therein arrived at to receive confirmation from what we find to be established by evidence in the case before us.

Even supposing the custom, which we find to be established by the evidence to have sprung up after the text-books which distinctly prohibit these adoptions were written, though it cannot be affirmed that it did so, that fact will not of itself invalidate the custom; and the alteration in the text of Çaunaka as given by Vayidináda Díkshatar and his comments thereon, are, in our opinion, to be explained in this manner: the commentator finding, at the time when he wrote, that the custom was actually prevalent among the Bráhmans in the south of this Presidency, gave the version of Çaunaka's text which we find in his commentary together with his gloss thereon, with a view to the adoption of daughters' sons and sisters' sons being recognized as made in accordance with the authorities; and we are of opinion that the inception or prevalence of the custom is not the result of an innovation introduced by the commentator, but that the practice was followed and recognized as not only not inconsistent with the customary law of the land at the time when the commentator wrote, but as a custom having the force of law, and that the local authority simply gave or purported to give the color of authoritative sanction to such usage; and we consider that we ought judicially to recognize such usage.

The decree of the Subordinate Judge is reversed and that of the District Múnsif restored; but in view of the former ruling and of the relationship we have found to exist between the parties, we direct that each party do bear his own costs in the Lower Appellate Court and in this Court.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Parker.

KRISTAYA (DEFENDANT), APPELLANT,

and

KASIPATI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1885. September 17.

Cause of action—Suit by debtor to compel creditor to accept money due.

A bond having been executed, whereby it was stipulated that a debt should be paid by instalments subject to the condition that if any one instalment were not

* Second Appeal 278 of 1885.

KRISTAYA v. KÁSIPATI.

paid within a certain time after it became due, the whole amount remaining due should become payable at once, the creditor evaded the debtor's attempts to pay the instalments as they became due, and the debtor brought a suit to compel the creditor to accept an instalment due :

Held, that such a suit would not lie.

THIS was an appeal against the decree of C. L. B. Cumming, Acting District Judge of Ganjam, confirming the decree of C. Simháchalam, District Múnsif of Chicacole.

The facts appear sufficiently, for the purpose of this report, from the judgment of the Court (Muttusámi Ayyar and Parker, JJ.).

Anandáchárlu for appellant.

Srírangácháryar for respondents.

JUDGMENT.—The respondents executed a bond in appellant's favor for Rs. 1,150 in September 1882. The document provided for repayment by twenty-three annual instalments of Rs. 50 each, and for the entire unpaid balance becoming payable at once in case any one instalment was in arrear for three months or more. Prior to the date of this bond there was another bond with like provisions, but, as it contained a clerical error, the bond in suit was executed. The plaint prayed for a decree directing the appellant to receive Rs. 50 on account of the second instalment due under the bond and to pay the respondents' costs. It stated that the appellant desired to defraud the respondents by causing some one instalment to become overdue, that he evaded accepting the first two instalments due under the first bond, that in original suits 197 of 1881 and 177 of 1882 they compelled him to accept those instalments, that the appellant behaved in the same way in regard to the first instalment due under the second bond, that the respondents obtained a decree in original suit 154 of 1883 which directed him to accept that instalment, and that the appellant again declined to accept the second instalment. Both the Courts below decreed the claim, and the Judge observed that the respondents were forced, owing to the appellant's conduct, to protect themselves by bringing suits to enforce acceptance of payment of each instalment. It is urged in second appeal that the facts alleged disclose no cause of action, and we consider that the contention is well founded. The plaint contains no demand on the part of the respondents that any *right* be enforced, and though they are under an obligation to pay each instalment on or before the date fixed for its payment, it would be a sufficient answer to any action

which might be brought thereon by the appellant that they tendered payment in time. A suit is a demand made judicially for attaining or recovering a right, and it does not lie for the bare performance of a duty at the instance of the person bound to perform it, for the evident reason that, when he is willing to perform it, there is no need for a suit, and that, if he is not, it is for the other party to enforce its performance. It is true that, under the terms of the bond, the regular payment of each instalment is necessary to enable the respondents to preserve their right to pay the balance still due by instalments; but a tender of payment made in time would be effectual for this purpose also. It is suggested that a suit may be brought to obtain a declaration that the right has not been forfeited by default, and that it continues to subsist. But the suit before us is not one of that kind, and it is not necessary for us to express an opinion on the question whether, under certain circumstances, a declaratory suit may not be brought. We are satisfied that, in its present form, the suit instituted by the respondents cannot be maintained. We set aside the decrees of the Courts below and dismiss the suit. Having regard, however, to the appellant's conduct as found by the Judge, we direct that each party do bear his or their costs.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

SIVARÁMÁ (PLAINTIFF), APPELLANT,
and
SUBRAMANYA (DEFENDANT), RESPONDENT.*

1885. August 5, 10.

Civil Procedure Code, s. 295—Mortgage—Sale by first mortgagee—Arrears of rent—Lien—Claim by puisne mortgagee on proceeds of sale—Limitation Act, sch. II, arts. 12, 13.

Certain land was mortgaged to A with possession to secure the repayment of a loan of Rs. 2,000 and interest. It was stipulated in the deed that the interest on the debt should be paid out of the profits, and the balance paid to the mortgagors.

By an agreement subsequently made, it was arranged that the mortgagors should remain in possession and pay rent to A. A obtained a decree for Rs. 2,000 and arrears of rent and costs and for the sale of the land in satisfaction of the amount decreed. The land was sold for Rs. 2,855 in March 1881.

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* Second Appeal 224 of 1885.