defendant either in his representative character or as manager of the family, and that if we had felt ourselves at liberty to go beyond the decree, we should have acceded to the contention that the debt was a family debt and binding on the respondents." The possibility of a second suit was not contemplated, because there was no fresh cause of action as in the case of father and son. Again, the decree in Original Suit No. 152 of 1885 does not strictly execute the prior mortgage, but it is a decree by the consent of one coparcener that the mortgage be treated as if it were an absolute sale.

We are of opinion that this second appeal must fail, and we dismiss it with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

MAHOMED SAIB (PLAINTIFF)

and

AGGAS (DEFENDANT).*

1887. April 1, 14.

Civil Procedure Code, s. 468—Army Act of 1881, 44 & 45 Vic. c. 58, ss. 144, 151—Jurisdiction of Small Cause Courts over soldiers.

A sued a soldier to recover a debt not amounting to £30:

Held, that the suit was cognizable by a Court of Small Causes.

Semble.—The Commanding Officer of the defendant is bound to cause the summons of the Small Cause Court to be served on him.

CASE stated under s. 617 of the Code of Civil Procedure, by B. Ramasami Nayudu, District Múnsif of Bellary, in Small Cause Suit No. 667 of 1886.

The case was stated as follows:—

"In Small Cause No. 667 of 1886, the plaintiff, baker Mahomed Saib, brought a suit against Sergeant Aggas of the Ordnance Department for the recovery of a sum of Rs. 6-13-0 for bread supplied to the defendant. The defendant's summons was forwarded to the Commissary of Ordnance, Bellary, along with two other summonses; but they were returned unserved twice by that officer, stating that soldiers are under section 144 of the Army Act

* Referred Case No. 3 of 1887.

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not liable to be sued for any debt unless it exceeds £30. He quotes clause 8, section 190 of the Army Act, 1881, as an authority for the exemption. In a former suit, brought against Sergeant-Major Hill, I held that as he came under the definition of soldier under section 190, clause 6, he was exempt from being sued in this Court.

"My attention is now drawn to a proviso to section 144, clause 5 of the same Act which makes a soldier liable to such action notwithstanding anything in this section after a due notice in writing given to such soldier; and it is alleged by Mr. Shrienes, the plaintiff's vakil, that a notice in writing was given in this case.

"It would appear from a perusal of section 148 of the said Act that suits against soldiers of the regular forces are not cognizable by a Court of Requests. Therefore it appears to me that soldiers are practically not amenable to either forum, if the proviso to clause 5 of section 144 of the Act be not applicable to them. It is conceded that Sergeant Aggas is a soldier under the definition above mentioned; but the question which is urged for their Lordships' consideration is whether this action which is for less than £30 is cognizable by the Court of Small Causes under the proviso to clause 5 of section 144, granting that he is a soldier; and, secondly, is the Commissary of Ordnance right in refusing to serve the summonses, although I referred him to proviso to clause 5 of section 144, because it appears to me that he is bound to serve the summonses, leaving it open to the defendant to raise the plea of jurisdiction. It seems to me that a difficulty arises only in the execution of the decree and not before. The town of Bellary, being a large military station, suits of this kind are often filed in my Court."

Counsel were not retained.

The Court (Collins, C.J., and Brandt, J.) delivered the following

JUDGMENT:—The person against whom baker Mahomed Saib has filed a suit in the Court of the District Múnsif of Bellary on the small cause side of that Court is, it is understood, admittedly "a soldier" within the definition of the word as interpreted in clause 6, section 190 of the Army Act of 1881.

He is, therefore, under s. 144 (1) of that Act not liable to be taken out of Her Majesty's service by any process execution or

order of any Court of Law, or to be compelled to appear in person before any Court of Law, the debt claimed not exceeding £30.

But under proviso (1) to that section, any person having a cause of action or suit against "a soldier of the regular forces may, after due notice in writing given to the soldier, proceed in such action or suit to judgment, and have execution other than against the person, pay, arms, ammunition, equipments, regimental necessaries or clothing of such soldiers."

There is no difficulty whatever in giving effect to the proviso. Except where the debt exceeds £30, a soldier cannot by any process or order of a Court of Law be taken out of the service, or compelled to appear in Court in person; but where a claim for a debt, damages or sum of money is under that amount, the creditor may proceed to judgment, as in any other case; after judgment where the debt, &c., exceeds £30 over and above all costs of the case, the prohibition contained in section 144 (1) does not apply in the case of decrees for debt, damages or sums of money; but where judgment is given in cases to which the first proviso to that section applies, the judgment-creditor is debarred from executing his decree otherwise than in the limited manner prescribed.

There may be some doubt whether the words in the proviso "may proceed in such action or suit to judgment" are controlled by the words "or to be compelled to appear in person before any Court of Law," but the question is not raised in the reference before us. There is of course nothing to prevent a soldier from so appearing with the permission of his Commanding Officer, if necessary, and Chapter XXXII of the Code of Civil Procedure makes special provision to enable officers and soldiers actually serving in a military capacity to defend suits when they cannot personally appear.

The question referred to us is not affected by section 148 of the Army Act, for the defendant in this case is not serving "beyond the jurisdiction of any Court of Small Causes" and the section deals only with "actions of debt and personal actions against officers and other persons subject to military law, with the exception of persons being soldiers of the regular forces."

The effect of section 151 of the Army Act is to recognize the jurisdiction of Courts of Small Causes in India to the extent of their powers, "in actions of debt and personal actions against all persons subject to military law other than soldiers of the regular forces," and in the case of the latter, *i.e.*, of soldiers of the regular

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forces, to restrict the extent of the powers of those as well as of other Courts, in the manner prescribed by section 144, but not absolutely to exclude such jurisdiction.

As to whether the Commissary of Ordnance, as the Commanding officer of the soldier in question, is bound to serve a copy of the summons upon the defendant it is sufficient to refer to section 468 of the Code of Civil Procedure.

APPELLATE CIVIL.

Before Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, and Mr. Justice Brandt.

1887. February 18. March 18. April 9.

MOIDIN KUTTI (DEFENDANT No. 3), APPELLANT,

and

KRISHNAN AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code, s. 30—Malabar Law—Joinder of parties—Res judicata—*Cancellation of deeds—Declaratory suit—Withdrawal of part of claim.*

A and B, junior members of a Malabar tarwad, sued to cancel certain mortgages executed by their karnavan and senior anandravan on the ground that the secured debt was not binding on the tarwad, and to appoint A to the office of karnavan. The last part of the prayer was withdrawn. The mortgages were executed to secure a decree-debt, the decree having been passed *ex parte* against the late karnavan of the tarwad. No fraud was alleged, but the Lower Courts found that the karnavan had been guilty of fraud in allowing the decree to be passed *ex parte*. The plaintiffs had not been parties to the decree, and the other junior members of the tarwad who had been joined were exempted from liability:

Held, that the nature of the debt was not *res judicata*, and that the plaintiffs were entitled to a declaration that the mortgages in question were invalid as against them.

Held further *per cur.*—All the members of the plaintiffs' tarwad should have been joined actually or constructively; but (Kernan, J., dissenting), the objection as to non-joinder is not essential, but merely formal, and weight should not be attached to it when it is first taken on second appeal.

SECOND appeal against the decree of W. Austin, District Judge of North Malabar, in Appeal Suit No. 660 of 1885, confirming the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in Original Suit No. 10 of 1885.

The plaintiffs were junior members of a Malabar tarwad, of which defendants Nos. 1 and 2 were, respectively, karnavan and

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* Second Appeal No. 730 of 1885.