NOTES.

[CIVIL PROCEDURE—POWERS OF AN APPELLATE COURT—

Finding by an Appellate Court on evidence recorded by the first Court without any finding on it by the latter is not illegal. This principle was extended by analogy to the case where one Judge records evidence and his successor gives findings on it:—(1886) 8 All., 576 (602).

See also (1886) 9 All. 26.]

[3 Mad. 98.]

APPELLATE CIVIL.

The 15th December, 1880.

PRESENT:

MR. JUSTICE KERNAN AND MR. JUSTICE FORBES.

Papa Sastrial.....(Plaintiff Appellant.

versus

Anuntarama Sastrial.....(Defendant) Respondent.*

Civil Procedure Code Amendment Act, effect of, on petition pending at date of its enactment.

Where an application to execute a decree was made under Section 230† of the Code of Civil Procedure before the Amendment Act (XII of 1879) came into force, but was not disposed of until after Section 230 was altered by that Act.

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* C. M. S. A. No. 334 of 1880 against the order of A. C. Burnell, District Judge of South Tanjore, dated 1st April 1880.

† [Sec. 230:—When the holder of a decree desires to enforce it, he shall apply to the Court which passed the decree or to the officer, if any, appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court, then to such Court or to the proper officer thereof.

Application for execution.

The Court may in its discretion refuse execution at the same time against the person and property of the judgment-debtor.

Where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted, no subsequent application to execute the same decree shall be granted unless the Court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree; and the order of the Court granting any such subsequent application shall be conclusive evidence that due diligence was used to procure such satisfaction.

And no such subsequent application shall be granted after the expiration of twelve years from any of the following dates (namely)—

(*a*) the date of the decree sought to be enforced, or of the decree (if any) on appeal affirming the same, or

(*b*) where the decree or any subsequent order directs the payment of money or the delivery of property by instalments,—the date of the default in paying or delivering the instalment in respect of which the applicant seeks to enforce the decree.

Nothing in this section shall prevent the Court from granting an application for execution of a decree after the expiration of the said term of twelve years, where the judgment-debtor has by fraud or force prevented the execution of the decree at some time within twelve years immediately before the date of the application.

Notwithstanding anything herein contained, proceedings may be taken to enforce any decree within three years after the passing of this Code, unless when the period prescribed for taking such proceedings by the law in force immediately before the passing of this Code shall have expired before the completion of the said three years.]

Held, that the rule in *Wright* v. *Hale* (6 H. and N. 227), applied, and that the Act, as amended, was the law to be applied.

ON the 19th July 1878 appellant applied to the District Munsif of *Mayavaram* for the execution of a decree, dated 28th February 1878, against the respondent, and a warrant was issued directing the property mentioned in the decree to be put into his possession. As the property was incorrectly described the warrant was returned on the 29th August unexecuted, the appellant undertaking in writing to the Amin to put in a petition to the Court and amend his application for execution.

[99] On the 13th September 1878, further proceedings not having been taken, this application was dismissed.

In January 1879 plaintiff made another application for execution. Subsequent to this date the lands in dispute came under the jurisdiction of the District Munsif of *Valangiman*, and on 25th June 1879 the appellant applied to the *Valangiman* Court for a fresh warrant.

On 2nd July the application was admitted, and on 12th July the respondent put in a petition objecting to the issue of the warrant as the appellant had been guilty of laches.

On the 29th July Act XII of 1879 came into force, repealing that part of Section 230 which required due diligence on the part of the decree-holder.

The application of the 25th June and the respondent's petition of 12th July 1879 were disposed of on the 2nd January 1880 by the District Munsif, who held that due diligence had not been used by appellant; and that, as it was not provided that Act XII of 1879 was to be taken as part of the *Civil Procedure Code* (as was declared in the case of Act XXIII of 1861 with reference to Act VIII of 1859), and as Section 102* of Act XII of 1879 did not apply to suits and applications but only to appeals pending on the date the Act came into force, Act XII of 1879 had no retrospective effect in this case.

The application was rejected, and on appeal the District Judge confirmed the order on the ground that due diligence had not been used.

The appellant then presented this appeal to the High Court on the ground that the case was governed by Act XII of 1879.

Mr. *Wedderburn* and *A. Tirumarayanachari* for the Appellant.

The question is whether the *Amendment Act* has retrospective effect in this case. Section 230 had been amended when the case was tried. The intention of the Legislature must be ascertained. Section 102 gives it retrospective effect in certain cases, but that of itself is not sufficient to rebut the presumption that the benefits of the new Act and the evils of the old Act were to be conferred and restricted as soon as possible.

Act I of 1868, Section 6,† enacts that the repeal of an Act does not affect any proceedings commenced before the repealing Act **[100]** came into force. But

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Pending appeals.

Orders and notifications under Sections 320 and 360.

*[Sec. 102:—Every appeal now pending which would have lain if this Act had been in force on the date of its institution shall be heard and determined as if the Act had been in force on such date; and every order heretofore passed purporting to transfer a case to a Collector under Section 320, and every notification heretofore published purporting to be issued under Section 360, shall be deemed to have been respectively passed and issued in accordance with law.]

Matters done under an enactment before its repeal to be unaffected.

†[Sec. 6:—The repeal of any Statute, Act or Regulation, shall not affect anything done or any offence committed, or any fine or penalty incurred, or any proceedings commenced before the repealing Act shall have come into operation.]

Act XII of 1879 does not affect these proceedings. It interferes with no vested right as in the *Bombay* case (I. L. R., 2 Bom., 148). The *Amendment Act* became part and parcel of the *Procedure Code*, and is to be applied as laid down in Section 3 as amended. It is true that there is an express provision in Act XXIII of 1861 (which is not to be found in Act XII of 1879) that it is to be part of the *Civil Procedure Code*, but it is submitted there is no necessity to enact a proposition of law which would apply without enactment.

Lastly, the provision contained in the last paragraph of Section 230 would appear to have the effect of postponing for three years, from the 1st October 1877, the operation of that section so far as it required diligence to be used in prosecuting execution proceedings, if Section 230 as unamended is applicable to this case.

The following cases and authorities were referred to: *Pardo* v. *Bingham* (L. R., 4 Ch. App., 740); *Kimbray* v. *Draper* (L. R., 3 Q. B., 160-163); *The Queen* v. *Vine* (L. R., 10 Q. B., 198); *Dwarris*, p. 546, pp. 562, 563.

A. Ramachandrayyar for the Respondent.

The decree-holder lost his right by want of diligence. This is not a mere question of procedure. I acquired a right by plaintiff's want of diligence just as I would have acquired a right had he left me in adverse possession of this land for twelve years.

The Court (KERNAN and FORBES, JJ.) delivered the following

Judgment:—The plaintiff obtained a decree in the Munsif's Court at *Mayavaram* for delivery to him of certain plots of land, and a warrant for delivery under the decree was issued on his application made on the 19th July 1878.

After the issuing of the warrant, the plaintiff found that one of the plots was not correctly described, and gave a statement to the Amin to that effect, adding that when the warrant was corrected he would obtain possession of all the lands, including the plot incorrectly described. The warrant was returned into Court on the 29th August 1878, and the original application for execution was dismissed on the 13th September 1878, presumably because the warrant could not be completely executed on account [101] of the mistake. The lands were subsequently transferred from the jurisdiction of the Munsif's Court of *Mayavaram* to the jurisdiction of the Munsif of *Valangiman*, and on the 25th June 1879 plaintiff applied to that Court for execution of the decree. The defendant on the 12th July 1879 filed an objection to such application on the ground that plaintiff had not used due diligence to procure complete satisfaction of the decree on his former application to execute the decree, and that the Court under Section 230 (as it then stood) of the *Civil Procedure Code* could not grant the fresh application to execute the decree.

This application and objection were heard on 2nd January 1880. Previous to that day, and on the 29th July 1879, Act XII of 1879 was passed. By it Section 230, *Civil Procedure Code*, so far as it contained the prohibition to grant a second application for execution unless due diligence had been used on the first application to execute the decree, was repealed. Section 230 of the *Procedure Code* was part of procedure, and was subject to the general rule of interpretation of statutes relating to procedure. That rule is stated in *Wright* v. *Hale* (4 H. & N., 227), and also in *Kimbray* v. *Draper* (3 L. R., Q. B., 160). In the latter case BLACKBURN, J., says: "The canon of decision in *Wright* v. *Hale* is that when an enactment is to take away a right, it *primâ facie* does not apply to existing rights; but when it deals with procedure only, it applies to all actions, pending as well as future."

Now the matter in question is mere procedure. Section 230, whether in its original state or as amended by the Act XII (which is an Act in terms expressed to be to amend the *Code of Civil Procedure*), has reference to procedure only. Therefore the Code, as amended, was the law to be applied by the Judge. The repealed part of Section 230 had no legal existence, and was incapable of application when the Judge made his order of the 2nd January 1880. The provision of Section 6, Act I of 1868, does not appear to us to oppose any obstacle, as it only provides that proceedings already commenced under an Act shall not be affected by the repeal of the Act. This provision does not relate to procedure. The proceedings may go on, but the procedure may be different.

[102] It was contended that the defendant had, at the time of the passing of the Act XII of 1879, a vested right to be free from execution of the decree, as the plaintiff had not used due diligence. We think that defendant had not such right.

Section 230, before it was amended, did not confer on a defendant any right to be free from further execution in case due diligence had not been used by plaintiff. It only provided that further application for execution should not be granted. Unless and until the Court was satisfied that due diligence was not used, defendant could not claim freedom from execution. Now before the passing of Act XII of 1879 the Court had not made any order that such due diligence was not used, and after the passing of that Act the Court had no jurisdiction to make such an order.

We think, therefore, that on the above grounds the orders of both the Lower Courts were wrong and must be set aside. But we do not see that the plaintiff failed to use due diligence to procure complete satisfaction of the decree. What he did was this: finding that, by reason of the incorrect description of the situation of one of the lots, he could not completely execute the decree, he gave notice of the defect to the Amin in order that he might have the warrant made right. His object was to procure complete execution and thus facilitate the object of Section 230. No doubt he might have, before January 1879, applied a second time for execution. But his neglect to do so does not appear to us to constitute want of due diligence within Section 230 as it originally stood. In its original state Section 230 was manifestly intended to apply to cases where an execution was partly executed, and where the plaintiff neglected to execute the decree completely when he had the power to do so. There were many cases where executions were merely nominally put in force and were held over incompletely executed, sometimes for long periods. The facts in this case do not show, in point of law, want of due diligence to procure complete satisfaction of the decree within the meaning of Section 230 unamended; but, on the contrary, they do show an effort to procure complete satisfaction at once. We set aside both the Lower Courts' orders, and direct the Court of First Instance to entertain the application by the plaintiff for execution. The defendant is to pay to the plaintiff costs below and in this Court.

NOTES.

[RETRO-ACTIVITY OF STATUTES—

"The general rule that Acts are always prospective and not retrospective, has two exceptions: (*a*) when Acts are expressly declared to be retrospective; (*b*) when they only affect the procedure of the Court" :—

Per **Scott, J.** in (1890) 14 Bom., 516 (525).

(*a*) In (1895) 6 M. L. J., 122, trial under Act I of 1894 without assessors was held good though the reference began under Act X of 1870.

(*b*) In (1883) 7 Bom. 459, the period of limitation for application fo rexecution was held affected by the new Act.

See (1888) 12 Bom. 449.

See also (1912) M. W. N. 652 under the Madras Estates Land Act and also (1912) 12 M. L. T. 437.

For an exhaustive treatise on the subject *See* Ch. XI., S. ii of "Interpretation of Statutes' by Ghose and Ghose.]

[103] APPELLATE CIVIL.

The 14th January, 1881.

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE INNES.

Rajagopal Takkaya Naiker and two others, Minors, by their Guardian Subramanya Ayyar.....Petitioners.

versus

Muttupalem Chetti & another.....Counter-Petitioners.*

Compromise of suit on behalf of minor by next friend—Leave of Court must be actually, not impliedly, given—Decree in terms of compromise not sanctioned set aside.

The conditions of Section 462† of the Civil Procedure Code, requiring the sanction of the Court to compromises entered into by the guardian *ad litem* of an infant suitor, are not sufficiently complied with by the Court passing a decree in the terms of a compromise presented by the guardian *ad litem*.

A decree passed under such circumstances should be set aside.

IN Suit 469 of 1877 before the District Munsif of *Kulitalai*, the counter-petitioners sued the petitioners, three minor sons, upon a mortgage-deed executed by their deceased father. The suit was compromised on behalf of the minors by their mother, who was their guardian *ad litem* and who signed and presented to the Court a compromise on their behalf. A decree was passed in the terms of this compromise on 23rd January 1878.

On 8th April 1880 the minors by their mother presented a petition to the District Munsif of *Kulitalai*, under Section 249 of the Civil Procedure Code, objecting to the decree being executed against the minors' property on the ground that the sanction of the Court had not been obtained, under Section 462 of the Code, to the compromise, and that the minors' interests were prejudiced thereby.

This petition was rejected by the Munsif, and the Munsif's decision was confirmed by the District Judge, who considered that the sanction of the Court had been impliedly given when the compromise was embodied in the decree.

* C.M.P. 562 of 1880 against the decree of the District Munsif of Kulitalai, dated 23rd January 1878.

Next friend or guardian *ad litem* not to compromise without leave of Court.

Compromise without leave voidable.

† [Sec. 462:—No next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian.

Any such agreement or compromise entered into without the leave of the Court shall be voidable against all parties other than the minor.]