But no similar provision was enacted in the Regulations of Madras. The principle of the decision in *Patiabhiramier's* case, as explained by the case of *Thumbusawmy*, is clearly that doctrines such as that of the equity of redemption and other doctrines foreign to the ancient law of the country should not be permitted to stand in the way of giving effect to the clear intention of the parties as expressed in the written instrument. And in the judgment in *Thumbusawmy's* case the practice in Madras, as stated in *Nullana Goundan* v. *Palani Goundan* (2 M. H. C. R., 420), of resorting to oral evidence to aid the Court in the discovery of the intention of the parties is distinctly deprecated if not condemned.

The question, therefore, in contracts which have been made before 1858 is narrowed to what was the intention of the parties as gathered from the instrument itself.

[31] It appears to me that the intention clearly was that on this plaintiff's failure to pay by the stipulated term the property should pass to the first defendant. I would, therefore, reverse the decrees of the Courts below and dismiss plaintiff's suit with all costs throughout.

Turner, C. J.—I am of the same opinion.

[3 Mad. 31.]

APPELLATE CIVIL.

The 8th April, 1881.

PRESENT:

MR. JUSTICE KERNAN AND MR. JUSTICE MUTTUSAMI AYYAR.

Pallikunath Ramen Menon.....(3rd Defendant) Appellant

versus

Mullankaji Sri Kumaran Nambudri.....(Plaintiff) Respondent.*

Abatement of suit under Section 102, Act VIII of 1859—Fresh suit brought under Act X of 1877.

Where a suit was declared abated in 1868 under Section 102† of Act VIII of 1859 for non-prosecution by the representative of deceased plaintiff.

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* Second Appeal, No. 828 of 1880, against the decree of H. Wigram, Officiating District Judge of South Malabar, reversing the decree of the District Munsif of Ernad, dated 25th October 1880.

† [Sec. 102:—In case of the death of a sole plaintiff or sole surviving plaintiff, the Court may, on the application of the representative of such plaintiff, enter the legal name of such representative in the place of such plaintiff in the Register of the suit, and the suit shall thereupon proceed; if no such application shall be made to the Court within what it may consider a reasonable time by any person claiming to be the legal representative of the deceased sole plaintiff, or sole surviving plaintiff, it shall be competent to the Court to pass an order that the suit shall abate, and to award to the defendant the reasonable cost which he may have incurred in defending the suit, to be recovered from the estate of the deceased sole plaintiff, or surviving plaintiff; or the Court may, if it think proper, on the application of the defendant, and upon such terms as to costs as may seem fit, pass such other order for bringing in the legal representative of the deceased sole plaintiff or surviving plaintiff, and for proceeding with the suit in order to a final determination of the matters in dispute, as may appear just and proper in the circumstances of the case.]

Proceeding in case of death of sole or sole surviving plaintiff.

Held that the Civil Procedure Code, Section 371,* was no bar to a fresh suit instituted in 1880 on the same cause of action.

IN this suit plaintiff in 1880 sued to recover with arrears of rent land demised on Kanom to the first defendant by a member of the Puliyara Illom which plaintiff claimed to represent under a Karar.

A Suit No. 519 of 1865 had been brought by the then head of the Puliyara Illom on the same cause of action, but the plaintiff dying *pendente lite* and the members of the family having disputed the present plaintiff's right to represent the family and continue the suit it was not prosecuted and was declared to have abated under Section 102† of Act VIII of 1859 on January 27, 1868.

The 3rd defendant alone contested this suit and pleaded that the order of 27th January 1868 was a bar to the present suit.

The Munsif dismissed the suit on this ground, holding that the Civil Procedure Code of 1877 applied, and that under Section 371 no fresh suit would lie. **[32]** The District Judge reversed this decree holding that Section 371 only applied to suits instituted after October 1, 1877, and that the plaintiff's right of action which existed at the date the Civil Procedure Code came into force had never been abrogated.

The 3rd defendant appealed to the High Court on the ground that the suit was barred by the dismissal of Suit 519 of 1865.

Mr. *Shephard* for Appellant.

A. Ramachandrayyar for Respondent.

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

Judgment:—Plaintiff sues to redeem a Kanom.

Defendant set up that a former Karnaven—predecessor of plaintiff—filed a suit in 1865 to redeem this Kanom and died before decree, and that plaintiff was then substituted as plaintiff by order.

But, on subsequent petition, the Judge, finding disputes as to who was the party entitled to be substituted for the deceased plaintiff, made an order that the parties should, within two months, have a decision on the question as to who was entitled to be substituted as plaintiff.

By a further order in January 1868 the Court declared the suit abated under Section 102, Act VIII of 1859. Defendant contends that plaintiff is not entitled to sue now as he is in position of a plaintiff who has not prosecuted his suit, and that no fresh suit can be brought by him.

It appears that, after the order of 1868, the parties, claiming under the deceased, settled their differences by a Karar, and plaintiff's title was acknowledged. Under the Act VIII of 1859 there was no provision as to pending

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Effect of abatement on parties' rights.

*[Sec. 371:—When a suit abates or is dismissed under this chapter, no fresh suit shall be brought on the same cause of action.

Application to set aside abatement or dismissal.

But the person claiming to be the legal representative of the deceased bankrupt or insolvent plaintiff, may apply for an order to set aside the order for abatement or dismissal; and if it be proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit].

† [Sec. 102:—*q. v. supra* 3 Mad. 31.]

suits such as in Section 12† of the new Code, neither was there such provision as Section 371 of the new Code. The plaintiff's right to bring a new suit is not, therefore, taken away. The former suit abated and the records most probably are gone.

We do not see any objection to the present suit on the grounds presented.

We dismiss the appeal with costs.

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[33] APPELLATE CRIMINAL.

The 20th April, 1881.

PRESENT:

MR. JUSTICE INNES AND MR. JUSTICE MUTTUSAMI AYYAR.

Boya Munigadu.....(Prisoner) Appellant

versus

The Queen.*

Murder—Culpable homicide not amounting to—Grave and sudden provocation.

On a certain evening M, a common workman, saw N committing adultery with his (M's) wife, and on the following morning, while labouring under the excitement provoked by their misconduct, came upon them eating food together while his wife had neglected to provide food for M. M took up a bill-hook and killed N on the spot.

Held, that if M connected the subsequent conduct of N and his wife with their misconduct of the preceding evening and regarded it as implying an open avowal of their criminal relations, which under the circumstances he might have done, the provocation was sufficiently grave and sudden to deprive him of self-control, and to reduce the offence from murder to culpable homicide not amounting to murder.

IN this case the prisoner was convicted of murder of one Kavali Narasimudu in October 1880 and sentenced to transportation for life, the Court finding that there were extenuating circumstances in the case owing to the provocation received by the prisoner, but that such provocation was not sufficiently grave to constitute the offence culpable homicide not amounting to murder.

The prisoner made a full confession before the committing Magistrate which was accepted by the Sessions Judge as a true narrative of the facts. The deceased, the prisoner, and his wife lived together in one house for five years. The confession was as follows:—"I will truly relate the facts because God has induced me to do so. Kavali Narasimudu of my village brought shame upon

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* Appeal No. 51 of 1881 against the sentence passed by C. G. Plumer, Sessions Judge of North Arcot, on 6th January 1881.

†[Sec. 12:—Except where a suit has been stayed under Section 20, the Court shall not try any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit for the same relief between the same parties, or between parties under whom they or any of them claim, pending in the same or any other Court, whether superior or inferior, in British India having jurisdiction to grant such relief, or in any Court beyond the limits of British India established by the Governor-General in Council and having like jurisdiction, or before Her Majesty in Council.

Pending suits.

Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.]