The contract in the present case was entered into in 1865, only seven years after the commencement of the course of decisions of the Sadr Court, when those decisions could have produced but an infinitesimal effect upon the contracting public in the depths of the country.

Construing the contracts according to what I believe to have been the intention of the parties, I would reverse the District Judge's decree and restore that of the Munsif.

Muttusami Ayyar, J.—I concur in the judgment of the Chief Justice.

NOTES.

[I. CONDITIONAL MORTGAGES IN MADRAS BETWEEN, BEFORE AND AFTER 1858; 1875.

The erroneous view held to apply to mortgages between 1858 and 1875 (when Thumbusawmy's case was decided) was held also to govern cases of mortgage between 1875 and 1882 when the Transfer of Property Act was passed :—(1891) 15 Mad. 230 ; 23 Mad. 117 ; (1904) 14 M. L. J., 347. But the mortgages before 1858 were to be given effect to according to the intention of the parties as expressed in the instrument itself :—(1884) 8 Mad., 185.

II. 'STARE DECISIS'—

There must have been a course of decisions for them to become law though erroneous :—(1903) 30 Cal. 883.

III. MODES OF CONDITIONAL MORTGAGES—

Different modes of conditional mortgage were explained by TURNER, C.J., at 183, 184; this was referred to in (1897) 19 All. 434.

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[193] APPELLATE CIVIL.

The 1st August and 22nd September, 1881.

PRESENT :

MR. JUSTICE MUTTUSAMI AYYAR AND MR. JUSTICE TARRANT.

Raja Yarla Gadda Sri Durga Bhavanamma Garu
of Palankipadu.....(Plaintiff), Appellant.

and

Ramasamigaru and another.....(Defendants), Respondents.*

Hindu Law—Zamindari—Grant of land for maintenance, duration of—Value enhanced by irrigation—Right, of parties.

Where a Zamindar granted to his mother in lieu of maintenance two villages, the income of which, upon the introduction of irrigation, was greatly enhanced without any expenditure or labour on the part of the grantee.

Held in a suit by the grantee for damages against parties claiming to have been put in possession of the lands of the two villages by the successor of the grantor—

(1) that in the absence of express words to the contrary the grant enured for the grantee's life ;

*Appeal No. 8 of 1881 against the decree of D. Buick, Acting District Judge of Kistna, dated 29th November 1880.

(II) that as the provision was reasonable the grant was binding on the successor of the grantor;

(III) that the introduction of irrigation not having been contemplated at the time of the grant, might entitle the present Zamindar to revise and readjust the terms of the grant, but was no ground for dispossessing the grantee.

THE facts and arguments in this case appear sufficiently, for the purpose of this report, in the following Judgment of the Court (MUTTUSAMI AYYAR and TARRANT, JJ.).

Anandacharlu and *Sundaram Sastriar* for Appellant.

The Advocate-General (Hon. *P. O'Sullivan*) for Respondents.

Subba Rau for first Respondent.

Judgment:—Appellant is the paternal grandmother of the present Zamindar of Devarakotta. During the minority of his father, the zamindari was under the management of the Court of Wards, and when, upon the late Zamindar attaining majority, the estate was restored to him, he granted to appellant the villages of Palankipadu and Mangalapuram on account of her maintenance [194] on the recommendation of the then Collector of *Masulipatam*. The Tashildar of Sellapalli Taluq in the *Kistna* District placed her in possession of those villages on the 16th August 1846. In 1847 she got the ryots of the two villages to execute muchalkas in her name and managed them till 1850. On the 11th June 1851 she granted a lease for 20 years in respect of one of the villages to one Pillayar Chetti Samudrala Nayadu, and the lessee's family remained in possession from 1851 to 1870, and paid her a rent of Rs. 251 a year. During this period she once gave permission to Pillayar Chetti Ragavalu Nayadu to raise wet crops on condition of his paying Tirvaijasti * in addition to the annual rent of Rs. 251, and when the village of *Palankipadu* was attached in 1867 as part of the zamindari for arrears of peishcush, *Ragavulu Nayadu*, the brother of the original lessee, applied to the Collector of the district on the 6th April 1867 for its release from attachment on the ground that it had been granted to appellant for her maintenance. In 1863 the present Zamindar's father granted a cowle for six years in respect of his zamindari to one Yarla Gadda Ankinedu Bahadur, and the two villages were excepted from its operation. From 1871 to 1874 they had been managed by late Zamindar on account of his mother, and the present Zamindar succeeded to the zamindari upon his father's death in April 1875. There being no friendly feeling between him and the appellant, several attempts were made to obtain muchalkas from some of the ryots in the two villages and thereby to dispossess the appellant; consequently a course of litigation has ensued between the ryots on one side and the appellant or the zamindar on the other, in which the appellant's right to continue in possession as against the present Zamindar has been incidentally opened for decision. The suit from which this appeal arises was brought by the appellant to recover damages alleged to have been sustained by the respondent having taken possession of 10½ acres of Kamatam,† waste land in the village of Palankipadu and enjoyed its produce without her consent from

* An additional assessment on inferior land when made to produce crops, usually limited to land of superior quality, as garden crops, or those raised from wet or irrigated land.—(*Wilson*).

† The land which a zamindar keeps in his own hands, cultivating it by labourers, in distinction to that which he lets out in farm.—(*Wilson*).

1285 to [195] 1288. Appellant alleged that, though the land was originally classed as dry, it was since converted into wet; but there is nothing on the record to show that it was ever under cultivation, while it is conceded that it had been lying waste for three or four years before 1285.

As against the present Zamindar the appellant's case was that the villages being granted in lieu of maintenance, she was entitled to hold them for her life. Respondents contended that they entered into possession under a patta granted by the present Zamindar, that the grant to the appellant was only nominal, and that during the lifetime of the late Zamindar the village of Palankipadu was managed by him and pledged for his debt. They further asserted that the appellant had no cause of action against them, that the claim was barred by Limitation, and that the suit could not be maintained unless the appellant first established her right to the land and sued to recover its possession. The District Judge of Kistna held that the late Zamindar set apart these villages for the appellant's maintenance, and that he did in fact fulfil his engagement on the whole during his life, but that the grant was an arrangement personal to the late Zamindar which he could have terminated at any time during his life, and that it was further not binding on the present Zamindar. Upon these grounds he dismissed the suit with costs. He considered also that the claim to damages for the first year was barred by Limitation, The appellant argues that the grant is binding on the present Zamindar, that its validity is not a material issue in the suit for damages instituted by the appellant against trespassers, that the Judge has misconstrued the grant which is embodied in Exhibits A, B and C, and that the cause of action is a recurring one, and therefore the claim to damages for the first year is not barred.

It is contended for the respondent that it was open to the present Zamindar to set aside the grant; that from its nature it was liable to be revised from time to time; that it could not enure beyond the grantor's life; that the land having lain waste the appellant had no such possession as might entitle her to sue for damages for trespass; that respondents came in under the present Zamindar and could not be treated as trespassers; that the appellant should have sued to eject the present Zamindar; that no [196] special damage has been proved; and that the Judge was right in holding that the claim for the first year, at all events, was barred.

We see no reason to doubt that it was necessary to decide, for the purpose of this suit, whether the grant by the late Zamindar of these two villages wa not binding upon the present Zamindar, and whether he was entitled to terminate it. The respondents claimed to hold the land in suit under th present Zamindar, and if it was competent for him to have entered into possese sion, his right of entry would be a sufficient answer to the action, and no action of trespass could then be maintained either against him or those who came in under him. The original grant itself having been lost, we have to ascertain its terms from documents A to C. In document A the terms are said to have been to the effect that when the Zamindari was made over to him (the late Zamindar), he was to put the appellant in possession of Mangalapuram and Palankipadu; that he was to pay the peishcush of those villages along with that of the whole Pargana or estate; that the appellant was to enjoy the income arising from all sources inclusive of hamlets and gardens, &c.; that should the Pargana be attached for arrears of peishcush for any year, the appellant was to pay the proportionate amount which might be fixed by Government as due on the two villages and retain them in her possession; that when the attachment was removed, the Zamindar was to pay the peishcush and the other demands

on those villages and to permit the appellant to continue in possession. This document, which is a letter addressed to the appellant on the 6th August 1846 by the then Collector of Masulipatam, proceeds to state that the amount of peishcush due on the said two villages in proportion to the peishcush fixed on the average of all the villages of Devaracotta Pargana would be communicated to the appellant after the approval of the Government was obtained. In document B, which is copy of an order addressed on the same day to the Tahsildar of Sallapalli Taluk, it is said that the villages were to be placed in the appellant's possession as a substitute for her "maintenance." The document C, which is a letter addressed by the Collector to the late Zamindar, recites that the grant was intended to be made as a substitute for maintenance, refers to a proposal made by the Zamindar to make the grant in his letter of the 3rd January 1845, [197] and also to a Kararnama filed by him to the effect that he would accordingly make over the villages to the appellant. It is obvious from these documents that no more than a provision for maintenance was intended by the late Zamindar, and reliance is therefore placed upon the decision of the Judicial Committee in Anunda Lal Sing Deo *v.* Maharaja Dheraj Gurrood Narayun Deo. (5 M. I. A., 82). But in that case it was admitted by the appellant that a grant for maintenance ceased with the life of the grantor, and the question in issue was whether the grant was absolute or only for maintenance. The question now raised for decision, *viz.*, whether a grant for maintenance limited to the grantee's life is one which it is competent for a Zamindar to make, so as to bind his successor, was not then contested or adjudicated upon. Assuming, therefore, that the zamindari of Devaracotta is an impartible estate belonging to a joint Hindu family descending to a single heir at a time to the exclusion of the rest of the family, that the Zamindar for the time being is not competent to bind his successors by a permanent grant of property forming part of his estate, and that an alienation made by him in circumstances which would not ordinarily render it binding on a joint Hindu family could not enure beyond the grantor's life, the question for decision is whether the grant now in dispute ceased to be in force on the death of the late Zamindar. In its nature it is admitted to be a substitute for maintenance. Does it then imply a grant for the grantor's or grantee's life? In the absence of express words to the contrary, a grant for a specific object will enure from its nature until the object fails.

Ordinarily, a grant for maintenance will enure so long as the grantee is entitled to be maintained, provided that the grantor is competent to make it. Although by virtue of joint ownership in an impartible estate belonging to a joint Hindu family, the Zamindar for the time being is incompetent to bind the *corpus* for his own purposes beyond his life, it is still open to him to bind his successors by an alienation which would bind a joint Hindu family if the estate were partible, and if the alienation were made by the managing coparcener for the time being. His act would then be an act within the scope of his authority as the head of the joint family and bind his co-parceners and successors. In the [198] case of ordinary coparcenary property, the managing coparcener has three rights, the right of enjoyment on behalf of the joint family, the right to divide it among the coparceners, and the right to alienate or encumber it for the benefit of the family or in discharge of its obligations. Though in the case of an impartible estate no partition is permitted, the character of the property as an impartible estate does not take away the power of alienation. The proposition, therefore, that a grant by a Zamindar does not enure beyond his life, is confined in its operation to grants which, if made by the managing coparcener

of an ordinary Hindu family, would not bind the family. The question then is whether the property allotted for the appellant's maintenance was of a value, at the time of allotment, obviously in excess of what would be a reasonable provision for the appellant in the circumstances of the family, and we have no hesitation in answering the question in the negative. The rent derived from 1850 to 1871 from one of the villages was Rs. 251 a year, and an allotment of Rs. 20 a month or even double that sum would not be excessive in the case of a lady in the position of the appellant. There is further no evidence to show that the income from the two villages was excessive, and the fact that the grant was suggested by the then Collector of the district raises a presumption that it was reasonable; and we shall hold that the allotment was a reasonable provision in the circumstances in which it was made, and, as such, binding on the present Zamindar.

Another question for decision is whether the grant is resumable at the pleasure of the grantor or on the ground that the land allotted has since become productive and commenced to yield an income far in excess of a reasonable provision. The Judge observes that owing to the introduction of irrigation the income from the villages has risen to more than Rs. 2,000 net, and this without any expenditure incurrred by, or improvements made by, the appellant. As a general rule, property allotted for maintenance is resumable at the death of the grantee, the presumption being that the income only was granted and not the *corpus* [Rajah Woodoya Ditto Deb *v.* Mukoond Narain Aditto Baboo, (22 W. R., 225)]. On the other hand there is nothing to preclude an owner from making **[199]** over property absolutely in full discharge of all claims to maintenance [Rajah Narsing Deb *v.* Roy Koyalasnath, (9 M. I. A., 55).] The question, therefore, is one of the intention of the parties to the contract when the allotment was made, and rather one of construction of the particular contract than of a rule of law. Whenever land is allotted for maintenance for the donee's life, its average income is recorded according to the custom of the country as the basis of the contract, and the allottee has no more a right to claim maintenance when the actual income is below the average than the grantor has to the excess when the actual income exceeds the average, and there is therefore no power to revise the grant so long as the basis of the contract remains unaltered. But the introduction of irrigation in the case now under consideration was, no doubt, a circumstance not foreseen by either party to the contract, and whether the present Zamindar is at liberty to revise the grant on the ground that the late Zamindar ought to have foreseen and provided against the contingency is a question which it is not necessary to decide for the purpose of this suit. It would suffice to observe that this would give only a right, if any, to claim readjustment of the grant with reference to its altered basis, and *not* to dispossess the lady either by gaining over the tenants and getting muchalkas from them, or by granting pattas for the first time and thereby licensing strangers to trespass on the land in her possession.

It is argued that if the present Zamindar entered into possession subsequent to the death of the late Zamindar, and if after such entry he granted pattas to the respondents, they should not be treated as trespassers, whatever remedy the appellant might have against the present Zamindar. This is no doubt true, but there is no evidence to establish a case of intermediate possession by the Zamindar. Although the land in suit had been lying waste at all events for some time before the death of the late Zamindar, it is shown by the appellant that the whole village was made over to her in 1846, and leased by her to the Pillayar Chetti family from 1850 to 1870, whilst there is no satisfactory proof that the late or present Zamindar had possession of the

Kamatam land now in dispute. The appellant appears to have had constructive, if not actual, possession, and is therefore entitled to maintain trespass **[200]** We are further of opinion that she is, if she chooses so to do, at liberty to sue trespassers for use and occupation, or for damages, instead of proceeding to eject them. We also concur in the finding of the Judge that the claim to mesne profits for the first year is barred, as the right to sue for them accrued three years before the suit. The Judge has not, however, found whether any and what loss has been sustained by the appellant during Faslis 1286 to 1288 (1876-77 to 1878-79). He is, therefore, requested to try, upon the evidence already recorded and upon such further evidence as the parties may adduce, the third issue, *viz.*, what is the amount of damages that can be awarded, and to return his finding, together with the evidence therein, to this Court within four weeks from the date of receiving this order when ten days will be allowed for filing objections.

NOTES.

["It cannot be disputed that land granted for maintenance is *prima facie* resumable on the death of the grantee :—(1874) 22 W. R., 225; (1899) L. R. 26 I. A., 216; (1900) L. R. 28 I. A., 1; (1881) 4 Mad., 193. though in certain cases the grant may be shown to have been absolute and irrevocable made in full satisfaction of all claims of future maintenance, and conferring on the grantee not only an heritable but an alienable estate :—(1881) 4 Mad., 371; (1862) 9 M. I. A., 55."—*per* MOOKERJEE, J., in (1905) 2 C. L. J., 20.

See also (1901) 1 C. L. J., 517, where HILL, J., remarked that the proposition in this case that only the income was granted *prima facie* was hardly supported by the case relied on (5 M. I. A., 82).]

[4 Mad. 200.]

APPELLATE CIVIL.

The 26th September, 1881.

PRESENT :

MR. JUSTICE MUTTUSAMI AYYAR AND MR. JUSTICE TARRANT.

Anantha Tirtha Chariar.....(Plaintiff), Appellant

and

Nagamuthu Ambalagaren and others.....(First, second and fifth Defendants), Respondents.*

Agraharam—Restriction against alienation in grant of land, effect of.

According to Hindu Law a restriction against alienation in a gift of land to Brahmans is inoperative as being a condition repugnant to the nature of the grant.

Where a grantor creates a secular estate with a religious motive, the grant does not stand on the same footing with a religious endowment, and is not exempt from the rule as to perpetuities.

THE facts and arguments in this case appear in the Judgment of the Court (MUTTUSAMI AYYAR and TARRANT, JJ.), which was delivered by MUTTUSAMI AYYAR, J.

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* Second Appeal No. 165 of 1881 against the decree of F. Brandt, District Judge of Trichinopoly, modifying the revised decree of A. Chendriah, District Munsif of Kulitalai, dated 27th October 1880.