to the suit can be bound by the decree. The case of trustess is not like the case of executors and administrators in a suit to administer, and in those suits a creditor who does not come in is only restrained as against the executor or administrator and has his rights against legatees, if any, to refund; hence the trustees could not get a complete discharge. I am inclined to think that the trustees, who are only constructive trustees by virtue of having possession of the trust funds and of having acted in trust, and who are not representatives of the original trustees, are not persons in whom the property is vested for a specific purpose under Section 10,* Limitation Act, 1877, inasmuch as the trust now sought to be established and administered is a resulting trust not expressly declared. The specific purpose was to pay dividends to all the creditors then. No specific purpose to redistribute was declared. But the defendants received no general funds: they only received dividends set apart for particular creditors, and those dividends are vested in them for the specific purpose of paying those creditors only and not for the specific purpose of the general estate. However, it is not necessary to decide the question of Limitation.

I dismiss the suit with costs.

Solicitors for Plaintiffs: *Branson and Branson.*

Solicitors for Defendants: *Barclay and Morgan.*

NOTES.

[*See* (1906) 31 Bom., 222 (234)=8 Bom. L. R., 328.]

[410] ORIGINAL CIVIL.

The 12th November and 11th December, 1881.

PRESENT:

MR. JUSTICE KERNAN.

Abdul Kawder and another.....Plaintiffs

and

Muhammad Meera and another.....Defendants.†

"Merger of Tort in Felony" (so called) not applicable to Natives within Original Jurisdiction of High Court.

Within the original jurisdiction of the High Court of Madras a Hindu, or Muhammadan whose civil rights have been infringed by an act which is also a non-compoundable offence, is not bound to prosecute the offender before maintaining his civil action, nor is his right to prosecute his action suspended until the offender is brought to justice.

THE plaintiffs in this case who carried on business in the town of Madras under the name of Sana Moona Chuna Pana Shaik Abdul Kawder Rawther sued in the High Court of Madras to recover from the defendants Rs. 2,000 and interest under the following circumstances.

*[Sec. 10:—Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property, shall be barred by any length of time.]

Suits against express trustees and their representatives.

† Civil Suit No. 464 of 1880 on the Original Side of the High Court.

The first defendant, who was employed as a gumasta or clerk by the plaintiffs, went on June 26, 1880, to a debtor of the plaintiffs and received from him without authority Rs. 2,000 due to the plaintiffs.

This money was not accounted for by the first defendant.

The second defendant, who was the father of the first defendant, admitted that he had received the money from the first defendant and promised to repay the money.

The first issue, settled by the Chief Justice, was—

"Is the suit maintainable, the plaintiffs not having brought a criminal prosecution against the defendants?"

The case was tried by KERNAN, J.

Mr. *Normandy* and *Nallatambi Mudaliar* for plaintiffs.

Ambrose for Second Defendant.

Kernan, J.—The question of law in this case is whether the rule of English law, that a person injured in his civil rights by an act [411] which is also a felony or misdemeanour of public nature, cannot maintain a civil action in respect of such civil right until he prosecutes the offender, is in force within the original jurisdiction of the High Court.

The rule is so stated as to felony or misdemeanour of a public nature. But, if the principle of the rule is applicable to offences that the law does not allow parties to compound, it is immaterial whether the offence is called felony or simply an offence within the meaning of the Indian Penal Code.

The first question is—Has the rule ever existed as a rule of Hindu or Muhammadan law?

Secondly, If not, has it been imported by England into India?

There is no trace of the rule in the law of India, and this Court on appeal in *Viranna* v. *Nagayyah* (I. L. R., 3 Mad., 9) decided that it did not apply to the Mofussil. A similar decision was made by the High Court, Bengal, in *Shama Churn Bose* v. *Bhola Nath Dutt* (6 W. R., (Civ. Ref.), 9), and in that case the judgment was expressed thus: "We are of opinion that there is a remedy by civil action and that the plaintiff is not bound to institute criminal proceedings in the first instance. There is no Act, Regulation, or Act of Parliament by which the cognizance of such a suit is barred. The Civil Court is bound to take cognizance under Act VIII of 1859, Section 1,* and cannot act on its own notions of policy."

The rules applicable to the question whether any particular principle of English law has been introduced into India are stated in *Mayor of Lyons* v. *East India Company* (1 M. I. A., 175); the question there was whether the English law of alienage had been introduced into Calcutta. Lord BROUGHAM, in giving judgment at p. 270, says: "It is agreed on all hands that a foreign settlement obtained in an inhabited country, by conquest, or by cession from another power, stands in a different relation to the present question, from a settlement made by colonizing, that is, peopling an uninhabited country.

"In the latter case it is said that the subjects of the Crown carry with them the laws of England, there being, of course, no *lex loci*. In the former

* [Sec. 1:—The Civil Courts shall take cognizance of all suits of a Civil nature, with the exception of suits of which their cognizance is barred by any Act of Parliament, or by any Regulation of the Codes of Bengal, Madras, and Bombay respectively, or by any Act of the Governor-General of India in Council.]

Civil Courts have cognizance of all suits unless specially barred.

case it is allowed that the law of the country continues until the Crown or the Legislature change it."

[412] He then proceeds to point out that Calcutta was acquired by the East India Company (and this rule applies also to Madras) by leave of a regularly established Government in possession of the country. It was held in that case that the English law of alienage had not been introduced into Calcutta. Whether the law of alienage had been so introduced depended (as the question here depends) on the force and effect of the charters granted to the East India Company and subsequent Acts of Parliament and Charters to which I shall refer.

The Charter of 1726 granted by George II created the Mayor's Court, and other Courts at Calcutta, Madras and Bombay, and gave jurisdiction over all civil suits, actions, and pleas that should arise within the said factories and created Courts for trial of offences. However that Charter of 1726 ceased to have any effect on the capture of Madras by the French in the year 1746, and a second Charter was granted in 1753 incorporating the Mayor and Aldermen of Madras and creating a Court called the Mayor's Court, and constituting a Court of Oyer and Terminer composed of the Mayor and two Aldermen and giving the Court civil jurisdiction to try all suits, actions, and pleas between party and party except such suits and actions as should be between Indian Natives of Madras only, which were to be determined among themselves unless both parties should by consent submit the same to the jurisdiction of the said Mayor's Court.

The reservation of the native laws to Hindus and Muhammadans within Madras remained unaffected by any Statute or Charter up to the time that 37, Geo. III, C. 142, was passed (1798). By Section 9 of that Act power was given to the Crown to create, by Charter, Recorders' Courts in Madras and Bombay. Section 10 provided that the jurisdiction under such Charter should extend to all British subjects—as thereby provided—and gave jurisdiction to hear complaints against any of His Majesty's subjects for crimes, &c., and to hear and determine all suits and actions against such subjects arising in territories subject or dependent on the Government of Madras or Bombay, or within any of the dominions of Native Princes of India in alliance with the Governments of Madras and Bombay.

Section 11 gave power to such Recorder's Court to hear and dertermine all civil suits and actions which by the authority of **[413]** any Act of Parliament might be tried by the Mayors' Courts at Madras and Bombay, and all powers and authorities which by any Act of Parliament might be exercised by the Mayors' Courts were conferred on such Recorders' Courts. This section created many exceptions, and amongst others an exception that no person by reason of being employed by a native of Great Britain should be subject to the jurisdiction of the Court in any matter of Inheritance or Succession to lands or goods or in any matter of contract or dealing between party and party, except in actions for wrongs or trespasses only.

Section 13 authorises the Court to hear and determine all suits and actions against inhabitants of Madras and Bombay in the manner to be provided by the Charter. Yet, nevertheless, their Inheritance and Succession to lands, rents, goods, and all matters of contract and dealing between party and party, shall be determined in the case of Muhammadans by the laws and usages of Muhammadans, and when the parties are Gentoos by the laws and usages of the Gentoos, or by such laws and usages as the same could have been determined by, if the suit had been brought and the action commenced *in a Native Court*, and when one party shall be a Muhammadan or Gentoo by the laws and usages of the defendant, and that in all suits to be decided by

the laws and usages of the natives, the Court should make order for the conduct thereof and for process and execution convenient to such manners and usages, &c.

The Act 39 and 40, Geo. III, C. 79, enabled the Crown to appoint a Supreme Court in Madras with the same power, privileges, limitations, and restrictions as to Natives and British subjects within the limits of Fort St. George and of the town of Madras, and the territories subject to the Government of Madras, as the Supreme Court of Bengal was invested with.

In is clear from this act that British subjects did not include Natives. The words were used in contradiction to each other. (See *Morley's* Digest, Vol. 2, p. 347.)

The Charter granted pursuant to this Statute was dated December 26th, 1800. The jurisdiction of the Supreme Court was to extend (Section 21) over persons described in Charters of Justice as British subjects residing within any factory subject to the Government of Madras, and persons employed by the Company [414] or said subjects, and to try actions that might be tried by Mayors' or Recorders' Courts.

Section 22—All suits against inhabitants of Madras were triable by the Supreme Court in the case of Muhammadans and Gentoos by their own law or the law of the defendant as to inheritance, succession, contracts, and dealing between party and party.

No one by reason of being employed by the Company or by a native of Great Britain shall become subject to the jurisdiction in any matter of Inheritance or Succession or contract or dealing between party and party except for wrong or trespass only.

The Act 24 and 25, Vic. 104, gave power to the Crown to establish High Courts by Charter, and provided that subject to the provisions of the Charter such Courts should have all the jurisdiction and power of the Courts already established.

Under this Act the Letters Patent of 26th June 1862 established a High Court in Madras giving by Section 11 original jurisdiction within the local limits, and by Section 12 fixing the jurisdiction as to suits. By Section 18 the law and equity to be administered was declared to be (until otherwise provided) the law and equity which should have been administered by the Supreme Court if the Letters Patent were not issued. The Letters Patent of 1865, Section 1, revoked those of 1862.

Section 12 defined the original civil jurisdiction of the High Court. Section 19 ordained that the law and equity to be administered by the High Court in its original civil jurisdiction should be the law and equity which the High Court should have applied if those Letters Patent were not issued.

There has been no alteration by Act of Parliament or Act of the Legislature of India, of the law and equity to be administered by the High Court. since the passing of such last-mentioned Letters Patent, which can affect the question, the subject of the first issue in this case.

It is clear from the above record of Statutes and Charters of Justice that as regards suits between Natives of India within the limits of the original civil jurisdiction of the High Court, the native laws and usages remain as they were at the date of the Charters of 1726 and 1753.

The reservation in the Charter of 1800 to the natives of such law and usages has been repeated through the different Statutes and Charters.

[415] If this case had been tried in a Native Court according to Native laws and usages the principle of English law in question could have no place.

The Courts in the Mofussil may be intended as Native Courts. The judgment of the High Court in *Shama Churn Bose* v. *Bhola Nath Dutt*, on a referred case from the Mofussil in Bengal, is—There is no Act of Parliament, Regulation or Act of the Legislature in India by which cognizance of such suit is barred. The Civil Court is therefore bound under Act VIII of 1859, Section 1, to take cognizance. This decision was followed by the decision of this High Court on appeal from a decision in the Mofussil as already mentioned.

Both those decisions proceeded on the ground that this rule of English law was not introduced into India as regards suits between Natives in the Mofussil in the Provinces of Culcutta in one case or Madras in the other.

It is not accountable that a difference should exist between the Mofussil and the Presidency Town. (*See* reasons on question of Maintenance or Champerty in *Chedambara Chetty* v. *Ranga Krishna Muthu Vira Pachaiya Naickar* (L. R., 1 I. A., 256).

This suit is in respect of a contract or dealing between natives. The first defendant was employed as a gumasta by the plaintiff, and it was part of the implied contract of such employment, as it was the duty of first defendant in that employment, to deliver to his employer any property given to him, as such gumasta, for his employer. The money in this case was received by the first defendant to the use of the plaintiffs. There is no native law or usage binding the plaintiff to prosecute defendant for criminal misappropriation before bringing the action; therefore, the plaintiffs are not bound to do so, and the first issue must be found in the affirmative.

The rule of English law, as stated in *Stone* v. *Marsh* (6 B. & C., 551), is that a man shall not be allowed to make the wrong, in cases of felony or misdemeanour affecting the public, the foundation of a civil action, and it may be doubted whether it applied to such a case as the present, which is not a case of trespass or tort, but [416] an action for money had and received—*see* Judgment of BULLER, J., in *Master* v. *Miller* (4 T. R., 320, Smith's L. C., Vol. 1, 889).

The action in any event is not barred by reason of the plaintiff's not having brought a criminal prosecution; it is only suspended as regards the party guilty of the criminal act until he shall be prosecuted. It has been always a difficult question how advantage is to be taken of the rule. The case of *Wells* v. *Abrahams* (L. R., 7 Q. B., 554) reviews all the cases on the subject. From the observations of several of the Judges they appear to be of opinion that the mode of taking advantage of this rule of law is by application at the instance of the Public Prosecutor for the exercise of the summary powers of the Court to stay the action until the prosecution is had. I have known proofs in bankruptcy refused until a prosecution was had. The guilty party could not set up the rule of law as a defence.

The rule is founded on public policy, *viz.*, that offenders against the criminal law should be brought to justice. The same policy is, of course, applicable in all civilized States by whatever name the offence may be known, except in cases where the law allows the parties to compound; the Indian Penal Code contains provisions to carry out that policy so far as it was deemed necessary to carry it out in India. But neither in it nor in the Criminal or Civil Procedure Codes, nor in any Act of Parliament or Act of the Legislature of India, is there anything to lead to the inference that such policy should be applied by adopting the English rule, or one of a similar

kind, in all Courts as regards the natives of India. The Indian Contract Act, Section 23, makes void contracts contrary to public policy, but there is here no such contract.

The second defendant agreed to pay to the plaintiff the amount of the debt, but in the evidence it appears that such agreement was not made to induce plaintiff to forego the prosecution of the first defendant, nor was there any conversation between either of the plaintiffs or any other person with the defendant in respect to any such prosecution. When the second plaintiff saw the second defendant, the father of first defendant, the second defendant said: "My son got this money; he was very foolish; he gave it to me; we have it and will give it to you." The consideration by the second defendant for his promise was that he had got posses-[417]sion of all or part of the money. There was no compounding of a criminal offence within Section 213, 214, or 215 of the Indian Penal Code, nor was the second defendant's promise affected by any consideration except that of paying his son's obligation, and that the second defendant had received part of the plaintiff's money.

Decree against both defendants for Rs. 2,000 and interest and costs.

NOTES.

[*See* also (1901) 14 C. P. L. R., 123.]

[4 Mad. 417.]

APPELLATE CIVIL.

The 5th December, 1881, and 23rd January, 1882.

PRESENT:

MR. JUSTICE INNES AND MR. JUSTICE KINDERSLEY.

Mahadevappa.....(Plaintiff's Representative), Appellant

and

Srinivasa Rau and another.....(Second and Third Defendants), Respondents.*

Civil Procedure Code, Section 267—Alienation after attachment—Renewal of prior mortgage.

A renewal of mortgage already existing on the property prior to attachment, which does not enhance the charge, is not an alienation within the meaning of Section 276 of the Code of Civil Procedure.

THIS was a suit to recover Rs. 50, principal and interest, due on a registered mortgage bond, dated 29th May 1879, executed by first defendant.

The house mortgaged was purchased by third defendant at auction in execution of a decree obtained by the second defendant against the first defendant.

The plaintiff prayed for a decree against the person of the first defendant and against the house mortgaged.

The Munsif gave the plaintiff a decree against the person of the first defendant, but not against the house, on the ground that the mortgage bond was

* Second Appeal No. 126 of 1881 against the decree of V. Gopala Rau Pantulu, Subordinate Judge of Bellary, confirming the decree of P. Tirumal Rau, District Munsif of Bellary, dated 28th October 1880.