she should not, in a case like the present be held to have thereby subjected herself to costs. While we absolve the 1st respondent from the particular imputations cast on him, we are not disposed to regard his conduct throughout the transactions as free from blame. We shall direct that the costs both here and in the Court below be borne by him.

Judgment affirmed, but modified as to costs.

Appellate Jurisdiction. (a)

Special Appeal No. 145 *of* 1875.

VENCATACHELLA CHETTY... (*Plaintiff*) *Special Appellant.*
PARVATHAM and another... (*Defendants*) *Special Respondents.*

Illegitimate sons are excluded by the Hindu Law from inheriting when the intercourse between their parents was in violation of, or forbidden by, law.

1875. *October* 19. *S. A. No.* 145 *of* 1875.

THIS was a special appeal against the decree of Mr. J. H. Nelson, the District Judge of North Tanjore, in Regular Appeal No. 96 of 1874 confirming the decree of the Court of the District Munsif of Tranquebar in Original Suit No. 354 of 1873.

Plaintiff, as the illegitimate son of Narrainsawmy Chetty, sued *in formâ pauperis*, to recover for his share certain property, &c. from 1st defendant, daughter of the said Narrainsawmy Chetty. Second defendant, another illegitimate son of the said Narrainsawmy Chetty, was made a party to the suit.

The plaintiff alleged that, at the death of the aforesaid Narrainsawmy Chetty, 1st defendant applied to the Civil Court of Tranquebar, under Act X of 1841, and obtained from plaintiff possession of the property specified in the schedule; that plaintiff instituted Original Suit No. 30 of 1865, on the file of the Tranquebar Principal Sadr Amin's Court for the recovery of the said property and obtained a decree, which, however, was reversed in Regular Appeal No. 265 of 1866. The Civil Judge, who disposed of the appeal, being of opinion that plaintiff and 2nd defendant were the sons of the said Narrainsawmy Chetty's concubine. The special appeal preferred by the plaintiff against this decree was dismissed. The plaintiff submitted that even as the son of a concubine, he is entitled to a fourth share.

The 1st defendant pleaded that the previous case barred the plaintiff's present claim; that plaintiff is not entitled to any share as he was the offspring of adulterous intercourse. She further contended that plaintiff should

(a) Present:—Sir W. Morgan, C. J., Innes and Kindersley, J. J.

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bear his share in certain debts legally due by her; that the claim for the moveable property is barred; and that no produce has been raised from the lands claimed.

The following, among other issues, were recorded :—

Whether or not the legal proceedings taken by plaintiff in the former suit, are a bar to this suit. If a bar, how ?

Whether plaintiff is the fruit of an adulterous connexion, or whether he is the son of a concubine legally recognized and as such entitled to the share he claims ?

Whether 1st defendant has any debts such as to compel plaintiff legally to contribute his quota in them ?

Whether the claim for the moveable property is barred or not ?

Was any produce raised from the land, and if so, what is the quantity ?

The District Munsiff of Tranquebar held that the plaintiff's present suit was not barred by the proceedings in the previous suit, and that plaintiff was the fruit of an adulterous connexion. Upon this second point he observed :—

"Plaintiff's vakil argued that even if plaintiff was looked upon as the fruit of an adulterous connection, there was nothing in the Hindu Law against his obtaining a share in the property of Narrainsawmy Chetty, but expressed his inability to quote cases in support of the position. The authority in point chiefly relied on by the defence, is the judgment of the Madras High Court in *Parisi Nayudu* v. *Bangaru Nayudu*(1). The conclusion which their Lordships have logically drawn in that judgment is, that to entitle the illegitimate sons of a Sudra by a Sudra woman to inherit a share in the family property, the intercourse between the parents must have been a continuous one, and the woman must have been an unmarried woman. Therefore the illegitimate son of a Sudra by a Sudra woman living with him in adultery is not entitled to a share in the family property. I think this is a clear law on the point and ought to be followed. The vakil for the plaintiff argued that the conclusion of their

(1) 4 Madras H. C. Rep., p. 204.

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Lordships was not supported by authorities and that the phrase "other unmarried Sudra woman" found in para. 2 of page 215 of Volume IV, was not found in the text in Mitákshárá, in page 426 of Mr. Stokes' edition. He further argued that among the fifteen classes of slaves, there is a slave for the sake of one's bride, and, if she says to the man that "I am thine," the issues begotten on her by the man are entitled to share in the property. The phrase is not, as the vakil contends, unsupported. It is to be found in Chapter IX verse 29 of the Dáya Bhága, Mr. Stokes' edition, page 298, *vide* also Elberling on Inheritance Section 160, page 71. Though Dáya Bhága is an authority in the Bengal Presidency I don't think we can entirely reject it. The vakil has blended two slaves into one. Among the fifteen classes of slaves enumerated in page 137 of Mr. Stokes' Hindu Law, a slave who offers himself and says "I am thine," is different from the slave for a bride. Therefore, I do not see any thing in the argument. The other authorities quoted by plaintiff's vakil are the judgments in *Pandaiyá Télaver* v. *Puli Télaver* (1) *Yettapa Naikar* v. *Venkatasubha Yettia*(2) *Krishnamma* v. *Papa*,(3) of Norton's Leading Cases on Hindu Law, p. 499, *Murdun Syn* v. *Purhulad Syn*(4) and Colebrooke's, Digest, Volume II, page 171. All these authorities do not at all support the contention. But the first six verses in page 171 of Colebrooke's Digest fully satisfy me that the issue of a woman living in adultery is not entitled to a share, and that the Hindu Law sets its face against adultery. For these reasons I am of opinion on the 2nd issue, that plaintiff is not one of the kinds of illegitimate sons recognized by the Hindu Law, and that he is not entitled to the share he claims."

On appeal from this decision the District Judge of North Tanjore sent down the followiug issue for decision.

"Is it or is it not customary in the caste to which the deceased Narrainsawmy Chetty belonged for an illegitimate

(1) 1 Madras H. C. Rep., p. 478, affirmed on appeal, 13 Moore's I. A., p. 1418, s. c. 3 B. L. R., (P. C.) p. 1.
(2) 2 Ibid., p. 293, on appeal, 12 Moore's I. A., p. 203.
(3) 4 Ibid., p. 234.
(4) 7 Moore's I. A., p. 18, at p. 49.

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son, begotten by one on the body of the wife of another, in any circumstances to succeed to any part of the estate left by his father? If so, in what circumstances and to what share should such son succeed?"

The Lower Court decided this issue against the plaintiff and that decision was affirmed on appeal by the District Judge. The plaintiff then appealed to the High Court on the following grounds.

I. That the Lower Appellate Court gave judgment on the strength of an unrecognized custom, and not on the broad principles of Hindu Law applicable to the case.

II. Exhibit H is more than 30 years old and from proper custody, and therefore requires no proof.

III. Both the Lower Courts failed to assign due weight to the presumption in plaintiff's favor arising from the fact of plaintiff's mother having lived with his father for more than 40 years.

IV. The dictum that the son of an adulterous connexion cannot inherit, is against the weight of the authorities on Hindu Law.

Ramachendrier for *Jaga Row Pillay* for the pauper special appellant, plaintiff.

In Hindu law an illegitimate son is not *quasi nullius filius* but has substantial rights. *Pandaiyá Télaver* v. *Puli Télaver*, (1) *Yettapa Naikar* v. *Venkatasubha Yettia*, (2) 1 Sir T. Strange's H. L., pp., 68, 132. All children born out of wedlock are illegitimate according to Hindu law, and their rights are secured. *Parisi Nayudu* v. *Bangaru Nayudu*, (3) is against me, but I submit that the judgment does not contain a correct statement of the law, and, as the

(1) 1 Madras H. C. Rep., p. 478, affirmed on appeal 13 Moore's I A., p. 141, s.c. 3 B. L. R. (P. C.) p. 1.

(2) 2 Ibid., p. 293, on appeal, 12 Moore's I. A., p. 203.

(3) 4 Ibid., p. 204.

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decision upon this point was not necessary for the case, it is a mere *obiter dictum*.

Mitákshárá, ch. 12, sloka 1 contains a special law on behalf of Sudras. In the original the word translated "slave" is "Dasi." According to the judicial interpretation of the word "Dasi" given in *Yettapa Naikár* v. *Venkatasubha Yettia*, (1) it includes any Sudra woman kept in concubinage. The word is further explained in *Krishnamma* v. *Papa*, (2) As to the term "slave" and those included thereunder, see the Dáya-kráma-Sángraha, ch. 12, s. 2, Stoke's "Hindu Law Books," p. 522.

The marriage tie is so loose that any wife may leave her husband when she pleases. Vyavahára Mayúkha, ch. 19, sloka 11 appears to give the power I contend for.

[INNES, J.—I do not see how that bears upon the present case.]

It shows the looseness of the marriage tie. Dattáka Mímánsá, s. 2 sloka 26, Stokes's "Hindu Law Books," p. 551 explains ch. 1, s. 12 of the Mitákshárá. And s. 4 sloka 75 of the Dattáka Mímánsá explains the words "slave's son" (Dása-putra). The question is—would the previous marriage of the mother bar her son's succession to the property of his father? In former ages Brahmins did not legislate for Sudras. For Sudras there are no "munthrums," no peculiar marriage ceremonies, no ceremony for divorce. The woman may be superseded at her husband's pleasure, and she may leave her husband when she pleases.

Mr. Miller and *Rama Row* for the 1st special respondent, 1st defendant.

There is a distinct finding that there was no condonation on the part of the husband; the plaintiff is therefore the

(1) 2 Madras H. C. Rep., p. 293, on appeal, 12 Moore's I. A., p. 203.
(2) 4 Ibid., p. 234.

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offspring of an adulterous connexion. The question is whether, among Sudras, children of such connexions inherit. According to Menu, ch. 9, sloka 179, "a son, begotten by a man of the servile class on his female slave, or on the female slave of his male slave, may take a share of the heritage, *if permitted*: thus is the law established."(*a*) The rights of such a son are laid down in Mitákshárá, ch. 1, s. 12. With regard to the special rules as to the partition of a Sudra's goods, see Stokes's "Hindu Law Books," p. 425. Yájnaválkya's text cited in the Dáya-kráma-Sángraha, ch. 6 slokas 32-33, refers to "the son of a Sudra by a female slave *or other unmarried Sudra woman*" according to slokas 29 to 31 of chapter 9 of the Dáya Bhága, Stokes's "Hindu Law Books," p. 298.

If the woman was not a "female slave," the son would only have a right to maintenance. II Colebrooke's Digest, pages 325, 326. Burnell's Dáya Bhága, p. 24, s. 32, Macnaghten's Hindu Law, Vol. I, p. 18 and Vol. II, pp. 15 and 16 (note).

This son could not perform important ceremonies. There are many authorities to show he should not be admitted to society, but he may perform some unimportant ceremonies on account of the maintenance to which we admit he is entitled. Elberling, p. 71 § 160. West and Bühler, p. 56, question 12, where "Dasi" is explained. See also p. 63.

Menu recognizes only seven sorts of slaves. Menu, ch. 8, sloka 415. This number is increased by Nárádá to fifteen, II Colebrooke's Digest, [3rd Edn.] p. 14; see also explanation at page 16, and p. 170—text of Hárita.

(*a*) In *Narain Dhara* v. *Rakhal Gain*, 1 Indian L. R., (Calcutta), p. 1, Mitter J., observed upon this passage (p. 5). "The passage as translated warrants the conclusion that an illegitimate son of a Sudra by a slave or other unmarried Sudra woman takes the inheritance of the father; but referring to the original text, I find that there is a slight inaccuracy of translation in the first part of the verse in question, the passage, if correctly rendered, would run thus:—'But the son of a Sudra by an unmarried female slave, &c., may share equally with other sons, by consent of the father, &c.'"

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In *Yettapa Naikar* v. *Venkatasubha Yettia*, (1) the text quoted from Macnaghten was approved of as also in *Murdun Syn* v. *Purhulad Syn*(2) *Parisi Nayudu* v. *Bangaru Nayudu*(3) As to what sons are now recognized, see 1 Sir T. Strange's H. L., p. 63. Burnell's Translation of the Dáya Bhágá, para. 32 shows that this large number of sons is not now recognized. Mitákshárá, Stokes's "Hindu Law Books," p. 410.

The question of a twice married woman's son succeeding does not arise in the present case. His is one of the classes now obsolete.

The term "female slave" must be confined to an "unmarried woman."

A woman living in adultery is a concubine and entitled to maintenance West and Bühler, p. 59, and her daughter also. Ibid., p. 60.

If deceased was a Sudra, his son on a twice married woman is entitled to half the share of a legitimate son, Sutherland's Translation of Dattaka Mímánsá, Section 4, sloka 58, (note). Stokes's "Hindu Law Books," p. 583 explains the term "twice married woman."

A woman who leaves her husband and lives with another man does not lose her spiritual connexion with her husband, only her temporal, and, on her death, the husband would go through the purifying ceremonies. Menu, ch. 9, sloka 59, describes who are the eleven fictitious sons, as also does sloka 170. 2 Colebroke's Digest, p. 330, shows that such sons were not unknown in former times.

Right to inherit depends on efficacy to perform funeral rights, 2 Colebroke's Digest, p. 371. At p. 375 of that work a son raised by appointment and a son raised on the sly are distinguished, and at p. 375, it is said that the son

(1) 2 Madras H. C. Rep. 293, on appeal, I2 Moore's I. A., p. 203.
(2) 7 Moore's I. A., p. 18.
(3) 4 Madras H. C. Rep., p. 204.

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of a concealed birth, becomes the son of the husband, the reason for which rule is given at p. 381. The only exception in the text-books is where the adultery is between high and low castes. Adultery is not immoral according to Hindu Law if between the same castes. The punishment awarded is very slight, and the offence is placed in the same degree as crimes in the third degree. See Menu, ch. XI, ss. 60-67. *Mayna Bái* v. *Uttáram.* (1) In that case if the father had been a Hindu the judgment would have been that the children were entitled to inherit their father's property notwithstanding the fact that they were the offspring of adulterous intercourse.

Ramachendrier in reply.

The Court delivered the following

JUDGMENT :—The plaintiff sought to participate in the estate of Narrainsawmy Chetty, his father. There was another son and a daughter. It appeared that, while these latter were the children of Narrainsawmy's lawful wife, plaintiff was the offspring of an adulterous connection of plaintiff's father with Venkata Ammal, the wife of one Nainam.

The District Munsif was of opinion that, by the Hindu Law, the plaintiff was not entitled to share in the inheritance. The District Judge, on the appeal made by plaintiff, entertaining doubts as to the application of the Hindu Law to people of the class to which the parties belong directed an issue to ascertain whether in such circumstances plaintiff was, by any custom of their caste, entitled to inherit to his father.

The Munsif returned a finding in the negative, and the District Judge concurring dismissed the appeal.

The only question, which, in the argument in the special appeal, we were asked to consider, is the right of plaintiff to inherit under the Hindu Law.

The decisions of this Court have gone the length of declaring the illegitimate son of a Sudra woman, where intercourse between the parents was of a continuous character, entitled to inherit but have disallowed the claim of a son by

(1) 2 Madras H. C. Rep. p. 196, at pp. 199 and 203.

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an incestuous intercourse, *Parisi Nayudu* v. *Bangaru Nayudu*(1). The intercourse in the present case was continuous, but in the former cases the precise question in this case was not before the Court for consideration, viz., whether the son by adulterous intercourse with the wife of another can share in the heritage of his father.

The law, as set forth in verse 170, Chapter IX of Menu, and in verse 14, Chapter V of the Smrutichándrika (Kristnasawmy Aiyer's Translation) seems to show that plaintiff cannot inherit to the husband of his mother. This incapacity may at first appear calculated to add strength to the arguments in favor of his inheriting to the person, to whose adulterous intercourse with his mother he owes his birth. But these arguments are such as must at once be rejected and cannot derive support from the presumption that incapacity in respect of the one source of inheritance implies capacity in respect of the only other source.

We were first asked to regard plaintiff as the son of what is called in the treatises a twice married woman, the rights of such a son to inherit being (it was said) recognized by the law. Granting that plaintiff's mother would answer one of the definitions of a twice married woman, that appear in the treatises, it is yet evident from the texts quoted to us [among which may be noticed the Dáya Bhága (Dr. Burnell's Translation) p. 24, verse 32] that this social relation has long become obsolete. Then it was urged that the intercourse of the woman with plaintiff's father was perfectly free on her part, and was not without the assent of the husband, and was, therefore, on the footing of a mere concubinage untinged with adultery ; but the assertion that the adultery was condoned was negatived by the finding of the District Munsif from which the District Judge has not dissented, and even, if it had been connived at or condoned, it does not appear that the Hindu Law would have regarded the marriage tie as dissevered, or the connection as other than adulterous. Verse 15, Section VIII of the Dattaka Mímánsá, which quotes a text of Prajapati, seems to show that an adulteress is still regarded up to her death as a member of the family of

(1) 4 Madras H. C. Rep. 204.

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the husband. The case of *Parisi Nayudu* v. *Bangaru Nayudu* (1) was disposed of mainly on the ground that sons by an intercourse prohibited by the law were not recognized by the Hindu Law as entitled to inherit and this conclusion was founded partly upon the words "or other unmarried Sudra woman" occurring in Chapter IX of the Dáya Bhága, verse 29. It seems not very clear that the words mean *absolutely* unmarried. It is at least doubtful whether they are not limited to the meaning of a woman not married to the person, whose son claims to inherit or share.

But, however this may be, there can be no question of the strong terms of condemnation in which the Hindu Law denounces adultery.

We find nothing therefore in the circumstances of the case to lead us to adopt a different ground of decision from that upon which the judgment in *Parisi Nayudu* v. *Bangaru Nayudu*(1) mainly preceded, viz., that illegitimate sons are excluded from the privilege of inheriting when the intercourse between their parents was in violation of, or forbidden by law.

It may be that plaintiff would be entitled to maintenance from the estate of his father, though not to a share in the estate, but we must dismiss this special appeal with costs.

Appeal dismissed with costs.

(1) 4 Madras H. C. Rep. 204.

NOTE.—According to the Bengal school of the Hindu law, only the illegitimate sons of a Sudra by an unmarried female slave, or a female slave of his slave, are entitled to inherit the father's property in the absence of legitimate issue. *Narain Dhara* v. *Rakhal Gain*, 1 Indian L. R., (Calcutta), p. 1.

Appellate Jurisdiction. (a)

Special Appeal No. 474 *of* 1875.

SIKKI.....(*Plaintiff*) *Special Appellant.*

VENCATASAMY GOUNDEN....(*Defendant*) *Special Respondent.*

A woman living in adultery formed a temporary connexion with a man by whom she had a son. *Held*, that she could not maintain a suit for maintenance against her paramour.

1875. *October* 19. *S. A. No.* 474 *of* 1875.

THIS was a Special Appeal against the Decree of Mr. F. M. Kindersley, the Acting District Judge of Coimbatore, in Regular Appeal No. 107 of 1874, reversing the Decree of the Court of the District Munsif of Coimbatore in Original Suit No. 465 of 1873.

The plaintiff alleged that she cohabited with the defendant by whom she had a son now about 12 years of age. The defendant maintained the plaintiff and her child up to eleven months before the institution of this suit, but that as the defendant then discarded the plaintiff and her son, this suit was brought to recover maintenance for the plaintiff during her life-time, and for her minor son during his minority.

The District Munsif held that for a series of years plaintiff and defendant had been living as husband and wife, and that the boy was the fruit of their intimacy.

Taking into consideration the means and position of the parties, the District Munsif gave the plaintiff a decree for maintenance during her life of two rupees a month from the date of the suit and four rupees annually for cloth. He allowed the plaintiff's son maintenance during his minority at the rate of one rupee a month, and a sum of one rupee annually for cloth.

From this decree the defendant appealed for the following, among other reasons :—

The plaintiff adduced no evidence that she was defendant's concubine for any length of time.

Plaintiff has no legal right to sue defendant for maintenance, she admitting that her husband is still alive, and that she has been leading a life of adultery.

(a) Present—Sir W. Morgan, C.J., and Innes and Kindersley, J. J.

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The Judgment of the Acting District Judge was as follows :—

"The first question is whether the plaintiff is entitled to any maintenance at all, and this I am inclined to decide in the negative. The question was raised in the Lower Court and embodied in the first issue, but seems to have been decided by the District Munsif solely on the ground that because the child was born to defendant, therefore defendant was bound to maintain the mother.

"Reference was of course made to Section 196 of Strange's Manual of Hindu Law, which refers again to pages 67, 68 and 132 of Sir Thomas Strange's treatise, as showing that illegitimate children and their mothers are entitled to maintenance.

"That such a doctrine is so stated there is no doubt, but I think that on looking into the authorities it will be found that it is not every illegitimate child or the mother of every such child that is entitled to maintenance. Were it so, the result would be that a man might be compelled to maintain a woman of notoriously bad character, perhaps a common prostitute, because owing to a casual connection with her she had given birth to a child, and such a woman might in the same way claim maintenance from several men should she happen to have several children. Such a result is repugnant to common sense, and the doctrine is so monstrous that it is impossible to conceive it to have been intended by Hindu Law unless the same is most clearly defined and laid down.

"Now referring to the Mitákshárá, the sections applicable seem to me to be contained in Chapter II. Section I. §§ 7, 12, 20, 27, 28: and if we read these I think there can be little doubt but that they refer to women having a recognized position in the house as concubines or "female slaves," a position which was undoubtedly recognized by Hindu Law, and that they do not refer to any woman with whom a man may have had intercourse and by whom he may have had a child. I would refer too to Vyavahára Mayúkha, Chapter IV, Section 8 § 5 which discusses

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the same text as in the Chapter of the Mitákshárá above quoted. This confirms my interpretation that the texts refer to women having a recognized position, and that when it is said "subsistence is to be given to the females," the text must be read to mean females belonging to, and forming as it were part of the household, and not to every woman kept by a man. For the above section of the Vyavahára Mayúkha explains that it relates to the "women set apart" and Section 7 §§ 18, 19 of that same Chapter show the "woman set apart" means what were called "female slaves," which expression cannot possibly be held to be the same as a "kept woman" in the ordinary sense of the words.

"Now I am quite satisfied, though I agree with the Lower Court in thinking it is proved that defendant did keep the plaintiff for some time and that the child was born to him, that the plaintiff was not defendant's "concubine" in the proper sense of the term. The evidence to my mind does not show more than that defendant kept the plaintiff for a time, sometimes in his own house, sometimes in a house where he visited her. But this does not, I think, constitute concubinage within the legal meaning of the term. A concubine is something more than a mere "kept woman."

"And more than this, I am satisfied that the plaintiff could not have been defendant's concubine properly so-called seeing that she was already married to another man, and was therefore an adulteress when living with defendant. Such a woman could never have been a "female slave" or "concubine" within the meaning and definition of the term given by the Hindu Lawyers. And I am, I think, warranted in this conclusion by the Judgment of the High Court in the case of *Parisi Nayudu* v. *Bangaru Nayudu*(1) in which the opinion is expressed that though the illegitimate son of a Sudra by a concubine is entitled to inherit, yet the illegitimate son of a Sudra by a Sudra woman living with him in adultery would be excluded from inheriting. This shows that every woman living with a man is not necessarily his

(1) 4 Madras H. C. Rep., p. 204.

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wife or concubine, and that it is not every illegitimate son who comes under the broad doctrine of the Hindu Law that illegitimate sons of a Sudra have a right of inheritance.

"I think on the above grounds that plaintiff herself has certainly no right of maintenance against defendant. As to the child the question is somewhat different, for it may be said that every man is bound to contribute at all events towards the support of his own child. At the same time it is a question whether this is not a rule to be enforced more for public convenience than a rule of Hindu Law giving every son a right to claim maintenance from his father. The law now provides by the Criminal Procedure Code for the maintenance of all illegitimate children *not able to support themselves*, and that rule is easily understood. But if the plaintiff's son is entitled by Hindu Law to maintenance, he is entitled to it not only while he is unable to support himself, but for his life-time, since the Hindu Law provides no limit for the payment of maintenance.

"And looking at the judgment above referred to holding that the son of a Sudra by a Sudra woman living with him in adultery is not entitled to inherit a share in the family property, and considering that all the authorities as to the maintenance of illegitimate sons seem to point to sons born by a concubine or female slave, and not to sons begotten by all casual or promiscuous intercourse with women, I think that such sons have no right to come into the Civil Courts and ask for maintenance. It seems to me that it can never have been intended that every child born to a man by casual and promiscuous intercourse with a woman should have the right to claim maintenance for life from his father's family estate.

"I therefore reverse the judgment of the Court below and dismiss the plaintiff's suit with all costs."

From this decision the plaintiff appealed for the following, among other, reasons:—

The facts that the defendant kept plaintiff as his mistress sometimes in his own house and at other times in houses hired by him, and that the plaintiff's son was begotten by

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the defendant, are sufficient to compel him to maintain plaintiff and her son.

Ramachendraiyer for the Pauper Special Appellant, Plaintiff.

The mother of an illegitimate child is entitled in Hindu Law to receive maintenance. Sir Thomas Strange after laying down that the claim of illegitimate sons of regenerated tribes is to maintenance only, unless where custom intervenes in their favor, goes on to observe " nor are authorities wanting, that assign to the mothers of such children, the like provision." 1 Sir T. Strange's H. L. (3rd Edn.) p. 71. Again he says (p. 173) " It has been seen that, in the Sudra class, *illegitimate* sons succeed as heirs, wholly, or partially, according to the state of the family in that respect; and, in all classes, as with us, it is the duty of the parent to maintain issue of this description; an obligation that attaches to the survivors, and is to be provided for upon partition. The mothers of such children also have the like claim, which the providence of the law, not content with securing for them, in all ordinary cases, has been careful to charge upon heirless property, in the hands of the king."

As to the illegitimate issue, Sir Thomas Strange observes, at page 187, that where such issue " would inherit, in the case of the death of their putative father, they will have a claim to share on partition in his life; and they are, under other circumstances, entitled to be provided for to the extent of maintenance."

Nullathumby Moodelliar for the Special Respondent, the Defendant.

Mr. Justice Holloway points out the difference between the position of the illegitimate issue of Sudras, and of the regenerated classes, in *Pandaiyá Télaver* v. *Puli Télaver* (1). It is not every illegitimate son of a Sudra however who is entitled to inherit or to share in family property according to Hindu law.

(1) 1 Madras H. C. Rep., p. 478, at p. 484: affirmed on appeal, 13 Moore's I. A., 141; s. c. 3 B. L. R. (P. C.) p. 1. See the remarks of Mitter J. in *Narain Dhara* v. *Rakhal Gain*, I Indian Law Reports, (*Calcutta*) p, 1, at p. 8.

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It was held that "the illegitimate son of a Sudra by a concubine, not being a female slave, is entitled to maintenance according to Hindu Law." *Yettapa Naikar* v. *Venkatasubba Yettia.*(1) An illegitimate child is described as "the offspring of a woman, not legally married to the putative father; the definition extending to the case, where the man and woman are descended from the same stock, or where the marriage has not been according to the order of class." 1 Sir T. Strange's H. L. p 68.

In *Parisi Nayudu* v. *Bangaru Nayudu*(2) the offspring of incestuous intercourse were held not entitled to inherit or to share in the family property. The Court appears to have been of opinion that the exclusion extend to the offspring of a Sudra, and a Sudra woman living with him in adultery. In *Yettapa Naikar* v. *Venkatasubba Yettia*(1) the Court observed (page 295), "The right to maintenance, too, follows upon the exclusion from inheritance, and we are unable to see that there would be any justice in upholding the argument used at the bar that he may have been entitled to inherit, but, as he has lost the inheritance, has no rights to be maintained."

The adulteress living in concubinage is not entitled to maintenance.

The case put in West and Bühler, page 92, does not support the remark on page 93, and is unsupported by the Hindu Law, which gives the adulteress living in concubinage no right to maintenance from the man supporting her.

Ramachendraiyer replied.

The Court delivered the following

JUDGMENT:—As to one of the questions argued in this appeal, viz., the right of the illegitimate son to maintenance, it is sufficient to say that it does not properly arise in the suit, which was brought by the mother alone, the son not being a party or represented.

(1) 2 Madras H. C. Rep., p. 293; on appeal, 12 Moore's I. A., 203.
(2) 4 Ibid., 204.

1875. October 19. S. A. No. 474 of 1875.

We may, however, upon this question refer to the decisions of the Privy Council and of this Court in the case of *Muttusamy Jagavira Yettapa Naikar* v. *Venkatasubha Yettia*,(1) which show that the natural son of a Hindu father, recognized by him as such, is entitled to maintenance, although he may not have been born in the house of his father or of a concubine possessing a peculiar status therein.

The right of the plaintiff to maintain this suit for her own maintenance has, we think, been properly disallowed upon the facts found by the Lower Appellate Court, according to which, the plaintiff, a married woman living in adultery some years ago, formed a temporary connexion with the defendant, during which a son was born. No authority of Hindu law has been produced to show that from such a connexion a right to maintain a suit like the present can arise.

The decision of the Lower Appellate Court is affirmed and this appeal dismissed but without costs.

Appeal dismissed.

(1) 2 Madras H. C. Rep. p. 293, on appeal, 12 Moore's I. A., p. 203.

Appellate Jurisdiction. (*a*)

Appeal No. 23 *of* 1875.

MOONEE UMMAH..... *Plaintiff* (*Appellant.*)

THE MUNICIPAL COMMISSIONERS FOR THE TOWN OF MADRAS..... } *Defendants* (*Respondents.*)

The President of the Municipality has a discretion to grant or withhold a license under Act IX of 1867, s. 142. His exercise of that discretion does not render him liable to an action.

An action for damages for malicious prosecution can succeed only if the plaintiff shows both malice *and* the absence of reasonable and probable cause.

1875. *October* 29. *Appeal No.* 23 *of* 1875.

THIS was an Appeal from the Decree of the Chief Justice, made in Suit No. 48 of 1875.

Mr. O'Sullivan, for the plaintiff, appellant.

The *Advocate General* and *Mr. Miller,* for the defendants, respondents.

The arguments of Counsel and the facts of the case appear sufficiently from the following judgment:—

INNES, J.:—The question in this case is whether the learned Chief Justice before whom it came originally, was right in dismissing it without hearing the plaintiff's evidence.

The suit was one for damages against the President of the Municipality for refusing to grant plaintiff a license for her sheep and goat stand and for his having maliciously instituted prosecutions against the plaintiff on account of her continuing to keep the sheep and goat stand without a license.

At the hearing of the appeal, we were informed that the grounds, on which the Chief Justice dismissed the suit, were that the President of the Municipality had a discretion to grant or withhold the license and that his exercising that discretion as he had done by withholding it, did not render him liable to an action. Also as regards the damages claimed for malicious prosecution that the allegations in the plaint were not sufficient to sustain a claim for damages for such a cause.

(*a*) Present:—Innes and Kernan, J.J.

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The first question for our consideration is whether it lay in the discretion of the President to withhold the license and this depends on the construction of Section 142 of the present Act, which runs as follows:—

"Whoever within the town shall own or keep any "livery or hack stable, horse lines, veterinary infirmary, "cart stand, cattle shed or yard for public resort or more "than 20 sheep or goats or ten horned cattle in one place "without a license from the President, shall be liable to "a penalty not exceeding 50 Rs. and to a further penalty "not exceeding 10 Rs. for every day after conviction for "such offence during which such offence is continued."

Now ordinarily a license signifies a permission, and a permission is something which is, in its very nature, in the discretion of the person who gives or withholds it, but the word 'license' occurs in Section 38 of the Act in the sense of a certificate which the President is bound to grant on certain payments being made, and in other sections of the Act, Sections 185 and 193, a discretion in regard to granting, withdrawing and revoking licenses is *expressly* given, which would, at first sight, seem to lend some ground for the argument that where (as in Section 142) the law is silent as to discretion, the President has no discretion but must, if applied to, grant the license.

The object of the Act, as stated in the preamble, is to amend the law relating to the appointment of Municipal Commissioners for the town of Madras and the management of its Municipal affairs, and to make better provisions for the police, conservancy and improvement of the town, and for lighting and water supply, for the enumeration of the inhabitants and for the registration of births and deaths and to enable the said Commissioners to levy taxes, tolls and rates therein.

A great portion of the Act (from Sections 23 to 99 inclusive) is devoted to the levy of taxes, and it is among these sections that the section occurs in which the word license is used as a certificate, which it is not in the discretion of the President to refuse. It is in effect a certi-

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ficate of the payment of a tax, which is incorrectly styled a license. This is the only receipt, which the tax payer has, and it is given him to answer the purpose of a receipt and also to show exemption from liability to the city tolls, which the payment of the tax confers upon him. The nature of the license renders it clear why the President has no discretion in granting or withholding it.

Section 142, out of which this case arises, is in a part of the Act which relates to the conservancy of the town. It is clearly not primarily a fiscal provision, nor does the authority, given in Section 243, to levy a fee upon grant of the license, impose upon it a fiscal character. The section standing where it does must be presumed to be concerned with conservancy.

Now if the section implies that there is a discretion vested in the President to grant or withhold the license, it imports that there may be something objectionable in the keeping in any particular place, of a sheep or goat stand, which it is desirable that the President should have the power of prohibiting.

If, on the other hand, it does not imply a discretion but signifies that a license must be granted, when applied for, then it imports that there is nothing objectionable in the thing itself. If, therefore, the latter view be maintained that the grant of a license is not discretionary, it is difficult to see the reason, which actuated the legislature in imposing the penalty. It was suggested that the object was to compel the complete Registration of all such places as are within the section, but this view is not supported by the purpose of the sections among which it stands, which are concerned with conservancy, nor is it explained upon this view why successive penalties should be inflicted after the first prosecution when all the materials for Registration are in possession of the President.

I will now consider the bearing of the observation that there is a contrast between Section 142 and Sections

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185 and 193 in the silence of the former as to the existence of a discretion, while the latter sections expressly confer it.

I think, if we turn to the earlier legislation, it will clearly appear that the provisions in Sections 185 and 193 assumed their present form quite independently of any intention on the part of the legislature to attach significance to this difference of language.

Section 93 of Act XIV of 1856, the earliest enactment on the subject, says "No place shall be used as a slaughter "house within the prescribed limits which was not in such "use at the time of the passing of this Act and has not so "continued ever since unless and until a license in writing "for the use thereof as a slaughter house has been obtained "from the Commissioners, who are hereby empowered at "their discretion from time to time *to grant such licenses.*" Now if we look at Section 100 of the same Act, it will appear that a Magistrate, before whom a conviction took place of a violation of the law or the bye-laws in regard to slaughter houses, had the power of *suspending and even revoking the license.*

Section 103 as to offensive and dangerous trades employs the same phraseology as Section 93;—"Who are "hereby empowered at their discretion from time to time to grant such licenses." There is no provision corresponding to that in Section 100 giving power to a Magistrate upon conviction of the offender to suspend or revoke his license; but such heavy penalties are imposed as would of themselves practically put an end to the use of the license. Now this Act was repealed by Act IX of 1865. The new Act contains provisions for regulating slaughter houses and offensive trades similar to those contained in Act XIV of 1856 but in place of leaving it with the Magistrates to suspend or revoke the licenses of slaughter houses, the legislature in this enactment (Section 162) places this power in the hands of the Commissioners and therefore adds to the words "are hereby empowered at their discretion from "time to time to *grant,*" the further words "and withdraw

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" or revoke" and the same extension of authority is given in regard to other offensive trades.

Now a power to *grant* at discretion carries with it a discretion to withhold, and in this section there is a discretion expressly given to *grant*.

We find in this Act a Section (118) with which Section 142 of the present Act in the main corresponds. The only section in the Act of 1856 at all answering to the provisions of this section was Section 43 in which a penalty was provided for keeping more than 20 sheep or goats or 10 horned cattle near a street " without permission of the Commissioners" in which the words " without permission" clearly import a discretion to give or withhold it. Section 118 of the Act of 1865 in which the word " license" is used is silent as to a discretion being given to the Commissioners in the matter of granting or withholding the license. Were the Act one homogeneous piece of legislation, the silence as to this matter in Section 118, when viewed with the express terms in which a discretion is granted in Sections 162 and 169, (which are closely followed in Sections 185 and 193 of the present Act) would, apart from the further matter contained in Section 118 which I shall presently consider, have a different bearing to that which it necessarily has, when it is considered that Sections 162 and 169 of the Act of 1865 have taken their form from a modification of the Act of 1856, and that Section 118 of the Act of 1865 is a newly introduced section; and the same remark of course applies to the present Act of 1867 in which Sections 185 and 193 and Section 142 are substantially reproductions from the Act of 1865 of its Sections 162 and 169 and of Section 118 respectively.

But further looking at Section 118 of the Act of 1865, I find words which place it beyond a question that the Commissioners were allowed a discretion of granting or withholding a license; for the section provides that " an " appeal against the Commissioners' refusal to grant such " license shall lie as provided in Section 63 for appeals " against assessment." It is therefore perfectly clear that Act IX of 1865, for which the present Act was substituted,

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allowed a discretion in the very matter concerned in the present suit, in a section standing in a group of sections corresponding closely with the associate sections among which Section 142 of the present Act stands. The position of the section in the latter Act corresponding as it does precisely with that of the section in the earlier Act leads irresistibly to the conclusion that it stands there with the same object. There is one material difference between Section 142 of the present and Section 118 of the repealed Act. The present Act gives no appeal against the refusal of the President to grant a license. What does this import? Can it, by any violence of construction, be taken to mean that the discretion no longer exists? It clearly cannot. All that appears from it is that the exercise on the part of the Commissioners (for whom the President is now substituted) of the discretion which, by Section 118 of Act IX of 1865 they undoubtedly had, is no longer subject to revision by an Appellate Court.

It appears to me that the same effect must be given to the language of Section 142 in the present Act as unquestionably attached to that language in the Act of 1865, which clearly imported that the Commissioners had a discretion.

It is of course a fair observation that, if the section be so construed, it puts into the hands of the President enormous powers of interference with private property which the legislature can hardly have contemplated. But the entire Act bristles with powers of this kind, and when the meaning of any provision of an Act is clear independently of such considerations, we are not at liberty to use them for the purpose of attaching a different meaning to the provision. I am of opinion that the Chief Justice was right in taking the view he did of Section 142.

Then as to the other question. It being determined that the President simply exercised a lawful discretion in withholding the license, there really is nothing alleged to show that he exercised that discretion improperly.

As to the claim for damages for malicious prosecution—an action of this kind can only succeed if the plaintiff shows

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both malice *and* the absence of reasonable and probable cause. Here, in admitting that she kept the sheep-stand in defiance of the prohibition of the law (for a penalty imports a prohibition), she admits that there was reasonable and probable cause for her prosecution. There is therefore, on the right construction of the Act and the allegations of the plaint, no ground for the action for malicious prosecution. The appeal should be dismissed with costs.

KERNAN, J. concurred.

Appeal dismissed with costs.

Appellate Jurisdiction. (*a*)

Regular Appeal No. 82 *of* 1875.

PAREYASAMI *alias* KOTTAI TE'VAR and 3 others. ... ... (*1st, 2nd, 3rd and 7th Defendants*) *Appellants.*

SALUCKAI TE'VAR *alias* OYYA TE'VAR. (*Plaintiff*) *Respondent.*

An impartible Polliaput held by one member of the family descends on a single heir as an ancestral estate the right to which vests, on the last holder's death without issue, in the next collateral male heir of the undivided family in preference to the widow of the deceased.

The words "We and our offspring shall have no interest in the said Polliaput, but you alone shall be Zemindar and rule and enjoy the same" must be construed with due regard to the person using them and the occasion when they were used. *Held* that in the present case they were not a release, by the person using them for himself and his heirs, of all future rights of succession which might accrue to them as members of an undivided family. Possession under such a relinquishment was not a new and separate acquisition. No question upon the law of limitation can arise between the different members of the joint family in respect of the property thus held by a single member. An estate so possessed, free from present co-parcenary rights in others, is not entirely at the disposal of the holder for his own purposes. The possessor has only the qualified powers of disposition of a member of a joint family, with such further powers, or it may be with such restrictions, as spring from the peculiar character of his ownership. These powers fall short of a right of absolute alienation of the estate.

Razinamah arrangements not made decrees of Court but irregularly acted upon as if they had been so made, do not substantiate advances alleged to have been made by creditors; but, assuming such "razinamah decrees" to substantiate creditors' claims, proceedings in execution against the widow of the mortgagor alone as his representative cannot be effectual to pass to the purchaser of the equity of redemption at a sale in the course of such proceedings any right or interest in the property mortgaged.

An appellant cannot defeat the suit by an objection to plaintiff's right to sue brought forward for the first time in the appeal

(*a*) Present :—Sir W. Morgan, C. J., and Innes, J.

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THIS was a regular appeal from the decrees of the Subordinate Court of Madura in Original Suit No. 105 of 1873, directing defendants to deliver to the plaintiff the village of Kanakkangudi with mesne profits from the date of the plaint with costs.

The facts appear sufficiently from the judgment of the High Court.

Mr. O'Sullivan and *Bhashyam Iyengar* for the 1st, 2nd, 3rd and 7th defendants, appellants.

The *Advocate General, Mr. Tarrant, Mr. Shephard,* and *Sashier* for the plaintiff, respondent.

Mr. O'Sullivan for the appellant.

It was held in *Jowala Buksh* v. *Dhurm Singh* (1) that "the general rule, that the possession of one member of a joint Hindu family is the possession of all does not apply where the claimant has been clearly excluded. In the latter case the possession is adverse, and time will run."

[INNES, J.—Here there was at most mere absence of participation in the estate.]

That is sufficient to bar the claim. The terms of Section 1, Class 13 of Act XIV of 1859 are distinct, but there is considerable difficulty in applying that section to the case of Hindus following the Mitákshárá law. The members of a joint Hindu family may be partly united and partly divided. This fact alone complicates matters and makes the strict application of the 13th Clause of Section 1 of the Limitation Act of 1859 difficult. There are, however, a number of decisions in which claims to shares of joint family property not filed within the statutory period were held to be

(1) 10 Moore's I. A., p. 511 at p. 535.

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barred by lapse of time. *Mudhub Dyal* v. *Punchanun Dyal* (1), *Subbaiya* v. *Rajesvara Sastrulu* (2), *Krishnama Rajah* v. *Narayanasawmy Rajah* (3).

This suit was brought after the new Limitation Act, No. IX of 1871, came into force, and, therefore that Act applies. By that Act, Schedule II § 125 the period of twelve years within which a suit must be brought "by a Hindu governed by the law of the Mitákshárá to set aside his father's alienation of ancestral property" begins to run from "the date of alienation," whereas in a like suit by a Hindu governed by the law of the Dáya Bhága, the period begins to run from the death of the father. Under the new Act, then, the claim is clearly barred. Even treating it as coming under Act XIV of 1859 it is barred, and if barred the present Act does not remove that bar.

In *Raja Ram Tewary* v. *Luchmun Pershad*, (4) where the parties were governed by the Mitákshárá Law the Calcutta High Court held that in the case of an alienation by a father the cause of action to the son accrues when possession is taken by the purchaser. Their Lordships observed "even if the son would, upon the father's death, become entitled to the father's share by survivorship, and consequently entitled to a greater interest in the estate than he had in his father's life-time, that would not necessarily affect the question of limitation ..... The inconvenience which would result from holding that, in cases like the present, limitation does not commence until the death of the father would be very great ..... Inconvenience could not be allowed to affect our decision if the law were clear, but it is a matter to be taken into consideration in determining what the law is." *Subrye Singh* v. *Narrain Singh* (5). In *Sámi Aíyan* v. *Ammai Ammál* (6) it was held that even in the case of *lis pendens* parties are not compelled to

(1) W. R., 1864, *(Civil Rulings)* p. 349.
(2) 4 Madras H. C. Rep., p. 354, followed in *Shidhojirdv* v. *Ndikojirdv*, 10 Bomb. H. C. Rep., p. 228.
(3) 4 Mad. H. C. Rep., p. 291.
(4) 8 W. R., *(Civil Rulings)* p. 15.
(5) 7 Ibid., p. 502.
(6) 6 Madras H. C. Rep., p. 234.

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quiescence until the determination of the litigation. In that case Mr. Justice Holloway pointed out that "*Agere non valenti non currit prœscriptio* is the only principle on which the plaintiff could be held not barred." (1)

Where a debt is incurred by the head of a Hindu family residing together, it will, under ordinary circumstances, be presumed to be a family debt. *Tándavaráya Mudali* v. *Valli Ammal* (2). "The mere creation of a charge by a Manager securing a proper debt, is not to be viewed as an improvident act; and a *bonâ fide* creditor is not to suffer when he has acted honestly and with due caution, but is himself deceived." *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (3). It is a pious duty on the part of a son to pay his father's debts, and the ancestral property is liable for such debts unless they were contracted for immoral purposes. *Girdharee Lall* v. *Kantoo Lall*(4).

This estate was, so far as third parties were concerned, self-acquired. The defendants have given reasonably fair evidence that these debts were binding on the estate. *Udáram Sitárám* v. *Ránu Pánduji*, (5.)

The Advocate General for the respondent.

In former cases where the right of the manager of an estate to alienate or charge it has been discussed, the question has turned on whether the charge or alienation is one that a prudent owner would make in order to benefit the estate, *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (3). That question cannot arise here as the whole estate has been dissipated by the late proprietor Gouri Vallabha Tévar.

First as to the impartibility. The nature of Pollium estates has been frequently and fully discussed. Their existence and tenure are facts judicially determinable on the

(1) 6 Madras H. C. Rep., p. 238.
(2) 1 Ibid., p. 398.
(3) 6 Moore's I. A., p. 391.
(4) L. R., 1 I. A., p. 321 s. c. 14 B. L. R., (P. C.) 187.
(5) 11 Bombay H. C., Rep., p. 76.

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evidence. Sudder Decisions for 1849-51, p. 9 ; *Lekkamani* v. *Puchaya Naikar,* (1) [on appeal, *The Collector of Trichinopoly* v. *Lekkamani* (2), and *Oolagappa Chetty* v. *The Honorable D. Arbuthnot* (3),] *Narangunty Lutchmeedevamah* v. *Vengamma Naidu* (4.) The payment of 600 Star pagodas " tribute payable by lesser poligars, the grants, [G and H] the compromise, [Exhibit 49] the deed of relinquishment [Exhibit 44] and the other documents in the case show that this pollium was an ancient, impartible estate. It has been said that there have been alienations of the estate for the purpose of dismembering it, and Exhibit J has been treated as indicating this, but this is not its true effect. Portions of an estate may be assigned to members of a family by way of maintenance without dismembering such estate, or having the effect of a partition. *Runjeet Singh* v. *Kooér Gujraj Singh*(5).

As to sonship—

[The CHIEF JUSTICE intimated that their Lordships considered the sonship established.]

Then as to non-division. The argument in favor of the estate having been divided is grounded on(1) the deed of relinquishment in 1829 (Exhibit 4), and (2) the subsequent conduct of the parties; but, in order to constitute division there must be an agreement express or implied to be separate in estate. Here there is no evidence of any such intention. Separate enjoyment is not incompatible with the continuance of a state of union. On the other hand, there is evidence that the family is undivided.

As to the question of Limitation. Section 13 of Act XIV of 1859 does not apply as this is not a suit for partition or for maintenance. The agreement of 1829 has the effect of vesting an estate in Muthusawmy and his lineal descendants

(1) 6 Madras H. C. Rep., p. 208. (3) Ibid., p. 315.
(2) L. R., 1 I. A., p. 282. (4) 9 Moore's I. A., p. 66.
(5) L. R., 1 I. A. p. 91 at p. 21.

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so long as any were forthcoming. Till Muthusawmy's issue failed no right of action accrued to the other members of the family nor could the plaintiff have got a declaratory decree. Section 13 clearly refers to partible property not to specific arrangements as to impartible property such as the one in the present case.

The question of preferential heirship was never raised in the pleadings, nor was there any issue taken on the point, nor have the sons of the ex-Zemindar been made parties to the suit. The plaintiff is clearly entitled to succeed in preference to his elder brother's grandson. On Gouri Vallabha's death his branch of the family became extinct. The proper person then to take as heir to the estate is the nearest kinsman to the deceased, not the descendants however remote of the eldest member of the family. The plaintiff, therefore, being a father's brother's son is entitled to succeed before a father's brother's great grandson, although the latter be descended through an elder brother of the plaintiff's. The law of primogeniture as applied to ancient Zemindaries is that the rules of Hindu Law applicable to an ordinary Hindu family are to be applied so far as they are compatible with keeping the estate in the hands of a single member of the family. The heir to be taken, therefore, seems to be the person who would be entitled to inherit if the family were divided, or if the property in question were self-acquired. In either of these cases it is certain that an uncle's son would inherit to the exclusion of the uncle's great-grandson. The strict rule of primogeniture for instance in the English Royal succession is not applicable to Zemindary estates. Frequently the rule seems to be that the fittest male member at the time of the last owner's death is entitled to succeed. In *Thakoor Jeebnath Singh* v. *The Court of Wards*(1) the assumption was that the nearest heir according to the ordinary rules of succession is entitled to succed to an impartible raj. In *Bhyah Ram Singh* v. *Bhyah Ugur Singh*(2) it is laid down that preference in succession is founded on superior efficacy of funeral oblations. Applying this test

(1) L. R., 2 I. A., p. 163; s. c. 15 B. L. R., p. 190.
(2) 13 Moore's I. A., p. 373.

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there can be no doubt as to the superior efficacy of oblations offered by a father's brother's son to those offered by a father's brother's great-grandson.

There is no evidence of any of the alienations having been for the benefit of the family. The decision of the Privy Council in *Girdharee Lall* v. *Kantoo Lall*(1) has not, it has been held by this Court in the *Shevagherry case*(2) altered the law as laid down in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (3), and it has been held that it still lay on a purchaser, or other alienee from the manager of a Hindu family, to show that the debt was contracted for a purpose sanctioned by Hindu law, or, that he had reason to believe it to be so.

Mr. Shephard on the same side.

Taking the view that the arrangement of 1829 was a mere family affair, the question arises—Who is next to the last holder? It is as if Muthusawmy had been the eldest, and, upon his line being exhausted one had to go to the next. The question is one of preference. What principle save that of religion is to govern? 2 Norton's Leading Cases in H. L., pp., 417, 419; 1 Sir T. Strange's H. L., pp., 122, 128, 145. The eldest son only is preferred because he can save his father from *Put*. These claimants do not represent the eldest son. The religious principle must be followed to limit the succession to persons within certain degrees in descent. It is submitted that the Court should look to the last holder, and not to the person who might have been entitled. It is essential that that holder should be a single individual and a male. It is not essential that he should be of the eldest branch of the family.

The mere suggestion of a *jus tertii* is not sufficient. This decree will bar the plaintiff—though it would not have that effect in an English action in ejectment. If there is no evidence of usage that is the defendant's fault. The

(1) L. R., 1 I. A., p. 321, s. c. 14 B. L. R., p. 187.
(2) Not reported. (3) 6 Moore's I. A., p. 393.

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Court does not look for evidence of usage unless no grant is forthcoming. Sudder Reports 1851, p. 9. On the terms of the grant see Sudder Reports 1858, p. 74. The purpose ceasing, or the reason of the grant, the grant also ceased. It is a resulting trust. *Ackroyd* v. *Smithson,* (1) *Campbell* v. *French* (2) 1 Story's Eq. Jur. s. 482.

Mr. O'Sullivan in reply.

The difficulty in this case arises from the fact that there is no evidence at all of any one person enjoying this estate alone. It is not clear that there was an impartible estate.

A pollium is in the nature of a raj and according to the plaintiff's contention is impartible, *Naragunty Lutchmeedevamah* v. *Vengana Naidu* (3). Unless some peculiar custom can be set up and proved one of two things must result —either the defendants can demand a partition, or, though they cannot demand a partition, they succeed by default.

In *Naraganty Lutchmeedevamah* v. *Vengana Naidu* (3) the Privy Council treated one of those small polliums as an estate in the nature of a raj and indivisible. It is very true that the Privy Council say that this incident, which is peculiar, must be strictly proved, but their Lordships have decided that estates were impartible because the parties admitted that they were.(4) There is abundance of evidence to show that this pollium was not such as that defined in *Naragunty Lutchmeedevamah* v. *Vengana Naidu* (3). There is no evidence that it was held by one person at a time. No pollium in this Presidency is enfranchised.

[INNES, J.—You will find some unsettled polliums in which the Government does not recognise the pollium, but it is treated as such by the family.]

(1) 1 Bro. C. C. 503; 1 White & Tudor's L. C., p. 690.
(2) 3 Ves. 321.
(3) 9 Moore's I. A., p. 61.
(4) In *Chowdhry Chintamun Singh* v. *Mussamut Nowlukho Konwari,* L. R., 2 I. A., p. 263, the Privy Council held that a custom of descent according to the law of primogeniture may exist by Kolachar or family custom, although the estate may be neither a raj nor a pollium, (p. 269).

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Yes—but in those unsettled polliums only one person is put forward as a Polligar. *Thakoor Kapilnauth Sabai Deo* v. *The Government.* (1)

The Court delivered the following

JUDGMENT:—These three Appeals (Nos. 82, 83 and 84 of 1875), are by the several defendants in three suits brought in the Subordinate Court at Madura by Seluckaiya Tévar for the recovery of certain villages said to constitute a pollium or polliaput called Padamathoor in that District. Each set of defendants appeal from the decree pronounced in their case by the Court below in the plaintiff's favor. The suits for the most part involve the same questions, the villages in each suit, and the titles advanced to them by the defendants being, however, distinct. The suits were heard together by the Lower Court, and the documentary and other evidence common to all has throughout been treated as given in all the suits.

We shall proceed to dispose of the first of the three appeals in which the appellants are the representatives and minor sons of Ponnusawmy Tévar, deceased. The suit from which this appeal arises is in the nature of an ejectment suit brought by Seluckaiya Tévar to recover four villages called Puvandy, Padamathoor, Yenady, and Kannariruppu, forming part of the polliaput of Padamathoor, which is described in the plaint as an ancient Zemindary impartible and inheritable "according to the custom of other similar Zemindaries and the Hindu Law," and the title therein set forth is that the plaintiff being the son of Muthuvaduganatha Tévar (who with his undivided brothers Muthusawmy and Chinnasawmy were the sons of Oyya Tévar) and being the only surviving grandson of the last named person is entitled to succeed as the next heir to the late proprietor Durai Pandien, who was the son of the said Muthusawmy and the grandson of Oyya Tévar.

Exhibit LXXXVIII.

Durai Pandien died without issue on the 7th of November 1861, and the present suit was not commenced until the month of October 1873.

(1) 13 B. L. R., p. 445.

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The written statements of the defendants deny that the estate was an ancient impartible estate ; they deny also the plaintiff's title to succeed thereto as heir ; they state that the last holder was a divided member of a Hindu family : also that he was competent to charge the estate, and to make alienations for purposes not prohibited by Hindu Law : and they claim to hold each of the four villages under titles derived from such charges and alienations.

Several issues were framed, which will be hereafter noticed, though not in the order in which they were disposed of by the Court below.

We shall consider first that which relates to the character of the estate claimed as the polliaput of Padamathoor. The evidence on this portion of the case is dealt with by the Sudordinate Judge in disposing of the 7th issue " Whether the estate of Padamathoor is partible or impartible."

The two documents [Exhibits G and H] mentioned in the judgment were admitted in evidence in the Lower Court without objection, and neither in the grounds of appeal to this Court nor in argument here has any objection been seriously urged against them. They are copies of original documents of which strictly some account should have been given and sufficient reasons assigned for the non-production of the originals. The explanation offered and not disputed was that they were produced in the litigation which formerly took place between members of the plaintiff's family and have since been lost or mislaid. They furnish the earliest information we have of these villages. The first document is dated in 1746, and is addressed to Padamathoor Oyya Tévar on whom it confers the ten villages therein named (among which are the villages sued for) described as included in the Padamathoor polliaput, belonging to " self" " paying the tax thereon at 3 fanams per kalam of seed land as had been fixed by the " *Peria Durai*" (great lord, chief lord) before."

Of the person making the grant we only know that he is suggested to be the same who (Ex. XLVI) is elsewhere

described as the son of the Setupathi, who held both Shevagunga and Ramnad, &c.

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The other document, a sunnud from the Nawab Wallajah dated 1773, purports to continue and to confirm, in recognition of services by him rendered to the State, Veddyoor Zemindar Paramattoor in the Zemindary or taluq of Padamathoor " as it had always hitherto been held."

Upon the occasion of the permanent settlement in 1803 of the Zemindary of Shevagunga (within the bounds of which the villages are situate) after the escheat and re-grant of the estate, Padamathoor Oyya Tévar, the then holder of Padamathoor (or his brother) was selected as the person with whom the settlement should be made ; and among the settlement papers there is a tabular statement of the resources and collections of the Shevagunga Zemindary importing that in the Kanoor Taluq, within which the villages lie, a sum of 1400 *suli pons* was payable as tribute by the Poligars. This sum, which is shown to be nearly equivalent to the sum of 600 Star Pagodas; which was payable by the holder of Padamathoor is thus treated as an asset of the Zemindary. Disputes afterwards arose between the Istimrar Zemindar of Shevagunga and his relations regarding certain family matters and also regarding the tenure of the villages (then only 8 villages in number) and the sum payable in respect thereof to the Zemindar. A suit was brought in 1823 by the Zemindar against his three nephews Muthu Vaduganatha, Muthusawmy, and Chinnasawmy to eject them for non-payment of the arrears of an enhanced rent claimed by the Zemindar. From the written pleadings in the suit it appears that the Zemindar so far from admitting that Padamathoor was a separate polliaput subordinate to the Zemindary and subject only to a quit-rent as alleged by his opponents distinctly averred that their interest in the villages was derived from himself subsequent to his accession to the Zemindary and that in effect it differed little if at all from the ordinary right of ryots of the Zemindary. The suit was compromised in 1826, and in the compromise it is declared that

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Exhibit XLIX.

" the defendants who had not only insisted on their right to the polliaput, but also advanced claims to the Zemindary, are not entitled to the Shevagunga Samasthanam, and that they should pay in each year to the plaintiff the circar kist of Parangi Pagodas 1,000 or 833 Star Pagodas for the 8 villages referred to in the plaint, and which were continued to be enjoyed by the defendants ere this ;" and that the defendants should enjoy the said villages for ever. The document also provided for the payment of arrears of kist due to the Zemindar.

The effect of this compromise apparently was that without recognition of the polliaput and in terms hardly consistent with its existence, the defendants were nevertheless continued in their tenure of the villages though at a rent enhanced beyond that fixed at the time of the settlement.

The permanent character of the tenure was recognized by the Zemindar, notwithstanding that by arrangement with his nephews he now succeeded in obtaining from them as if from ryots an enhanced annual payment.

No agreement between them could be effectual to alter or enlarge the Zemindar's rights in contravention of the provisions of the Regulation of Settlement. (Reg. XXV of 1802, Ss. 4—12.) Bearing in mind who the parties were to this arrangement and what were the circumstances attending the compromise, it appears to us to deserve but little weight either as evidence of the real character of the estate or as working a change in any of its incidents.

On the death without male issue of the Zemindar of Shevagunga in 1829, his eldest nephew Muthu Vaduganatha succeeded to the Zemindary and relinquished Padamathoor to his brother Muthusawmy the 2nd son of Oyya Tévar. The deed of relinquishment recites the death of the Zemindar and appoints Muthusawmy " as our next younger brother," Zemindar of the polliaput of Padamathoor. It proceeds thus :—" Now that Parvathavurthanee Nachiar, one of the Pattam wives of our abovementioned junior paternal uncle is

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pregnant, we shall act as usual in the matter of the said polliaput in the event of her giving birth to a son, but should she be delivered of a daughter, we and our offspring shall have no interest in the said polliaput, but you alone shall be the Zemindar and rule and enjoy the same allowing at the same time according to the former arrangement to the younger brother P. Bodha Gurusawmi Tévar the village assigned to him." Exhibit XLIV.

Muthu Vaduganatha and his descendants continued in possession of the Zemindary until they were ejected under the authority of the decree of the Privy Council in 1863. His brother Muthusawmy Tévar held the Padamathoor polliaput until his death in 1835 when his son Durai Pandien succeeded and held possession until his death in 1861.

Of the ten villages mentioned in the grant of 1746 eight only are named in the compromise of 1826, and of these villages it is admitted that one, the village of Chembur, having long ago been given to Vailai Nachiar, who was the sister of Muthu Vaduganatha for maintenance, has never been resumed, but has continued in the possession of her descendants or of those to whom it has been transferred by them.

Of the two other villages we have no account beyond this that they are stated in the answer of the defendants in the suit of 1823 to have been given to the defendants' ancestral *dayadies* (cousins.)

No evidence was adduced in the Court below to throw further light on the character of the estate or on the course of possession and enjoyment. The existence of the tenure in the middle of the last century is apparently recognized both by the superior lord and the ruling power; and in the settlement proceedings of 1802 the quit-rent payable to the Zemindar being alone included in the assets of the settlement, the polliaput is recognized though not expressly mentioned like some others (which are talooks in themselves) and is excluded therefrom. Although the litigation in 1823 between the Zemindar of Shevagunga and his nephews respecting Padamathoor, conducted as it was on both sides in a most hostile spirit, shows that the former then asserted

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rights inconsistent with the existence of the polliaput and the subsequent compromise contained no recognition of it, the conduct of the family afterwards, the mode in which the estate was dealt with, and held from the succession of Muthu Vaduganatha to the Zemindary until Durai Pandien's death in 1861, show that the old character of the estate was recognized. In our opinon it may fairly be deduced from the evidence that this is an ancient hereditary estate, and further that it has been transmitted according to a particular mode of descent and that it is impartible. We have direct evidence that it has been held ordinarily like a polliem by one person at a time, and there is also evidence of the impartible character of the property. Upon the question of impartibility, it is said that the mode in which Muthu Vaduganatha and his two brothers were sued first by the Zemindar in the suit brought by him in 1823, and afterwards in 1837 by Ramanadan Chetty and Lakschmanan Chetty the mortgagees, tend to disprove this. Considering the object of the litigation in each case all the brothers would, it might be expected, be therein made defendants. And even were this not so, no inference of any weight can be drawn from the fact that Muthu Vaduganatha was not regarded by the plaintiffs or their advisers as the only necessary party to the suits. But it must be admitted that in the first suit the three brothers by their answer, while insisting that the estate was a polliaput held by them in the same manner as their ancestors had enjoyed it, appear to assume that they themselves then had a joint and equal interest, a contention not consistent with their subsequent conduct when the eldest brother succeeded in 1829 to the Shevagunga Zemindary. A partition suit brought by Chinnasawmy against Durai Pandien in 1844, which was pending at the time of Chinnasawmy's death, and another suit by his widow in support of an alleged adoption are also referred to. These suits were dismissed nothing having been therein determined respecting the partible character of the property, which was denied by the defendant, and which until that time had never been

Exhibit LXXXVI.

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asserted by Chinnasawmy otherwise than in the answer to the Zemindar's suit.

The proceedings of the Inam Commissioner, in the year 1864, are also relied on which have resulted in separate settlements of several villages with those who were then their respective holders, no claim to the settlement having been advanced on behalf of the ex-Zemindar of Shevagunga in whose name some villages of the polliaput were recorded by the Collector.

It is true as has already been noticed that we have little direct evidence of the mode in which the villages have been held and enjoyed, and it is certain that some of the villages having been assigned for maintenance to members of the family have never been restored or recovered by the holder of the polliaput for the time being and are now found in the hands of strangers. There is nevertheless we think evidence of the fact that the Padamathoor estate has been transmitted for several generations by a peculiar mode of descent, and its special and impartible character has been recognized by the family except on the occasion of the dispute between Muthu Vaduganatha and his nephews in 1823, and has not since been questioned until the suit of Chinnasawmy in 1844. Neither the default of the holder or of the person entitled to the estate in respect of the non-resumption of particular villages assigned for maintenance or otherwise, nor the Inam Commissioner's proceedings, materially affect the weight of the evidence.

We conclude that Padamathoor is shown to be (apparently like other similar groups of villages in the Shevagunga Zemindary) a polliaput impartible, and therefore held by one member of the family and descending on a single heir.

The decision of the Court below on the 7th issue is to this effect.

The plaintiff claims the succession through his father Muthu Vaduganatha. The defendants deny his legitimacy, and the 1st issue in the case is whether the plaintiff is the son of Muthu Vaduganatha the son of the acknowledged Istimrar Zemindar of Shevagunga. Upon this

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issue evidence was given by members of the Zemindar's family and by others both of the fact of a marriage celebrated with considerable ceremony, and that the plaintiff both before and after the accession of his father to the Shevagunga Zemindary had always been treated by the Zemindar himself and by others in a manner not different from his other children. This evidence fully satisfied the Subordinate Judge, and all that we find alleged against the decision is that in the family pedigree given in the course of litigation which has from time to time occurred, the plaintiff's name has not found place, and that in an account of disbursements made to the relatives and servants of the Zemindar of Shevagunga for 1849 to 1854 by the guardian under the Court of Wards the amount allowed to Pacheathal the mother of the plaintiff is only ten Rupees, (Rs. 100 being allowed to Pichama Nachiar another widow) and that she is described as அன்னியஸ்திரி annia sthree=another woman= woman from another caste: the word used being the same as is used in referring to the admitted wife of the Zemindar.

The parties were both of the Sudra caste, the husband being of one part of the caste and the wife of another part or a sub-caste. Her condition in life before her marriage was much below his. The circumstances above mentioned may probably thus be sufficiently accounted for. However this may be they are insufficient to counterbalance the direct evidence in favor of the plaintiff's legitimacy, We concur with the Subordinate Judge's finding on this issue.

The defendants not only denied the legitimacy of the plaintiff but also asserted that Durai Pandien the last proprietor having left a widow Villai Nachiar who is still alive, the right of suit is with her and not with the plaintiff.

The Subordinate Judge regarding the suit not as raising any question between contending heirs, but as a suit brought to recover from strangers family property unlawfully alienated by a member, held that the plaintiff might sue subject to any question between himself and others concerning the right to the inheritance. It appears to us that the right of Durai Pandien's widow, which was the only right urged in

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the Court below as prior to the plaintiffs cannot be maintained for the estate of Durai Pandien was not a separate acquisition by him, following the course of succession prescribed for separate estate but an ancestral estate of the character already mentioned, the right to which would vest on his death without issue in the next collateral male heir of the undivided family in preference to the widow.

In this Court the defendants have urged a new ground of objection to the plaintiff's competency to sue which is said to arise on the plaintiff's deposition given in the suit. It is urged here that, "there are preferential heirs to the estate who are descendants of an elder branch of the family." We find that the plaintiff in his cross-examination after mention of Muthu Ramalinga Shervai, the son of the Istimrar Zemindar whose legetimacy was questioned in the suit of 1823, says that his, the deponent's elder brother had two sons (by a kept mistress) and that there are three grandsons of his still living. The enquiry was not, so far as is shown, fully pursued, nor was the Court asked to decide upon the matter, and the issue already noticed respecting the prior title of Durai Pandien's widow was alone tried and disposed of. A decision unfavorable to the defendants having been given, they now seek in appeal to bring forward for the first time an objection to the plaintiff's right to sue which they declined to urge in the Court below. We think they cannot fairly be permitted in this stage of the case to defeat the suit by such an objection. If there are other and nearer heirs, their rights will remain unaffected, and any decree to be now given may make reservation of such rights.

The plaintiff for the purposes of the present suit may be regarded as entitled to the succession, and it is unnecessary to consider the arguments which were addressed to us on the subject of the course of descent of this property on the assumption that there were in existence descendants of his elder brother.

Issues were framed on the subject of the alleged relinquishment of Padamathoor by Muthu Vaduganatha to his brother Muthusawmy in 1829, and on the effect of that do-

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cument (which was not in fact disputed) as in itself a bar to the suit, the Istimrar Zemindar having left no male issue; and also in regard to the defence which was set up that the suit was barred by the Law of Limitations.

The appellants' contention on this part of the case, we understand to be that the instrument of relinquishment precludes all claims on the part of Muthu Vaduganatha's descendants, that the family can no longer be regarded as they admittedly were originally as a joint and undivided Hindu family, and that under the terms of the Limitation Act XIV of 1859 the plaintiff's claim is barred because Muthu Vaduganatha and his descendants are not shewn to have participated in the income or profits of Padamathoor, since the year 1829. Although the fact of the division of the family in or before the year 1829 was alleged by the defendants in their written statement, no evidence of this was adduced, and it is only from the mode of enjoyment of the property and from the effect attributed to the instrument of relinquishment that this is inferred. We think it clear that the family must still be regarded as a joint Hindu family, and that Muthu Vaduganatha's renunciation of his right in 1829, whatever its operation on himself and his descendants in possession of the zemindary of Shevagunga, cannot operate further, and that upon the death of Durai Pandien without issue, the right of succession which then opened to the members of this joint family was not affected by such renunciation. The words "we and our offspring shall have no interest in the said polliaput, but you alone shall be the Zemindar and rule and enjoy the same" must be construed with due regard to the person using them and the occasion when they were used. They refer to the estate and rights of the new so-called Zemindar of Padamathoor, and amount to a declaration that the polliaput shall be enjoyed by him exclusively, the Shevagunga Zemindar disclaiming any joint interest. They are not a release by the latter for himself and his heirs of all future rights of succession which might accrue to them as members of an undivided family. The possession of Padamathoor by Muthusawmy after this relinquishment cannot be regarded as a

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new and separate acquisition, and no question upon the Law of Limitation can arise between the different members of the joint family in respect of the property thus held by a single member.

Upon a wrongful alienation of the property to a stranger by the holder for the time being, and not before, the question of limitation may arise, and under the 6th issue the defendants further contended that the suit was in this view barred.

The Law of Limitation which governs this suit is Act IX of 1871. According to clause 145 of the 2nd Schedule of the Act, the time of limitation for a suit like the present (which has not otherwise been specially provided for) is 12 years from the time when the possession of the defendant or of some other person through whom he claims became adverse to the plaintiff. Several of the defendants in the three suits hold under mortgage titles, and as to these no question of limitation arises. In one instance only a title by purchase from Durai Pandien (of the village of Puvandy) in December 1860 is relied on, and as this was more than 12 years before the suit, it is necessary to determine whether the possession of the purchaser Ponnusawmy Tévar, through whom the appellants claim, became adverse to the plaintiff at that time. It must, we think, be held that Ponnusawmy Tévar's possession of the village under his purchase from Durai Pandien first became adverse to those entitled to claim this village upon the death of Durai Pandien in November 1861, and not before, and that computing from the date of his death (7th November 1861) this suit is brought within the appointed period. The vendor was in the condition of the family the owner of the property (subject it may be to claims for maintenance in others), and was entitled to dispose of it for his own purposes to the extent of his life interest but not beyond.

Upon the issue of limitation and the connected issues, our decision is in concurrence with that of the Subordinate Judge.

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There remains for consideration the validity of the several defences set up under titles by mortgage and sale in bar of the plaintiff's claim.

This suit is, as has already been stated, in the nature of an ejectment suit brought by the plaintiff as heir of the last proprietor to recover the property from strangers, and notwithstanding the delay in bringing the suit of which no clear explanation has been offered beyond the suggestion of the want of the necessary funds, the plaintiff is entitled to recover unless the defendants show that the several charges and alienations made by the late proprietor Durai Pandien were duly made by him so as to bind the estate.

As to the factum of each charge and alienation there is no dispute, and the payments by the defendants have not been questioned by particular evidence. The contention on the plaintiff's part in the Court below was that the defendants failed to show that the estate was liable beyond the life of Durai Pandien, and the decision of the Subordinate Judge upon this was in the plaintiff's favor, the defendants having adduced no reliable evidence to support a charge against the estate. Former debts had been discharged, but there was no proof that such debts were themselves legal charges upon the estate, and it had been shown that only a small fraction of Rupees 5,000 remained undischarged of the debts of former proprietors at the date (1854) of one of the earliest of Durai Pandien's mortgages.

Upon the authority of a recent decision of the Privy Council, it was urged on behalf of the defendant that in the circumstances they should not be put to the proof of a legal necessity for the creation of the charges; but the Subordinate Judge held, citing a decision of this Court, that the burden of proof that the debts were contracted fairly and for family purposes still lay upon the defendants and that they were bound to discharge it. The judgment (12th May 1874) of the Lords of the Judicial Committee of the Privy Council on the appeals of *Girdharee Lall* v. *Kantoo Lall* and *Muddun Thakoor* v. *Kantoo Lall*(1) is the Privy

(1) L. R., 1 I. A., p. 321; s. c., 14 B. L. R., (P. C.) p. 187.

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Council decision referred to by the Subordinate Judge. It was contended for the appellants that according to this decision, the Subordinate Judge was in error in requiring from them, evidence in support of their claim beyond that which they had given. Indeed the appellants' arguments went the length of insisting as they had before done in their written statements that the late proprietor was by the Hindu Law fully competent to alienate and charge the estate as he pleased, and that his acts could not be questioned by the next but even if this were otherwise, they were relieved as the heir, law now stood from the burthen of proving a necessity for the several charges and alienations.

The appellants' contention is, we think, based on a misapprehension of Durai Pandien's true position and powers, and of the decisions cited.

At the time of the alienations, his ownership of Padamathoor did not resemble the ownership of the two sons of Kunhya Lall in the case cited, in the property which had descended to them and which they burdened with their debts, nor is the plaintiff here in the position of the plaintiffs in that case who sued in their father's life-time, and probably, as is stated, at his instigation "to turn out the *bonâ fide* purchaser who gave value for the estate."

Durai Pandien was a member of an undivided Hindu family, subject to the law of the Mitákshárá, and the estate held by him, as representing the second branch of the family, although subject to the peculiar incidents which have been mentioned, and possessed by him free from present coparcenary rights in others was not entirely at his disposal for his own purposes. We think he should be regarded as possessing only the qualified powers of disposition of a member of a joint family with such further powers, or it may be with such restrictions as spring from the peculiar character of his ownership, and that these powers fall short of a right of absolute alienation of the estate.

If we are right in this it is to be seen whether, as the law stands, the appellants can justly object that they were

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subjected to the burthen of proving that the monies advanced by them were advanced for necessary and proper purposes under circumstances which entitle them to claim a charge upon the estate.

The rule as stated by the Privy Council in the case reported in *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree*(1) has not, so far as we are aware, been departed from and is applicable here, although the alienations are by a member of a joint family not by a manager.

"Their Lordships think that the question on whom does the *onus* of proof lie in such suits as the present is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances and must be regulated by and be dependent on them."

Of the dictum there quoted, to the effect that if the factum of a deed of charge be established and the fact of advance be proved the presumption of law is *primâ facie* to support the charge and the onus of disapproving it rests on the heir, it is observed that it "must be read in connection with the facts of that case. *It might be* a very correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father on the ground of the alleged misconduct of the father in extravagant waste of the estate."

The later judgment of the Privy Council was pronounced in a suit of this particular character with the difference that the defendants in the suits were *bonâ fide* purchasers of property sold or attached and about to be sold in execution of decrees in contested suits in which the creditors' claims had been established against their debtors.

Whether the appellants in this case can claim to be regarded as *bonâ fide* purchasers, or are otherwise entitled to any relaxation of the rules of proof in favor of their claims, will appear on a statement of the circumstances in

(1) 6 Moore's I. A., p. 393.

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which these claims are founded. Whatever presumption may arise unfavourable to the respondent in consequence of the long delay in the institution of the suit, it cannot be said that the respondent (the plaintiff), is here seeking to get rid of charges on ancestral property at the instance of or in collusion with the person by whom they were made.

The appellants claim the four villages of Padamathoor, Puvandy, Yenady, and Kannariruppu by distinct titles.

Two of these villages Puvandy and Yenady like the three villages of Arasanoor, Pappagudy, and Kanakkangudi claimed in the other suits, were, so far back as the year 1827, charged with sums amounting to Rs. 23,000 for purposes connected with the family benefit, and from the Sudder Court's decision in Appeal Suits 3 and 4 of 1839, it appears that a balance on account of principal and interest of 38,820 Rupees was then due which the plaintiffs were declared entitled to receive from the five villages mentioned.

In 1854 a balance of 5,417 Rupees remained due under this decree for which, together with other sums then alleged to be due under decrees obtained in subsequent suits, the two villages of Puvandy and Padamathoor were, under a compromise arrangement made in a suit, mortgaged to the decree-holders for a period of ten years, the usufruct being given in lieu of interest.

In November 1860, Durai Pandien being in prison (it is recited in the deed evidencing the charge) for the amount of a decree then recently obtained, borrowed from Ponnusawmy Tévar a sum of 50,000 Rupees for this and other purposes (including 5,480 Rupees alleged to be paid on account of sums borrowed by Durai Pandien for his household expenses) and therewith it is stated discharged the amounts of this and other decrees (including the balance due under the decree of the Sadr Court); receiving from the mortgagees an assignment of the village of Puvandy according to the terms of the compromise of 1854 under which it had been acquired. In the following month Ponnusawmy Tévar purchased the village from Durai Pandien for the sums of 100,000 Rupees, of which 13,500 Rupees is

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in the deed stated to have been received in cash. The mortgagees had then been in possession of the two villages, since 1854 and by the law in force were accountable for their receipts from the mortgaged property. The appellants rely on this purchase and the payments made to Durai Pandien and his creditors. To the extent to which the original charge remained unsatisfied in 1860 when the advance by Ponnusawmy Tévar was made, he and his representatives would be entitled to support a claim against the estate. Of the old debt only Rupees 5,487 remained due in 1854, and the mortgagees having had on account of this and other claims the usufruct of both villages for 6 years, it may be assumed that no larger sum was due in 1860.

Except as to this sum we have no evidence to explain the expenditure beyond the alleged fact that it was in satisfaction of the decrees already referred to and of other decrees vaguely mentioned in the purchase deed. The first payment of 50,000 Rupees procured it is said Durai Pandien's discharge from prison and a portion of this (5,480 Rupees) with the sum of 13,500 Rupees already mentioned are represented to have been paid to Durai Pandien in cash or for his household expenses.

It is to the documents showing these transactions that the defendants refer in the 5th paragraph of their written statement where they say that "for a considerable time prior to such sale the said village was in the possession of certain Chetties by virtue of mortgages, razinamahs and decrees for debts incurred by the said Muthu Vaduganatha Tévar and Muthusawmy and the said Oyya Tévar. The encumbrances on the said village, amounted to about 86,000 Rupees, which sum was paid by Ponnusawmy Tévar to the creditors shortly before the sale of the village to Ponnusamy Tévar."

The defendants, without expressly relying on the defence that there was a *bonâ-fide* purchase for value without notice by Ponnusawmy, sought to support the purchase by allegations not only that these were old precedent debts of ancestors not before questioned which were satisfied by the

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purchaser, but also, as the recitals in the purchase deed and prior documents are apparently meant to show, that the pressure on the estate or on the late proprietor at the time of the discharge of the debts was such as to justify the payments made in good faith by Ponnusawmy.

The condition and character of the vendor at that time and for many years before that time is beyond dispute, and is thus described in one of the appellants' exhibits which was read. "It is well known in the history of litigation in this district that the late Zemindar of Padamathoor was as the phrase is, head over ears in debt and that he was in the habit of mortgaging and hypothecating over and over again every scrap of land he could lay claim to." According to one of the plaintiff's witnesses "he would take 400 or 500 Rupees from the Chetties and grant them documents for large amounts." A witness for the defendants says "I do not remember whether it was the custom of the Zemindar to receive 1,000 Rupees and grant documents for 10,000 Rupees or not. It is true he granted documents in that manner to some people." Without attaching undue weight to either of these two witnesses evidence we have here a concurrence of testimony on both sides to the reckless extravagance of Durai Pandien.

A principal creditor in the transaction which immediately preceded the sale was Narrain Chetty; his ancestors [the plaintiffs in the suit brought in 1837] had long had money lending transactions with the family. These persons and Ponnusawmy Tévar were residents in the district. The name of Ponnusawmy Tévar is prominent in the family litigation which for many years had taken place. Connected with the family he was admittedly well acquainted with its affairs. He himself occupied for many years some place of trust or management in the Ramnad Zemindary. It is not disputed that in the position of these parties the inference may justly be drawn that Ponnusawmy Tévar in his dealings with the late proprietor cannot be regarded as a stranger without knowledge of his true position and of his antecedents and circumstances. By the mention of mortgages,

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razinamahs and decrees in the written statement and the purchase deed and elsewhere it is intended we understand to assert that the advances made were upon securities which had formed the subject of suits and had been substantiated in a Court of Justice. No doubt in some instances there had been, as in the suit brought in 1829 against Muthu Vadugunatha, Muthusawmy, and Chinnasawmy, adjudications in contested suits, but the general character of the transactions between Durai Pandien and his creditors notwithstanding the invention of decrees of Courts was, it is admitted on all sides, very different from that which is suggested. Ordinarily the so-called decree was merely a mode of recording formally a previous compromise arrangement (usually also hypothecating property mentioned therein) the terms of which being embodied in an application made by the parties were filed by leave of the Court. No formal order or decree was subsequently drawn up, but in accordance with an irregular practice which formerly prevailed in this and some other districts process of execution was sometimes applied for and issued as if upon a formal decree to enforce the rights of the parties to the compromise.

Such being admittedly the general character of these razinamah arrangements, it cannot, we conceive, be said that the advances alleged to have been made by Narrain Chetty and others are in any way substantiated by such proceedings.

The existence of old unquestioned debts of Muthu Vadugunatha and Muthusawmy has not been shewn by trustworthy evidence except in the single instance of the Sudder Court decree for the satisfaction of which both the Zemindar of Shevagunga and the owner of Padamathoor were liable; and we find no reason to differ from the Subordinate Judge's conclusion that of the ancestral debts and particularly of this decree only a small portion [5,480 Rupees] remained undischarged in 1854 at the date of the usufructuary mortgage. There is certainly some oral evidence showing ancestral debts, but it is of a description which, without further corroboration than it has received, we could not safely receive to charge the estate.

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Durai Pandien succeeded to the property on his father's death in 1835 more than 10 years before the date of the first of the razinamah decrees mentioned in the deed of sale, and it cannot be assumed that the sums mentioned in these documents were sums advanced to his ancestors. If like the sum of 13,500 Rupees mentioned in the purchase deed and other like sums they were in truth advanced to him or on his behalf, such advances cannot without further proof in this case sustain a charge on the property. In respect only of the sum of 5,480 Rupees due under the Sudder Court's decree has any ground been shewn and as to this even admitting that on adjustment of the mortgage accounts, (on the lowest estimate of the annual proceeds of this village) anything remained due the amount would not be such as to justify a sale of the property. If the advances were not otherwise binding on the estate the additional facts alleged in the purchase deed and the previous document of Durai Pandien's release from jail, and of his protection from arrest by means of the monies paid by Ponnusawmy Tévar could be of no avail to the latter, who was, we are satisfied well aware of Durai Pandien's previous career of extravagant waste.

The estate which he inherited was, as is apparent from this litigation, one of considerable value, and we cannot presume in the appellant's favor in the absence of trustworthy evidence that the income fell short in amount what was reasonably sufficient for the maintenance of the surviving members of this branch of the family.

If the late proprietor possessed by Hindu Law only a limited and qualified power of disposition, his acts of waste resulting in the alienation of the whole estate cannot be regarded as valid charges and alienations on such proof as has been here given. The devices of razinamah decrees and of process of execution issued thereon against his property and person can give no support to loan transactions otherwise not established as valid charges on the estate. To hold otherwise would be apparently to place ancestral property

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completely at the disposal of any prodigal owner of the character of Durai Pandien.

The village of Padamathoor is said to have been mortgaged by Durai Pandien "to Udayappa Chetty and certain other Chetties" from whom Ponnusawmy Tévar took an assignment. Udayappa Chetty having in respect of the amount due by Durai Pandien on a bond for 7,475 Rupees obtained a decree and being himself the assignee of other "razinamah decrees" against Durai Pandien charging this village, transferred his interest to Ponnusawmy Tévar in the year 1868.

Dada Miya, the 8th defendant in this suit (the assignee of another creditor) having a similar charge, sued Durai Pandien's widow as his representative and in execution of the decree obtained in the suit sold, and himself became the purchaser of, the equity of redemption [as it is stated in the written statement] in the village which he has since assigned to the appellants to secure a sum of Rupees 4,825.

We have, respecting this village, no evidence beyond the fact that the appellants are shown to stand in the place of Udayappa Chetty and others who had in former years advanced monies to Durai Pandien and [in one instance] to his wife; and who had obtained securities of the description already mentioned. Further, the appellants, or Dada Miya, have acquired whatever interest may have passed upon the sale in execution of the decree obtained against Durai Pandien's widow. Upon this evidence we cannot hold that the debt is a charge upon the village as against the present plaintiff.

The village of Yenadi is, in the written statement, said to have been mortgaged at different times to Mangalashwara Nachiar and others. In January 1856 $\frac{1}{16}$th of the village which under a razinamah decree had been mortgaged to the plaintiff in a suit [No. 11 of 1853] brought against Durai Pandien for a sum of Rupees 1,688 was transferred to Mangalashwara Nachiar, wife of one Pula Tévar residing at Ramnad. In August 1867, Ponnusawmy Tévar on payment of a decree of 4,800 Rupees received $\frac{1}{4}$th of the village

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from Muthu Chetty who is described as having obtained a transfer of Mangalashwara Nachiar's mortgage interest. Previously in 1859 Ponnusawmy Tévar had obtained from other persons a transfer of their interest in a mortgage for a term of ten years of one half this village on payment of 13,743 Rupees. The purchase by him of the equity of redemption in this village was in March 1866 when in execution of a decree obtained by creditors against Durai Pandien [Suit No. 1 of 1859 in the Civil Court of Madura] in his lifetime [his widow alone being then described as his representative] his rights and interests in the village were offered for sale and Ponnusawmy Tévar became the purchaser.

Admitting the fact that Ponnusawmy Tévar paid former debts and took assignments of the securities, this alone is not sufficient to enable him to claim a charge on the village against the plaintiff.

As to the purchase of the equity of redemption it is not shown that the decree in the Suit No. 1 of 1859 differed in any respect from the razinamah decrees obtained by other creditors, nor is it explained how proceedings in execution having been against Durai Pandien's widow alone as his representative the property now in question could be affected. Even assuming the decree to have been one whereby the claim of the creditors was substantiated, the proceedings in execution could not be effectual to pass to the purchaser any right or interest in the village.

The village of Kannariruppu, the equity of redemption of which is said to have been purchased in 1866, is stated like Yenadi to have been mortgaged at different times to persons whose mortgages were afterwards redeemed. The evidence in respect of this village does not carry the case in support of the charge further than in the case of Yenadi.

We are of opinion that the appellants have failed as to the four villages to shew that they are entitled as purchasers or mortgagees to withhold from the respondent the ancestral estate which he has inherited.

We shall affirm the judgment of the Subordinate Judge and dismiss the appeal with costs.

Appeal dismissed with costs.

Appellate Jurisdiction. (a)

Regular Appeal No. 83 *of* 1875.

RAMASAMI CHETTI and 3 others.....(*Defendants*) *Appellants.*
SALUCKAI TE'VAR *alias* OYYA TE'VAR..(*Plaintiff*) *Respondent.*

Proceedings against the widow of the deceased mortgagor alone in execution of a decree obtained against the mortgagor (the widow having merely a right to maintenance) cannot be effectual to pass to the purchaser at the sale in execution any right or interest in the property mortgaged.

1875. *November* 10. *R. A. No.* 83 *of* 1875.

THIS was a regular appeal against the decree of the Subordinate Court of Madura in Original Suit No. 89 of 1873.

Mr. O'Sullivan and *Bhashyam Iyengar* for the defendants, appellants.

The *Advocate General, Mr. Tarrant, Mr. Shephard* and *Sashier* for the plaintiff, respondent.

This appeal and Regular Appeals No. 82 and 84, were heard together. For the arguments of Counsel see Regular Appeal, No. 82 of 1875.(1)

The Court delivered the following

JUDGMENT :—Ramasawmy Chetty and three others are the appellants. The suit was brought against them for the recovery of Arasanoor and Pappangudy, two villages of the Polliaputt of Padamathoor and was in all other respects like the suit brought by the plaintiff against Ponnusawmy Tévar's representatives.(1) The appellants claimed to be mortgagees of these villages and purchasers of the equity of redemption.

These villages with three others were in 1827 mortgaged to or charged in favor of the father of Ramanadan Chetty and Lutchmanan Chetty, and, by a decree of the Sudder Court made in 1839, this charge was established, and the amount due in respect of it was ascertained to be 38,820 Rupees. In 1854 this amount having been in great part satisfied, Narrain Chetty, representing the persons abovenamed, obtained a fresh security for the sum of 5,487 Rupees,

(a) Present :—Sir W. Morgan, C. J., and Innes, J.

(1) *Ante* p. 155.

1875. *November* 10. *R. A. No.* 83 *of* 1875.

the balance then remaining due and for other monies alleged to be then due from Durai Pandien. The villages of Puvandy and Padamathoor were mortgaged to him for 10 years to secure the sum of 48,874 Rupees, being the amount then ascertained to be due to him.

The two villages now in question were about the same time mortgaged for 10 years to Aroonachella Chetty, the appellants' father, to secure a sum of Rupees 17,692 said to be due under a decree in a suit (Original Suit No. 1 of 1852) on the file of the Adalut Court of Madura and another decree of the Subordinate Court. Having obtained a transfer of the decrees, an arrangement by way of compromise was made to the above effect and filed in Court. It was thereby stipulated that Aroonachella Chetty should receive the usufruct in lieu of interest for the term of mortgage, and that on non-payment of the principal sum the amount should be recovered "through process of the Court" from the two villages and the defendants' other property. According to the written statement these villages were, "under the two razinamahs filed in the Civil Court on the 3rd February 1860," mortgaged to 1st defendant's father by the said Oyya Tévar *alias* Gouri Vallabha Tévar for Rupees 1,28,133-13-8. Shortly before the date mentioned an arrangement similar to that already noticed was made and filed in Court which, after referring to the compromise of 1854 and to several razinamahs in suits brought in the three previous years and ascertaining an amount of 106,928 Rupees to be due for principal and interest, provided for an extension of the mortgage term for 3 years. In the event (it was stipulated) "of any obstruction at any time henceforward as to the enjoyment of the two villages under mortgage." Aroonachella Chetty was declared entitled to recover "by means of a precept of the Court the principal and interest on the responsibility of the villages and of the defendants' other property."

About the same time another like arrangement was made and filed relating to a sum of 21,205 Rupees.

1875. November 10. R. A. No. 88 of 1875.

Under these arrangements Aroonachella Chetti was entitled, subject to an adjustment of accounts under Regulation XXXIV of 1802, Section 9, to hold the village during the mortgage, and under a practice then prevailing process of execution would have been issued on his application against the villages and against the debtors' other property.

The appellants also claim to be purchasers (in the name of Ramiengar, the 4th appellant) of the villages at a sale in execution of a decree obtained in 1866 by one Meenachi Ammal against Vellai Nachiar *alias* Karaka Nachiar the widow of Durai Pandien.

The plaintiff in that suit had obtained in 1859 a decree by consent or after compromise against Durai Pandien for a balance of 870 Rupees due on account of a bond given for 1,559 Rupees. The terms of the compromise provided for a payment of this sum in two months, and on failure for the levy of the amount by Court precept from all the resources of the defendants' Zemindary.

Five years after her husband's death a suit was brought against Vellai Nachiar for 2,358 Rupees said to be due under this compromise, and the defendant not appearing, the Court gave a decree for the amount. In the judgment though not in the decree the defendant is described as the legal representative of Durai Pandien. In execution of this decree, the right, title and interest of Vellai Nachiar, the widow of the deceased Zemindar Durai Pandien, in the village was sold to the appellants.

As upon Durai Pandien's death his widow, beyond her right to maintenance, derived no interest in the property and in regard to it was not her husband's representative, it cannot, we conceive, be held that by this sale any further right passed to the appellants. Whatever claim they may now have must rest upon the mortgage title advanced by them. In support of this we have at the most evidence of sums advanced to the late proprietor and secured in the manner we have stated. So far as the advances made by Aroonachella Chetty or his father can be traced they may be regarded as advances made to Durai Pandien. The profits

1875. November 10. R. A. No. 83 of 1875.

of the villages were adequate to the discharge of encumbrances of an earlier date. Durai Pandien was not authorized to sell the estate, or to raise money, or incur debts for his own extravagant purposes and without limit. Notwithstanding the long delay on the plaintiff's part he is entitled to require from the defendants further evidence than they have given in support of their charge, and, in the absence of of such evidence, we hold that the Court below has rightly decided that the plaintiff was entitled to a decree.

This appeal will be dismissed with costs.

Appeal dismissed with costs.

Appellate Jurisdiction. (a)

Regular Appeal No. 84 of 1875.

KOSALA RAMA PILLAI and another...(*Defendants*).*Appellants.*
SALUCKAI TE'VAR *alias* OYYA TE'VAR.(*Plaintiff*). *Respondent.*

Debts undertaken by the holder of an ancestral and impartible Polliaput in respect of decrees obtained against his mother cannot by such undertaking become a charge upon villages forming part of the estate.

Razinamah arrangements not made decrees of Court but irregularly acted upon as if they had been so made do not alone substantiate advances alleged to have been made.

1875. November 10. R. A. No. 84 of 1875.

THIS was a regular appeal against the decree of the Subordinate Court of Madura in Original Suit No. 107 of 1873.

Mr. O'Sullivan and *Bhashyam Iyengar* for the defendants, appellants.

The *Advocate General, Mr. Tarrant,* and *Mr. Shephard,* for the plaintiff respondent.

This Appeal and Regular Appeals, Nos. 82 and 83 were heard together. For the arguments of Counsel see Regular Appeal No. 82 of 1875.(1)

The Court delivered the following

JUDGMENT :—Kosala Rama Pillai and Vasudéva Pillai, who are the appellants in Regular Appeal No. 84 of 1875

(a) Present :—Sir W. Morgan, C. J., and Innes, J.

(1) *Ante* p. 155.

1875. November 10. R. A. No. 84 of 1875.

purchased the village of Kanakkangudi, one of the villages of the Polliaput of Padamathoor, from one Fischer on 7th September 1864.

In their written statement they merely mention the fact of purchase. The have not either in allegation or in evidence put forward anything in the nature of a defence to the effect that they are *benâ fide* purchasers without notice for a valuable consideration, although the fact that Fischer received from them the purchase money mentioned is not disputed.

The appellants must we think be regarded as occupying the place of Fischer, and it is necessary to ascertain what his position was before the sale by him.

His title commenced in 1854 when three compromise arrangements of the kind already described were filed in Court on behalf of himself and the late proprietor of Padamathoor purporting to charge for Fischer's security different portions of the village. These all bore date the 17th day of October 1854, and were respectively made to secure payment of the sums of Rupees 7,000, 6,750 and 3,250, the two latter sums being due to Fischer for money lent.

Under these razinamah decrees, Fischer entered into possession which he was entitled to do by the terms of the arrangements according to which a power of sale (by Court process) was given to him on non-payment of the money after 4 years. On the expiration of this time Fisher caused the village to be sold in execution of the decrees.

The debt for 7,000 Rupees to which the first of these decrees relates arose thus—

Fischer obtained by purchase and transfer from the plaintiff in an old suit (which had been decided by the Sudder Court ultimately, the appeal being then numbered 23 of 1844) a decree for a sum of 3,910 Rupees which with interest is computed at the time of the compromise to amount to 7,000 Rupees. This suit was brought against Vijayalakshmi Nachiar the mother of the late proprietor of Padamathoor who had, according to the recital in the compromise of 1854,

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of 1875.

undertaken to pay the "transfer plaintiff" Fischer the sum of 7,000 Rupees then ascertained to be due.

In regard to this decree Fischer as the transferree must be considered as in effect the holder of the decree in the same sense and with the same right as the original plaintiff, except in so far as the arrangement of 1854 may have strengthened his claim.

Upon these three decrees process of execution having issued on the application of Fischer in January 1859, the right, title and interest of Durai Pandien in the property was attached and sold, Fischer himself becoming the purchaser. It is upon the title thus obtained by Fischer that the appellants rely. No evidence was adduced by them to show under what circumstances Fischer's advances were made. The facts that the advances were made and that they were secured by the razinamah decrees are alone relied on, and they are insufficient to support the charge. The debt undertaken by Durai Pandien in respect of the decree obtained against his mother could not by such undertaking become a charge upon the village. The subsequent purchase by Fischer himself in execution of his own decrees we conceive in no way varied or strengthened the claim of Fischer against the property.

No debt or claim affecting the property having been shown, the plaintiff was rightly held to be entitled to a decree. We shall affirm the judgment and dismiss this appeal with costs.

Appeal dismissed with costs.

1875.
November 8.
R. C. No. 72
of 1875.

Appellate Jurisdiction. (a)

Referred Case No. 72 *of* 1875.

RAMANJEM NAIDOO.....*Plaintiff.*
RUNGIAH NAIDOO.....*Defendant.*

A judge appointed under Section 3 of Act X of 1870, to perform the functions of a judge under the said Act generally within the local limits of the ordinary original jurisdiction of the High Court, has no power to award costs in respect of proceedings under Section 39, Part IV of the Act.

THIS was a case referred for the opinion of the High Court under Section 55, Act IX of 1850 by Mr. T. M. Busteed, the 1st Judge of the Madras Court of Small Causes in Suit No. 20535 of 1875.

No Counsel were instructed.

The Court delivered the following

JUDGMENT :—The question submitted is whether the Judge appointed under Section 3 of Act X of 1870 to perform the functions of a Judge under the said Act generally within the local limits of the ordinary original jurisdiction of the High Court has power under the Act or otherwise to award costs in respect of proceedings had before him under Section 39, Part IV (apportionment of compensation) of the Act.

The High Court (a majority) is of opinion that the Judge has not power to award costs in the case stated.

The jurisdiction being of a special nature and exercised under a special enactment must be strictly confined within the limits given by the statute.

(a) Present—Sir W. Morgan, C.J., and Innes, Kernan and Kindersley, J. J.

Original Jurisdiction. (*a*)

Original Suit No. 196 *of* 1875.

THE SENNAY POORASAY HINDU JANANOO-KOOLA NIDHI (*Limited*).....*Plaintiff.*

THAYAR AMMAL.....*Defendant.*

A Society, which came into existence after Act X of 1866, but was not registered, until some time afterwards, under the provisions of that Act sued by some of its officers to recover debts arising out of transactions entered into before Registration.

Held, that such Society could not recover in the suits in their present form, as it was not, before Registration, an Association authorized to sue in the name of an officer.

1875. *September* 30. *O. S. No.* 196 *of* 1875.

THE plaintiff *Nidi* or Fund, by its President, Secretary, Treasurer and Law Agent, sued the defendant, a subscriber to the said fund, for recovery of Rupees 1,080-10-6 balance of principal and interest due up to the 15th April 1875; interest on rupees 900 and rupees 300, respectively, from the 16th April 1875 to date of payment at annas 8-4 pice *per cent. per mensem* according to Rules 15 and 18 of the Fund; and costs. The plaint prayed that, in default, the house and ground No. 32, Vurdier Street, Peddoo Naick's Pettah, in the Black Town of Madras, be sold, and the sale proceeds applied so far as they extend towards the payment of the said loan.

The plaint alleged that on the 18th February 1872, the defendant borrowed and received from the Managing Committee of the said Fund the sum of Rupees 900 and executed a mortgage of the said house and ground No. 32, Vurdier Street, Peddoo Naick's Pettah, in the Black Town of Madras as a security for the re-payment of the said Rupees 900, interest thereon at annas 8 and pice 4 *per cent. per mensem*, and the defendant's monthly subscription of Rupees 12 which was to go towards the payment of the principal according to the Rules of the Fund.

The defendant borrowed and received a further sum of Rupees 300 on the 3rd March 1872 and executed a Promissory Note in favor of plaintiff or order on demand. The said Promissory Note provided for the payment of interest at the rate of annas 8 pice 4 *per cent. per mensem*.

(*a*) Present:—Innes, J.

1875. *September* 20. *O. S. No.* 196 *of* 1875.

The defendant is in possession of the premises as tenant under a Tamil rental agreement executed on the 18th February 1872 providing for the payment of Rupees 6-4-0 monthly before the 20th day of each month.

The defendant having paid only Rupees 590-8-1 on account of her debt, this suit is brought for the recovery of the balance.

The defendant alleged that she dealt with the Hindu Jananookoola Nidhi established in 1869, but which was never registered under Act X of 1866, and which no longer exists. She denied that she dealt with the Fund represented by the plaintiffs. She pleaded, among other things, that the Nidhi established in 1869 not having been registered is incapable of suing; that she did not receive the whole of the consideration mentioned in the mortgage and the Promissory Note; that she has paid her subscriptions and interest mentioned in the mortgage in full as well as the principal and interest in the Promissory Note; that the claim on the said Note is barred.

On the 22nd July 1875, the Mr. Justice Kernan *settled* the following amongst other issues:—

"Whether plaintiffs are competent to sue, the Company not having been registered at the date of the mortgage and Promissory Note?"

Balajee Row, Vakil for the plaintiffs.

Gurumurti Iyer and *Kristnasawmy Chetty*, Vakils for the defendant.

Cur. adv. vult.

This case and Original Suit No. 197 of 1875 (next case) were heard together. The judgment of the Court upon both suits will be found at page 195.

Original Suit No. 197 *of* 1875.

THE SENNAY POORASAY HINDU JANANOOKOOLA NIDHI (*Limited*)... ...*Plaintiff.*

RAMANJIAH and another. ... ...*Defendants.*

The plaintiffs sued as the President, Secretary, Treasurer and Law Agent of the *Nidhi* or fund for the recovery of

1875.
September 30.
O. S. No. 197
of 1875.

Rs. 1,569-12-6 "being the amount of principal and rent due to the plaintiffs up to 15th April 1875 on a Tamil registered Mortgage Bond, and also a rental agreement in writing respectively dated Madras 30th May 1870." The plaintiffs claimed further rent and costs; and prayed that in default of payment the property mentioned in the plaint might be sold and the sale proceeds thereof be applied so far as they can extend towards the payment of the said debt.

The defendants pleaded, *inter alia*, that they were not indebted to the plaintiffs; that their dealings were with the Hindu Jananookoola Nidhi established in 1869 which was never registered and does not now exist; and that the said Nidhi is incapable of suing as it was not registered under Act X of 1866.

On the 22nd July 1875, the Honorable Mr. Justice Kernan settled the following amongst other issues:—

"Whether the plaintiffs are competent to sue, the mortgage having been executed before the date of registration of the Company?"

Balajee Row, Vakil for the plaintiffs.

Gurumurti Iyer and *Kristnasawmy Chetty*, Vakils for the defendants.

Cur. adv. vult.

On the 30th September the Court delivered the following judgment.

INNES, J.—The plaintiff in these cases in a Society now registered under Act X of 1866 but which admittedly came into existence after the passing of that Act, and made the loans it now seeks to recover some time before it was registered under the provisions of the Act. One of the questions raised by the defendants in each case is, whether the plaintiff is entitled to sue for debts arising out of transactions so entered into before registration.

I have taken time to consider the point as it appeared to me doubtful whether it could have been intended that persons who, like the defendant in each of these two cases, were actually members of the Association and had borrowed

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money of it with a full knowledge of its position in the eye of the law should be entitled, after enjoying the advantages of the loans, to turn round upon the Association and say, you were a legal nullity when you lent me the money and I am not bound to pay you.

The Act no doubt in Section 4 prohibits the formation of such an Association unless it is registered under the Act, or is formed in pursuance of some other Act or of Letters Patent.

The Act does not deal with the rights and liabilities of unregistered Companies except in the eighth part in which it provides for their being wound up, and in Section 218 it distinctly says that an unregistered Company shall not, except in the event of its being wound up be deemed to be a Company under this Act, and then only to the extent provided by this part of the Act.

Now, the course prescribed by Act X of 1866 is the only mode by which a Society of this kind and numbering more than 20 members can in British India assume a corporate status and capacity, and, until it has taken that course it is simply a number of people associated for purposes perfectly legal perhaps, but unprovided with any machinery for proceeding at law to recover debts on obligations entered into with the officers of the Association on its behalf.

In the present cases the officers of the non registered Association who sue are the very persons in whose presence on behalf of the Association the loans were contracted and who continue to hold the same offices as they then did. Section 280 of the Act, which was appealed to by the Vakil for the plaintiff, is a section of Part VII of the Act and has exclusive reference to Companies in existence at the time of the commencement of the Act, and Section 224 must be read with Section 223 which applies to Companies required to register by any Act repealed by Act X of 1866, and certainly there is nothing in the Act to suggest that subsequent Registration can supply that active legal capacity in regard to obligations entered into prior to Registration which

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of 1875.

the Act withholds from such an Association while unregistered.

Then, apart from the Act, is the plaintiff otherwise in a position to recover in either of these suits ?

In the Industrial and Provident Societies Act 1862 (25 and 26 Vic., c. 87) which provides for the Registration under it not only of Societies already registered under prior enactments but also of any societies of the like nature that may be newly formed, it is provided further that the certificate of Registration shall vest in the society all the property that may at the time be vested in any person in trust for the society and in the *Queensbury Industrial Society* v. *Pickles*(1) it was held that property included debts due, and that this provision so effectually passed the right to recover the debts due to the Society from the Trustees appointed prior to Registration to the society itself that the Society could sue in its corporate name for debts due to it prior to Registration, but that the Trustees could not sue. Such Associations had found it necessary to vest their property in Trustees in consequence of the extreme inconvenience which otherwise attended the conduct of suits for the recovery of debts due to them. This inconvenience ceased when they became corporate bodies and could sue in their corporate name and had no longer to make every member of the Association a party to each legal proceeding. No similar provision is to be found in the Indian Companies Act, and it would therefore seem that Trustees in whom the property of legally formed Associations were vested before registration might sue after registration for debts previously accrued due to the Association.

But the persons who are plaintiffs in the present suits were not constituted Trustees. They were, apparently, merely delegated by the Society to conduct some of its affairs. None of its property is vested in them, and these obligations in their names are, on the face of them, due to the Association itself as it existed prior to registration, and

(1) 35 L. J., Ex., p. 1, s. c. L. R., 1 Ex., p. 1.

1875. *September* 30. *O. S. No.* 197 *of* 1875.

this is not such an Association before Registration as is authorized to sue in the name of an officer.

No doubt legal disabilities do not always avoid contracts by persons labouring under a disability, as a man may recover on a contract which, as an infant, he entered into with another. But in such a case there is a person to the contract though he be labouring under a disability. There is merely a want of capacity. In the case of this Association formed subsequent to the passing of Act X of 1862 there is, for the purpose of contracting, neither the status of person nor that of capacity, for the law forbids its existence as an Association.

Whether by joining all the individuals who were members of the Association at the date of these contracts or the survivors of those persons or under any other form of suit, the Association could sue for recovery of their debts it is unnecessary now to determine. It is sufficient to say that they cannot recover in the suits in their present form. These suits will, therefore, be dismissed but without costs.

Suits dismissed.

Original Jurisdiction. (a)

Original Suit No. 214 *of* 1875.

THE PURSEWAULKUM HINDU JANOBACARA NIDHI ...*Plaintiff.*
NARAYANA ACHARRY and another... .....*Defendants.*

Section 16 of Act X of 1866, does not refer to obligations contracted with a Company in accordance with the purposes of its formation other than those directly implied by the Articles of Association.

Section 208 of the Act has no application to Companies formed but not registered after the Act came into force.

1876. *February* 1. *O. S. No.* 214 *of* 1876.

THE Plaintiff Association sued, by its President, Agent, and Secretary, for recovery of Rs. 273-4-2 being the amount of principal and balance of interest up to the 31st March 1875, due in respect of a Tamil Mortgage Bond for the sum of Rs. 172, dated the 29th June 1871, and a Tamil Promissory Note payable on demand, dated the 30th December 1870, for the sum of Rs. 28 respectively executed

(a) Present:—Innes, J.

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by the defendants in plaintiff's favor. The said Mortgage Bond, and Promissory Note bore interest at 9 *per cent. per annum.* The plaintiffs sought further interest at 12 *per cent. per annum* from the 1st April 1875, till payment; and prayed that, in default of payment, certain property mentioned in the plaint might be sold, and the sale proceeds applied so far as they may extend towards the payment of the debts.

The defendants pleaded that they were not indebted, and alleged, *inter alia,* that the Fund, represented by the plaintiffs was incapable of suing as it had not been registered under Act X of 1866 at the date of the Mortgage and Promissory Note; and the claim, if any, on the latter instrument is barred by the Law of Limitation.

On the 30th July 1875 the following, among other issues, was settled by Mr. Justice Kernan :—

"Whether the plaintiffs are entitled to sue on the mortgage and note in the pleadings mentioned, the same having been given previous to the date of Registration of the Company ?"

Ruthnavalu Moodeliar, Vakil for the plaintiffs.

Gurumurti Iyer and *Kristnasawmy Chetty,* Vakils for the defendants.

Cur. ad. vult.

On the 1st February 1876 the Court delivered the following judgment :—

INNES, J.—This case is similar to cases 196 and 197 of 1875 in which I gave judgment on the 30th September 1875 (1). I was asked however, to consider the bearing of Section 16 of the Companies' Act of 1866, upon the question of the right of the plaintiff to recover. I have accordingly considered that section carefully. I do not think that it refers to obligations contracted with the Company in accordance with the purpose of its formation other than those directly implied by the Articles of Association.

(1) Reported *ante* p. p. 193 and 194.

1876. *February* 1. *O. S. No.* 214 *of* 1876.

The words are "where registered, they shall bind the Company and the members thereof to the same extent as if each member had subscribed his name thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act. All monies payable by any member to the Company, in pursuance of the conditions and regulations of the Company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the Company."

I do not think that these words refer to obligations contracted subsequently to the signing of the articles and not arising directly out of them. It appears to me to refer to the agreements directly entered into by, or to be implied from, those articles, such as to the amount of contribution *per* share, payments of calls, and so on: Obligations in fact which become so by the very fact of signing the articles. It cannot, I think, be intended to embrace debts subsequently incurred to the Company while unregistered. Such debts cannot be properly considered to come within the terms "all monies payable to the Company *in pursuance of the conditions and regulations of the Company.*" They are rather payable in pursuance of contracts or other obligations. It may be that these are entered into "in pursuance of the conditions and regulations of the Company," but the language used does not seem to warrant its application to money not directly payable under the conditions and regulations of the Company.

In the cases referred to as lately disposed of (196 and 197) (1) I have not assigned my reasons for the view I took in disposing of those suits, that Section 208 of the Act had no application to Companies formed but not registered after the Act came into force. Whether it so applies or not depends upon Section 194.

Now this section includes the following Companies :—

(1) Reported *ante* p. p. 193 and 194.

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of 1876.

1. Every Company existing at the time of the commencement of the Act, including any Company registered under the former Acts.

2. Any Company *(a)* hereafter formed in pursuance of Act of Parliament, or Act of the Governor General other than this Act or of Letters Patent; or,

(b) being otherwise duly constituted by law and consisting of seven or more members.

Now, unless the words "being otherwise duly constituted by law and consisting of seven or more members" can include such Companies as the one seeking to recover in this suit, the section cannot possibly apply to it. Now, I think, the language must refer to Companies constituted in accordance with some existing or future provision of the law other than the Act, and being therefore legal as Societies irrespective of Registration under the Act, but Section 4 of the Act illegallizes such Companies as the present unless they are Registered, and until Registration they cannot be said to "be duly constituted by law."

Section 194 therefore does not appear to apply to the Company now suing, and, consequently, Section 208 is also inapplicable. This part of the Act (Part VII) admits existing Companies, and certain Companies whose constitution is legal, to the advantages of the Act by the process of Registration —while the 1st Part of the Act is that which applies to the Registration of such Companies as are formed under the Act above and are not legally constituted irrespective of Registration. I express this opinion, however, with diffidence, as I am informed that Original Suit 460 of 1873(1) was decided by Mr. Justice Holloway in favor of plaintiff, the case being precisely on all all fours with the case now before me.

Holding the opinions I have expressed, I must dismiss the suit with costs.

Suit dismissed with costs.

(1) Not reported.

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ment can be drawn from the non-completion of formalities which are not of their selection.

The parties to a suit executed a written agreement, which was duly registered, whereby the plaintiff agreed to accept the property of the defendant, specified in the agreement, in adjustment of the said suit. The agreement was not recorded under Section 98, Act VIII of 1859. Plaintiff proceeded with his suit, obtained a decree, and sold the property mentioned in the agreement in execution of the said decree. The sale proceeds being insufficient to satisfy the decree, other property belonging to the defendant was attached and sold for Rs. 23,360. In a suit for damages brought by the defendant:—*Held*, that the agreements to withdraw the previous suit and to accept the properties of the present plaintiff in discharge of the claim were concluded agreements, and that, therefore, present plaintiff was entitled with interest, to the sum which property, not mentioned in the agreement, fetched at the sale under the decree obtained by the defendant.

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See ENDOWMENT.

SUNNUD.

See ISTIMRAR SUNNUD.

TEACHER.

See LIMITATION.

TESTAMENTARY GUARDIAN.

See JURISDICTION.

WIDOW.

See CHILDLESS WIDOW.
INHERITANCE.
SALE IN EXECUTION.

WILL.

It is not law that all that a Hindu may dispose of *inter vivos* can be disposed of by him by mortuary instrument.

Gooroova Butten v. *Narrainsamy Butten* ... [NOTE... 13

MADRAS HIGH COURT RULINGS.

Appellate Side.

Proceedings, 18th January 1875.

1874. *January 18.*

UPON reading a letter, dated the 19th December 1874, from the Magistrate of Malabar referring the Proceedings of the 2nd Class Magistrate, Palghaut Talook, in Case No. 20 of 1874, as contrary to law.

The High Court made the following

RULING :—In this case the defendant was convicted of being the owner of a cow which strayed on a Railway provided with fences suitable for the exclusion of cattle, an offence punishable under Section 19 of the Railway Act (Act XVIII of 1854) as amended by Act XXV of 1871. The date of the alleged offence was 10th April 1874. On the 13th June following, Government published Rules under Section 21 of the Railway Act, Amendment Act (XXV of 1871) determining what kind of fences should be deemed to be suitable for the exclusion of cattle.

On the 10th April 1874, prisoner's cow strayed on a Railway provided with a fence. On the 13th June following, Government published Rules under Section 21 of the Railway Act Amendment Act (XXV of 1871) determining what kind offences should be deemed to be suitable for the exclusion of cattle. On the date of the offence there were no such Rules.

No evidence was offered of the state of the fence, and the prisoner was convicted solely on his admission that he was the owner of the cow.

Held, that in this case, the state of the fences required specific proof, in the absence of which the conviction could be sustained.

No evidence was offered as to the state of the fences, and the conviction proceeded solely on the confession of the prisoner that he was the owner of the animal that had strayed upon the Railway.

The High Court are of opinion that the conviction cannot be sustained. No rules having been framed, up to the time of the alleged offence, determining the kind of fences to be deemed suitable for the purposes of the section, the state of the fences was, in the particular case, matter requiring specific proof. The conviction must be set aside, and the fine, if levied, refunded.

Ordered accordingly.

Appellate Side.

Proceedings, 16th February 1875.

1875. *February* 16. UPON reading again a letter from the District Magistrate of Tanjore, No. 511, dated 22nd September 1874, and also a letter from the Sessions Judge of North Tanjore, No. 647, dated 2nd October 1874, requesting to be allowed to lay his views on the question raised by the District Magistrate, before the High Court, and upon reading also the papers submitted with reference to the Proceedings of this Court, dated 31st October 1874, No. 1649.

The High Court made the following

RULING :—The question stated by the District Magistrate is whether, when a complaint of an offence under Section 195 (*a*) of the Penal Code is presented and is unaccompanied by sanction to prosecute under Section 468 (*b*) of the Code of Criminal Procedure, it is necessary to examine the complainant under Section 144 of the same Code, or whether the complaint is to be refused at once unless it is accompanied by the written sanction of the Court concerned.

As soon as it becomes apparent that a complaint is of an offence falling within Section 468 (*b*) of the Code of Criminal Procedure, and that it is made without sanction, the Magistrate is not competent to entertain it.

The law is clear. The Magistrate cannot *entertain* the complaint without the prescribed sanction.

As soon as it becomes apparent that the complaint is of an offence falling within Section 468 of the Code of Criminal Procedure, and that it is made without sanction, the Magistrate is not competent to entertain it.

(*a*) Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation or imprisonment.

(*b*) A complaint of an offence against public justice described in Section 195, among other Sections of the Indian Penal Code, "unless such offence is committed before or against a Civil or Criminal Court, *shall not be entertained* in the Criminal Courts, *except* with the sanction of the Court before or against which the offence was committed or of some other Court to which such Court is subordinate."

Appellate Side.

Proceedings, 17th February 1875.

1875. *February* 17.

UPON reading again a letter dated the 9th January 1875, No. 17, from the Magistrate of Bellary referring, at the instance of the Cantonment Magistrate, the Proceedings of the Assistant Cantonment Magistrate of Bellary in Cases Nos. 488 to 494, 498 to 501, 504, 515, 538, 541, 542, 544, and 563 to 565 of 1874, as contrary to law, and upon reading also copies of the bye-laws of the Bellary Municipality, published in 1868 and 1874.

The High Court made the following

RULING:—In the letter recorded above, the District Magistrate submits, at the instance of the Cantonment Magistrate, the Proceedings of the Assistant Cantonment Magistrate in certain cases in which the defendants have been sentenced to pay fines for a breach of a bye-law of the Municipality.

A mere publication of a bye-law with a penal clause at the end which had not been passed by the Municipal Commissioners or approved by the Government as applicable to the bye-law in question, though it was so passed and approved in reference to other bye-laws, cannot avail to legalize the infliction of the penalty.

Bye-laws requiring licences in cases in which the Towns' Improvement Act III of 1871, by specifying the cases in which they shall be required has implicitly declared that they shall not, are in violation of the Act.

The bye-law under which the defendants have been punished runs as follows:—'No vegetables or fruit shall 'be sold except in such places as may 'be appointed by the Municipal Com-'missioners.' This bye-law having been approved and confirmed by Government under Section 165 of the Towns' Improvement Act (III of 1871) was published with the following bye-law attached to it. 'Breaches of all Municipal bye-laws not expressly provid-'ed for to be punishable as provided in Section 163 of Act III 'of 1871.'

This last bye-law, containing a general direction as to penalties, is stated to have been sanctioned by Government with reference to certain bye-laws previously framed by the Municipal Commissioners, but not with reference to the particular bye-law to which it was attached on publication.

The sentences of the defendants are now referred as illegal on the ground that there has been no penalty affixed by the Municipal Commissioners and sanctioned by Government for the

1875. *February* 17. infringement of the bye-law under which the defendants have been convicted.

The High Court are of opinion that the convictions are illegal on the ground stated.

A mere publication of a bye-law with a penal clause at the end which had not been passed by the Municipal Commissioners or approved by the Government as applicable to the bye-law in question, though it was so passed and approved in reference to other bye-laws, cannot avail to legalize the infliction of the penalty.

The High Court are also of opinion that the sentences are illegal on a further and more serious ground; the bye-law itself is in their opinion illegal because repugnant to a provision of law latent in the Act which gives the power to make bye-laws at all.

The Act has specified certain trades which may not be carried on without licence (Section 129) and with such offensive trades the Municipality cannot interfere otherwise than as the following section provides. Section 127 moreover specifies what the Municipality may do with buildings used for the sale of food, but is silent as to any restriction by licence. These provisions would be wholly inoperative if the Municipal body are to have the power to legislate as they may think fit.

The bye-laws requiring licence in cases in which the Act, by specifying the cases in which they shall be required has implicitly declared that they shall not, are therefore in violation of the Act.

The convictions must be set aside and the fines levied refunded.

Ordered accordingly.

Appellate Side.

Proceedings, 22nd February 1875.

1875. *February* 22. UPON reading a letter, dated the 30th January from the District Magistrate of South Arcot, referring, at the instance of the Acting Head Assistant Magistrate, the Proceedings of the 2nd Class Magistrate of Tindivanum, in Case No. 1 of 1875, as contrary to law.

The High Court made the following

1875. *February* 22.

RULING :—In this case the accused was charged by the Police with criminal breach of trust, an offence punishable under Section 406 of the Penal Code.

Of five witnesses cited for the prosecution only three were examined by the 2nd Class Magistrate who, thereupon discharged the prisoners on their trial for criminal breach of trust. *Held*, that such discharge without hearing all the witnesses was irregular, but the High Court was not disposed to interfere on that ground alone.

Five witnesses were cited for the prosecution. The 2nd Class Magistrate, after taking the evidence of only three of these witnesses, directed the discharge of the accused under Section 215 of the Code of Criminal Procedure.

The Proceedings are now submitted for the orders of the High Court on the ground that under Explanation III, Section 215 of the Code of Criminal Procedure, no order of discharge could legally be passed until all the witnesses named for the prosecution had been examined.

The High Court are not disposed to interfere on the ground stated.

The discharge of the accused without hearing the witnesses was irregular. The examination of the other two witnesses could not, however, have altered the case which was in all material points proved and admitted. There has probably been a miscarriage of justice ; but it is in no way ascribable to the error of procedure.

Appellate Side.

Proceedings, 24th February 1875.

1875. *February* 24.

UPON reading a letter, dated the 20th January 1875, from the District Magistrate of South Arcot, referring at the instance of the Joint Magistrate, the Proceedings of the 3rd Class Magistrate of Bhowanagherri, in Case No. 125 of 1864, as contrary to law.

1875. *February* 24.

The High Court made the following

RULING:—In this case complainant failed to appear on the day to which the hearing of his complaint had been adjourned. The 3rd Class Magistrate thereupon dismissed the complaint.

A complaint was dismissed because the complainant did not appear on the day to which the hearing had been adjourned. The order of adjournment was not made in the presence and hearing of the parties. *Held*, that the order of dismissal was illegal.

The Proceedings are referred as illegal on the ground that the order of adjournment was not made in the presence and hearing of the parties.

On the ground stated the order of dismissal is illegal and must be set aside.

The 3rd Class Magistrate will restore the case to the file and proceed to dispose of it in due course.

Ordered accordingly.

Appellate Side.

Proceedings, 26th February 1875.

1875. *February* 26.

UPON reading a letter, dated the 17th February 1875, from the Magistrate of Bellary, referring the Proceedings of the Head Assistant Magistrate, in Case No. 77 of 1874, as contrary to law,

The High Court made the following

RULING:—In this case the prisoner was convicted of the offence of house-breaking. The Head Assistant Magistrate found that the entry into the complainant's house was with the object of having sexual intercourse with the complainant's wife.

Prisoner was convicted of house-breaking, his object being to have sexual intercourse with complainant's wife. *Held*, conviction valid.

The District Magistrate refers the conviction as illegal on the ground that in a similar case recently submitted to the High Court (High Court Proceedings, dated 14th January 1875), it was held that the act intended would, if accomplished, not have been an offence.

The *differentia* is that in the present case the woman is a wife; in the former case she was 'no one's' wife.

The present conviction is perfectly legal.

Appellate Side.

Proceedings, 27th February 1875.

1875. *February 27.*

UPON reading a letter, dated the 3rd February 1875, from the Acting Sessions Judge of the South Malabar Division, referring the Proceedings of the Acting Head Assistant Magistrate, in Appeal Case No. 11 of 1874, as contrary to law.

The High Court made the following

RULING :—In this case the Head Assistant Magistrate, acting as an Appellate Court, reversed a sentence of fine passed on the defendants, and under Section 209 of the Code of Criminal Procedure awarded them compensation for a false and vexatious complaint.

The special provisions of Section 209 (*a*) of the Criminal Procedure are applicable only in the case of original trials under Chapter XVI of the Code (*b*.)

The special provisions of Section 209 (*a*) are applicable only in the case of original trials under Chapter XVI of the Code (*b*.)

The award of compensation by the Appellate Court was therefore illegal.

The order of the Head Assistant Magistrate must be set aside, and the sums awarded, if paid, refunded.

Ordered accordingly.

Appellate Side.

Proceedings, 4th March 1875.

1875. *March 4.*

UPON reading again a letter, dated the 28th August 1874, No. 222, from the Magistrate of South Arcot, referring the Proceedings of the Head Assistant Magistrate in Appeal Case No. 34 of 1874.

(*a*) Section 209, so far as it relates to the present question is as follows :—

"A Magistrate may dismiss the complaint as frivolous or vexatious, and may, in his discretion, by his order of dismissal award that the complainant shall pay to the accused person such compensation, not exceeding fifty Rupees, as to such Magistrate seems just and reasonable.

"In such case, if more persons than one are accused in the complaint, the Magistrate may, in like manner award compensation not exceeding fifty Rupees to each of them."

(*b*) Of the trial of summons cases by Magistrates.

1875. *March* 4.

And upon reading also a letter from the same officer, submitting in reply to the High Court's Proceedings, dated 5th November 1874, the explanation called for from the Acting Head Assistant Magistrate.

The High Court made the following

RULING :—In this case the facts are as follows :—

Five persons were convicted of mischief. One prisoner appealed. Notice to attend the hearing of the appeal was sent to all five, of whom only three attended. The Head Assistant Magistrate, however, enhanced the sentence passed on all. *Held*, that the enhanced sentence passed on the prisoners who did not appear and who disclaimed all intention of appealing must be annulled.

Five persons were convicted of mischief. An appeal petition, signed by one of the prisoners, was presented to the Head Assistant Magistrate. Notice to attend the hearing of the appeal was sent to all the five prisoners. Only three out of the five attended. The Head Assistant Magistrate, however, enhanced the sentence passed upon all.

Subsequently the two prisoners who had failed to appear at the hearing of the appeal, having been apprehended and brought before the Head Assistant Magistrate, denied that they had ever had any intention of appealing against the sentence originally passed. On this the enhanced sentence, as against these prisoners, was held in abeyance.

The High Court direct that the enhanced sentence, passed on the two prisoners who did not appear, and who disclaimed all intention of appealing, be annulled.

It is observed, that the facts of this case, as stated by the District Magistrate and by the Head Assistant Magistrate, are not the same.

Ordered accordingly.

Appellate Side.

Proceedings, 17th August 1875.

1875. *August* 17.

UPON reading Calender in Case No. 112 of 1875 on the file of the Cantonment Magistrate of Trichinopoly and the records of the above case submitted in accordance with the Proceedings of the High Court dated 18th March 1875, No. 638.

The High Court made the following

ORDER:—In these five cases the Cantonment Magistrate has convicted the defendants of causing obstruction in the public road by driving herds of cattle and has sentenced them under Section 283 of the Penal Code to pay a fine of Rupees 5 each.

Under Act XXV of 1861, s. 62, it is necessary that the direction should be addressed to a particular person, or particular persons, and not to the public generally, and with reference to a particular occasion only, not for a continuance.

From the papers submitted by the Cantonment Magistrate, the High Court learns that the defendants were prosecuted on the authority of a notice issued by the Magistrate of the District dated 28th October 1872. This notice is as follows:—

"Herds of cattle are not to be driven along any of the Cantonment Roads between 5 and 8 P. M.

2. Any person found driving cattle contrary to the terms of the above notice will be liable to a fine of 200 Rupees under Section 283 of the Penal Code."

The High Court is of opinion that the conviction of the defendants under Section 283 of the Penal Code cannot be sustained. The persons who have been convicted and punished by the Cantonment Magistrate are not, it is understood, the 'herds' or drivers but the owners of the cattle, who were not present. Not having been present the defendants could not be held to have done or taken part in the Act charged, and on this ground the convictions would have to be reversed. But whether this be so or not, the High Court is also of opinion that the order of the District Magistrate dated 28th October 1872 upon the violation of which the conviction is founded is illegal. Under the law in force at the time the order was made (Section 62, Act XXV of 1861) it was necessary that the direction should be addressed to a particular person or particular persons and not to the public generally and with reference to a particular occasion alone, not for a continuance.

1875. *August* 17. On this ground alone the District Magistrate's order is bad in law and must be set aside. This being so, it is unnecessary to consider whether the order is not also illegal on other and broader grounds.

Ordered accordingly.

Appellate Side.

Proceedings, 21st October 1875.

1875. *October* 21. UPON reading letters Nos. 299 and 300, dated 27th September 1875, from the District Munsif of Peddapore, requesting the sanction of the High Court under Section 4 of Act XXIII of 1861 to proceed with the trial of a Small Cause Suit in which one of the defendants resides beyond the jurisdiction of the District Munsif, but within the jurisdiction of the District Judge of the Godavery District.

The High Court passed the following

ORDER :—The District Munsif should apply to the District Court for sanction to proceed with the trial of the suit under Section 4 of Act XXIII of 1861.

By the Madras Civil Courts' Act (III of 1873, s. 27) the general control over *all* the Civil Courts in the District under the Act is now vested in the District Judge. It is only in cases in which a defendant is beyond the local jurisdiction of the District Court, and the Court before which the suit is instituted has not otherwise jurisdiction under Act XI of 1865, s. 8, that a reference to the High Court becomes necessary.

The Proceedings of this Court, dated 8th December 1862 (I. H. C. Reports page 103) requiring the reference in Small Cause Cases to be made to the High Court, proceeded upon the view that the Munsifs in their Small Cause Jurisdiction were not subordinate to the District Court.

By the Madras Civil Courts' Act (III of 1873, Section 27) the general control over all the Civil Courts in the District under the Act, whether in the exercise of jurisdiction as Courts of Small Causes or otherwise, is now vested in the District Judge. As the defendant in respect to whom this application is made resides within the jurisdiction of the District Court, the application for sanction to proceed with the suit should be made to that Court.

It is only in cases in which a defendant is beyond the local jurisdiction of the District Court, and the Court before which the suit is instituted has not otherwise jurisdiction under Section 8 of Act XI of 1865, that a reference to the High Court becomes necessary.

Appellate Side.

Proceedings, 19th November 1875.

1875. *November* 19.

UPON reading Calendar in Case No. 99 of 1875 on the file of the Head Assistant Magistrate of Madura, and the records in the above case submitted in accordance with the High Court's Proceedings dated 1st November 1875, No. 2637, and the letter dated 9th November 1875, from the Subordinate Judge of Madura, furnishing the information called for, and the Judgment and order of the Session Court of Madura in Criminal Regular Appeal No. 55 of 1875.

The High Court passed the following

ORDER :—The conviction for the offence of rioting cannot be maintained. At the most the evidence shows only that some of the accused persons may have committed a breach of the peace and may also have offered obstruction to the distrainers on their departure from the village.

The law confers, (certain conditions being first complied with) on landholders, and their authorized agents, power to distrain the moveable property of their tenants for the recovery of arrears of rents due by them. In all such cases the landholder acts upon his own responsibility, and if, in the alleged exercise of this power he attempts to seize the goods of his tenant when no rent is in arrear, mere obstruction to the seizure is not an offence.

The law confers (certain conditions being first complied with) on landholders and their authorized agents power to distrain the moveable property of their tenants for the recovery of arrears of rents due by them. In all such cases the landholder acts upon his own responsibility, and if, in the alleged exercise of this power, he attempts to seize the goods of his tenant when no rent is in arrear, obstruction to the seizure such as was in this case offered is not an offence.

There was reason to believe that a Court receiver was at the time, or recently had been, in receipt of the rents of the village and had made collections from the persons whose property it was sought to distrain, and the obstruction offered to the distress proceeded in the first instance from those who alleged this and who asserted that they had paid the rents due.

The Magistrate, this being the state of the case, upon the bare assertion of the right to distrain on the part of the Zemindar and those acting on his behalf, refused to enter upon any

1875. *November* 19.

enquiry tending to show that the accused persons had merely acted on their legal rights, and convicted them of the offence of rioting.

Both the Judge and the Magistrate appear to have regarded the case as one of obstruction to the execution of legal process issuing from a Court or other competent authority, whereas the obstruction was to the exercise of an authority conferred by law on private persons in certain cases, on the ground that in the circumstances, the authority had not arisen.

The High Court annuls the conviction and directs that the prisoners be set at liberty.

Ordered accordingly.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

The 20th day of December 1875.

It is ordered that the General Rules and Orders of the Fifth day of July 1866 relating to Practice and Procedure on the Original Side of the Court numbered 35, 36, and 39, respectively, be rescinded, and that the following General Rules and Orders be substituted for them :—

35. All Writs, Summonses, and other Judicial Process shall be signed by the Registrar or Assistant Registrar and sealed with the seal of the Court, and shall be tested on the day on which they issue, but no Writ of Habeas Corpus, Injunction, Certiorari or other Extraordinary Writ or any Commission shall be sealed, unless previously subscribed with the name and in the proper handwriting of one of the Judges of the Court. All Process shall be delivered to the party applying for the same or to his Vakil or Attorney to be served as hereinafter directed.

36. Writs of Summons to Defendants issued under Section 41 of Act VIII of 1859, Notices to produce documents, Summonses to witnesses and every other Judicial Process, except Writs of Execution may be served by the Vakils or Attorneys of the parties to the suit or other proceeding or by persons employed by them, but parties appearing in person must cause all Notices, Summonses, Writs and other Process to be served by the Sheriff.

39. All Process executed by the Sheriff shall be returned by him as soon as the same is executed, and the return shall state the time and manner of execution.

(Signed) W. MORGAN, *Chief Justice.*
(„) L. C. INNES,
(„) JAMES KERNAN, } *Judges.*
(„) J. R. KINDERSLEY,

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„ ... 310...*R. A. No.* 37 *of* 1870, see L. R. 2 I. A., p. 169.
S. A. No. 488 *of* 1871, 8 Madras H. C. Rep., p. 6.

RULINGS OVERRULED.

V... xxi...Proceedings of the 9th March 1870, overruled by Proceedings of the 3rd April 1873, 7 Madras H. C. Rep., p. xxi.

„ ... xxiii...Proceedings of the 1st June 1870, overruled by Proceedings of the 24th April 1873, 7 Madras H. C. Rep., p. xxii.

NOTES.

I... 105...To *S. A. Nos.* 286 and 299 *of* 1862, add, "see *R. A. No.* 17 *of* 1866, 3 Madras H. C. Rep. p. 94."

„... 248...To *S. A. No.* 25 *of* 1862, add, "see *S. A. No.* 387 *of* 1862, Ibid, p. 359."

„... 326...To *S. A. No.* 34 *of* 1862, add, "see *S. A. No.* 488 *of* 1871, 8 Mad. H. C. Rep., p. 6; Gooroova Butten *v.* Narrainsawmy Butten, Ibid., [Note] p. 13, and Baboo Beer Pertab Sahee *v.* Maharajah Rajender Pertab Sahee, XII Moore's I. A., p. 1."

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I... 358...To *S. A. No.* 417 *of* 1862, add "see *S. A. No.* 19 *of* 1864, 2 Madras H. C. Rep., p. 238."

,,... 359...To *S. A. No.* 387 of 1862, add, "see *S. A. No.* 25 *of* 1862, Ibid., p. 248."

,,... 381...To note (*a*) add, "This is not a correct interpretation of the original Canarese text, see *S. A. No.* 407 *of* 1867, 4 Madras H. C. Rep., p. 28."

,,... 414...To *S. A. No.* 374 *of* 1863, add that, "Upon this case being quoted at the hearing of *R. A. No.* 1 *of* 1875 (not reported). Mr. Justice Holloway remarked that this report of his judgment was incorrect."

,,... 453...To *R. A. No.* 25 *of* 1862, add "see *R. A. No.* 41 *of* 1865, 2 Madras H. C. Rep. p. 435. In *Civil Petition No.* 153 *of* 1866, 3 Madras H. C. Rep., p. 287, the Court observed that this report 'is defective, as it omits the material fact that in the prior suit mesne profits, up to the date of the institution of the suit, had been sought for and decreed.'"

,,... 471...To *O. S. No.* 179 *of* 1863, add, "Not so in Bengal, see *R. A. No.* 165 *of* 1865, 3 B. L. R., (F. B.) p. 31."

II... 56...To *R. A. No.* 73 *of* 1863, add, "see *R. A. No.* 56 *of* 1871, 7 Madras H. C. Rep., p. 47."

,,... 114...To *R. A. No.* 57 *of* 1863, add, "But see *S. A. No.* 1677 *of* 1874, 1 I. L. R., (Allahabad Series), p. 82."

,,... 144...Opposite to line 27, add "see *R. A. No.* 80 *of* 1873, 7 Madras H. C. Rep., p. 263, at p. 266."

,, ... 270...To *R. A. No.* 16 *of* 1864, add "see *S. A. No.* 1677 *of* 1874, 1 I. L. R., (Allahabad Series) p. 82.

,, ... 307...To *R. A. No.* 4 *of* 1864, add "see *Rogers* v. *Montriou*, 6 B. L. R. p. 550."

,,... 367...To *S. A. No.* 360 *of* 1864, add, "see *R. A. No.* 51 *of* 1868, 4 Madras H. C. Rep., p. 270."

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II...	416...	To *S. A. No.* 188 *of* 1865, add, "see 1 Bombay H. C. Rep., p. 182; Ibid., p. 39; 3 W. R., 210; 3 B. L. R., (F. B.) p. 31."
„...	435...	To *R. A. No.* 41 *of* 1865, add, "see 1 Madras H. C. Rep., p. 453 and *Civ. Petn. No.* 253 *of* 1866, 3 Ibid., p. 288."
III...	303...	To *R. A. No.* 9 *of* 1867, add, "see 6 Madras H. C. Rep., p. 215."
„ ...	308...	To *R. A. No.* 24 *of* 1867, add, "see 6 B. L. R., p. 550."
„ ...	320...	To *R. A. No.* 15 *of* 1867, (at p. 334, line 9) add, "see *R. A. No.* 115 *of* 1872, 7 Madras H. C. Rep., p. 160."
„ ...	376...	To *S. A. No.* 356 *of* 1867, add, "see 6 Madras Jurist, p. 15."
IV...	32...	To *Mis. S. A. Nos.* 8 *and* 70 *of* 1868, add, "see *Mis. Appeal No.* 145, 1 B. L. R., (short notes of cases) p. i. *C. M. S. A. Nos.* 297 *and* 305 *of* 1869, 5 Madras H. C. Rep., p. 219."
„ ...	225...	To *Referred Case No.* 11 *of* 1873, add, "so held *In the matter of the petition of Tadir Hossein Khondkar*, 6 B. L. R., p. 388."
„ ...	242...	To *Crim. Petn. No.* 30 *of* 1869, add, "see however 4 Madras H. C. Rep., (High Court Rulings) p. xxxvi."
„ ...	378...	To *Referred Case No.* 13 *of* 1869, add, "see *Referred Case No.* 14 *of* 1870, 7 Madras H. C. Rep., p. 1."
„ ...	384...	To *S. A. No.* 411 *of* 1868, add, "see *Rogers* v. *Montriou* 6 B. L. R. 550."
V ...	215...	To *C. M. S. A. No.* 297 *of* 1869 add "see *Mis. R. A. No.* 299 *of* 1870, 7 Bengal L. R., p. 704; *Kristo Kinkur* v. *Rajah Burrodacaunt Roy*, XIV Moore's I. A., p. 465.
„ ...	451...	To *Sashachellum Chetty* v. *Govindappa*, add, "Approved of in *S. A. No.* 134 *of* 1875, 1 I. L. R., (Bombay Series) p. 45."

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VI...	93...	To *R. A. No.* 88 *of* 1867, add, "But see *Soorendranath Roy* v. *Mussamut Heeramonee,* 1 Moore's I. A., p. 91, and *Serumah* v. *Palathan* 15, W. R., (P. C.,) 47.
„ ...	180...	To *R. A. No.* 108 *of* 1870, add "see *Mason* v. *The Shrewsbury and Hereford Ry. Co.* L. R. 6 Q. B., 578.
„ ...	310...	The Privy Council dissented from the proposition at p. 329 from line 21 to line 28, see L. R., 2 I. A., p. 188. Note against lines 10 to 12. "The principle so stated, if acted upon, would open the door to the determination of future interests whenever one party chose to think it desirable that a dispute as to title which might at any time afterwards crop up, should be determined by a declaration." L. R., 2 I. A., p. 189.
„ ...	ix...	To Proceedings of the 9th December 1870, add, "But see *S. A. No.* 285 *of* 1875, 1 I. L. R., (Bombay Series) p. 67."
VII...	225...	To *Referred Case No.* 11 *of* 1873, add, "So held in 6 B. L. R., p. 388."
VIII...	46...	To *R. A. Nos.* 82 *and* 86 *of* 1874, add, "see *Koegler* v. *The Coringa Oil Company (Limited,)* 1 I. L. R., (Calcutta Series) p. 42."

CORRIGENDA.

VI...	13...	Line 12 from the bottom for *Civil* read *Criminal.*
VIII...	195...	line 25. For "in" read "is."
„ ...	198...	line 10. For "1862" read "1866."
„ ...	CORRIGENDA p. IX	*dele* "page 53 line 17. For (2) read (3)."
„ ...	„	„ „ referring to appendix, page i side note, line 9 for "Insert 'of' before 'offences'" read "For 'offences' read 'of fences.'"

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1.—Where a defendant is bound over to appear and fails to attend, this section requires that the Magistrate shall form a reasonable opinion that there has been wilful default before issuing process to enforce the penalty. (9th April 1869.) 4 xliv

2.—There is nothing illegal in requiring defendants to execute a recognizance to appear from that date until the close of the trial. No notice is necessary before proceeding to enforce the penalty. [17th November 1871.] ... ... 6 xxxix

Section 228.

A Magistrate has no jurisdiction to order a sum of money deposited under this section, for the refund of which an application was made, to be credited to Government. (13th December 1870.) 6 ix

Section 249.

Sanction was given by the Magistrate for the prosecution of defendant for having made a false charge against the complainant. The Magistrate dismissed the complainant under Section 67 on the ground that the complainant had taken no steps to prosecute for three months after the sanction was obtained. *Held*, that though Section 67 was wrongly quoted, the Magistrate had discretion under Section 249 to dismiss the complaint. (9th January 1871.) 6 xv

Section 255.

See ACT VIII OF 1869.

Section 404.

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Section 259.

This section only applies to cases which fall within Chapter 15. (24th March 1869.) ... ... 4 xli

See SUB-MAGISTRATE.

Section 266.

This section only requires the Magistrate to hear such witnesses as the accused shall produce in his defence. (4th February 1869.) ... ... 4 xxix

Section 269.

Dismissal of a complaint under this section, in consequence of non-attendance of the complainant, the order of dismissal having been passed before the trial commenced, amounts to a discharge without trial, and does not bar the complaint from being again preferred. (1st April 1868.) ... ... 4 viii

Section 270.

1.—In a trial for causing hurt, the Sub-Magistrate awarded compensation to the defendant under this section for a frivolous and vexatious complaint. *Held*, that this section did not apply to such a case. (4th November 1870) ... ... 5 xl

2.—This section applies only when a complaint of an offence triable under Chapter 15 is dismissed. [21st December 1871.] ... ... 6 xlix

Section 273.

1.—Under this section a full power Magistrate may refer for enquiry to a Subordinate Magistrate any criminal case. The reference may be for enquiry or for trial by the Sub-Magistrate or with a view to commitment. [23rd March 1869.] ... ... 4 xl

2.—By virtue of this section and of Sections 1 and 2 of Madras Act I of 1863, a Sub-Magistrate is enabled to convict persons accused under Section 174 of the Penal Code for disobedience to summonses issued by himself. [18th May 1869.] ... ... 4 li

3.—This section is inapplicable to a case referred to a Magistrate under Section 171. [20th November 1871.] ... ... 6 xli

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Section 277.

A Divisional officer to whom a case is referred by a 3rd Class Subordinate Magistrate, under this section, is bound to form his own judgment and pass sentence thereon. [8th November 1870.] 5 xliii

Section 294.

This section does not authorise the imprisonment of sureties. [20th August 1869.] ... ... 4 lxix

Section 296.

See *Section* 301.

Section 301.

When a Magistrate required security from persons for their good behaviour under Section 296, and, in default, sentenced them to six months' rigorous imprisonment, *held* that the order was illegal, as this section requires that such persons should be committed to prison until the security be furnished. In fixing the amount of security the Magistrate should not go beyond a sum for which there is a fair probability of the defendant being able to find security. [26th April 1869.] ... ... 4 xlvii

Section 316.

1.—Where the Magistrate's order directed the defendant to pay a monthly sum for the maintenance of his wife, and directed that the defendant be rigorously imprisoned for the term of 15 days for every breach of the order under this section, the High Court quashed the latter part of the order as being irregular and bad in substance. (28th July 1870) ... 5 xxxiv

2.—The issue of a warrant under this section is permissible for every breach of an order of maintenance, but a defendant cannot get out of his liability for any payments by the failure to issue a warrant for the levy of that payment. The result of issuing it for an aggregate of payments is that one month's imprisonment would alone be awardable when in default. [19th April 1871] ... ... 6 xxiii

Section 318.

1.—In order to give a Magistrate jurisdiction to make an order under this section, he

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must be satisfied that there exists a dispute likely to induce a breach of the peace, and he must record the grounds of his being so satisfied. The question whether any such evidence existed is one for the consideration of the High Court. [15th May 1869]	4	xlix
2.—A Magistrate proceeding under this section is bound to examine any witnesses tendered in support of the respective claims to actual possession of the land in dispute before passing an order. (28th November 1870)	6	iv
Section 320.		
1.—This section gives special jurisdiction to Magistrates with full powers, and, in the cases provided for by it, the general power given to any Magistrate by Section 62 is barred. (21st February 1867)	3	xxiii
2.—Right of way is a right of use of land within the meaning of this section. (1st June 1868)...	4	xi
3.—The jurisdiction given by this section should not be exercised except on clear and satisfactory proof. (4th January 1869)	4	xxvi
Section 380 *A*.		
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Section 404.		
The High Court alone under this section can set aside the finding of a Sub-Magistrate who, acting without jurisdiction, has held a trial and acquitted the accused under Section 255. (26th July 1869)	4	lxi
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Section 405.		
1.—The High Court has power to mitigate a sentence passed by a Magistrate and confirmed on appeal by the Court of Session under this section and Section 428. (30th April 1869)...	4	xxxvi
2.—The High Court as a Court of Revision, has jurisdiction to set aside a finding of acquittal by a Session Court by virtue of this section. (26th August 1869)	4	lxx

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3.—Where there is no such error in the Proceedings as makes the conviction or the acquittal contrary to law, the High Court has no power of revision under this section. (29th November (1869.) 5 x

Section 426.

See *Section* 439.

Section 428.

See *Section* 405.

Section 435.

Where the Session Judge is of opinion that a Sub-Magistrate has convicted the defendant of an offence which the Sub-Magistrate has no power to try, the Session Judge may, under this section annul the conviction and direct the committal of the accused for trial. (21st July 1870.) 5 xxxii

See *Section* 404.

ACT VIII OF 1869.

Section 439.

A Police Constable was tried and convicted under Section 44 of Act XXIV of 1859, and sentenced to fine and imprisonment. On appeal the conviction and sentence were reversed on the ground that there had been irregularity of procedure in not recording evidence for the prosecution, and in only taking down the *substance* of the prisoner's statement. *Held*, that the question was whether there had been such error and irregularity as to prejudice the accused and to occasion a failure of justice. That if not, the order reversing the conviction was rendered bad in law by Section 426 and Section 439 of the Code of Criminal Procedure. [10th November 1871] ... ... 6 xlv

Chapter XIV.

The course taken by a Magistrate before preparing a charge under this chapter must depend upon the circumstances of each case, and the Magistrate should exercise his discretion in the matter. [16th December 1864.] ... ... 3 ii

See COMPLAINT.

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Chapter XVI.

See *Section* 209.

Chapter XIX.

In an enquiry under this chapter the defendant should have an opportunity of cross-examining the witnesses produced against him, of making his own statement, and of calling witnesses on his own behalf. [3rd November 1868.] ... 4 xxii

Chapter XXII.

1.—A Magistrate has no ground for proceeding under this chapter where there is no dispute as to the fact of actual possession of either the land or crop. (13th July 1868.) ... ... 4 xiii

2.—The enquiry contemplated by this chapter is a personal enquiry before the Magistrate who makes the order. (13th November 1868.) ... 4 xx

3.—The actual possession intended by this chapter does not include the occupancy of a mere trespasser. (9th January 1871) ... ... 6 xiii

ACT X OF 1862. [*Stamp Duties.*]

[Repealed by Act VII of 1870.]

Section 3.

1—The words "unless in any case in which a higher penalty is imposed" and "not exceeding" apply both to the penalty of Rs. 100 and to one higher than ten times the value of the omitted stamp. [15th February 1867.] ... 3 xxvii

2.—Attesting witnesses and persons who draft documents and note the fact with their signatures at the foot do not come within the words "make, execute, sign, or be a party to," and are, therefore, not punishable under it. (15th February 1867.)... ... ... 3 xxvii

See ACT I OF 1868.

ACT I OF 1863. [MADRAS ACT.] [*Second Class Sub-Magistrates.*]

Sections 1 *&* 2.

A Sub-Magistrate who issues a summons may take cognizance of the offence of disobedience to that summons notwithstanding the repeal of Madras Act I of 1863. (26th July 1869.) ... 4 li

See ACT XLV OF 1860, *s.* 174.

ACT XXV OF 1861, *s.* 273.

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ACT III OF 1864, [MADRAS ACT.] [*Abkarry.*]

Section 21.

1.—*Primâ facie,* toddy is fermented palm juice. A conviction under this section for selling toddy without a license upheld, although no evidence was given as to whether fermentation had taken place. (21st October 1870.)... ... 5 xxxvi

2.—The Magistrate convicted the accused under this section, and directed the confiscation of certain arrack found in his possession. *Held,* that the accused being a licensed vendor, the arrack was not liable to confiscation. (4th November 1870.) 5 xli

3.—Prisoners were sentenced to fines under this section and Section 22, and, in default of payment of fine, to rigorous imprisonment. *Held,* that as fine in these cases was the only assignable punishment, and by Sections 30, 31 and 32 a specified procedure is laid down for the levy of the penalty, Section 64 of the Penal Code had no application. (20th November 1871.)... ... ... 6 xl

Section 22.

Upon a conviction under this section for conveying liquor without valid permits, it appearing that the defendants produced permits by the Taluq Abkarry Renter covering the amount of liquor which was being conveyed, but made out in the names of third parties who were not present when the liquor was seized, but on whose behalf the liquor was at the time of seizure being conveyed; *Held,* that the permits were valid and the conviction was bad. (20th July 1870.) ... 5 xxix

See ACT I OF 1866, *s.* 30. [MADRAS.]

TODDY.

ACT VI OF 1864. [*Whipping Act.*]

1.—When a person is convicted at one time of two or more offences punishable under the Penal Code, the Court is empowered to sentence the prisoner in the one case to rigorous imprisonment and in the other case to whipping under this Act. [18th February, 1870.] ... ... 5 xviii

2.—In order to justify a sentence of whipping, the previous conviction must be of the same specific offence. [25th October 1869.] ... ... 5 i

3.—See also High Court Proceedings, [25th October 1869.] ... ... 5 i

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Section 9.

A sentence of flogging cannot be carried out after the expiry of the limit of 15 days from the date of sentence provided by this section. [13th November 1871.] ... ... 6 xxxviii

Section 11.

[Repealed by Act X of 1872.]

The meaning of the words "execution shall be stayed" is that the staying shall be final. [25th July 1864.] ... ... 3 i

ACT XIII OF 1864, [*Emigration.*]

[Repealed by Act VII of 1871.]

Section 71.

Recruiters of Emigrants charged under this section must be tried by the Magistrate within whose jurisdiction the holding out of false pretences to the labourers took place. [16th March 1868.] 4 iv

ACT III OF 1865, [MADRAS ACT.] [*Punishment under Special or Local Laws.*]

1.—Magistrates of all grades are, under this Act, competent to try persons charged with offences under *Section* 26 of the *Railway Act XXVIII of* 1854. [2nd April 1868.] ... ... 4 ix

2.—By this Act a Native Deputy Magistrate has power to try Police Officers above the rank of a private charged with offences under the *Madras General Police Act XXIV of* 1859 notwithstanding the proviso in Section 50 of the latter enactment. [7th July 1869.] ... ... 4 liv

3.—This Act authorises every Magistrate to take cognizance of offences against *Act XIII of* 1869. [9th August 1869.] ... ... 4 lxiv

4.—The jurisdiction conferred on Magistrates by this Act is not ousted by the Schedule to the Code of Criminal Procedure as amended by *Act VIII of* 1869. (4th June 1872) ... ... 7 vi

5.—See also High Court Proceedings. (29th June 1872.) ... ... 7 viii

ACT V OF 1865, [MADRAS ACT.] [*To Amend Act XXIV of* 1859.]

A Hindu priest was charged with knowingly and wilfully solemnising a marriage between persons one of whom professed the Christian religion, the said priest not being duly authorised under Section 5 of this Act, an offence punishable under Section 56. The Session Judge discharged the accused without trial on the

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ground that the enactment in question was inapplicable to the celebration of a marriage according to the Hindu form by a Hindu priest, though one of the contracting parties was a Christian convert. *Held,* that this view of the law was erroneous, and that the accused was *primâ facie* liable under this section. (21st March 1871.) ... ... 6 xx

See ACT XXIV OF 1859, *s.* 48.

ACT X OF 1865, [MADRAS ACT.] [*Towns' Improvement Act.*]

Section 108.

Defendant was charged, under this section, with having used a place not licensed by the Municipal Commissioners as a slaughter house. The defendant had killed a sheep on his own premises for his own use. *Held,* no evidence of the offence charged. [1st February 1871.] ... 6 xviii

Section 114.

The continuing of offensive trades in premises already used is not an offence under this section which applies only to the fresh dedication of premises to certain offensive trades. (4th February 1870.) ... ... 5 xvi

ACT X OF 1865. [*The Indian Succession Act.*]

A bond is not to be taken from a person to whom probate is granted under this Act. [22nd December 1866.] ... ... 3 x

ACT XI OF 1865, [*Mofussil Small Cause Courts.*]

See ACT III OF 1873. *s.* 27.

ACT I OF 1866, [MADRAS.] [*Military Cantonments Act.*]

Section 30.

Beer is not included in the term "spirituous liquor," as used in this section. (14th March 1873.) ... ... 7 xv

ACT XX OF 1866, [*Registration Act.*]

[Repealed by Act VIII of 1871.]

Section 17, *Clause* 2.

The registration of a deed of division of immoveable property of the value of more than Rs. 100, executed by members of an undivided Hindu family is optional, and a suit will not lie to compel registration. (9th December 1870.) [See S. A. No. 285 of 1875.] ... ... 6 ix

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ACT I OF 1868, [*Language of Legislative Acts.*]

Section 6.

By this section an offence committed under Section 3 of Act X of 1862, when that enactment was in force, is still an offence and may be tried under that enactment. By force of Section 3, Clause 1 of this Act, the mere repealing of Section 2 and Schedule 3 of Act XVIII of 1869 by Act XIV of 1870, did not *per se* revive the repealed portion of Act X of 1862. (30th July 1872.) ... ... 7 ix

ACT IX OF 1868, [*Certificate Tax.*]

[Repealed except as to the Taxes due under Act IX of 1869.]

Section 17.

Where it is sought to recover the penalty described in this section from any person who omits to take out a certificate, the Collector who issued the notice should prefer a complaint before a Magistrate, and the Collector cannot prefer the complaint before himself in his capacity of Magistrate. [26th July 1869.] ... ... 4 lxii

ACT III OF 1869, [MADRAS] [*Revenue Officers' Summons.*]

1.—This Act confers no authority upon Revenue Officers to summon a subordinate to attend for purpose of carrying out a sale of land for arrears of Revenue. [15th July 1870.] ... ... 5 xxviii

2.—This Act gives a Tahsildar power to issue summonses. [30th November 1871.] ... ... 6 xliv

3.—But does not authorise him to issue a summons to any person to appear before any other person but himself. [21st August 1872.] ... ... 7 x

4.—This Act is the only provision of the law, which authorises a Tahsildar to issue a legal summons, disobedience to which would constitute an offence. [4th November 1872.] ... ... 7 xi

See ACT XLV OF 1860, *s.* 174.

ACT VIII OF 1869, [*Code of Criminal Procedure Amendment Act.*]

[Repealed by Act X of 1872.]

When a Subordinate Magistrate of the 1st class acting without jurisdiction held a trial and acquitted the accused person under Section 255 of the Code of Criminal Procedure: *Held*, that the High Court alone could set aside the finding under Section 404, and that the Magistrate of the District had no power to do so under

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Section 435 of the Code as amended by this Act. [26th July 1869.] ... ... 4 lxi

See ACT III OF 1865, [MADRAS.]

ACT XVIII OF 1869, [*General Stamp Act.*]

Section 29.

1.—Intention to evade payment of stamp duty is not an essential ingredient to the offence described by this section. (28th November 1870.) ... ... 6 v

2.—A Schedule appended to a deed of sale does not require to be stamped under the provisions of this Act. (3rd November 1871.) ... ... 6 xxxvi

Section 49.

A bond written partly on one and partly on another stamp paper, the two aggregating the proper stamp leviable, was tendered in evidence without the certificate required by this section. *Held*, that there was a deficiency in the stamp on the bond, and therefore a liability to the penalty. That the deficiency must be held to be equivalent to the difference between the value of the stamp on one of the papers and the whole value chargeable. (6th November 1874.) ... ... 7 xxxvi

ACT VII OF 1870, [*Court Fees' Act.*]

Section 31.

1.—An order to repay a fine under this section is an integral part of the sentence, and the fee should be treated as a fine imposed by the Court and may be retained in deposit pending an appeal where an appeal lies. (20th July 1870.) ... ... 5 xxviii

2.—In cases in which the value of property in respect of which a certificate of heirship is sought exceeds Rupees 1,000, the stamp duty should be calculated on the whole amount and not on the excess over Rupees 1,000, under Schedule 1, Article 12 of this Act, but the exceeding Rupees 1,000, is the condition of liability. (16th November 1870.)... ... ... 5 xlv

3.—Notes of judgment furnished to parties under the Rules of Practice for the guidance of Small Cause Courts are copies of decrees and require a stamp under Article 7, Schedule 7 of this Act. (20th April 1871.) ... ... 6 xxiv

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ACT I OF 1871, [*The Cattle Trespass Act.*]

Section 22.

This section does not provide for a fine in addition to compensation, (1st August 1873.) ... ... 7 xxiv

ACT III OF 1871, [MADRAS ACT.] [*Towns' Improvement Act.*]

1.—*Section* 154 was not intended to apply to omissions to take out licenses. It applies to breaches of the Act which, in a Policeman's view are offences, and regarding which, if committed within his view, one of two courses is open to him, viz., to arrest without warrant, or to lay an information before a Magistrate and apply for a summons or warrant. [29th December 1871.] ... 6 1

2.—A mere publication of a bye-law with a penal clause at the end which had not been passed by the Municipal Commissioners or approved by the Government as applicable to the bye-law in question, though it was so passed and approved in reference to other bye-laws, cannot avail to legalize the infliction of the penalty. [17th February 1875.]... ... ... 8 iii

3.—Bye-laws requiring licenses in cases in which this Act, by specifying the cases in which they shall be required has implicitly declared that they shall not, are in violation of the Act. [17th February 1875.] ... ... 8 iii

ACT VIII OF 1871 [*Registration, Act.*]

Section 17.

See ACT VIII OF 1859, *s.* 259.

ACT XXV OF 1871, [MADRAS ACT.] [*Railway Act Amendment Act.*]

Section 21.

On the 10th April 1874, prisoner's cow strayed on a Railway provided with a fence. On the 13th June following, Government published Rules, under this section, determining what kind of offences should be deemed to be suitable for the exclusion of cattle. On the date of the offence there were no such Rules. No evidence was offered of the state of the fence, and the prisoner was convicted solely on his admission that he was the owner of the cow. *Held* that in this case, the state of the fences required specific proof, in the absence of which the conviction could not be sustained. [18th January 1875.] 8 1

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ACT I OF 1872, [*The Indian Evidence Act.*]

Section 30.

This section is an exception, and its wording shows that the confession is merely to be an element in the consideration of the evidence. Unless there is something more, a conviction upon it will still be a case of no evidence and bad in law. [24th January 1873.] ... ... 7 xv

ACT X OF 1872, [*Criminal Procedure Code.*]

Section 23 G.

This section makes the Magistrate of a District competent to refer cases under Section 273 to a Divisional Magistrate exercising full powers. [23rd April 1872.] ... ... 7 v

Section 34.

See *Section* 283.

Section 41.

See HEAD ASSISTANT MAGISTRATE.

Section 43.

See ACT III OF 1871, *s.* 154. [MADRAS.]

Section 44.

1.—The accused was convicted of theft of some bullocks and fined. Under this section the Magistrate directed that the fines, if collected, should be paid to the 6th witness as compensation for having to return the bullocks, which he had purchased, to the complainant. *Held,* that this order was bad. The sale to the 6th witness was not "the offence complained of" within the meaning of this section. [3rd December 1872.]... ... ... 7 xiii

2.—This section confers no authority on one Subordinate Magistrate to refer to another Subordinate Magistrate a case referred to him for disposal. [15th June 1874.] ... ... 7 xxxiii

3.—There is no provision of the Code which authorises a Magistrate acting under this section to refer the case for enquiry or trial to another Magistrate. Section 68 merely authorises him to take cognizance of offences without complaint and to issue summons or warrant. [17th January 1872.] ... ... 7 ii

See *Section* 273.

ACT III OF 1871, *s.* 154. [MADRAS.]

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Section 72.

The Magistrate of Cochin, a Justice of the Peace but not a European British subject, convicted and sentenced a Merchant seaman, a European British subject, under cl. 4, s. 83 of Act I of 1859. *Held*, by a majority of the High Court, that by force of this section the Magistrate had no jurisdiction. (18th December 1873.) ... 7 xxxii

Section 144.

Accused was convicted by a 2nd Class Taluq Magistrate of insult with intent to provoke a breach of the peace. No formal complaint was entered in the record until after sentence was passed. The 2nd Class Magistrate not being authorised to entertain cases without complaint, the District Magistrate submitted that the whole proceedings were void under Section 34, Clause 2. *Held*, that the 2nd Class Magistrate could not be said to have entertained the case without complaint, but that he acted in violation of Section 144 in not reducing it to writing, and that, under Section 283, the Appellate Court would have no power to reverse the Judgment, or sentence on the ground of this irregularity. [24th March 1873.] ... ... 7 xxv

Section 169.

The *Court* before which the perjury is alleged to have been committed is to give the permission required by this section. A change of *incumbent* leaves it still the same *Court*. [12th November 1872.] ... ... 7 xii

Section 186.

No Advocate or Attorney of the High Court, or authorised Pleader, appearing in defence of an accused person under this section, should be required to file a Vakalutnamah. [23rd November 1874.] ... ... 7 xli

Section 195.

Cancellation by Magistrate of his order of discharge, under this section, and committal of accused held good there being nothing to show that the accused had been prejudiced. [23rd November 1874.] ... ... 7 xl

Section 209.

The special provisions of this section are applicable only in the case of original trials under Chapter XVI. [27th February 1875.] ... ... 8 vii

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A discharge of accused without hearing all the witnesses is irregular but not illegal. The High Court declined to interfere. [22nd February 1875.] ... ... 8 v

See *Section* 296.

Section 273.

This section applies only to criminal cases brought before the Magistrate of the District; either on complaint preferred direct to such Magistrate or on the report of a Police Officer. [17th January 1872.] ... ... 7 ii

Section 283.

Under this section the Appellate Court has no power to reverse a judgment or sentence on the ground of mere irregularity. [24th March 1873.] ... ... 7 xxv

Section 295.

This section gives the Court of Session the power of calling for the records of any Court subordinate to it for certain purposes. A Court of Session has power to direct a Magistrate to enquire into a complaint dismissed by him under Section 67 of the old Code or the corresponding Section 147 of the present Code. (19th March 1873.) ... ... 7 xvi

Section 296.

A complaint was preferred before the Assistant Magistrate against two persons of an offence punishable under Section 409 of the Penal Code. After enquiry they were discharged under Section 215 of the Code of Criminal Procedure. Subsequently the Sessions Court directed their committal under this section. *Held,* that this order was *ultra vires.* (5th November 1873.)... 7 xxviii

Section 301.

See ACT XLV OF 1860, *s.* 224.

Section 310.

The ruling of the High Court, reported at 6 M. H. C. R., Ap. XXXVIII, is still applicable to this section of the new Criminal Procedure Code. (10th December 1873.)... ... ... 7 xxx

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Section 467.

With the exception of cases triable by the Court of Session exclusively, a Court cannot try any offence described in Sections 467, 468 and 469 of the Code of Criminal Procedure, when committed before itself. [24th March 1873.]... ... 7 xvii

Section 468.

As soon as it becomes apparent that a complaint is of an offence falling within this section, and that it is made without sanction, the Magistrate is not competent to entertain it. [16th February 1875.] ... ... 8 ii

See *Section* 467.

Section 536.

There is nothing in this section to render the levy of accumulated arrears of maintenance by a single warrant illegal. (11th November 1874.) .. 7 xxxvii

ACT III OF 1873, [*Madras Civil Courts' Act.*]

Section 27.

By this section the general control over *all* the Civil Courts in the District under the Act is now vested in the District Judge. It is only in cases in which a defendant is beyond the local jurisdiction of the District Court, and the Court before which the suit is instituted has not otherwise jurisdiction under Act XI of 1865, Section 8, that a reference to the High Court becomes necessary. [21st October 1875.] ... ... 8 x

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ADJOURNMENT.

1.—The adjournment of a trial by public proclamation is irregular and objectionable. (1st August 1871.) ... ... 6 xxx

2.—The day to which the hearing is adjourned must be fixed. (22nd December 1870)... ... 6 x

3.—An order of adjournment should be made in the presence and hearing of the parties. (24th February 1875.)... ... ... 8 vi

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Where the Session Judge directed the committal of the defendant for adultery, the defendant having been already convicted by the Magistrate of enticing away: *Held*, that the sentence passed by the Magistrate should have been at once annulled, the requisite intention in the one case being the substantive delict in the other. (10th February 1870.)	5	xvii
See ACT XLV OF 1860, *s.* 497.		
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A Magistrate is at liberty to alter his sentence at any time before the despatch of the Calendar to the Appellate authority. (29th March 1870.) ...	5	xx
APPEAL.		
1.—It is the duty of Appellate Judges to act so far in conformity with the provisions of the Code of Civil Procedure as is sufficient to show that the Court has dealt with each ground of appeal, and more especially to record distinct findings on questions of fact. (22nd July 1869.)	4	lvi
2.—The valuation of an appeal must be according to the Act in force at the time of its presentation. (15th November 1870.)	5	xliv
3.—In disposing of an appeal the Magistrate at first reversed the Sub-Magistrate's decision and directed the release of the appellant; subsequently he recalled this order and confirmed the Sub-Magistrate's decision. *Held*, that the second order ought to be set aside and the original order restored. (8th December 1870.)	6	viii
4.—When the appeal from an order of a 1st Class Magistrate lies to the District Magistrate, the copy of the order should be sent to him, and not to the Sessions Judge. (14th July 1873.) ...	7	xxiii
5.—When a Criminal Appeal has been rejected without hearing the Appellant's Pleader, and it is afterwards proved to the satisfaction of the Appellate Court that an adequate excuse has been made for the Pleader's non-appearance, it is open to the Appellate Court to re-hear the Appeal on its merits. [7th November 1873.]...	7	xxix
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Arrest under Civil process of a Mofussil Court on Sunday is legal in this country. [30th July 1869.] ... ... 4 lxii

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Where the condition of bail bonds given by the defendants, and by the surety of a security bond, was that the defendants should appear when called upon; *Held,* that the defendants and their surety were entitled to reasonable notice of the time at which the former would be required to attend. [13th April 1869.] ... 4 xlv

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BIGAMY.

A Hindu Christian convert relapsing into Hinduism and marrying a Hindu woman cannot be convicted of bigamy on the ground that he has another wife living whom he married while a professing Christian. [8th November 1866.]. 3 vii

BOND.

See ACT X OF 1862.

BREACH OF THE PEACE. VOL. PAGE.

When there is evidence which would justify the finding of a Magistrate that an act likely to cause a breach of the peace has been committed, the High Court will not interfere with the proceedings of the Magistrate. [8th March 1869.] ... ... 4 xxxviii

BURIAL GROUND.

See CRIMINAL TRESPASS.

BUTCHER.

See ACT XIII OF 1859.

BYE-LAWS.

See ACT III OF 1871, [MADRAS.]

C.

CALENDARS.

Duplicates of Calendars sent by the Magistrate to the Session Court should be retained in the Session Court for a period of three years, after which they may be destroyed or returned to the Magistrates' offices. (1st December 1870.) ... 6 vi

See ACT XIII OF 1859.

CANCELLATION OF ORDER OF DISCHARGE.

See ACT X OF 1872, *s.* 195.

CANTONMENTS.

See ACT I OF 1866.

CASE REMANDED.

See REGULATION XIV OF 1816, S. 22.

CATTLE.

The mere fact of allowing cattle to stray, whereby damage is caused to the complainant, affords no evidence to support a conviction on the charge of mischief. (10th November 1871). ... 6 xxxvii

See ACT XXV OF 1871, *s.* 21.

CATTLE TRESPASS.

See ACT I OF 1871.

CAUSE OF ACTION.

See JURISDICTION.

CAUTIONING PRISONER.

It is not necessary for a Magistrate to caution a prisoner before receiving his or her statement. (9th December 1869.) ... ... 5 xi

CERTIFICATE OF HEIRSHIP.

See ACT VII OF 1870.

CERTIFICATE OF SALE. VOL. PAGE.
See ACT VIII OF 1859, *s.* 259.
ACT XVIII OF 1869, *s.* 49.
ACT VII OF 1871, *s.* 17.

CERTIFICATE TAX.
See ACT IX OF 1868.

CHANGE OF JUDGE.
See ACT X OF 1872, *s.* 169.

CHARGE.
A charge alleging a previous conviction need not show the extent of the former punishment. (17th April 1868.) ... ... 4 xi

See ACCOMPLICE.
ACT XLV OF 1860, *s.* 324.
FALSE EVIDENCE.

CHEATING.
The defendant was convicted of cheating. He applied to the Tahsildar for a specified quantity of land on cowle tenure free of tax for five years, and falsely represented that the land was waste land. *Held*, a good conviction. [6th January 1871.] ... ... 6 xi

CHEMICAL EXAMINER.
See ACT X OF 1872, *s.* 380 A.

CIVIL COURTS' ACT.
See ACT III OF 1873.

CIVIL PROCEDURE CODE.
See ACT VIII OF 1859.

COMMITMENT.
A commitment by a Sub-Magistrate to the Session Court with respect to offences not exclusively triable by the Session Court is good. (23rd January 1871.) ... ... 6 xvii

COMPENSATION.
See ACT XIII OF 1859.
ACT XXV OF 1861, *s.* 270.
ACT I OF 1871, *s.* 22.

COMPLAINT.
In cases triable under Chapter XIV where a Magistrate, on account of the non-appearance of the complainant, or for any other sufficient cause, is satisfied that the charge cannot be substantiated, he may dismiss the complaint. The dis-

COMPLAINT—*continued.* VOL. PAGE.

missal will not bar the complaint being again entertained. [8th December 1870.]... ... 6 viii

See ACT XXV OF 1861, *s.* 249.

ADJOURNMENT.

MAGISTRATE.

COMPULSORY LABOR.

See ACT I OF 1858.

COMPOUNDING OFFENCE.

See ACT XLV OF 1860, *s.* 404.

CONCEALING BIRTH.

See ACT XLV OF 1860, *s.* 318.

CONFESSION.

The prisoner was convicted of theft on his own confession. The charge to which the prisoner pleaded did not allege the taking out of the possession of some person dishonestly, and there was no evidence of such taking. *Held,* that the conviction was bad. [28th October 1870.] ... ... 5 xxxvii

See ACT I OF 1872, *s.* 30.

CONFISCATION.

See ACT III OF 1864, *s.* 21.

CONTEMPT.

See ACT XLV OF 1861, *s.* 163.

CONTRACT.

See ACT XIII OF 1859.

CONVERTS.

See BIGAMY.

MAINTENANCE.

CONVICTION.

See ACT XLV OF 1860, *ss.* 181, 188, 193.

INCOMPLETE TRIAL.

SENTENCE.

THEFT.

COOLIES.

See ACT XIII OF 1859, *s.* 2.

COPIES.

See APPEAL.

ORDERS.

STAMP.

CORPUS DELICTI. VOL. PAGE.

See THEFT.

COURT FEES.

See ACT VII OF 1870.

COWLE.

See CHEATING.

CRIMINAL APPEAL.

See APPEAL.

CRIMINAL BREACH OF TRUST.

1.—Conviction of the pledge of a turban, on the charge of criminal breach of trust for wearing it, quashed. (18th September 1866.) ... ... 3 vi

2.—A person who pledges what is pledged with him may be guilty of criminal breach of trust. (23rd May 1871.) ... ... 6 xxviii

See ACT XLV OF 1860, *s.* 409.

ACT I OF 1849, *s.* 9.

"DISHONESTLY."

CRIMINAL PROCEDURE CODE.

See ACT XXV OF 1861.

ACT VIII OF 1869.

ACT X OF 1872.

CRIMINAL TRESPASS.

1.—Accused was Ejman of complainant's family. Complainant obtained a decree setting aside an alienation made by accused. In execution, complainant obtained possession from the alienee. The accused entered on this land. *Held*, that he had not committed the offence of criminal trespass. [10th February 1871.] ... 6 xix

2.—Defendant was convicted of criminal trespass for having enclosed and commenced to cultivate a portion of a burial ground. *Held*, that the conviction was right. [28th March 1871.] ... 6 xxv

3.—Defendant was convicted of criminal trespass for including in his own land a portion of a public foot path. *Held*, that he was wrongly convicted. [25th May 1871.] ... ... 6 xxvi

CROSS-EXAMINATION.

See ACT X OF 1872, *s.* 19.

CUSTODY.

See ACT XLV OF 1860, *s.* 224,

ACT X OF 1872,

D.

DEAF AND DUMB PRISONER. VOL. PAGE.

See PRISONER.

DECREE.

A plaintiff cannot recover more than is clearly given to him by the decree either in express terms or by necessary inference. Where the plaint prayed for interest up to the date of the suit together with subsequent interest, and the decree purported to be an award in accordance with the prayer of the plaint; *Held*, that the plaintiff was not entitled to interest subsequent to the date of the decree. [4th November 1869.] ... ... 6 i

DEED.

See ACT XX OF 1866, *s.* 17, *cl.* 2.

ACT XVIII OF 1869.

DEFAMATION.

The Gumastah of a Guru or Priest was convicted of defamation for having published an order of his master ex-communicating the complainant from his caste. The letter publishing the ex-communication was a statement that complainant disobeyed some one and treated him with disrespect. *Held*, that the letter contained no expressions defamatory *per se*. [20th December 1871.] ... ... 6 xlvii

DEFAULT.

See ACT XXIV OF 1859, *s.* 48.

MADRAS ACT III OF 1864, *ss.* 21, 22, 64.

DEPOSIT.

See ACT X OF 1872, *s.* 228.

DEPOSITION.

The depositions of Ghosha ladies examined before the committing Magistrate in the presence of the accused are not admissible in evidence on the trial before the Session Court. (19th August 1868.) ... ... 4 xv

See ACT XXV OF 1861, *s.* 163.

APPROVER.

DEPUTY COLLECTOR. VOL. PAGE.
See ACT VII OF 1857, *s.* 3.

DIRECTION TO ASSESSORS.
See SESSIONS JUDGE.

DISCHARGE.
A prisoner is entitled to be discharged from custody immediately on the judgment of acquittal being pronounced, and no formal warrant is necessary. (30th October 1869.) ... ... 5 ii
See ACT X OF 1872, *s.* 215.
POWER TO DIRECT COMMITTAL.

"DISHONESTLY."
1.—This word in the Penal Code means the doing an act with the intention of causing wrongful loss or wrongful gain; and wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled. (18th September 1860.) ... ... 3 vi
2.—Accused was convicted of robbery, but the Magistrate found that the property taken was not taken with any dishonest intention. *Held*, that the conviction was bad. (28th October 1870). 5 xxxviii
See CRIMINAL BREACH OF TRUST.

DISMISSAL OF COMPLAINT.
See COMPLAINT.
MAGISTRATE.

DISOBEDIENCE.
See ACT XLV OF 1860, *ss.* 174, 188.
ACT I OF 1863. [MADRAS.]
ADJOURNMENT.
SUMMONS.

DISTRAINT.
See RIOTING.

DISTRICT MUNSIF.
See ACT VII OF 1857, *s.* 3.

DUMB PRISONER.
See PRISONER.

DUPLICATES OF CALENDARS.
See CALENDARS.

E.

	Vol.	Page.
EMIGRANTS.		
See ACT XIII OF 1864, *s.* 71.		
ENHANCED PUNISHMENT.		
Five persons were convicted of mischief, one prisoner appealed. Notice to attend the hearing of the appeal was sent to all five, of whom only three attended. The Head Assistant Magistrate, however, enhanced the sentence passed on all. *Held*, that the enhanced sentence passed on the prisoners who did not appear, and who disclaimed all intention of appealing, must be annulled. [4th March 1875.]	8	viii
See ACT X OF 1872, *s.* 46.		
ESCAPE.		
Escapes by parties detained for offences not punishable under the Penal Code are punishable under that Code. [22nd December 1866.]	3	xi
EUROPEAN BRITISH SUBJECT.		
See ACT I OF 1859, *s.* 83.		
ACT XXIV OF 1859, *s.* 48.		
EVIDENCE.		
A conviction based upon evidence taken in the absence of the accused is illegal. [8th April 1867.]	3	xxxiv
See ACCOMPLICE.		
ACT XXV OF 1861, *s.* 380 A.		
ACT I OF 1872.		
APPROVER.		
BREACH OF THE PEACE.		
CONFESSION.		
DEPOSITION.		
FALSE EVIDENCE.		
EXAMINATION OF ACCUSED.		
If the examination of an accused person taken before a Magistrate is afterwards read in evidence at the trial before the Session Court, the whole of it should be read out. (11th November 1869.)	5	iv
"EXECUTION SHALL BE STAYED."		
See ACT VI OF 1864, *s.* 11.		
EXEMPTION.		
See WITNESS.		

EXTORTION. VOL. PAGE.

The defendant was junior vakil for the complainant (the defendant in a case before the Magistrate) and was instructed by his senior to apply for an adjournment, but the defendant obtained a bond from the complainant and conducted his defence. The defendant was convicted of extortion. *Held*, that the conviction was bad. (14th January 1870.) ... ... 5 xiv

F.

FALSE EVIDENCE.

1.—When a party makes a false statement while legally bound by solemn affirmation, the fact that the statement was one tending to criminate himself will not justify his acquittal on a charge of giving false evidence. (21st February 1867.) ... ... 3 xxx

2.—In cases of giving false evidence, a separate charge against each prisoner must be framed and separate trial held of each charge. (15th March 1867.) ... ... 3 xxxii

3.—The making of any number of false statements in the same deposition is one aggregate case of giving false evidence. (1st May 1871.)... ... 6 xxvii

See ABETTOR.

FINDING.

1.—Until the finding is recorded the trial is incomplete. If before the finding is recorded the presiding officer of a Court is removed, the successor cannot pass judgment upon consideration of the evidence recorded by the predecessor. [7th April 1869.] ... ... 4 xliii

2.—Once the finding is recorded a Magistrate is not authorised to alter it. [1st February 1871.] 6 xviii

See ACT VIII OF 1859.

ACT XLV OF 1860, *s.* 324.

FINE.

1.—A sentence must impose a specific fine on each prisoner. [11th November 1869.] ... ... 5 v

2.—When a fine is imposed in addition to transportation and the whole or part of the fine is levied, it is the duty of the Sessions Judges to inform the authorities at Port Blair of the fact. [12th November 1870.]... ... ... 5 xliv

See ACT XVIII OF 1854, *s.* 34.

ACT XXIV OF 1859, *s.* 48.

ACT III OF 1864, [MADRAS.]

ACT I OF 1871, *s.* 22.

REGULATION XI OF 1816.

SENTENCE.

FOREIGN STATES—OFFENCES IN — VOL. PAGE.
See ACT I OF 1849.

FRIVOLOUS COMPLAINT.
See ACT XXV OF 1861, *s.* 270.

G.

GENERAL STAMP ACT.
See ACT XVIII OF 1869.

GOSHA WOMEN.
See DEPOSITIONS.

GRIEVOUS HURT.
See ACT XLV OF 1860, *s.* 338.

GUARDIANS AD LITEM.
Guardians *ad litem* should always be appointed by the Court in which the litigation is pending. [18th November 1869.] ... ... 5 viii

GUILTY KNOWLEDGE.
See ACT XLV OF 1860, *s.* 411.

H.

HEAD ASSISTANT MAGISTRATE.
A Head Assistant Magistrate has no power to order a Subordinate Magistrate to submit amended proceedings; but if the Sub-Magistrate be a Magistrate subordinate to the Head Assistant Magistrate, under Section 41 of the Code of Criminal Procedure, the latter may call for explanations of his subordinates' proceedings. [4th August 1873.] ... ... 7 xxvi

HEAD OF VILLAGE.
See ACT X OF 1872, *s.* 10.

HEIRSHIP, CERTIFICATE OF
See ACT VII OF 1870.

HIGH COURT.
The order of the High Court of the 30th August 1871, respecting the period of issuing orders confirming sentence of death after receipt of the record, is no longer in force. [3rd April 1873.] ... 7 xxi
See REVISION.

HOUSE-BREAKING.
1.—Three persons were charged with five distinct offences of house-breaking by night and were sentenced to two years' rigorous imprisonment in each case. *Held*, that the Magistrate had power only to pass sentences of four years' im-

HOUSE-BREAKING—*continued.* VOL. PAGE.

prisonment upon each prisoner, but according to the sentence all the punishments inflicted would be going on simultaneously. [7th November 1870.] ... ... 5 xlii

2.—Prisoner was convicted of house-breaking, his object being to have sexual intercourse with complainant's wife. *Held,* conviction valid. (26th February 1875.)... ... ... 8 vi

HOUSE-TRESPASS.

The accused was found in the complainant's house by night, but he stated that he was there for the purpose of carrying on an intrigue with the complainant's wife. The complainant refused to lay a complaint of house-trespass with intent to commit adultery. *Held,* that the Magistrate was right in refusing to convict of a charge which the husband refused to make. (15th November 1869.) ... ... 5 v

HUSBAND.

See ACT XLV OF 1860, *s.* 497.

HURT.

See ACT X OF 1872, *s.* 270.

I.

IMPRISONMENT.

See ACT XVIII OF 1854, *s.* 34.
ACT XIII OF 1859, *s.* 2.
ACT XXIV OF 1859, *s.* 48.
ACT XLV OF 1860, *ss.* 181, 193.
ACT III OF 1864, *ss.* 21, 22, 64. [MADRAS.]

INCOMPLETE TRIAL.

Where the Subordinate Magistrate convicted certain persons without allowing them a proper opportunity for the summoning and attendance of witnesses named for the defence, the High Court quashed the conviction and directed the subordinate Magistrate to rehear the case. (5th July 1870.) ... ... 5 xxvii

See FINDING.

INDIAN EVIDENCE ACT.

See ACT I OF 1872.

INDIAN PENAL CODE.

See ACT XLV OF 1860.

INDIAN SUCCESSION ACT.

See ACT X OF 1865.

INSULT. VOL. PAGE.

Accused was convicted by a 2nd Class Taluq Magistrate of insult with intent to provoke a breach of the peace. No formal complaint was entered in the record until after sentence was passed. The 2nd Class Magistrate not being authorised to entertain cases without complaint, the district Magistrate submitted that the whole proceedings were void under s. 34, cl. 2 of the Code of Criminal Procedure. *Held*, that the 2nd Class Magistrate could not be said to have entertained the case without complaint, but that he acted in violation of Section 144 in not reducing it to writing, and that under Section 283, an Appellate Court would have no power to reverse the judgment or sentence on the ground of irregularity. (24th March 1873.) ... ... 7 xxv

INTENTION.

See ACT VIII OF 1869, *s.* 29.

INTEREST.

See DECREE.

IRRIGATION WORKS.

See ACT I OF 1858.

J.

JUDGE, CHANGE OF

See FINDING.

JUDGE, PROSECUTION OF

See ACT X OF 1872, *ss.* 167, 169.

JUDGMENT.

A Judge may, at the close of the hearing of a suit, state at once orally the judgment which he intends to record and deliver. [18th November 1869.] ... ... 5 viii

JURISDICTION.

1.—The fact that the cause of action arose within the jurisdiction of the Civil Court gives the Court jurisdiction in Civil Suits irrespective of the residence of the defendants. (5th November 1869.) ... ... 5 iv
7

JURISDICTION—*continued.* VOL. PAGE.

2.—The Joint Magistrate of Tellicherry has no jurisdiction to try a resident of Mysore for criminal acts done in Mysore. [21st November 1870.] 6 iii

See ACT XVIII OF 1854, *s.* 26.
ACT I OF 1858, *ss.* 1, 6.
ACT I OF 1859, *s.* 83.
ACT XXIV OF 1859, *s.* 48.
ACT XXV OF 1861, *ss.* 23 D, 36, 228, 320, 405.
ACT XIII OF 1864, *s.* 71.
HOUSE-BREAKING.
MAGISTRATE.
REGULATION IX OF 1816.
SUB-MAGISTRATE.

K.

KA'VA'LGA'RS.
See ACT XXIV OF 1859, *s.* 43.

KURNUM.
See ACT X OF 1872, *s.* 138.

L.

LANDLORD AND TENANT.
See RIOTING.

"LEGALLY BOUND."
See ACT XLV OF 1860, *s.* 177.

LEGISLATIVE ACTS, LANGUAGE OF
See ACT I OF 1868.

LIQUOR.
See ACT III OF 1864, *s.* 22, [MADRAS]

M.

MADRAS CIVIL COURTS' ACT.
See ACT III OF 173.

MAGISTRATE.

1.—A Magistrate has no power to seize the property of a person convicted by him when the person convicted has not been directed to pay a fine. Nor has a Magistrate power to take property from one defendant and give it to another defendant. (16th January 1869.) ... ... 4 xxviii

2.—Where the Sub-Magistrate dismissed a charge of theft without enquiry, *Held*, that the District Magistrate might institute a fresh enquiry into the complaint. [17th June 1870.] ... ... 5 xxxi

MAGISTRATE—*continued.* VOL. PAGE.

3.—A complaint of theft of cocoanuts valued at 1 anna and 8 pies was made to a 3rd class Magistrate who returned the petition to the complainant, with an endorsement that he should obtain redress from the Village Magistrate. *Held,* that the procedure of the Magistrate was unauthorised. (13th December 1873.) 7 xxxi

See ACT I OF 1858, *ss.* 1, 6.
ACT I OF 1859, *s.* 83, *cl.* 5.
ACT XXIV OF 1859, *s.* 48.
ACT XXV OF 1861, *ss.* 15, 61, 163, 228, 296, 301.
HOUSE-BREAKING.
POWER TO DIRECT COMMITTAL.
REGULATION IX OF 1816.
SUB-MAGISTRATE.

MAINTENANCE.

1.—The rejection of an application for maintenance made by the wife of a Christian who had reverted to Hinduism and married a second wife is not warranted by the decision reported in 3 Madras High Court Reports, 7 (18th February 1868.) ... ... 4 iii

2.—Form of warrant of imprisonment on failure to pay maintenance amended by omitting the word "civil" before "Jail." [23rd February 1871.] ... ... 6 xx

See ACT XXV OF 1861, *s.* 316.
ACT X OF 1872, *s.* 536.

MASTERS AND WORKMEN.
See ACT XIII OF 1859.

MERCHANT SHIPPING ACT.
See ACT I OF 1859.

MILITARY CANTONMENTS.
See ACT I OF 1866.

MISCHIEF.

1.—To constitute the offence of mischief according to the Penal Code, the act done must be shown to have caused destruction of some property or such a change in the property or the situation of it as destroys or diminishes its value or utility or affects it injuriously. The probable consequential damage to other property would not of itself constitute mischief. (22nd October 1868.] 4 xvi

MISCHIEF—*continued.* VOL. PAGE.

2.—The accused were convicted of mischief. The facts were that whilst the accused were employed in floating timber through a bridge some of the logs struck against the arch of the bridge, *Held.* that the conviction was bad. [4th November, 1870.] ... ... 5 xl

See ACT XLV OF 1860, *ss.* 405.

CATTLE.

ENHANCEMENT OF PUNISHMENT.

MITIGATION OF SENTENCE.

See ACT X OF 1872. *s.* 405, 428,

MONEY PAID INTO COURT.

If money is brought into Court under process of execution, and the party entitled to it or his vakil is present to receive it, the Court shall cause it to be paid over immediately. (29th October 1869.) ... ... 5 ii

MUNICIPAL COMMISSIONERS.

See ACT XLV OF 1860, *s.* 443.

ACT III OF 1871, [MADRAS.]

MUNSIF.

A Munsif has no jurisdiction as a Small Cause Court to take cognizance of a suit against defendants not resident within his jurisdiction. [25th February 1867.] ... ... 3 xxiv

See WITNESS.

N.

NEGLIGENCE.

See ACT XXV OF 1861, *ss.* 289, 338,

NOTES OF JUDGMENT.

See ACT VII OF 1870, ART. VII. *Sch.* 1.

NOTICE.

See ACT XXV OF 1861, *s.* 219.

BAIL.

O.

OATH.

The Courts no longer possess the power of settling cases by "oath." (3rd March 1868.)... ... 4 iii

[But see the *Oaths' Act, No.* X *of* 1873.]

OBSTRUCTION TO SEIZURE.

See WRITING.

OFFENCES IN FOREIGN STATES. VOL. PAGE.
See ACT I OF 1849.

OFFENSIVE TRADES.
See ACT X OF 1865, *s.* 114, [MADRAS.]

ORAL JUDGMENT.
See JUDGMENT.

ORDERS.
Copies of every order which determines, or disposes of, a matter *sub-judice* should be submitted to the Court of Session, as also copies of every proceeding passed by a Magistrate with full powers on review of the calendars of the Sub-Magistracy. But orders originating on enquiry or relating to process issued during an enquiry are not within the Rule of the High Court of the 17th November 1868. [16th November 1869.] ... ... 5 vii
See APPEAL.

P.

PENAL CODE.
See ACT XLV OF 1859.

PENALTY.
See ACT XXV OF 1861, *s.* 219.

PERMITS.
See ACT III OF 1864, *s.* 22, [MADRAS.]

PLEADER.
See APPEAL.

PLEDGE.
See CRIMINAL BREACH OF TRUST.

PLEDGEE.
See "DISHONESTLY."

POLICE ACT.
See ACT XXIV OF 1859.

POLICE CONSTABLE.
See ACT XXIV OF 1859, *ss.* 10, 44.
ACT X OF 1872, *s.* 426.

PORT BLAIR.
See FINE.

POWER OF REVISION. VOL. PAGE.

See REVISION.

POWER TO DIRECT COMMITTAL.

The Session Court is the only authority empowered by law to direct a committal. [9th February 1869.] ... ... 4 xxxi

PRELIMINARY ENQUIRY.

Each preliminary enquiry should be conducted to a close as quickly as the circumstances of the case will permit. [21st June 1871.] ... ... 6 xxix

PREVIOUS CONVICTION.

See ADULTERY.

CHARGE.

PRISONER.

1.—A Judge should not refuse to try a prisoner brought up in chains to stand his trial, but he may direct the removal of the fetters unless satisfied by a representation from a proper officer that they are necessary. [24th August 1869.] ... ... 4 lxix

2.—A deaf and dumb prisoner was convicted of an offence. Upon the trial no attempt was made to communicate with the prisoner respecting the charge against him. The High Court quashed the conviction. [5th December 1870.] ... ... 6 vii

PRISONER'S STATEMENT.

See CAUTIONING PRISONER.

PROBATE.

See ACT X OF 1865.

PROPERTY.

See MAGISTRATE.

PUBLIC FOOT PATH.

See CRIMINAL TRESPASS.

PUBLIC SERVANT.

See ACT XLV OF 1860, s. 409.

CRIMINAL BREACH OF TRUST.

PUNISHMENT.

See ACT III OF 1865, [MADRAS.]

PURDANASHEEN.

See DEPOSITION.

R.

RAILWAY ACT. VOL. PAGE.

See ACT XVIII OF 1854.
ACT III OF 1865, [MADRAS.]
ACT XXV OF 1871, *s.* 21. [MADRAS.]

RASHNESS.

See ACT XLV OF 1860, *s.* 338.

REASONABLE NOTICE.

See BAIL.

REASONS.

1.—Sessions Judges should record their reasons for confirming, reversing, or modifying the sentences or orders of the Magistrates. [10th December 1869.] ... ... 5 xii

2.—Defendants were charged with theft, and on their appearance before the Sub-Magistrate were bound to appear from that date until the close of the trial. On the next day when the case was called on, defendants were not present, but they appeared the following day. The Sub-Magistrate heard what they had to say and directed the penalties on the forfeited recognizances to be levied from the defendants. *Held*, that there was no ground for the interference of the High Court as a Court of Revision; that there was nothing illegal in requiring defendants to execute such a bond, and that no notice was necessary before proceeding to enforce the penalty. [17th November 1871.] 6 xxxix

RECOGNIZANCE.

See ACT XXV OF 1861, *s.* 219.
SUBORDINATE MAGISTRATE.

RECORD.

Copy to be forwarded without unnecessary delay. [28th August 1871.] ... ... 6 xxxv

REGISTER.

See ACT XX OF 1866, *s.* 17, *cl.* 2.

REGISTRATION.

See ACT XX OF 1866, *s.* 17.
ACT VIII OF 1871, *s.* 17.

REGULATION IX OF 1816.

This Regulation confers no jurisdiction on a Magistrate of a District to extend a limited jurisdiction. [27th November 1871.] ... ... 6 xliv

See ACT XXV OF 1861, *ss.* 23 D, 36.

REGULATION XI OF 1816, s. 10. VOL. PAGE.
See VILLAGE MAGISTRATE.
REGULATION XII OF 1816.
See ACT VII OF 1857, s. 3.
REGULATION XIV OF 1816, s. 22.
When a suit is remitted by order of an Appellate Court for re-hearing or finding on an issue, the proceedings on such order must be regarded as further proceedings in the trial of the suit, and consequently under this Act a Vakil cannot change sides and hold a Vakalatnamah for the party opponent to the one for whom he appeared at the first hearing. [8th April 1869.] ... 4 xliii
REMOVAL OF HOUSE.
See SUB-MAGISTRATE.
REMOVAL OF PRESIDING OFFICER.
See FINDING.
REPEAL.
See ACT I OF 1868, s. 6.
REPORT OF CHEMICAL EXAMINER.
See ACT X OF 1872, s. 330 A.
RESPONDENT.
See APPEAL.
RETENTION PENDING APPEAL.
See ACT VII OF 1870, s. 31.
REVENUE OFFICERS' SUMMONS.
See ACT III OF 1869, [MADRAS.]
REVIEW OF JUDGMENT.
The stamp fee on an application for review of judgment must be calculated on the amount which would be obtained if the review were granted, and not necessarily on the whole value of the suit. [16th January 1872.] ... ... 7 i
See ACT X OF 1872, s. 55.
REVISION.
1.—A sentence duly passed and recorded cannot be revised by the Judge. [13th November 1868.] 4 xix
2.—When the evidence upon which a prisoner is convicted by a subordinate tribunal of an offence within its jurisdiction discloses an offence of a graver character without the jurisdiction of that tribunal, the High Court may quash the conviction and sentence for the minor offence and direct a trial before a tribunal having jurisdiction for the graver. Whether it will do so or not is a question simply of expediency. [1st May 1872.] ... ... 7 v

RIGHT OF WAY. VOL. PAGE.
See ACT XXV OF 1861, s. 320.

RIGOROUS IMPRISONMENT.
See ACT VI OF 1864.
ACT XXIV OF 1859, s. 48.

RIOT.
1.—In a case of a very serious riot the rioters were acquitted by the Magistrate because he thought they might have considered their act justified because the procession was illegal by virtue of some orders which did not appear, which might have been efficacious in point of law. *Held*, that the order of acquittal was bad in law. [8th January 1873.] ... ... 7 xxxv
2.—The law confers (certain conditions being first complied with) on landholders, and their authorized agents, power to distrain the moveable property of their tenants for the recovery of arrears of rents due by them. In all such cases the landholder acts upon his own responsibility, and if, in the alleged exercise of this power he attempts to seize the goods of his tenant when no rent is in arrear, mere obstruction to the seizure is not an offence. [17th November 1875.] 8 xi

ROBBERY.
See "DISHONESTLY."

RULE OF PRACTICE.
Proceedings of Sadr Court, 25th August 1823, annulled. [28th November 1870.] ... ... 6 vi
See ORDER.

S.

SALE CERTIFICATES.
See ACT VIII OF 1859, s. 259.

SALT.
Being in possession of salt earth from which salt may be manufactured with the object of making salt is an offence under the Salt laws. [1st July 1869.]... ... ... 4 liii

SANCTION TO PROSECUTE.
See ACT X OF 1872, ss. 169, 468.

SCHEDULE.
See ACT XVIII OF 1869.

REGULATION XI OF 1816, s. 19. VOL. PAGE.
See VILLAGE MAGISTRATE.
REGULATION XII OF 1816.
See ACT VII OF 1857, s. 2.
REGULATION XIV OF 1816, s. 22.
When a suit is remitted by order of an Appellate Court for re-hearing or finding on an issue, the proceedings on such order must be regarded as further proceedings in the trial of the suit, and consequently under this Act a Vakil cannot change sides and hold a Vakalatnamah for the party opponent to the one for whom he appeared at the first hearing. [8th April 1869.] ... 4 xl
REMOVAL OF HOUSE.
See SUB-MAGISTRATE.
REMOVAL OF PRESIDING OFFICER.
See FINDING.
REPEAL.
See ACT I OF 1868, s. 6.
REPORT OF CHEMICAL EXAMINER.
See ACT X OF 1872, s. 280 A.
RESPONDENT.
See APPEAL.
RETENTION PENDING APPEAL.
See ACT VII OF 1870, s. 31.
REVENUE OFFICERS' SUMMONS.
See ACT III OF 1869, [MADRAS.]
REVIEW OF JUDGMENT.
The stamp fee on an application for review of judgment must be calculated on the amount which would be obtained if the review were granted, and not necessarily on the whole value of the suit. [16th January 1872.] 7
See ACT X OF 1872, s. 55.
REVISION.
1.—A sentence duly passed and recorded cannot be revised by the Judge. [13th November 1868.] 4
2.—When the evidence upon which a prisoner is convicted by a subordinate tribunal of an offence within its jurisdiction discloses an offence of a graver character without the jurisdiction of that tribunal, the Hi... may ... on-viction and ... nd direct a tr... c-tion for ... is a ... not 1...

RIGHT OF WAY. VOL. PAGE.
See ACT XXV OF 1861, s. 320.

RIGOROUS IMPRISONMENT.
See ACT VI OF 1864.
ACT XXIV OF 1859, s. 48.

RIOT.
1.—In a case of a very serious riot the rioters were acquitted by the Magistrate because he thought they might have considered their act justified because the procession was illegal by virtue of some orders which did not appear, which might have been efficacious in point of law. *Held*, that the order of acquittal was bad in law. [8th January 1873.] ... ... 7 xxxv
2.—The law confers (certain conditions being first complied with) on landholders, and their authorized agents, power to distrain the moveable property of their tenants for the recovery of arrears of rents due by them. In all such cases the landholder acts upon his own responsibility, and if, in the alleged exercise of this power he attempts to seize the goods of his tenant when no rent is in arrear, mere obstruction to the seizure is not an offence. [17th November 1875.] 8 xi

ROBBERY.
See "DISHONESTLY."

RULE OF PRACTICE.
Proceedings of Sadr Court, 25th August 1823, annulled. [28th November 1870.] ... ... 6 vi
See ORDER.

S.

SALE CERTIFICATES.
See ACT VIII OF 1859, s. 259.

SALT.
Being in possession of salt earth from which salt may be manufactured with the object of making salt is an offence under the Salt laws. [1st July 1869.]... ... ... 4 liii

SANCTION TO PROSECUTE.
See ACT X OF 1872, ss. 169, 468.

SECURITY FOR GOOD BEHAVIOUR. VOL. PAGE.

See ACT XXV OF 1861, *ss.* 296, 301.
ACT XLV OF 1860, *s.* 224.

SENTENCE.

1.—A Sessions Judge has no authority to suspend his own sentence. [17th January 1868.] ... 4 ii

2.—Where prisoners are convicted of separate offences, a separate sentence should be passed on each case with a direction that the imprisonment in the second case should begin on the expiration of that on the first and so on. [15th January 1869.] ... ... 4 xxvii

3.—A Sessions Judge has no power to suspend a sentence in a case in the absence of an appeal. [25th October 1869.] ... ... 6 i

4.—Where a Magistrate convicts a person of an offence he is bound to pass some sentence. [11th August 1869.] ... ... 4 lxvi

5.—To enter up *findings* on every head of charge is not only not illegal but the most convenient course. Where the acts constituting the offence are founded on one single continuous transaction, *sentence* should only be passed for the principal offence. [20th December 1871.] 6 xlvii

See ALTERATION OF SENTENCE.
FINE.
REVISION.

SESSIONS JUDGE.

1.—Where in a trial before a Sessions Judge with Assessors, the prisoner pleads not guilty and the Public Prosecutor does not offer evidence in support of the charge, the Judge ought to instruct the Assessors that they are bound to find the prisoner not guilty. [9th March 1869.]... 4 xxxix

2.—A Sessions Judge has no power to direct a Division Magistrate to cancel his proceedings reviewing the calendar of Magistrates subordinate to him. [18th August 1873.] ... ... 7 xxvii

See REASONS.
SENTENCE.

SMALL CAUSE COURT.

See ACT XI OF 1865.
ACT VII OF 1870.
MUNSIF.

SPIRITUOUS LIQUOR. VOL. PAGE.

See ACT I OF 1869, *s.* 30, [MADRAS]

BEER.

STAMP.

1.—With the exception of the deposition of the witnesses, and the documentary evidence and copies of final sentences or orders passed by Criminal Courts, which parties desirous of appealing from such sentence are required to file with their petition of appeal, when the party desirous of appealing is in confinement under the operations of the sentence or order at the time that he applies for a copy of the same, copies of any part of the record of a criminal trial can only be furnished to applicants on stamp paper. [26th July 1867.] ... ... 4 lviii

2.—The exemption of the Government of India, dated the 19th September 1870, cannot be extended to copies of the statement of the evidence and grounds of conviction. Persons desirous of obtaining copies of such documents for the purpose of appeal must furnish stamped paper on which the copies are to be written. [5th January 1871.] ... ... 6 xii

See ACT X OF 1862.

ACT XVIII OF 1869.

ACT VII OF 1870.

REVIEW OF JUDGMENT.

STATEMENT.

See ACT X OF 1872, *s.* 19.

CAUTIONING PRISONER.

SUB-MAGISTRATE.

1.—A Sub-Magistrate cannot bind over witnesses by recognizances to appear before himself. The proper cause to enforce attendance is by summons, and, if that fails, by warrant. [18th March 1868.] ... ... 4 vi

2.—[31st October 1868.] ... ... „ xvii

3.—[Do.] ... ... „ xviii

4.—A Magistrate of the District has no power to direct a Subordinate Magistrate to commit for trial in the Sessions Court accused persons who have been discharged by the Subordinate Magistrate, and such committal when made by the Subordinate Magistrate is illegal. The Sessions Court is the only authority empowered by law to direct a committal. [9th February 1869.] 4 xxxi

SUB-MAGISTRATE—*continued.* VOL. PAGE.

5.—Orders by Sub-Magistrate, in one case directing the removal of a house on the ground that it was in a dangerous and dilapidated condition, and in the other directing the removal of a granary on the ground that it had been improperly erected upon land required to be kept unoccupied for common purposes, were set aside by the High Court because the Sub-Magistrate acted without jurisdiction. (12th February 1869.) ... ... 4 xxxv

6.—A Sub-Magistrate has no power to dismiss a charge under Section 403 of the Penal Code for non-appearance of the complainant under Section 259 of the Code of Criminal Procedure. [24th March 1869.] ... ... 4 xli

7.—A commitment by a Subordinate Magistrate to the Sessions Court with respect to offences not exclusively triable by the Sessions Court is good. [23rd January 1871.]... ... ... 6 xvii

See ACT I OF 1868, [MADRAS.]

SUCCESSION ACT.

See ACT X OF 1865.

SUMMONS.

1.—Magistrates may, under the Criminal Procedure Code, issue summonses for services upon witnesses beyond the limits of their Districts. (18th August 1861.) ... ... 3 v

2.—The accused was convicted upon a charge that he being summoned as a defendant in a case of trespass, left the Court without permission and thereby disobeyed the summons. The Sub-Magistrate gave the accused a verbal order to appear when required, but he did not adjourn the case to any particular day. *Held*, that the conviction was bad. (22nd December 1870.)... 6 x

3.—When defendant was summoned to appear before a Magistrate on a certain date, but the summons did not specify the place of appearance; *Held*, that the Magistrate ought not to have passed an *ex parte* order in defendant's absence, as there was no failure to appear because no place was specified at which the petitioner was to appear. [30th November 1874.]... ... ... 7 xliii

See ACT XLV OF 1860, *s.* 174.
ACT III OF 1869, [MADRAS.]

SUNDAY. VOL. PAGE.

Arrest under Civil process of a Mofussil Court on sunday is legal in this country. [30th July 1869.] ... ... 4 lxii

See SENTENCE.

WHIPPING.

T.

TAHSILDAR.

See ACT III OF 1869, [MADRAS.]

THEFT.

1.—A conviction for theft under the Penal Code is illegal if the owner has given up all property in and all possession of the object of the alleged theft. [5th February 1869.]... ... ... 4 xxx

2.—Two persons were committed for trial, the 1st prisoner for adultery, enticing away a married woman, and theft, and the 2nd prisoner for abetment of the enticing away and theft. The 1st prisoner was acquitted of the charges of adultery and enticing away. *Held*, that notwithstanding the acquittal the prisoners were not entitled to be discharged without trial on the charge of theft. (16th May 1870.) ... 5 xxiii

3.—The moving by the same act which effects the severance may constitute a theft. (22nd October 1870.) ... ... 5 xxxvi

4.—Accused was convicted of theft of paddy. The facts were that prisoner was found in possession of rice not thrashed in the usual way, and that having no paddy land of his own, he failed to account satisfactorily for the possession of the rice. *Held*, conviction bad. (18th February 1873.) 7 xix

See ACT X OF 1872, *s.* 44.

CONFESSION.

MAGISTRATE.

RECOGNIZANCE.

TENANT.

See RIOT.

TODDY.

1.—Sweet palm-juice, which, by exposure to the operation of natural causes, ferments and becomes toddy, is as much manufactured by the person who exposes it as if the same result were produced by the process of distillation. [17th June 1870.] ... ... 5 xxvi

TODDY—*continued.* VOL. PAGE.

2.—*Primâ facie,* toddy is fermented palm-juice. [21st October 1870.] ... ... 5 xxxvi

3.—The High Court did not however intend by this definition to define toddy as a matter of law. [4th January 1871.] ... ... 6 xi

See ACT III OF 1864, [MADRAS]

TOWN.

See ACT XXI OF 1859, *s.* 49.

TOWNS' IMPROVEMENT ACT.

See ACT X OF 1865, [MADRAS.]

ACT III OF 1871, [MADRAS.]

TRANSPORTATION.

See FINE.

TRESPASSER.

See ACT X OF 1872, *ch.* 22.

U.

UNCOVENANTED.

See ACT VII OF 1857.

UNCORROBORATED EVIDENCE.

See ACCOMPLICE.

UNSTAMPED DOCUMENT.

See ACT XLV OF 1860, *s.* 477.

V.

VACCINATORS.

See ACT XLV OF 1860, *s.* 177.

VAKALATNAMAH.

See ACT X OF 1872, *s.* 186.

VAKIL.

The practice of admitting private Vakils to defend parties in Criminal Courts is not illegal. It is discretionary with the Magistrate to hear such agents or not. (11th November 1874.) ... 7 xxxvii

See EXTORTION.

REGULATION XIV OF 1816, S. 22.

"VALUABLE SECURITY."

See ACT XLV OF 1860, *s.* 477.

VALUATION OF APPEAL. VOL. PAGE.
See APPEAL.

VERBAL ORDER.
See ACT XLV OF 1860, *s.* 174.

VEXATIOUS COMPLAINT.
See ACT XXV OF 1861, *s.* 270.

VILLAGE KAVALGARS.
See ACT XXIV OF 1859, *s.* 48.

VILLAGE MAGISTRATE.
A Village Magistrate has no jurisdiction to impose a fine upon a person who uses abusive language to him in the course of a trial under Section 10, Regulation XI of 1816. (26th July 1870.) ... 5 xxxiii
See ACT XLV OF 1860, *s.* 174.

VILLAGE SHROFF.
See ACT XLV OF 1860, *s.* 409.

VILLAGE WASTE LANDS.
See ACT XLV OF 1860, *s.* 447.

W.

WARRANT OF DISTRESS.
See ACT XVIII OF 1854, *s.* 34.

WASTE LANDS.
See ACT XLV OF 1860, *s.* 447.
CHEATING.

WAY—RIGHT OF
See ACT X OF 1872.

WHIPPING.
See ACT VI OF 1864.
ACT X OF 1872, *s.* 310.

WILFUL DISOBEDIENCE.
See ACT I OF 1859, *s.* 83, *cl.* 4.

WITNESS.
A Munsif ought not to be called on to depose as to what took place before him in the course of a trial which he was conducting as Munsif. (27th November 1871.)... ... ... 6 xlii
See ACT XLV OF 1860, *s.* 174.
ACT X OF 1872, *ss.* 19, 163, 266, 318.
SUB-MAGISTRATE.
SUMMONS.

WORKMEN. VOL. PAGE.
See ACT XIII OF 1859.

WRONGFUL CONFINEMENT.
Two Police Constables and two Village Officers were convicted of wrongful confinement and abetment thereof. The Village Officers maliciously directed the arrest of certain persons for resisting the detention of certain pigs found trespassing; *Held*, a good conviction. [13th June 1870.] 5 xxiv